Al-Jāmiʿah: Journal of Islamic Studies
Vol. 63, no. 2 (2025), pp. 283-321, doi: 10.14421/ajis.2025.632.283-321

RECONFIGURARING *ZINĀ*
The Criminalization of Adultery in Modern Egyptian Criminal Law

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Abstract

The Egyptian parliamentary debates on the criminalization of adultery reveal how Sharīʿa is invoked to penalize conduct that does not correspond to the conceptual foundations, definitions, evidentiary standards, or procedural rules of zinā in Islamic jurisprudence. This article examines how opposing sides in these debates construct their legal arguments and deploy distinct modes of reasoning, each grounding its position in Sharīʿa to justify the penalization of adultery. It asks why Sharīʿa doctrines of zinā are mobilized to legitimize the criminalization of adultery in Egyptian criminal law. The article argues that this strategy generates ambiguity, inconsistency, and doctrinal indeterminacy, while simultaneously undermining the function of modern criminal law within the framework of the modern state. In doing so, it produces a distorted mode of rearticulating Sharīʿa within contemporary legal institutions. Finally, the article contends that any attempt to reclaim Sharīʿa within the modern state must take into account the public function of criminal justice institutions, particularly their role in securing constitutional values such as fairness, non-discrimination, justice, and equality.

[Perdebatan parlementer di Mesir mengenai kriminalisasi perzinaan memperlihatkan bagaimana syariat Islam diargumentasikan untuk

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ISSN: 0126-012X (p); 2338-557X (e)
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https://aljamiah.or.id

menghukum suatu perbuatan yang tidak sejalan dengan landasan konseptual, definisi, standar pembuktian, maupun prosedur zinā dalam fikih Islam. Artikel ini mengkaji bagaimana pihak-pihak yang berseberangan dalam perdebatan tersebut membangun argumen hukum mereka dan menggunakan metode penalaran yang berbeda, masing-masing dengan mendasarkan posisinya pada Syariat untuk membenarkan kriminalisasi perzinaan. Pertanyaan utama yang diajukan adalah mengapa doktrin Syariat tentang zinā dimobilisasi untuk melegitimasi kriminalisasi perzinaan dalam hukum pidana Mesir. Artikel ini berargumen bahwa strategi tersebut melahirkan ambiguitas, inkonsistensi, dan ketidakpastian doktrinal, sekaligus melemahkan fungsi hukum pidana modern dalam kerangka negara modern. Dalam prosesnya, hal ini menghasilkan cara yang terdistorsi dalam mengartikulasikan kembali Syariat di dalam institusi hukum kontemporer. Pada akhirnya, artikel ini menegaskan bahwa setiap upaya untuk mereklaim Syariat dalam negara modern harus mempertimbangkan fungsi publik lembaga peradilan pidana, khususnya perannya dalam menjamin nilai-nilai konstitusional seperti keadilan, non-diskriminasi, kesetaraan, dan kepastian hukum.]

Keywords: *zinā*, adultery, Sharīʿa, Egyptian law, modern Muslim state.

A. Introduction

In 2025, the Egyptian Parliament debated a new Criminal Procedure Law intended to repeal the 1955 law in its entirety, along with all subsequent amendments enacted between 1955 and 2025. The numerous sessions devoted to discussing the provisions of the new law featured extensive debates among Members of Parliament, as well as broader public engagement involving civil society, media actors, and human rights activists outside Parliament. Among these discussions, the provisions governing the criminalization and penalization of adultery proved to be the most contentious. They generated sustained debate not only within Parliament but also across social media platforms, where MPs and activists actively engaged one another. Notably, the time devoted to debating these long-standing provisions on adultery appears to have exceeded that allocated to fundamental rights and freedoms protected under the law of criminal procedure. Although the new law introduced no substantive changes to the procedures governing the penalization of adultery, the debates themselves were revealing. They exposed the underlying philosophy, methods, and logic informing the criminalization

of adultery. More importantly, they illuminated the ways in which Sharīʿa is invoked, claimed, and argued to justify penalizing conduct that does not correspond to the conceptual foundations, definitions, rules, or procedures of *zinā* in Islamic jurisprudence. In other words, the only apparent point of convergence between Sharīʿa—as invoked in these debates—and Egyptian criminal law is the term *zinā* itself. Yet this term operates within fundamentally different conceptual frameworks, carrying distinct definitions, philosophical underpinnings, legal logics, and evidentiary standards from those found in modern Egyptian criminal law.

The debates on penalizing adultery in the new law began with a proposal suggested by a representative of the *Salafi* political party, who indicated that adultery in Egyptian law should move from the private realm to the public one, as Sharīʿa states. In response, opposing Sharīʿa, legal, jurisprudential, and judicial views were raised to refute the *Salafī* proposal, maintaining that Egyptian laws criminalizing and penalizing adultery align with Sharīʿa and do not conflict with the rules of Islamic jurisprudence. While the first proposal was suggested by the representative of the *Salafī* political party, the counter-approach was defended by the head of Parliament, who is also the former head of the Egyptian Supreme Constitutional Court, the Minister of Justice, the Minister of Parliamentary Affairs and Legal Affairs, and the former *Muftī* of Egypt. Although the two views reached opposite conclusions, both insisted on using, claiming, and arguing Sharīʿa's rules on *zinā* to defend the criminalization of adultery in Egyptian law. Ultimately, after these lengthy debates in Parliament and on social media, the same articles on criminalizing adultery in the old law were approved and included in the new law, confirming that they represent the core understanding of Sharīʿa.

Adopting a multi-method approach and integrating doctrinal legal analysis of judicial rulings and parliamentary debates within a socio-legal critique, this paper shows how the two different opinions explain their legal reasoning and methods of proof on adultery, as well as the way both use Sharīʿa's rules on *zinā* to argue for penalizing adultery in Egyptian law. The main question of the paper is why lawyers, MPs, jurists, Islamists, judges, and legal scholars use Sharīʿa rules on *zinā* to justify the criminalization of adultery in Egyptian criminal law. In other words, why are the rules of *zinā* used to justify the criminalization of adultery in modern Egyptian law? Although the definitions, philosophy, rules, methods of proof, and punishments of *zinā* in Sharīʿa differ from adultery in Egyptian law, the rules of *zinā* are still claimed to justify adultery.

After presenting the two different approaches, the paper examines the concept of adultery under Egyptian law, including its definitions, methods of proof, reasons for criminalization, and punishments. Understanding the elements of criminalization and penalization of adultery helps clarify the similarities, differences, and links between *ẓinā* in Sharīʿa and adultery in Egyptian law. The paper then traces the logic behind criminalizing adultery in Egyptian law. Namely, why do Egyptian legislators criminalize adultery? This question is examined within various modern approaches to criminalization, including harm-based criminalization, morality-based criminalization, public-right criminalization, and the Sharīʿa philosophy of criminalization. In other words, do Egyptian laws follow one of these, all of them, or none of them? If there is no clear philosophy, why do Egyptian laws lack a clear logic for criminalization? Why is it so easy for courts, lawyers, and jurists to turn to Sharīʿa to justify this case of criminalization? Is adultery understood as a public right, a private right, or both under Egyptian law?. After presenting how laws, explanatory memoranda, courts, jurists, and legal scholars use Sharīʿa's rules on *ẓinā* to argue for the criminalization of adultery in Egypt, the paper concludes that the criminalization of adultery relies on the policies of forum shopping through movement between public and private, Sharīʿa and *qānūn*, traditionalism and modernism, and state law and customary law. The conclusion notes that these inconsistent logics and vague philosophies of criminalization serve the interests of powerful actors at the expense of vulnerable groups, thereby reinforcing policies of control, power, domination, and rule. Finally, the paper argues that invoking *ẓinā* to criminalize adultery is a key method within these policies of power, presenting them as grounded in Sharīʿa and Islamic law to those subject to them.

B. The Recent Parliamentary Legal, Jurisprudential, and Sharīʿa Debates on Adultery

Claiming Sharīʿa to justify the criminalization of adultery in Egyptian law is as old as the first law criminalizing adultery. Since the first criminal legislation on adultery, courts, lawyers, and jurists have relied on Sharīʿa rules on *ẓinā* to approve the criminalization of adultery. For the purpose of this paper, I begin with the debates that have arisen in discussions of the new Criminal Procedures Law, which was

promulgated last May.[1] In this section, I present the way Sharīʿa was used by the two opposing views to justify the criminalization of adultery in Egyptian criminal law. In other words, I examine how the two opposing opinions cite the primary and secondary sources of Sharīʿa, as well as classical and modern Islamic jurisprudential views on *zinā*, to justify their understanding of how adultery should be recast in Egyptian law.

On 29 December 2024, during parliamentary discussions on the proposal for a new criminal procedures law, MP Ahmed Hamdy Khattab, a representative of the Al-Nur Party, the Salafī political party, suggested amendments to specific provisions in Article 3 regarding the criminalization of adultery in the new law project.[2] He proposed that provisions in Articles 274, 277, and 279 be excluded from Article 3, which restricts the public prosecutor from initiating any investigation into adultery unless the victim files a complaint.[3] In other words, he proposed repealing this restriction and enabling the public prosecutor to investigate regardless of whether the victim files a complaint. MP Khattab argued that, according to Article 2 of the Egyptian Constitution, which states that Sharīʿa is the primary source of legislation, any law that conflicts with Sharīʿa is unconstitutional.[4] Accordingly, provisions that criminalize adultery while limiting the right to complain to the victim are unconstitutional because they conflict with Sharīʿa. He added that the crime of adultery should be moved from the private realm to the public one, enabling the public prosecutor or any member of society to initiate proceedings, irrespective of the victim's opinion.[5] Khattab further argued that marriage, which adultery breaches, belongs to God and society, meaning it is a public right rather than a private one. Khattab cited the

[1] Gamal Essam El-Din "Criminal Procedures Law approved," *Ahram Online* (1 May 2025), https://english.ahram.org.eg/News/545443.aspx, accessed 25 May 2025.

