

Religious-legal survey of “Al-mashhura bezena”Pegah Roshan (M.A) (*Corresponding author*)¹, Jamal Rezaie Hosein Abadi (ph.D)²¹. Department of Religious Jurisprudence and Islamic law, Karaj branch, Islamic Azad University, Karaj, Iran.². Department of Religious Jurisprudence and Islamic law, Karaj branch, Islamic Azad University, Karaj, Iran.E-mail: Jamal-rezaei@yahoo.com

Abstract: Al-mashhura bezena is considered to be a woman who earns her living by prostitution. In law and other branches of knowledge including sociology and psychology this word has very affinity of meaning in general and specifically. Importance of these issues is so much that in any historical era it has not been eradicated completely. For example in ancient Greece Aphrodite was known as goddess of beauty and prostitution. In any Aphrodite temple there was a circle called Aphrodite circle which consisted of only young and beautiful woman and girls. Also in the Arabian age of ignorance such women usually set up a flag over their houses. All of revealed religions have reproached prostitution and in some of religions have imposed some penalties on it. But Islam as the most complete religion has established some rules against it in Quran and traditions, the most important one is verse3 surah light. Shiite and Sunnite commentators have commented a lot about marriage with such women. The jurists have divided the religious rules in 3 groups: 1- They can't get married before repentance. 2-Being permitted by divorce. 3- The difference between prostitution and not prostitution. Concerning legal action nothing has been brought into the “Islamic punishment law “directly. This crime thus can be verified in 2 aspects: 1- social (general aspect):Not any specific rule has not been declared about it explicitly but it can be subject to articles 638,637 and 639 of part punishments of Islamic punishment law because continuing and prevalence of this behavior is against public regulations and good ethics (Article 975 of civil law). 2- Jurisprudential: considering the lack of explicit rule on this issue one can referred to articles 167 of constitution according to which: Judge has to try to find the rule of any case in the codified law and if he cannot, referring to credited Islamic sources or credited religious decree issues order for the case and he cannot refuse from verifying the case or from issuing a verdict with the excuse of lack or imperfection or brevity or contradiction of codified law. And article 214 of penal legal procedure rule of revolutionary courts in penal cases specifies that judge, referring jurisprudential texts, must issue a verdict and such an absence of rules is not justifiable and in credited Islamic sources such women have not been neglected and in case of an evidence this act is zena (illicit intercourse) per se and is subject to punishment for adultery which is specified by Saint Legislator in the chapter of Islamic punishments.

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1. Introduction

Al-mashhura bezena is considered to be a woman who earns her living by prostitution. In law and other branches of knowledge including sociology and psychology this word has very affinity of meaning in general and specifically. Importance of these issues is so much that in any historical era it has not been eradicated completely. For example in ancient Greece Aphrodite was known as goddess of beauty and prostitution. In any Aphrodite temple there was a circle called Aphrodite circle which consisted of only young and beautiful woman and girls. Also in the Arabian age of ignorance such women usually set up a flag over their houses.

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Concerning legal action nothing has been brought into the “Islamic punishment law “directly. This crime thus can be verified in 2 aspects:1- social (general aspect): Not any specific rule has not been declared about it explicitly but it can be subject to articles 638,637 and 639 of part punishments of Islamic punishment law because continuing and prevalence of this behavior is against public regulations and good ethics (Article 975 of civil law).2- Jurisprudential: considering the lack of explicit rule on this issue one can referred to articles 167 of constitution according to which: Judge has to try to find the rule of any case in the codified law and if he cannot, referring to credited

Islamic sources or credited religious decree issues order for the case and he cannot refuse from verifying the case or from issuing a verdict with the excuse of lack or imperfection or brevity or contradiction of codified law. And article 214 of penal legal procedure rule of revolutionary courts in penal cases specifies that judge, referring jurisprudential texts, must issue a verdict and such an absence of rules is not justifiable and in credited Islamic sources such women have not been neglected and in case of an evidence this act is zena (illicit intercourse) per se and is subject to punishment for adultery which is specified by Saint Legislator in the chapter of Islamic punishments.