[2] Extra News, "The Parliament Discusses the Provisions of the Criminal Procedural Law Proposal," 29 December 2024), https://www.youtube.com/watch?v=qiPkT7K25-Q&list=WL&index=30&t=1044s, accessed 25 May 2025.

[3] Article 3 of the Egyptian Criminal Procedure Law No. 50/ 1950 states that "A criminal case may only be filed based on a verbal or written complaint from the victim or their representative to the Public Prosecution or a judicial police officer in the crimes stipulated in Articles 185, 274, 277, 279, 292, 293, 303, 306, 307, and 308 of the Penal Code. A complaint shall not be accepted after three months from the day the victim learned of the crime and its perpetrator, unless the law provides otherwise."

[4] Art. 2 of the 2014 Egyptian Constitution states, "The principles of Islamic Sharīʿa*h* are the main source of legislation."

[5] Mahmud Najib Husni, *Al-Fiqh al-Jināʾī al-Islāmī* (Cairo: Dār al-Nahḍah al-ʿArabīyah 2018).

Egyptian criminal law jurist Mahmoud Naguib Husni, who argued that the offence of adultery is a public crime against society. He also referred to the modern jurist of Islamic law Abū Zahrah, who stated that adultery is an offence against the family, the social system, and lineage, as well as a public crime against God and society, rather than merely a private act.[6] He added that if the right to complain belongs only to the husband, then where are the rights of God, the father, the mother, relatives, and neighbours? He concluded that no one has the right to pardon the offence of adultery, as it is a right that belongs only to God, as argued by Abū Zahrah and Husni.[7] In this regard, MP Khattab criticized Egyptian laws on the criminalization of adultery, which grant the victim's spouse the right to pardon the offender. In short, the provisions he suggested for exclusion aim to reclassify adultery from a complaint offence to a reporting offence. The former refers to offences that cannot be pursued by public authorities unless the victim files a complaint, while the latter refers to offences that may be pursued by public authorities regardless of the victim's position.

On the same day, MP Khattab defended his position on a television talk show, repeating the same arguments and citing numerous classical Sharīʿa jurists. He stated that adultery should shift from being a personal right of the victim to a public right of society as a whole. In addition to Abū Zahrah and Husni, Khattab cited classical jurists such as al-Shāfiʿī, the Mālikī jurists Ibn Rushd and Ibn al-ʿArabī, the Ḥanbalī jurists Ibn Qudāmah and al-Mardāwī, and the Ḥanafī jurist al-Kāsānī, all of whom argued that adultery is a right of God.[8]

In the same parliamentary session, after Khattab presented his amendments and views on adultery, opposing positions were defended by the governmental representatives, including the Minister of Justice, the Speaker of Parliament (former president of the Supreme Constitutional

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[6] Muḥammad Abū Zahrah, *Al-Jarīmah wa'l-ʿUqūbah fi'l-Fiqh al-Islāmī: al-Jarīmah* (Cairo: Dār al-Fikr al-ʿArabī 1998), pp. 49-51.

[7] Abū Zahrah, *Al-Jarīmah wa'l-ʿUqūbah*, p. 50. Husni, *Al-Fiqh al-Jinā'ī al-Islāmī*, p. 27.

[8] Muḥammad b. Aḥmad ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (Cairo: Dār al-Hadīth, 2004); Muḥammad b. Idrīs al-Shāfiʿī, *al-Umm* (Cairo: Dār al-Wafā', 2001); Abdullah b. Ahmad Ibn Qudāmah, *Al-Mughnī* (Cairo: Maktabat al-Qāhirah, 1969; ʿAlī b. Aḥmad Al-Mardāwy, *Al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf* (Cairo: Hajr for Publishing, 1995); Abū Bakr b. Mas'ūd al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ fī Tartīb al-Sharā'iʿ* (Cairo: Dār Al-Kutub Al-ʿIlmīyah, 2003); Muḥammad Abū Bakr b. ʿAbdallāh Ibn al-ʿArabī, *Aḥkām al-Qur'ān* (Cairo: Dār al-Kutub al-ʿIlmīyah, 2003).

Court), the Minister of Parliamentary and Legal Affairs, the head of the Constitutional and Legislative Committee, and the former *Muftī* of Egypt. The Minister of Justice rejected Khattab's proposal to reclassify adultery from a complaint offence to a reporting offence. He stated that Khattab's arguments relate only to procedural aspects of the offence and do not concern the substantive concept of adultery.[9] The Minister of Parliamentary and Legal Affairs also rejected Khattab's proposal on several grounds. First, he emphasized that the family is the foundation of Egyptian society, and preserving family unity is a constitutional duty. Therefore, restricting public authorities from initiating proceedings in adultery cases without a complaint from the spouse is consistent with this constitutional obligation. Second, he argued that the discussion concerns criminal procedural rules, which are distinct from the substantive law governing the offence of adultery; accordingly, Khattab's proposed amendments are not relevant to the scope of criminal procedure. *Third*, he maintained that the harmful consequences of reclassifying adultery as a reporting offence outweigh any potential benefits. Finally, he argued that Sharīʿa rules that are definitive in both transmission (*qaṭʿiyyat al-thubūt*) and meaning (*qaṭʿiyyat al-dalālah*) do not conflict with classifying adultery as a complaint offence requiring the consent of the victim's spouse, as provided in Egyptian criminal law. He concluded that restricting the public prosecution from initiating investigations into adultery without a complaint serves to preserve family unity and accords with the objectives of Sharīʿa.[10]

Next, MP Judge Ibrahim al-Hinidi, who is the head of the Legislative and Constitutional Committee in the Egyptian Parliament and a former vice president of the Court of Appeal, participated in supporting this opposing view against the amendment proposal on the adultery offence in Egyptian law. Al-Hinidi claimed that the husband is the head of the family, the one in charge, and the one authorized by law to file a complaint when adultery is committed. He added that the procedural rules governing the adultery offence in Egyptian law aim to protect the husband's honor and safeguard his chastity so that he is not defamed or slandered by others or in the media. Al-Hinidi criticized MP Khattab for relying on the Constitutional Court's views on interpreting the law, noting that the same court had previously ruled that the current Egyptian laws on adultery are consistent with the Constitution and do

[9] Extra News, "The Parliament Discusses"

[10] *Ibid.*

not conflict with the Sharīʿa provision in Article 2.[11]

Then, the Speaker of Parliament, Hanafy El-Gebaly, a former Chief Justice of the Egyptian Supreme Constitutional Court, added his view in support of the opposing position against MP Khattab's amendment proposal. El-Gebaly stated that MP Khattab's proposal is legally flawed because it confuses complaint offences with reporting offences. He further explained that the proposal conflates the right to report a crime with the restrictions imposed on public prosecution in initiating criminal proceedings. The former is a guaranteed legal right for all individuals, whereas the latter limits the ability of public prosecution to proceed with a case only when the offence in question is adultery. El-Gebaly added that if the act of adultery is accompanied by other criminal acts, such as immoral conduct, vice, or debauchery, these restrictions do not apply. He also referred to the decision of the Supreme Constitutional Court affirming the constitutionality of adultery laws.[12] Finally, the Speaker called for a vote on MP Khattab's proposed amendment. A minority supported the proposal, while the majority rejected it. After the provisions on adultery were approved without incorporating MP Khattab's proposal, the Speaker invited MP Ali Gomaa to present the Sharīʿa perspective on Egyptian adultery laws.

MP Ali Gomaa, the former *Muftī* of Egypt and a member of Al-Azhar's Council of Senior Scholars, affirmed the compatibility between Sharīʿa and Egyptian adultery laws. Gomaa argued that Parliament's rejection of MP Khattab's proposal constituted a significant achievement. He supported his position, which aligns with the opposing view, with several arguments. First, he argued that reclassifying adultery in Egyptian law from a complaint offence to a reporting offence would contradict Sharīʿa. Gomaa cited the prophetic tradition concerning the case of Māʿz ibn Mālik, a Companion who committed *zinā* during the time of the Prophet. He stated that a man urged Māʿz to confess, and that the Prophet ignored his confession four times. When Māʿz persisted, the Prophet referred him, as Gomaa described it, to a form of assessment to evaluate his mental condition. After this assessment, and confirmation from Māʿz's family that he was of sound mind, the Prophet proceeded with

[11] MP Ibrahim al-Hinidi, who is the head of the legislative and constitutional committee in the Egyptian Parliament and a former vice president of the Court of Appeal, refers to the ruling of the Egyptian Supreme Constitutional Court No. 34, Judicial Year No. 10, 3 February 1990.

[12] The Egyptian Supreme Constitutional Court No. 34.

punishment. During the execution of the punishment, Mā'z declared, "I did not commit *zinā*, release me." 'Umar and other Companions did not accept this statement and continued the punishment. Later, 'Umar approached the Prophet, expressing anger at what had occurred. The Prophet responded that Mā'z should have been released. Gomaa interpreted this response to mean that retracting a confession in criminal cases should be accepted. He added that although the Prophet was certain that Mā'z had committed *zinā*, he still wished that the Companions had released him. According to Gomaa, this indicates that Sharī'a promotes compassion and does not seek to investigate the private conduct of individuals. He further cited the Prophet's statement to the man who urged Mā'z to confess: "If you had concealed his offence, it would have been better." From this, Gomaa concluded that concealing the offence of *zinā* is preferable to exposing it. Accordingly, he argued that Egyptian laws and the rulings of the Supreme Constitutional Court, which classify adultery as a complaint offence, are consistent with the objectives and meaning of Sharī'a.