The fact that in early Islam a phenomenon called famous to Zena (illicit intercourse) has existed is undeniable because different stories about it has been narrated in historical books, so the claim that in early Islam such issue has not existed is a matter of doubt. In Islamic texts one can mention special Arabic titles meaning being famous for illicit sexual intercourse like: "Almashurat Menalna", "Almostaalenabezena", "Albaghimenalna", "Almaraalkhabsaialfajera". According to a police report one of social phenomena threatening any society is prostitution which exists in different levels like a bad illness. Noble people have always fought with it and tried to find a solution for it.

Iranian society like other ones has not been an exception to it. It makes educated people of our country responsible to discuss about it and try to find logic answers to questions and clarification of ambiguities and probable fallacies.

The necessity of improving the society is obvious and when the moral principles and religious faith is ruined the most effective sanction will duty which includes not only religious experts but also for any Iranian who likes this country because it ruins a country with all its national and religious identity. The main aim of this article is studying religious-legal aspects of "al-mashhura-bezena".

Necessity and importance: with the advent of divine religions including Judaism, Christianity and Islam many of common norms of society takes a religious form and religion makes an exact system of religious rules upon it. In Islamic law human dignity is well supported. If prostitution is considered to be a crime and the government does not control these activities, supporting and legal authorities won't pay attention to such people thus they become social victims and abused. In many countries that prostitution is permitted the rights of prostitutes is protected and they can defend themselves. Many rules have been passed for them but it seems that in our country this subject has not been dealt with carefully. It is necessary that lawmakers according to religious resources make it clear: Who is al-mashhurabezena?

What are the verses and narrations and rules about these people? And...We will first discuss religious aspects and then legal aspects.

In Islamic jurisprudence we will speak about two categories of Quran and tradition:

Quran-the text of Quran about al-mashhurabezena: surah Noor verse3:

The adulterer won't marry except the adulteress and female polytheist, and the adulteress won't marry except the adulterer and male polytheist and it is prohibited for the believers."³

This verse shows the respect of marriage between those who are involved.⁴ Interpreters, both Shiite and Sunnite, have discussed different aspects of this verse.

Shiite comment on surah Noor, verse3:1-when the (Meccan) emigrants came to Medina there were many dervishes among them and in Medina there were some women who were famous for zena. Dervishes decided to marry them. They had no money and shelter⁵.....told that there were women who adulteress and9 of them were famous...their houses were called Kharabat and no one went there except the polytheist and the adulterer....

In the era of ignorance poor people used to marry impious women to become rich some of dervishes decided to do so they asked the prophet to guide them and god revealed the verse and prohibited their marriage.⁶

Appearance of the verse:1_revealed-prohibited law: appearance of the verse shows it. according to some people including" IbneAbbas", "mojahed", "ghatadeh"....in this verse the word "nekah" means marriage and not coitus...it means that⁷:an impious man can only marry a polytheist or similar woman. 2_these people have been decried and author of Javaher Rahmatollah says: the verse is informative and not prohibitive: an adulterer would not go towards the pietism women who are not like him and the same is true for an adulterous....⁸...Some have argued that according to exegetes the verse doesn't inform about the man and women who are polytheist and commit illicit intercourse but it aims at prohibition of pious people from marriage with such implicated ones, and the word Nekah in this verse refers to prohibition and sanction of contract and intercourse.

Some authors say that it means:

Shameful deed is prohibited from faithful people.⁹

Meaning of the verse (considering narrations from the family of the prophet): the adulterer who became famous for his crime and was punished but did not repent is prohibited to marry a chaste Muslim woman. so this is an explicit verse and is not abrogated and doesn't need allegorical interpretation, and if in narrations they have rules of punishment and

expression of repentance it may be drawn from the order of the verse because the rule to prohibition of nekah follows punishment.¹⁰...and conjunction between adulteration and polytheism indicates the obscenity of the guilty. The interpreters have long argument about the meaning of the verse: some say that the verse indicates what the guilty deserves, some authors believe that the verse is a restatement of the fact that "birds of a feather flock together". And the believers never marry guilty women. It is the same as verse26, surah Noor. But another group believes that it is a religious order and God intends to prohibit the Muslim from marriage with those who commit illicit intercourse.¹¹...and marriage with an adulterous that no more carries the guilt is not prohibited.¹²

2-The aim of the holy verse is decrying of such people, telling that these people deserve the people like themselves. Another viewpoint is a moral aspect, but it has been argued that these2views are not considering the order of the verse.

Another aspect shows that this holy verse is abrogated by another verse. In reply it has been said that the verse is a general statement...even if we want to say it has been abrogated we must mention verse221, surah "bagharah": Don't marry the idolater women before they are believers...

Some of interpreters have argued that the marriage between the infidel and Muslim had been permitted until the 6th year of Hejira, and after that, verse221, surah Bagharah has been revealed.¹³

Decision of the verse: 1-If married never allowed.2- if has not a husband some people order to punish: A-when punished if they repent both of them can marry.¹⁴....B-If punished and don't repent the marriage is prohibited. Interpretation of the Sunnites to verse4, surahnnoor:Exoteric meaning: expression of revealed-prohibited law: prohibition of adulteress marriage means that the marriage of the faithful with the adulteress and adulterer is prohibited by god and is not good but it doesn't mean that if they marry they committed adulteration.¹⁵....

Meaning of the verse: The aim of the 3rd verse is that the people of debauchery and libertinism who are famous...in such condition to marry them is an unforgiving action and the faithful should keep aloof from them...the verse means that fornication is so shameful that if one does it he or she deserves marriage with one who has committed it¹⁶..

Moslem in his "sahih"narrated the story of Gamediah.¹⁷...a woman called Gamediahcame to Mohammad(god bless him and his descendant)and told him" I have committed fornication, purify me"but the prophet didn't answer, the next day she came back and asked: why don't you reply me? I am pregnant. The prophet told her: go until your childbirth. After the childbirth the woman came with her baby at her

arms and said: It is the baby. the prophet asked her to come back after weaning(2years)and asked for the order of the prophet. He gave the child to a Muslim, asked to dig a ditch, put the woman into it...and ordered people to stone her.¹⁸

According to the author such actions in the time of prophecy has a noble philosophy which is accomplishment of divine law so that it will be eternal in the generations...

Order of the verse: early experts of Muslim laws have different attitudes about it.¹⁹ 1-unlawfulness of marriage to the adulteress (narrated byAli and ibn masud). 2-permissibility of marriage to the adulteress (narrated by Abu-Bakr, omar and ibneabbas and the majority of it).

The reasons of the first narration: they argue by the verse that:"the adulterer doesn't marry except to the adulteress and polytheist"...it has been narrated that Morsadbevabi Morsad came to the prophet to get permission to marry an adulterous and he didn't reply until the verse was revealed he asked the man not to marry her.

The reasons of majority of the Sunnites: 1-Ayeshe narrated about a man who had committed fornication and intended to marry her, the prophet was asked to order about it and he said: its beginning was fornication and its end is nekah, and the prohibited doesn't prohibit the permissible

2-Ibn omar has been narrated: once when Abu-Bakr was sitting in a mosque some unconscious man came to him and said something to him. Abu-Bakr told omar that he had invited a man and the guest ad made an illicit intercourse with her daughter. Then mar asked why he **didn't protect her and didn't keep the secret. Abu-Bakr ordered to punish them and made them marry and exiled them for1year.**²⁰

3-ibn abbas has been narrated that he was asked about it and he said:itsbeginning is fornication and its end is nekah.it is like a person who steals fruits of a garden and then goes to the owner and buys fruits.what he has stolen is prohibited and what he has bought is allowed.²¹ 4-theverse:"an adulterer wont marry but the adulteress"²².has been interpreted as evildoer doesn't like to marry a righteous man has been encouraged to marry a woman like himself.²³

Tradition

It has been narrated from Imam sagedh and imam bagher:there were men and women famous for fornication during age of prophecy and god has banned marriage to them...but if he or she was punished and repented...you can marry...²⁴. It has been narrated from abdollah bin omar that one of Muslimsasked permission to marry a woman famous for prostitution.then the verse was revealed and banned him²⁵...