Second, Gomaa criticized MP Khattab's proposal as reflecting a form of inquisition that is not recognized in Sharī'a. He maintained that although adultery is a grave offence that harms society and the family, it is necessary to distinguish between *zinā*, which carries severe punishments, and the everyday conduct of individuals in modern societies. Gomaa cited the case of a Companion accused of *zinā* based on three witnesses, where the fourth witness failed to confirm the act. In that case, 'Umar ibn al-Khaṭṭāb declared the accused innocent and charged the witnesses with slander. Gomaa explained that although 'Umar believed that the offence had occurred, he distinguished between social reality and the legal standards required under Sharī'a. Gomaa further stated that while Sharī'a permits the reporting of *zinā*, it simultaneously discourages it. Therefore, if Sharī'a discourages reporting such offences, it would be inconsistent to reclassify adultery in Egyptian law as a reporting offence in the name of Sharī'a. He concluded his statement by affirming that, in his view, Egyptian adultery laws are valid under Sharī'a and that the proposed amendment should be rejected.[13]

From the debates outlined above, several points can be identified. First, both opposing positions rely on Sharī'a to argue for either the compatibility or incompatibility of Egyptian laws on the criminalization and penalization of adultery. Participants from Islamist, religious, and

[13] Extra News, "The Parliament Discusses".

secular backgrounds all relied on Sharīʿa to support their positions. Moreover, even arguments derived from the rulings of the Supreme Constitutional Court are ultimately grounded in Sharīʿa-based reasoning.[14] Second, the statement of MP Ali Gomaa, whom the Speaker presented as the voice of Sharīʿa in these debates, was delivered after the law had already been approved. Although earlier speakers had affirmed the compatibility between Sharīʿa and Egyptian law based on constitutional and legal reasoning, it remained necessary to present a religious authority to confirm this position. This suggests that invoking Sharīʿa in modern Egyptian criminal law is not merely a matter of legal sourcing, but also serves a broader social and political function. It operates as a means of framing legal authority in religious terms in order to present state power as grounded in Sharīʿa. Third, none of the six MPs who participated in these discussions, despite their expertise in Sharīʿa or law, attempted to distinguish clearly between *zinā* in Sharīʿa and adultery in Egyptian law. It is well known that the definitions, conceptual foundations, philosophy of criminalization, and methods of proof associated with *zinā* in Sharīʿa differ significantly from those governing adultery in Egyptian law. As will be shown later, the term itself is the only shared element between the two.

Fourth, the proposed amendment concerning adultery provisions, although ultimately rejected, received extensive discussion and debate, including legal, social, and religious arguments. This level of engagement was not extended to other provisions addressing fundamental rights and freedoms. For example, the debates did not address issues such as gender-based disparities in punishment, the broad authority of the husband to grant pardon, the limited authority of the wife, or mitigating circumstances available only to husbands in cases of violence.[15] These issues raise serious concerns regarding equality, justice, and human rights within the procedural framework governing adultery.[16] Finally, it is notable

[14] The Egyptian Supreme Constitutional Court No. 34.

[15] Later, the paper discusses the discriminatory articles against women in the Egyptian criminal laws that criminalize adultery.

[16] Farah Fangary and Rana Mamdouh, "House Approves New Criminal Procedures Law, Codifying 'Violations' Despite Widespread Opposition", *Madamasr* (29 April 2025), https://www.madamasr.com/en/2025/04/29/news/u/house-approves-new-criminal-procedures-law-codifying-violations-despite-widespread-opposition/, accessed 25 May 2025; Bassam Khawaja, "Egypt's Catastrophic Draft Criminal Procedure Code: Codifies Abuses, Further Undermines Justice System", *Human Rights Watch* (20 December 2024), https://www.hrw.org/news/2024/12/20/egypts-catastrophic-draft-criminal-procedure-code, accessed 25 May 2025; UN Office

that participants with legal backgrounds relied extensively on Sharīʿa and religious concepts, while those with Sharīʿa backgrounds drew on modern legal language. MPs with judicial backgrounds frequently employed religious terminology, including references to family unity, *qaṭʿiyyat al-thubūt*, *qaṭʿiyyat al-dalālah*, *maqāṣid al-*Sharīʿa, and the protection of honor. In contrast, MP Khattab and MP Ali Gomaa employed concepts drawn from modern legal discourse, such as constitutionality, public and private rights, complaint and reporting offences, and distinctions between public and private crimes.

Finally, this section has presented how debates on the criminalization and penalization of adultery in Egyptian law rely on Sharīʿa and the rules governing *ẓinā* to support or oppose existing legal provisions. The following section examines the substantive legal framework governing adultery in Egyptian law, including its definition, historical development, underlying philosophy, evidentiary standards, and punishments. These elements, whether derived from statutory provisions or judicial reasoning, are essential for understanding the relationship between adultery in Egyptian law and *ẓinā* in Sharīʿa, as well as the ways in which Sharīʿa is invoked in legal argumentation.

C. Criminalization of Adultery in the Egyptian Laws

Articles 273, 274, 275, 276, and 277 of Egyptian Criminal Law No. 58/1937 regulate the criminalization and penalization of adultery. According to these articles, adultery, unlike *ẓinā* in Sharīʿa, refers only to the unfaithfulness or cheating of the husband or the wife.[17] In other words, the definition of adultery in Egyptian criminal law does not

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of the High Commissioner for Human Rights, "Egypt: Concerns over the draft Code of Criminal Procedure", (13 May 2025), https://www.ohchr.org/en/press-briefing-notes/2025/05/egypt-concerns-over-draft-code-criminal-procedure, accessed 25 May 2025; Mohamed Napolion, "UN Concerns Over Egypt's Criminal Procedure Code Draft", *Manassa* (14 May 2025), https://manassa.news/en/news/24163, accessed 25 May 2025. Human Rights Watch, "Review of Egypt's Draft Criminal Procedure Code", *Human RRIhts Watch* (2 October 2024), https://www.hrw.org/news/2024/10/02/review-egypts-draft-criminal-procedure-code, accessed 25 May 2025.

[17] Bahaa al-Murry, *Al-Jarā'im al-Mukhillah bi'l-Ādāb fī Ḍaw' al-Fiqh wa Aḥkām al-Naqḍ* (Cairo: Dar al-Ahram, 2024), pp. 483-516; Aḥmad Ḥāfiẓ Nūr, *Jarīmat al-Zinā fi'l-Qānūn al-Miṣrī wa'l-Muqāran* (Cairo: Nahḍat Miṣr, 1958), pp. 369-400; Majdī Maḥmūd Muḥibb Ḥāfiẓ, *Al-Jarā'im al-Mukhillah bi'l-Adāb al-ʿĀmmah*, vol. III (Cairo: Dār al-ʿAdālah, 2007), pp. 1181-331; Aḥmad Fatḥī Surūr, *Al-Wasīṭ fī Qānūn al-Ijrā'āt al-Jinā'iyah*, vol. I (Cairo: Dār al-Nahḍah al-ʿArabīyyah, 2016), pp. 789-807.

include non-married individuals, whereas *ẓinā* in Sharīʿa refers to any sexual relationship outside marriage.[18] Al-Awwa criticized the concept of adultery in Egyptian law, arguing that this definition neither complies with Sharīʿa nor with Egyptian custom. He stated that the three religions—Judaism, Christianity, and Islam—which influence Egyptian customs, do not define adultery in the same way as it is described in Egyptian criminal law. Al-Awwa further argued that the gap between the concept of adultery in Egyptian law and *ẓinā* in Sharīʿa, as well as in Egyptian custom, is rooted in the European origins of the criminalization of adultery in Egyptian law.[19] Namely, the criminalization of adultery in Egyptian law was translated and transmitted from the period of French influence. In the same manner, the Egyptian criminologist Ahmed Khalifa argues that:

> "The sexual offences included in the Egyptian laws were transmitted from the French legal system. Consequently, definitions, concepts, and philosophies related to criminalization were derived from French laws. These Egyptian laws were not products of Egypt's economic, cultural, social, and political communities. It is hard to link these foreign legislations to Egyptian communities' traditions, customs, and needs."[20]

Article 273, which gave rise to debates and discussions in the recent proposed amendments to the criminal procedural law, stipulates that the prosecution of adultery cannot proceed without a complaint submitted by the victim.[21] Unless the victim files a complaint, the public prosecutor or the court cannot intervene to prosecute the offender. Namely, this private justice understanding highlights the philosophy behind the criminalization and penalization of adultery. On the other hand, *ẓinā*, according to Sharīʿa, is a public or Godly right that is not limited to the harmed spouse, but is a crime against God, society, and the family.[22] Furthermore, this private

[18] Al-Murry, *al-Jarā'im al-Mukhillah bi'l-Ādāb*, 483-516. Nūr, *Jarīmat Al-Zinā*, 370-400. Ḥāfiẓ, *Al-Jarā'im al-Mukhillah*, vol. III, pp. 1181-331. Surūr, *al-Wasīṭ*, vol. I, pp. 789- 807.

[19] Muḥammad Salīm al-ʿAwwā, "Bayna al-Qāʿidah al-Qānūnīyyah wa'l-Qāʿidah al-Khuluqīyah", *Majallat Kullīyat al-Sharīʿa wa-al-Dirāsāt al-Islāmīyah* vol. 5, no. 5 (1987), pp. 212-3.

[20] Aḥmad Muḥammad Khalīfah, *Al-Naẓarīyah al-ʿĀmmah li'l-Tarjīm: Dirāsah fī Falsafat al-Qānūn al-Jinā'ī* (Cairo: Dār al-Maʿārif, 1959), pp. 216-22.

[21] Al-Murry, *Al-Jarā'im al-Mukhillah bi'l-Adāb*, pp. 483-516; Nūr, *Jarīmat al-Zinā*, pp. 370-400; Ḥāfiẓ, *Al-Jarā'im al-Mukhillah*, vol III, pp. 1181-331.