Comments of jurists on marriage to *almashhurabezena*: the late Koiee considers repentance necessary to marry *almashhur* (opposed to non *mashhur*) and for reasoning divides the narrations into 3 groups: first group are narrations that marriage to the adulteress, *mashhur* or non *mashhur*, is not permitted. second group are narrations that permit marriage to the adulteress and this group is subdivided into 2 categories. first category are narrations that although indicate permission but as they are absolute for being famous are also absolute for repentance and non-acceptance. thus they can be restricted to first group narrations. but other category are narrations that give permission in case of non-repentance and cannot be restricted. consequently the second category of this group contradicts the first group... as a result we must say if a woman was *mashhura* no one can marry her before

can have 2 aspects: 1- *almashhura*, if being *moallana*, it is prohibited to marry her. 2- if she is *almashhura* but not *moallana* (openly prostitute)... it is said... Mr. Khoie's argument is not correct... in summary if narrations preferred.²⁶... but maybe in all it can be said that none of the kinds of marriage to adulteress... are not in essence prohibited but according to saint-legislator the most important barrier to this kind of marriage is the risk of single adultery which is the worst kind of illicit intercourse and if the man can control his wife there is no ban for marriage. so it can be concluded that: 1- in essence there is no ban for this marriage and it can be seen in many narrations that have discussed repentance and adultery. 2- Active permission of marriage to *almashhura*, it happens rarely that one becomes certain that can control her and a formal prostitute is always at the risk of repetition. so the saint-legislator doesn't want that illicit relations that existed before marriage changes into adultery. as far as we studied, the narrations appeared appeared contradictory and it was decided to refer to the preferables. the preference is with the narrations of prohibition... Seyyed Mortezaei "almasa'eloreza" stipulates that if she repeats she can marry...

prostitution is the most common word and has much semantic affinity to *almashhurabezena*.

Similarities and differences of prostitution and *almashhurabezena*.²⁷ is public judgment: a comparison shows that prostitution indicates a job and has repetition while what is important in being famous... is public judgment about a certain person or people although such judgment is not on the basis of realization of a fact called *zena*.

Society in its judgment has some criteria which are sometimes unjustly. One can argue that this kind of judgment changes with variations in culture. The relation between prostitution and being famous to

fornication, among logic relations, is the relation of general to specific aspects it means that sometimes being famous to adultery is due to prostitution but manytimes a person might be famous but actually not be a prostitute, or a person might be really a prostitute but because of concealing and working secretly she won't be famous as such. according to aforementioned reasons these 2 words cannot be matched exactly.

The difference between prostitution and adultery:

There are important differences between them. A- adultery is mostly realized with mutual consent (except rape) but in prostitution the person may commit it due to provision of material needs so it can be said that for one who does it there is a kind of dislike's- adultery happens in different times as both sides want but prostitution is done at certain times. C: adultery is committed directly but in prostitution there exists a mediator, an important question is still raised: with the importance of prostitution why nothing is mentioned about it in the "Islamic punishment law"? maybe the answer is that legislator considers prostitution an example of adultery and doesn't need to restate it separately there is nothing in law about it but rarely referred to... the law to against human smuggling.

Similarity between prostitution and adultery

It can be said that prostitution is a crime exclusive to women. Of course mostly and usually it is attributed to women although it is not limited to them. Attribution of crime to prostitution is in relation to the main role played by women it is why they are considered to be guilty and not the victim.²⁸ On the other hand while the common element of prostitution and adultery is a woman, illicit sexual intercourse of a man and woman is without marriage.

Legal elements of adultery

Legal element: legal items considering adultery²⁹ begins from article 222 and up to article 231...