[22] Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (New York: Oxford University Press, 2019), pp. 63-65; Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2006), pp. 59-62; Al-ʿAwwā, "Bayna

justice understanding of adultery in Egyptian law, which focuses only on the harmed spouse, grants the victim the right to pardon the offence at any stage of the proceedings.[23] Specifically, the victim's decision to pardon suspends the trial and ceases the offender's punishment.[24] In Sharīʿa, no one can pardon the perpetrator once the evidence confirms the offence. In other words, the Godly understanding of *ẓinā* in Sharīʿa prevents anyone from pardoning the offender, ceasing the punishment, or suspending the trial.[25]

Article 276 of the Egyptian criminal law addresses the proof of the adultery offence, which may be established through flagrante delicto, the offender's confession, letters or messages between the offender and the accomplice, or the presence of the offender in the harem of a Muslim household. The Egyptian Court of Cassation has added that these methods of proof are not exhaustive, and that the judge may establish the offence through any circumstances indicating the practice of adultery.[26] According to Sharīʿa, however, *ẓinā* can only be proven through the confession of the offender or the testimony of four male witnesses who agree that they have observed the actual act of sexual intercourse.[27]

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al-Qāʿidah al-Qānūnīyyah,", pp. 212-3; Abū Zahrah, *al-Jarīmah*, p. 50. Husni, *al-Fiqh al-Jināʾī al-Islāmī*, p. 27.

[23] Art. 3, Law No. 50/ 1950. The Egyptian Court of Cassation, Appeal No. 1369, Judicial Year No. 47, 22 May 1978; Surūr, *al-Wasīṭ*, vol II, pp. 803-80. Al-Murry, *Al-Jarāʾim al-Mukhillah biʾl-Adāb*, 505.

[24] Surūr, *al-Wasīṭ*, vol. II, pp. 803-7. Al-Murry, *Al-Jarāʾim al-Mukhillah biʾl-Adāb*, p. 505.

[25] Muḥammad Salīm al-ʿAwwā, *Fī Uṣūl al-Niẓām al-Jināʾī al-Islāmī* (Cairo: Nahḍat Miṣr, 2006), pp. 261-75. Aḥmad Fatḥī Bahnasī, *al-Sīyāsah al-Jināʾīyah fīʾl-Sharīʿah al-Islāmīyah* (Cairo: Dār al-Shurūq, 1998), pp. 112-4.

[26] Article 276 of the Egyptian Criminal Law No. 58/ 1937 states 'Evidence that is acceptable and can be used as proof against an accused person for adultery is the flagrant delicto, his confession, the presence of letters or other written papers from him, or his presence in a Muslim home in a place designated for women.' The Egyptian Court of Cassation explained this article, saying the judge can use any explicit and implicit evidence to prove the adultery. See, The Egyptian Court of Cassation, Appeal No. 477, Judicial Year No. 44, 10 June 1974. The Egyptian Court of Cassation, Appeal No. 333, Judicial Year No. 32, 29 May 1962. Al-Murry, *Al-Jarāʾim al-Mukhillah biʾl-Adāb*, pp. 492-7.

[27] Aḥmad Fatḥī Bahnasī, *al-Jarāʾim fīʾl-Fiqh al-Islāmī* (Cairo: Dār al-Shurūq, 1988), 123-46; *Naẓarīyat al-Ithbāt fīʾl-Fiqh al-Jināʾī al-Islāmī* (Cairo: Dār al-Shurūq, 1989); Moḥamed Ḥussein Qandīl, "Ithbāt al-Zinā: Dirāsah Muqāranah bayna al-Sharīʿa waʾl-Qānūn", *Majallat al-Buḥūth al-Fiqhīyah waʾl-Qānūnīyyah,* vol. 15 no. 18 (2003), pp. 708-92; Al-ʿAwwā, *Fī Uṣūl al-Niẓām al-Jināʾī al-Islāmī*, pp. 275-9.

In other words, the four witnesses must unanimously confirm that they witnessed actual penetration between a man and a woman. Flagrante delicto, correspondence between the offenders, presence in a private space, or other circumstantial evidence, as recognized in Egyptian law, do not constitute valid proof of *zinā* according to Sharīʿa.[28]

Articles 274, 275, and 277 of the Egyptian criminal law determine the penalties imposed on offenders of adultery. These provisions distinguish between men and women. While a husband may be sentenced to imprisonment for less than six months, a wife may be sentenced to imprisonment for up to two years.[29] There are four essential differences between *zinā* in Sharīʿa and adultery in Egyptian criminal law with regard to punishment. *First*, unlike the prison sentences provided in Egyptian law, the punishments prescribed for *zinā* in Sharīʿa include stoning, flogging, and banishment. *Second*, Sharīʿa distinguishes between married and unmarried individuals: married offenders are subject to stoning, while unmarried offenders are subject to flogging, with or without banishment. *Third*, Sharīʿa does not distinguish between male and female offenders in punishment,[30] unlike Egyptian law.[31] *Fourth*, while Egyptian law treats the other party in an adulterous relationship as an accomplice, Sharīʿa considers both parties as principal offenders.[32] In short, the penalization policies of *zinā* in Sharīʿa differ significantly from those governing adultery in Egyptian law.

The final point concerns gender-based discrimination in Egyptian

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[28] Mohammad Hashim Kamali, "Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia", *Arab Law Quarterly*, vol. 13 no. 3 (1998), pp. 203-34, Souha Korbatieh, "Evidence Rules in Sharīʿah and the Impact of Modern Technology and DNA Testing", *Australian Journal of Islamic Studies*, vol. 5, no. 3 (2020), pp. 4-29; Fida Mohammad and Richard Lee, "Evidentiary Standards for Sexual Offenses in Islam", *Pakistan Journal of Criminology*, vol. 7, no. 1 (2015), pp. 29-43; Mufti Ali Jumaa, "Using Scientific Methods to Prove Adultery Offence," *Dar al-Iftaa Website* (22 Feb 2009), https://www.dar-alifta.org/ar/fatwa/details/12868/حكم-استخدام-الوسائل-العلمية-الحديثة-في-إثبات-جريمة-الزنا, accessed 25 May 2025.

[29] Articles 247 states, 'A married woman who is proven to have committed adultery shall be sentenced to imprisonment for a period not exceeding two years.'. Article 277 states that "Every husband who commits adultery in the marital home shall be punished by imprisonment for a period not exceeding six months." See Articles 247, 275, and 277 of Egyptian Criminal Law No. 58/1937.

[30] Muḥammad Abū Zahrah, *al-Jarīmah wa'l-ʿUqūbah: al-ʿUqūbah*, pp. 87-95; Kamali, *Crime and Punishment in Islamic Law*, p. 63.

[31] Articles 247, 275, and 277, Law No. 58/1937.

[32] Bahnasī, *Al-Jarā'im fi'l-Fiqh al-Islāmī*, p. 146.

law. First, the adultery of a husband is limited to acts committed within the marital home, whereas the adultery of a wife includes any act of marital unfaithfulness committed anywhere.[33] Second, the husband, as a victim, has the absolute power to pardon the wife, cease the trial, and suspend the penalty even after a final court ruling. By contrast, the wife has only limited power to pardon within the proceedings and before the final ruling.[34] Third, the punishment for the husband is less than six months, whereas the wife may be sentenced to up to two years.[35] Fourth, a husband who kills his wife upon discovering her adultery benefits from a mitigating circumstance that reduces the offence from a felony punishable by death to a misdemeanour punishable by imprisonment for less than six months. This mitigating circumstance, which may involve assault, beating, or killing, applies only to the husband, not to the wife.[36] None of these forms of gender-based differentiation exist in Sharīʿa's policies on *ẓinā*.

In sum, the above analysis of the rules governing the criminalization and penalization of adultery in Egyptian law suggests that Sharīʿa and Egyptian law do not share common rules, philosophy, or concepts, except for the term *ẓinā*, which has been used to persuade the public that these practices are religiously justified. Since Sharīʿa, as invoked in these arguments, does not correspond to the penalization rules of adultery in Egyptian law, the question remains: what is the underlying philosophy, if any, behind the criminalization of adultery in Egypt? The following

[33] Article 277, Law No. 58/1937 states that "Every husband who commits adultery in the marital home…". Al-Murry, *Al-Jarā'im al-Mukhillah bi'l-Adāb,* p. 507. The Egyptian Court of Cassation, Appeal No. 119, Judicial Year No. 14, 13 December 1943.

[34] ʿAbd al-Muhaymin Bakr, *Al-Qism Al-Khāṣṣ fī Qānūn al-ʿUqūbāt* (Cairo: Dār al-Nahḍah al-ʿArabīyyah, 1970), p. 737; The Egyptian Court of Cassation, Appeal No. 148, Judicial Year No. 41, 31 May 1971; The Egyptian Court of Cassation, Appeal No. 18863, Judicial Year No. 62, 16 November 1995; Ḥāfiẓ, *Al-Jarā'im al-Mukhillah bi'l-Adāb*, vol. III, p. 1269; Article 277, Law No. 58/1937; Al-Murry, *Al-Jarā'im al-Mukhillah bi'l-Adāb*, p. 507; The Egyptian Court of Cassation, Appeal No. 119.

[35] Articles 247, 275, and 27 of Law No. 58/1937. The Egyptian Court of Cassation, Appeal No. 18863.

[36] Article 237 of Law 58/1937 states, "Whoever surprises his wife in the act of adultery and kills her on the spot together with her adulterous partner shall be punished with detention instead of the penalties prescribed in articles 234 [death penalty and permanent and temporary hard labor] and 236 [hard labor or imprisonment for a period of three to seven years]"; The Egyptian Court of Cassation, Appeal No. 1357, Judicial Year No. 53, 12 October 1983; The Egyptian Court of Cassation, Appeal No. 24855, Judicial Year No. 64, 10 March 1997; Al-Murry, *Al-Jarā'im al-Mukhillah bi'l-Adāb,* p. 485. Nūr, *Jarīmat al-Zinā*, p. 385.

section examines judicial rulings, legal interpretations, and explanatory memoranda to determine whether a consistent logic or philosophy can be identified.

D. Why do the Egyptian Laws Criminalize Adultery?

In this section, I examine the logic, if any, behind the policies of criminalizing and penalizing adultery in Egyptian law. To do so, I trace court decisions, reviews, interpretations, comments, and rules regarding adultery in Egyptian law and assess them in light of contemporary philosophies of criminalization and penalization. Namely, I draw on three contemporary theories of the philosophy of criminalization and penalization to determine whether any of these theories align with the policies of Egyptian criminal justice institutions on penalizing adultery. The three contemporary theories are morality-based criminalization theory, harm-based criminalization theory, and public right-based criminalization theory. Additionally, since judges, courts, lawyers, jurists, and legislators invoke Sharīʿa to argue for and justify these policies of criminalization, I also include Sharīʿa-based criminalization theory to examine the consistency between Sharīʿa and Egyptian law in the philosophy of criminalizing adultery.

1. The Morality-based Criminalization of Adultery

The morality-based theory of criminalization refers to the use of criminal law to protect, maintain, and enforce societal morals. In other words, the immorality of a practice is considered a sufficient reason for criminal justice institutions to intervene and punish those who commit it.[37] This legal moralism approach is controversial, as it was debated between James Fitzjames Stephen and John Stuart Mill in the nineteenth century.[38] These debates continued in the following two centuries with Lord Devlin, the jurist H. L. A. Hart, Michael Moore, and Antony Duff.[39] James Stephen and Lord Devlin argued that criminal law serves

[37] Thomas Søbirk Petersen, "What is Legal Moralism", *SATS*, vol 12, no. 1 (2011), pp. 80-8.

[38] See James Fitzjames Stephen, *Liberty, Equality, Fraternity*, ed. by Stuart D. Warner (Indianapolis: Liberty Fund, 1993); John Stuart Mill, *On Liberty* (Cambridge: Cambridge University Press, 2011).

[39] Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1967); H.L.A. Hart, *Law, Liberty, and Morality* (Stanford CA: Stanford University Press, 1963); Michael S. Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford: Oxford University Press, 2010); R. A. Duff, *The Realm of Criminal Law* (Oxford: Oxford

to maintain shared political and moral values. Any breach of these values could undermine the community, and therefore imposing penalties is necessary to preserve them. Devlin further argued that violating these values threatens society and cannot be regarded as merely personal behavior; therefore, it should be addressed through state criminal sanctions.[40] Although moralism underlies this theory of criminalization, its proponents do not advocate an absolute application of moralism. Namely, the criminalization and penalization of immoral acts are not necessarily extended to sexual practices, and the state should not intervene in matters such as prostitution, homosexuality, obscenity, or other private sexual conduct.[41] Michael Moore, a legal moralist, argued that criminal law should protect individuals' freedoms and liberties from infringement by the state.[42] Furthermore, Antony Duff conditioned his account of legal moralism on the principle of the public realm. He explained that a wrongful act should be criminalized only when it breaches the civil order of the polity and falls within the public sphere of civic life.[43] In other words, Duff's approach ties legal moralism to acts that are public in nature and concern the community as a whole.[44]

Many scholars, judges, jurists, and lawyers in Egyptian legal scholarship have advocated the use of criminal penalties to promote and maintain morality within Egyptian society. For example, Mohamed Salīm al-ʻAwwā, the legal jurist, cited Lord Devlin's approach to legal moralism to argue that Egyptian criminal law should intervene to enforce morality. Al-ʻAwwā maintained that harm-based criminalization is inadequate because it separates legality from morality. Accordingly, he urged Egyptian criminal justice institutions to punish any sexual practice outside the marriage contract, including prostitution, adultery, and homosexuality. He also criticized the narrow definition of adultery

University Press, 2018); John Finnis, *Natural Law and Natural Rights*, 2nd edition (New York: Oxford University Press, 2011; Gerald Dworkin, "Devlin Was Right: Law and the Enforcement of Morality", *William & Mary Law Review*, vol. 40, no. 3 (1999), p. 927; Petersen, "What is Legal Moralism?".

[40] Massimo Renzo, "Law, Liberty, and Morality: Fifty Years On", *Criminal Law and Philosophy*, vol. 7, no. 3 (2013), p. 417.

[41] Moore, *Placing Blame*, p. 662.

[42] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2007), p. 198.

[43] Duff, *The Realm of Criminal Law*, pp. 232, 275, and 277

[44] R. A. Duff, "Defending the Realm of Criminal Law", *Criminal Law and Philosophy*, vol. 14, no. 3 (2020), p. 468.

in Egyptian law, arguing that it should follow the Sharīʿa definition of *zinā*, which penalizes any sexual practice outside marriage, whether the individuals involved are married or not.[45]

It is difficult to determine whether Egyptian courts and laws criminalize and penalize adultery on the basis of legal moralism.[46] In practice, courts and legislation apply moral reasoning as a general principle across various judicial reviews and rulings. In some instances, legal moralism is articulated through Islamic Sharīʿa.[47] In others, courts interpret morality through the framework of the three predominant religions: Islam, Christianity, and Judaism.[48] In yet other cases, Egyptian customs are used to define legal morality.[49] At the same time, courts

[45] Al-ʿAwwā, *Fī Uṣūl al-Niẓām al-Jinā'ī al-Islāmī*, pp. 67-70; Al-ʿAwwā, "Bayna al-Qāʿidah al-Qānūnīyah wa'l-Qāʿidah al-Khuluqīyah", pp. 191-195, 212. 213, and 215.

[46] For example, Law No. 175/ 2018 on Technology Crimes punishes anyone who infringes the values or principles of the Egyptian family without defining or limiting these values with a clear definition. Similarly, Art. 10 of the Egyptian constitution considers morality as one of the bases of the Egyptian family that the state should protect. The courts always use the morality term with no clear definition or explanation, such as the Cairo Economic Court stating, "Each father and mother is obliged to do their duty toward their children to protect and prepare them to behave according to the morality and ethics of this nation." Cairo's Economic Court, Ruling No. 479/ 2020 (27 July 2020); Mohamed Tarek, "How Authorities Targeted Rising Online Stars for Violating Family Values", *Madamasr* (10 November 2020), https://www.madamasr.com/en/2020/11/10/feature/politics/how-authorities-targeted-rising-online-stars-for-violating-family-values/, accessed 25 May 2025.

[47] The Egyptian Constitutional Court, Case No. 7, Judicial Year No. 2, 1 March 1975; A. D. Hamid, *The Trap: Punishing Sexual Difference in Egypt* (Kairo: Egyptian Initiative for Personal Rights, 2017), pp. 35-6; Damanhur's Criminal Court, Case No. 16660/ 2017, 18 January 2018.

[48] The two Egyptian Supreme Constitutional Court judges, Ḥossām Faraḥāt and Abdal-Aziz Salmān, wrote that the public morality and ethics of the family within the Egyptian community are defined through the three monotheistic religions. See Ḥossām Faraḥāt, "Al-Ḥimāyah al-dustūrīyah ḍidda al-Tamyīz ʿalá Asās al-Dīn fī Miṣr", *Majallat al-Maḥkamah al-dustūrīyah al-ʿUlyā*, vol. 11 (2007); ʿAbd al-ʿAzīz Salmān, "Al-Ḥudūd al-Dustūrīyah li Ḥurrīyat al-ʿAqīdah", *Majallat al-Maḥkamah al-Dustūrīyah al-ʿUlyā*, vol. 10 (2006). Similarly, Muḥammad ʿAbd al-Fattāḥ ʿAbd al-Barr, a judge at the Egyptian Supreme Constitutional Court, argued that the three monotheistic religions define the boundaries of the legal countering of any moral violation in Egyptian society. See Muḥammad ʿAbd al-Fattāḥ ʿAbd al-Barr, "Al-Ḥimāyah al-Dustūrīyah li'l-Khuṣuṣiyyah al-Thaqāfīyyah" *Majallat al-Maḥkamah al-Dustūrīyah al-ʿUlyā*, vol. 31 (2022).

[49] For example, the Egyptian Court of Appeal justified the criminalization of adultery because it breaches the values and customs of Egyptian society. Egyptian Court of Appeal, Appeal No. 697, Judicial Year No. 11, 19 May 1941. Egyptian Court of Appeal, Collection of Legal Principles, Vol. 5, No. 259, 471.

sometimes reject vague, undefined, or ambiguous references to morality, values, customs, and traditions when assessing criminalization and penalization policies.[50] In other words, legal moralism is simultaneously invoked, limited, and questioned within Egyptian criminal justice practice.[51] Therefore, it may be argued that attributing the criminalization of adultery in Egyptian law to legal moralism alone is problematic, given the vagueness, contradictions, and inconsistencies in how this approach is applied within Egyptian criminal justice institutions and scholarship.

2. The Harm-based Criminalization of Adultery

The second approach through which this essay reviews the policies of criminalizing adultery in Egyptian laws is to criminalize an act only if it causes harm to others. This theory of criminalization was a primary counter to the previous legal moralism approach, which punishes immoral acts, regardless of whether they cause harm or not.[52] Mill suggested the harm-based principle, which was later adopted and developed by leading jurists such as Joel Feinberg and Hart in the twentieth century.[53] Michael Moore explained Mill's principle of harm as follows,

> "Mill's famous taxonomy of possible reasons for criminal legislation is often cast in terms of characteristics of the actions to be regulated by such legislation. These are actions: (1) harmful to persons other than the actors or those consensually joining in their actions; (2) harmful to the actor(s) themselves only; (3) not harmful to anyone but which are offensive to others; and (4) neither harmful nor offensive to anyone but which are (at least thought to be) immoral to perform. Mill's famous harm principle asserts that only actions harmful to others may be prohibited by criminal law; actions merely harmful to the actor himself, or only

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[50] The Egyptian Supreme Court, Case No. 105, Judicial Year No. 12, 12 February 1994. The Egyptian Supreme Court, Case No. 3, Judicial Year No. 10, January 2nd, 1993. See the Official Journal, Vol. 2, 14 January 1993. The Egyptian Supreme Constitutional Court considered the vague terms in the criminal legislation an example of violating citizens' inherent rights. For how the Supreme Constitutional Court nullifies the vague and ambiguous criminal provisions, see Aḥmad Fatḥī Surūr, *Al-Ḥimāyah al-Dustūrīyah li'l-Ḥuqūq wa'l-Hurrīyyāt* (Cairo: Dār al-Shurūq, 2000), pp. 440-50.