Material element: It refers to sexual intercourse between a man and a woman who are not married by law. adultery is an absolute crime, that is, it is realized as soon as entrance of penis into a female's *volva*. it is necessary to note that the crime will be committed by the adulterer, the actions like beginning for adultery such as making privacy and preparation for coition including copulation and kissing are not considered a crime *per se*.³⁰ but as a rule whatever that leads to the prohibited action is prohibited.³¹ In jurisprudence and principles of Sunnites and religious rules punishment exists for any prohibited action.³²

Psychological element: adultery is considered to be an intentional crime. it is because the guilty commit coition purposefully.³³ thus if is done by force anyone who has been forced is not punished. although in western world, opposed to Islamic laws,³⁴ there is no penalty for adultery the psycho logic element is the

mental process, different from criminal code, so a person who is able for mental process can think and want. mental process is sometimes criminal thinking from which intentional crime is drawn and sometimes there is negligence and not thinking the result of which is unintentional crime.³⁵

Ant chastity and anti social morals crimes:

In the chapter of punishments of Islamic punishment law the legislator has declared some titles as crime in articles 641-637 and has laid down punishment on them. Studying the articles in this chapter, article 637 can be considered as showing the definition of prostitution. Also article 638 in which the general notion of pretending the prohibited action in public places is used can in some cases refer to prostitution and article 639 concerning encouraging indecency or establishing fornicity is in connection with this subject. But articles 640-641 are not related to this issue. There is a lack of law about prostitution and its problems.³⁶ Article 637 denotes: when a man and a woman who are not married commit illicit relationships such as kissing or copulation must be lashed up to 90 times and if it is done by force only the forceful person will be punished. Using the words of kissing and copulation in article 637 are examples and can include other similar actions.³⁷

Undoubtedly a prostitute cannot be punished according to this article. This article considers sexual behavior before adultery as a crime. A prostitute may commit such actions and be punished accordingly but in this case one cannot argue that the article has prohibited prostitution.

Article 638 declares: "Any one publicly appears to do wrong action, in addition to punishment of the action must be jailed from 10 days to 2 months and lashed up to 14 times and if commits an action which does not have punishment per se but it is against public chastity only will be jailed from 10 days to 2 months and lashed up to 74 times." The definition of prohibited is not clear. And it empowers the judge to interpret it as he wishes and give a decree. Accordingly any action which is not done "publicly" will not be subject to this article,³⁸. Although when the prostitute is publicly marketing may be punished but mostly prostitution is committed secretly. Therefore article 638 is about the behaviors that are publicly against social norms. Article 639 stipulates: The following people are sentenced to jail from 1 to 10 years and in item A the place is closed too, A-a person who establishes or manages a place of indecency. B-a person who encourages people to indecency or makes preparations for it. The crime in this way is a habitual one and one time committed is not subject to punishment.³⁹ this article cannot be used to deal with prostitution. It can be accepted that if a criminal establishment is made to propagate this action part can

be used and it is not expected that the article can deal effectively with prostitution.

Studying articles of "General punishment law" and Islamic punishment law it can be seen that the legislator in "general punishment law" has embarked on removing crime from prostitution but the legislator in Islamic punishment law has either neglected the subject or when passing law has thought that using the Islamic punishments or punishments written in chapter 18 of Islamic punishment law doesn't need independent crime supposing of prostitution and all of aspects of it is included in them and it has caused a legal vacuum in this issue and this legal vacuum is not justified in the penal system because considering the admitted introduction to crime supposing in the Iranian penal system basically there should not be permissibility in this field, and Islamic framework in this field is not suitable to consider prostitution a crime, therefore considering the logic interpretation from article 167 of constitution and the article 214 of penal legal procedure rule of general and revolutionary rules, it will be seen that referring jurisprudence texts there is possibility of punishment of prostitutes and this silence is not justified.