[51] The Egyptian Supreme Constitutional Court, Case No. 54, Judicial Year No. 37, 6 July 2019.

[52] Bernard E Harcourt, "Mill's *On Liberty* and the Modern 'Harm to Others' Principle", in *Foundational Texts in Modern Criminal Law,* ed. Markus D. Dubber (Oxford: Oxford University Press, 2014), p. 163.

[53] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (New York: Oxford University Press, 1987); Mill, *On Liberty*; Hart, *Law, Liberty, and Morality*.

offensive or immoral, may not be prohibited."[54]

Arguing for this theory, Hart stated that criminalization and penalization are only justified against the citizens of civilized societies to prevent harm to others.[55] Similarly, Feinberg argued that a state's criminal sanctions are legitimate only when they prevent harm that may befall others.[56] Additionally, the harm-based principle of criminalization influenced the well-known Wolfenden report, which challenged the use of criminal law to regulate immoral private practices. The report stated criminal law should only function to, "preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide a sufficient safeguard against exploitation or corruption of others, particularly those who are vulnerable".[57]

Egyptian criminal justice institutions do not have a clear, obvious, and consistent answer regarding the use of the harm-based theory to criminalize adultery. Namely, the courts sometimes consider that the criminalization of adultery aims to prevent a harm that has happened; however, these courts are uncertain and indefinite regarding whether the spouse, society, or family is the harmed party. For example, in many cases, the Egyptian Court of Cassation asserted that a wife's adultery is criminalized because of the harm caused to the family's honor.[58] However, a husband's adultery causes harm to the wife who is offended, insulted, and dishonoured because of the commission of the offence in the marital house.[59] In other words, in these cases, the court believed that adultery causes harm; however, the harm caused to the husband is not the same as the harm caused to the wife. Additionally, it was clear

[54] Michael S. Moore, "Liberty's Constraints on What Should be Made Criminal", in *Criminalization: The Political Morality of the Criminal Law*, ed. by R. A. Duff et al. (Oxford: Oxford University Press, 2014), p. 189.

[55] Hart, *Law, Liberty, and Morality*, p. 4

[56] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016) p. 15; Feinberg, *The Moral Limits of the Criminal Law*; Husak, *Overcriminalization*, p. 71.

[57] The Report of the Great Britain Committee on Homosexual Offences and Prostitution (Wolfenden Report), Command No. 247/ 1957, Paras. 61 and 62.

[58] The Egyptian Court of Cassation, Appeal No. 10445, Judicial Year 64, Session on 9 March 2000; The Egyptian Court of Cassation, Appeal No. 7835, Judicial Year 59, Session on 9 January 1990; The Egyptian Supreme Administrative Court, Appeal No. 15575, Judicial Year 49, Session on 25 March 2006; Al-Murry, *Al-Jarā'im al-Mukhillah bi'l-Adāb*, pp. 503-5

[59] The Egyptian Court of Cassation, Appeal No. 119, Judicial Year 14, Session on 13 December 1943; Al-Murry, *Al-Jarā'im al-Mukhillah bi'l-Adāb*, p. 507.

from the debates mentioned above between the Egyptian MPs, officials, judges, and jurists that there are protected interests from being harmed other than family's honor or wife's being insulted, such as considering adultery an offence against all society, marriage institution, social system, offspring, and God.[60] Needless to say, although the legislator and courts sometimes claim adultery causes harm, they do not explain why the harm is different based on gender. In other words, these harm claims should be present whether the victim is a husband or a wife. Also, there is no clear explanation on how to balance between the adultery breaches the public right of all society, but cannot be prosecuted without a private permission from the spouse. In short, the Egyptian criminal justice institutions have no consistent policy in criminalizing adultery based on the harm-based theory of criminalization.

3. The Public Right Theory of Criminalization

This theory of criminalization means that criminal justice institutions work within the public realm of a state that does not use sanctions to maximize utilities, achieve moral duties, or punish moral wrongdoers.[61] A theory that aims to maintain the constitutional values of equality, justice, and fairness for each citizen without any discrimination. In other words, using the moral ideology of some societal groups to impose penalties on those who breach these ideological values undermines the function of criminal laws in the modern state.[62] Malcolm Thorburn explained his view on public rights as a theory of criminalization, arguing that criminal laws aim to achieve morality by maintaining that all citizens are subject to the rule of law, not the wishes or ideological opinions of some groups or individuals.[63] Similarly, Vincent Chiao argued that taking the criminalization policy seriously means that punishing offenders should be part of empowering the rule of law, not favouring the moral view of some societal groups or people.[64] On the Egyptian legal scholarship level, the Egyptian jurist Ramsīs Bihnām defended this theory of criminalization and penalization. Bihnām argued that criminal justice institutions should

[60] Extra News, "The Parliament Discusses".

[61] Farmer, *Making the Modern Criminal Law*, p. 43; Husak, *Overcriminalization*, p. 55.

[62] Vincent Chiao, "What is the Criminal Law For?", *Law and Philosophy*, vol. 35, no. 2 (2016), p. 139; Malcolm Thorburn, "Constitutionalism and the Limits of the Criminal Law", in *The Structures of the Criminal Law*, ed. by R. A. Duff et al. (Oxford: Oxford University Press, 2011), p. 99.

[63] Thorburn, "Constitutionalism and the Limits of the Criminal Law", p. 100.

[64] Chiao, "What is the Criminal Law For?", p. 145.

punish only public practices that seriously threaten communities based on the shared policies between all community members, and not just build the philosophy of penalization on some controversial moral views.[65]

Criminalization and penalization of adultery in Egyptian laws are far from following the public right understanding of criminalization for different reasons. First, the courts and legislators always justify the laws and rulings of punishing adultery on ideological views that ignore the public realm within which criminal law functions, as noted in the above debates. Second, there is an apparent gender-based discrimination in the policies of criminalizing adultery in the Egyptian laws; punishing, proving, mitigating, and the right to pardon.[66] Third, the courts always speak about the logic behind punishing adultery, and give reasons based on whether the offender is a male or female.[67] Additionally, the criminalization of adultery in the Egyptian laws not only contradicts the public right theory of criminalization, but also conflicts with some of the rulings that were issued by the highest Egyptian courts regarding the policies that should be considered in criminalization and penalization.[68] For example, the Egyptian Supreme Constitutional Court ruled that enacting criminal legislation, criminalizing, and penalizing should consider the democratic venues of respecting human rights and liberties. The court added that the vagueness of the words, meanings, definitions, and philosophies of criminalizing codes is an example of violating these human rights and liberties.[69] Paradoxically, the Supreme Constitutional Court contradicted its ruling of limiting criminal legislation and criminalization policies with the democratic values of equality, justice, and fairness in two different cases. Three times, the constitutionality of adultery laws was challenged before the Supreme Constitutional Court for the gender- and religious-based discrimination in punishing and proving the offence, as well as the

[65] Ramsīs Bihnām, *Naẓarīyat al-Tajrīm fī'l-Qānūn al-Jinā'ī* (Cairo: Manshaat al-Maʿārif, 1996), pp. 12, 25, and 310.

[66] Articles 247, 275, and 277 of Law No. 58/1937; Bakr, *Al-Qism al-Khāṣṣ fī Qānūn al-ʿUqūbāt*; Al-Murry, *Al-Jarā'im al-Mukhillah bi'l-Adāb*, p. 507; The Egyptian Court of Cassation, Appeal No. 119. The Egyptian Court of Cassation, Appeal No. 148; Ḥāfiẓ, *Al-Jarā'im al-Mukhillah*, vol. III, p. 1269.

[67] Al-Murry, *Al-Jarā'im al-Mukhillah bi'l-Adāb,* 507. The Egyptian Court of Cassation, Appeal No. 119. The Egyptian Court of Cassation, Appeal No. 148; Ḥāfiẓ, *Al-Jarā'im Al-Mukhillah*, vol. III, p. 1269.

[68] Surūr, *Al-Ḥimāyah al-Dustūrīyah*, p. 63.

[69] The Egyptian Supreme Constitutional Court, Case No. 105, Judicial Year No. 12, 12 February 1994; The Egyptian Supreme Constitutional Court, Case No. 3, Judicial Year No. 10, 2 January 1993. See the Official Journal, Vol. 2, 14 January 1993.

conflict of the law with Sharīʿa Article in the Egyptian constitution. The court decided the unconstitutionality of the adultery laws for the religious-based discrimination in the proving methods of the offence. It concluded that the religious-based discrimination in proving the adultery offence breaches the explicit provisions of the Egyptian constitution that prohibit all practices of discrimination. The court added that the prohibition of all discrimination practices is an essential value and a great principle for any civilized community.[70] However, the same Supreme Court rejected the other two cases on gender-based discrimination and violation of the Sharīʿa article in the Egyptian constitution.[71] The court neither considered the violation of the Egyptian constitution that prohibited all practices of discrimination, nor the elimination of the gender-based discrimination that represents an essential value for every civilized community, nor the democratic conditions for any criminalization and penalization policies, which the court explicitly argued in various rulings. In short, the Egyptian laws of adultery and the practices of the Egyptian courts on prosecuting the offence denote that the criminalization of adultery is far from the public right theory of criminalization for the explicit gender-based discrimination, which represents an essential element in the public right theory.

E. Claiming *Sharīʿa* to Criminalize and Penalize Adultery in Egyptian Law

In the previous section, the essay demonstrated that the policies of criminalizing and penalizing adultery within Egyptian criminal justice institutions are inconsistent with modern theories of criminalization, such as legal moralism, harm-based, or public right-based theories. It was clear that the rulings, laws, reviews, and reasoning conflicted with these presented theories. In this section, the essay examines the way that lawyers, judges, legislators, and Islamic law scholars use, claim, and argue Sharīʿa to justify the criminalization and penalization of adultery

[70] The Egyptian Supreme Constitutional Court, Case No. 248, Judicial Year No. 30, 6 June 2020.

[71] For the gender-based discrimination case, see: The Egyptian Supreme Constitutional Court, Case No. 318, Judicial Year No. 23, 4 July 2020. For the violation of Sharīʿa case, see: The Egyptian Supreme Constitutional Court, Case No. 34, Judicial Year No. 10, 3 February 1990. See also, Mohamed Napoleon, "Masār Jadīd li'l-Qaḍā' ʿala Nuṣūṣ al-Tamyīz fi ʿUqūbah al-Zinā bi'l-Tashrīʿ al-Miṣrī", *Manshūrāt Qānūneya* (10 January 2021), https://manshurat.org/node/70194, accessed 25 May 2025.

in the Egyptian laws. As it was noted in the above parliamentary debates between the MPs who are coming from the lawyering, judicial, and Islamic law backgrounds, Sharīʿa is an essential tool to justify the opposing views on the position of adultery in the Egyptian laws.[72] Not only the parliamentary debates that use *Zinā* rules in Sharīʿa to justify any position of adultery in Egyptian laws, but also the lawyers and prosecutors who defend their clients, whether they are offenders, victims, or complicit.[73]

Although the content, formation, history, and philosophy of Egyptian criminal law are not influenced or based on Islamic law, the Sharīʿa rules of *Zinā* are always presented to justify the criminalization of adultery.[74] Moreover, the Egyptian Supreme Constitutional Court rejected many times the lawyers' attempts to question the unconstitutionality of the Egyptian criminal laws, either the general rules or the rules on adultery, due to the conflict of criminal law with a constitutional article on Sharīʿa as a source of legislation. The court announced that the obligation of Sharīʿa compliance with Egyptian laws, as article 2 of the Egyptian constitution states, applies only to any codified laws after the Sharīʿa article is added to the constitution. In other words, all the laws enacted before adding Sharīʿa article 2 to the constitution are not necessarily required to be according to Sharīʿa. Thus, any case that comes to the Egyptian Supreme Constitutional Court with this Sharīʿa Article 2 claim is always rejected based on this principle.[75] In 1990, the constitutionality of Egyptian adultery laws was challenged due to their contradiction with the Sharīʿa, which should be the primary source of legislation, as the constitution states. The court rejected the case as the adultery laws were enacted before the 22nd of May 1980, when the

[72] Extra News, "The Parliament Discusses"; Article 3 of Law No. 50/ 1950. Art. 2 of the Egyptian Constitution; Husni, *Al-Fiqh al-Jināʾī al-Islāmī*; Egyptian Supreme Constitutional Court No. 34; Abū Zahrah, *Al-Jarīmah waʾl-ʿUqūbah fī al-Fiqh al-Islāmī*, 49-51.

[73] For how the lawyers use Sharīʿa*h* rules to challenge the constitutionality of adultery laws in the Egyptian Criminal Law, see The Egyptian Supreme Constitutional Court, Case No. 318; The Egyptian Supreme Constitutional Court, Case No. 34; Napoleon, "Masār Jadīd".

[74] For the separation between the Egyptian Criminal Law and Sharīʿa*h*, see Al-ʿAwwā, *Fī Uṣūl al-Niẓām al-Jināʾī al-Islāmī*, pp. 27-33.

[75] The Egyptian Supreme Constitutional Court, Case No. 318; The Egyptian Supreme Constitutional Court, Case No. 34; Napoleon, "Masār Jadīd; Surūr, *al-Wasīṭ fī Qānūn al-Ijrāʾāt al-jināʾīyah*, vol. II, pp. 330-2; The Egyptian Supreme Constitutional Court, Case No. 29, Judicial Year No. 11, 26 March 1994; The Egyptian Supreme Constitutional Court, Case No. 5, Judicial Year No. 13, 6 January 1996.

Sharīʿa compliance article was added to the constitution, so the legislator must follow Sharīʿa for any laws enacted after this day.[76] With this clear distance between Sharīʿa and criminal law, Sharīʿa classical rules on *Zinā* are always present to justify any ambiguity, vagueness, and inconsistency in some controversial topics of this law, such as adultery, homosexuality, beating wives, and the death penalty.[77]

In addition to the legislators, lawyers, and judges, there are modern Islamic law scholars who use and claim the Sharīʿa's classical discourse on *Zinā* to argue for amending or maintaining the case of criminalizing and penalizing adultery in the Egyptian laws. For example, the lawyer and Islamic law jurist Muḥammad Salīm al-ʿAwwā argued that the adultery laws in the Egyptian laws should be amended, according to Sharīʿa, to include and punish any sexual practice outside the legal marriage relationship.[78] The Islamic law expert, Ahmed Fathi Bahnasī, criticized the limited purpose for which the Egyptian laws criminalize adultery, which is only to protect the marriage institution. Bahnasī stated that punishing adultery in the Egyptian laws should be derived from Sharīʿa's rules of criminalizing adultery, which not only aim to protect the marriage institutions, but also to prevent the uncertainty in defining the children and to safeguard the honour.[79] ʿAbd al-Qādir Aūda, the Egyptian judge and jurist of Islamic criminal laws, criticized the policies of positive laws in criminalizing adultery because they do not punish the offender enough to keep him/her away from this offence. Aūda argued that the absence of following the Sharīʿa rules in punishing adultery caused immorality, debauchery, and chastity in our communities.[80] Additionally, all the law projects of Islamizing the Egyptian criminal laws included flogging or stoning to death, as well as the other Sharīʿa rules of criminalizing *Zinā* to prosecute adultery in the Egyptian laws.[81]

[76] The Egyptian Supreme Constitutional Court, Case No. 34, Judicial Year No. 10, 3 February 1990.

[77] See Ahmed Ezzat, "Law and Moral Regulation in Modern Egypt: Ḥisba from Tradition to Modernity", *International Journal of Middle East Studies*, vol. 52, no. 4 (2020), p. 673; Badouin Dupret, *Positive Law from the Muslim World: Jurisprudence, History, Practices* (Cambridge: Cambridge University Press, 2021).

[78] Al-ʿAwwā, "Bayna al-Qāʿidah al-Qānūnīyah wa'l-Qāʿidah al-Khuluqīyah", pp. 191-195, 212, 213, and 215. Al-ʿAwwā, *Fī Uṣūl al-Niẓām al-Jinā'ī al-Islāmī*, pp. 67-70.

[79] Bahnasī, *Al-Jarā'im fi'l-Fiqh al-Islāmī*, pp.142-3.

[80] ʿAbd al-Qādir ʿAūda, *al-Tashrīʿ al-Jinā'ī al-Islāmī Muqāranan bi'l-Qānūn al-Waḍʿī* (Cairo: Dār al-Kitāb al-ʿArabī), vol. I, p. 645; vol. II, 347-9.

[81] See, Committee of Sharīʿa Codification, *Lajnat Taqnīn al-*Sharīʿa*: al-Jalasāt al-Tamhidiyyah* (Dār Ibn Rajab and Dār Al-Fawā'id 2013); Al-ʿAwwā, *Fī Uṣūl al-Niẓām*

In short, Sharīʿa is always presented to justify any position on the criminalization and penalization of adultery in the Egyptian legal system. Although there is a clear distance between Sharīʿa and Egyptian criminal laws, the MPs, lawyers, Islamic law scholars, jurists, and judges always resort to the classical Sharīʿa rules on *Zinā* to defend any position they have regarding adultery within the Egyptian criminal justice institutions.

F. Critical Discussion and Implication

These above parliamentary debates showed the way Sharīʿa is used to justify any position on the criminalization and penalization of adultery in the Egyptian criminal laws. The opposing and dissimilar opinions on considering adultery as a public or private act claim Sharīʿa's rule on *Zinā* to argue for the position of adultery in the Egyptian laws. The above debates demonstrate the ambiguity and vagueness in the criminalization and penalization of adultery and the policies of using, jumping, and patching between Sharīʿa, *Qānūn*, modernity, law, custom, public right, private right, family values, and many contradicting ideas and philosophies are argued to justify the policies of using criminalization and penalization against the vulnerable groups and people.[82] Nabil ʿAbd al-Fattah noted that,

> "Dualities coexist, support one another and enter into conflicts with one another. Conflicts stem from many sources that can be traced back to the Muhammad Ali's project, to the historical rift between modern and traditional modes and between the secular laws and customary laws, to the nostalgia for Islamic law, and to the rift between meta-positive laws and religious laws."[83]

ʿAbd al-Fattah argues that the empowered groups and parties exploit the legal diversity in the Egyptian laws to gain more privileges and secure their social status at the expense of the vulnerable. Thus, the criminalization and penalization of adultery in the Egyptian laws are a clear example of how legal diversity is exploited to target women as a

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al-Jināʾī al-Islāmī, pp. 275-9.

[82] For how the empowered parties and groups are using the legal dualities against the vulnerable ones in the Egyptian laws, see Nabil Abd al-Fattah, "The Anarchy of Egyptian Legal System", in *Legal Pluralism in the Arab World*, eds. Badouin Dupret, Maurits Berger, and Laila Al-Zwaini (Alphen aan den Rijn, Netherlands: Kluwer Law International, 1999), pp. 159-72.