Conclusion

1- Although in the study of Quranic verses and Islamic rules we seldom see the expression "Almashhura Bezena" and most of the verses are about the obscene action of adultery, the interpretations of jurists indicate that verse 3 of surah Noor is about the people who are Al-mashhura Bezena. The appearance of the verse is an expression of a revealed-prohibited law.

Considering the narrations from family of the prophet the resultant meaning of the verse is: when the adulterer became famous and was punished but didn't repent, a pure Muslim woman can no more marry him and similarly about an adulterous cannot be married to a pure Muslim man.

The verse tells that the people who do sin and iniquity who are publicly known for their sin, their marriage with Muslim people is prohibited and is not forgivable and religious people should keep aloof from them, because indifference of people in this issue causes sin and corruption.

The verse doesn't mean that marriage of a Muslim adulterer to an unbelieving woman or marriage of Muslim adulteress to an unbelieving woman or marriage of Muslim adulteress to an unbelieving man is right but it means that adultery is so shameful that if committed that person doesn't deserve relation with pure people and such a person should be in relation with the people who are like he/she himself/herself.

2- In the field of arguments of jurists there

are two kinds of narrations, one about Al-mashhura and one about Moallana:

A-Al-mashhura: The late Khoiee has divided the narrations about marriage with the adulteress into 3 groups: one group are prohibited before repentance, the other indicate absolutely permission and third group have differentiated between Al-mashhura and not Almashhura. It is probable that the narrations which have given permission are about the women who have been under control after marriage and are safe from adultery and the narrations that prohibit are about the cases that do not stop their shameful behavior, and cause the risk of stoning and collapse of the family and so on. the marriage to them is not permitted before repentance.

B-Moallana- If the adulteress is moallana her marriage is prohibited. If she is Al-mashhura but not moallana (has not used flag...) her marriage is permitted. Not any kind of marriage to the adulteress is essentially prohibited and there is no problem in their marriage. So if a man can restrict the adulteress after marriage he can marry her.

Repentance is necessary before this kind of marriage. If a married person commits adultery it is most shameful form of adultery and she should not marry before being certain about her deed.

3- the chapter of arbitrary punishment of Islamic punishment law has declared titles as a crime in articles 641-637 and has imposed some punishment for them. Although article 637 in some of its presumptions can be formed to the definition of prostitution but a prostitute cannot be punished according to it because in this article illicit relations have been prevented and sexual behavior before marriage is presumed to be a crime.

Also article 638 in which the general title of prohibited action in public places has been mentioned can in some cases conform to prostitution but this article mainly refers to punishing the behaviors that harm public morality.

Article 639 is in relation with encouraging indecency or establishment of fornication but it seems that considering the doctrine of close interpretation, the prostitutes in this group cannot be punished because administrators of these criminal groups encourage indecency and make its preparations so it cannot be expected that the article deals with the issue effectively.

Legal experts, referring to jurisprudence texts should fill the legal gap; And ratify preventive and supportive acts.

Suggestion:

1-Fundamental reply to such jurisprudential questions should be searched in a knowledge called philosophy of jurisprudence which is about the aims of Islam's legislative system; the knowledge which the

first steps to its systematization has not been taken. It is true that origins of this scientific field can be found in jurisprudential sources and the philosophy of jurisprudence should be fed by jurisprudence at last but there is long distance between early origins of a knowledge, especially there is still a view point which even in the fields that social aspects prevail considers logic defense of religious belief and rules unnecessary and even harmful. Fideism and considering holy all of jurisprudential acts actually doesn't consider religious propositions a matter of reasoning and prevents systematization of philosophy of jurisprudence while it is the philosophy of jurisprudence that can make it easy to access jurisprudential system and explain its range and make preparation to classify religious rules and problems in a logic system. It is suggested to pay more attention to the philosophy of such rules which have different reasons and dimensions.

2-At first causes and roots of the crime must be studied. Given the fact that Islam is known to be the most complete religion, and at any time and any society it is responsive to needs of human societies, are these people social patients and should they be cured or are they guilty and sinful which religious rules must be used on them?

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Notes

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