[83] Abd al-Fattah, "The Anarchy of Egyptian Legal System", p. 161.

vulnerable party.[84] Additionally, using of Sharīʿa's rules to criminalize adultery is a matter of political and populist coverage of the status of ambiguity, inconsistency, and vagueness of the policies of criminalization and penalization, as well as the discriminatory policies against vulnerable groups, people, and parties.[85] Nathan Brown described these conflicting judicial rulings, incompatible philosophies, and inconsistent policies of the Egyptian judicial and legislative institutions as a legal market for the empowered people, groups, parties, and state bodies who pick up their favourite laws, jurisprudential schools, *fatāwā*, scholars, court rulings, and procedures.[86]

Thus, any policies of criminalization and penalization should start from understanding criminal law as a public right. Namely, criminal law is made to maintain the constitutional values of equality, Justice, fairness, and non-discrimination. In other words, the morality of criminal law is to maintain equality between citizens and groups of society. Imposing some ideological values of some societal groups, even if they are the majority, negates the philosophy under which criminal law functions within the modern state.[87] The Egyptian Supreme Constitutional Court established that one of the main constitutional values is that the legislator is obliged to consider the constitutional values of equality, justice, fairness, and non-discrimination in any act of criminalization and penalization. The court added that any vagueness in the definitions, meanings, or philosophy of criminal legislation is considered a violation of the constitutional rights

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[84] Pesha Magid, "Fight the Man: Laws that Help Women and Laws that Hurt Them," *Mada Masr* (9 March 2015), https://www.madamasr.com/en/2015/03/09/feature/society/fight-the-man-laws-that-help-women-and-laws-that-hurt-them/, accessed 25 May 2025.

[85] Ziba Mir-Hosseini, "Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts" *SUR-International Journal on Human Rights*, vol. 8, no. 15 (2011), p. 12.

[86] Nathan J. Brown, "Islam in Egypt's Cacophonous Constitutional Order", in *The Rule of Law, Islam, and Constitutional Politics in Egypt and Iran*, ed. by Saïd Amir Arjomand and Nathan J. Brown (New York: SUNY Press, 2013), 243-5.

[87] For the idea of the public right understanding of criminal laws, see: Chiao, "What is the Criminal Law For?", pp. 137-145; Vincent Chiao, *Criminal Law in the Age of the Administrative State* (New York: Oxford University Press, 2018), p. 86; Leora Dahan Katz, "Criminal Law: Political or Moral? Defending A Complementary Conception of Criminal Law in the Age of the Administrative State", *Jerusalem Review of Legal Studies*, vol. 17, no. 1 (2018), p. 113; Thorburn, "Constitutionalism and the Limits of the Criminal Law," p. 99; Bihnām, *Naẓarīyat al-Tajrīm fī'l-Qānūn al-Jinā'ī*, p. 12.

of the citizens.[88]

Furthermore, the paper claims that this public right understanding of criminalization and penalization is necessary not only for the modern function of criminal law but also for the process of recasting Sharīʿa within the modern state. In other words, recasting Sharīʿa within the modern state starts from properly understanding the function of criminal law under the modern state. Arguing the classical rules of Sharīʿa without considering the modern function of criminal justice institutions undermines the function of the modern state and breaches the objective of Sharīʿa. Reclaiming Sharīʿa within the modern state shall consider the public meaning of criminal justice institutions that function to guarantee the constitutional values of fairness, non-discrimination, justice, and equality. In other words, taking Sharīʿa seriously in the modern state shall be within the objectives of securing the human rights and liberties of the state's citizens without any discrimination. In this context, An-Na'im argued for the civic reason enforcement of Sharīʿa that is operated through the framework of human rights, constitutionalism and equality between all the citizens, men and women, Muslims and non-Muslims.[89] An-Na'im added, this civic reasoning of enforcing Sharīʿa would mirror the noble moral code of the Islamic faith in the daily working of the administration of criminal justice institutions of the modern state.[90]

Additionally, claiming Sharīʿa with the ignorance of the public right understanding of criminal law results in creating a case of criminalization and penalization that is neither familiar in the modern criminal law theories nor the classical and traditional Sharīʿa. It has been noted above that arguing the classical rules of *Zinā* to criminalize adultery in the modern Egyptian laws resulted in enacting laws dissimilar to Sharīʿa in the philosophy, definition, concept, punishment, and proving methods of the offence. Ziba Mir-Hosseini argued that the selective way in which the criminal justice institutions use Sharīʿa to defend the legal moralism

[88] Surūr, *Al-Ḥimāyah al-Dustūrīyah*, p. 63; The Egyptian Supreme Constitutional Court, Case No. 105, Judicial Year No.12, 12 February 1994; The Egyptian Supreme Constitutional Court, Case No. 3, Judicial Year No. 10, 2 January 1993; See the Official Journal, Vol. 2, 14 January 1993.

[89] Abdullahi Ahmed An-Na'im, "The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law", *Modern Law Review*, vol. 7, no. 1 (2010), pp. 1-29.

[90] Abdullahi Ahmed An-Na'im, "Sharia and Positive Legislation: Is an Islamic State Possible or Viable?", *5 Yearbook of Islamic and Middle Eastern Law*, vol. 5, no. 1 (1998), pp. 29, 31.

in the areas of sexual practices has become an authoritarian interpretive tool against poor people, women, and vulnerable groups.[91] She added that the criminal justice institutions claim Sharīʿa in these sexual offences in a way that maintains their power, control, and dominance.[92] Similarly, Asifa Quaraishi criticized the consequences of the modern Muslim State's usage of the classical Sharīʿa approach on sexual offences that result in making the state devices invade people's privacy. Quaraishi added that the classical Sharīʿa denounced the publicity of sexual crimes but was never involved in prosecuting the private sexual practices.[93] Namely, claiming the classical approach of Sharīʿa on *Zinā* to criminalize adultery in the Egyptian laws without considering the public right function of the modern criminalization and penalization process creates a legal statute that is unfamiliar in the classical Sharīʿa, as well as incompatible with any contemporary theory of criminalization.

Furthermore, claiming Sharīʿa in the criminal laws of the modern Muslim state aggravates the problems arising from the overcriminalization phenomenon, which is known as "the large number of conducts covered by criminal law, the overlapping statutes covering the same conduct, and the application of excessive punishments."[94] Ramsiʿs Bihnām described the overcriminalization phenomenon in Egypt as an injudicious legislative policy that turns the criminal justice institutions into frightening bodies to the citizens and communities.[95] The problem with overcriminalization in the Egyptian criminal laws is that it happens at the expense of claiming and arguing a random interpretation and understanding of the Sharīʿa. The way Sharīʿa is used to criminalize and penalize adultery in the modern Egyptian laws results in overcriminalization, which is represented in unfamiliar offences, punishments, legislations, and procedures that are neither known in the classical Sharīʿa nor the modern philosophies of criminalization. Adnan Zulfiqar criticized the phenomenon of overcriminalization in the contemporary Muslim state's

[91] Mir-Hosseini, "Criminalizing Sexuality", p. 12.

[92] *Ibid.*, p. 33.

[93] Asifa Quaraishi, "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective", *Michigan Journal of International Law*, vol. 18, no. 2 (1997), p. 296.

[94] Shon Hopwood, "Clarity in Criminal Law", *American Criminal Law Review*, vol. 54, no. 3 (2017), p. 699.

[95] Bihnām, *Naẓarīyat al-Tajrīm fī'l-Qānūn al-Jinā'ī*, p. 12.

criminal laws.[96] He argues that the way Sharīʿa is claimed and discussed by modern Islamic criminal justice institutions neglects the procedural and substantive conditions of classical Sharīʿa, leading to the innovation of many criminalized acts that classical Sharīʿa never sanctioned.[97] Zulfiqar wrote that contemporary Muslim states enact criminal laws in a way that, creates novel crimes and disregards defendant rights, thus diverging from norms of fairness and cultural accommodation present in the precedents and mores of the very Islamic system which it seeks to reinterpret for its society today."[98]

G. Conclusion

This paper has shown the way Sharīʿa is used to justify any position on the criminalization and penalization of adultery in Egyptian criminal law. Opposing and divergent views on whether adultery should be considered a public or private act both rely on Sharīʿa rules on *zinā* to support their positions within Egyptian law. This paper has argued that Egyptian criminal justice institutions and legal scholarship lack a consistent philosophy and a clear logic underlying the criminalization and penalization of adultery. The paper demonstrates that modern theories of criminalization, including the harm-based approach, legal moralism, and public right theory, are simultaneously adopted, ignored, and rejected in judicial and legislative practices concerning adultery. Moreover, Egyptian criminal justice institutions and scholarship both rely on and conflict with Sharīʿa, which is consistently invoked to justify the criminalization of adultery, yet diverges from it in terms of philosophy, rules, and conceptual foundations.

That is to say, the philosophy and logic of criminalizing adultery in Egyptian law are inconsistent with both modern theories of criminalization and classical approaches in Sharīʿa. Additionally, the paper argues that any policy of criminalization and penalization should begin with an understanding of criminal law as a public right. In other words, criminal law exists to uphold constitutional values such as equality, justice, fairness, and non-discrimination. Furthermore, the paper asserts that this public-right understanding of criminalization and penalization is necessary not only for the modern function of criminal law, but also

[96] Adnan Zulfiqar, "Pursuing Over-Criminalization at the Expense of Islamic Law", *Journal of Islamic Law*, vol. 1, no. 1 (2020), p. 193.

[97] *Ibid.*, pp. 190-193.

[98] *Ibid.*, p. 189.

for the process of recasting Sharīʿa within the modern state. Arguing from classical Sharīʿa rules without considering the modern function of criminal justice institutions undermines both the function of the modern state and the objectives of Sharīʿa. The practice of invoking Sharīʿa rules on *ẓinā* to justify the criminalization and penalization of adultery in Egyptian criminal justice institutions reflects ambiguity, inconsistency, and vagueness. It also undermines the function of modern criminal law within the modern state and introduces a distorted method of recasting Sharīʿa in contemporary legal systems.

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