

The Crime Of Incest In Islamic Jurisprudence And The Algerian Penal Code

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Abstract:

The article explores the crime of incest in both Islamic Jurisprudence and the Algerian Penal Code, highlighting it as one of the gravest threats to family cohesion and social values. While marriage in Islam was ordained to preserve lineage and build families, weak religious commitment and moral decline have contributed to the spread of incest. The study questions the adequacy of existing legal texts in preventing this crime, defining incest as consensual sexual relations between relatives prohibited from marriage. Its main causes include weak faith, exposure to pornography, drug abuse, and poor upbringing. Article 337 bis of the Algerian Penal Code establishes varying penalties depending on kinship, with harsher punishments for closer relations and the possibility of withdrawing parental authority. In Islamic law, incest is regarded as even more heinous than adultery, with punishments ranging from flogging and exile to stoning or even execution according to some jurists. The article concludes that effective prevention requires not only legal deterrence but also strong religious and moral education to protect the family and society.

Keywords: Incest crime, Algerian Penal Code, Severing kinship ties, Incestuous adultery, family protection.

1. Introduction:

One of the primary objectives of marriage is to protect spouses, preserve lineage, and establish a family founded on affection and mercy. However, the absence of a strong religious deterrent, which leads to the violation of moral values, together with the lack of proper ethical upbringing, can destroy the very structure of the family, sever kinship ties among its members, and contribute to the erosion of society's moral values. For this reason, the Algerian Penal Code has sought to criminalize acts that undermine the

family unit, such as the crime of incest (*fahisha* between relatives), which is explicitly provided for and punished under Article 337 bis.

Research Problem:

To what extent are the existing legal provisions sufficient to prevent the crime of incest and to ensure the protection of family bonds in Algerian society, as expressed by the legislator in Article 03 of the Algerian Family Code, which states that family life is based on solidarity, cohesion, good companionship, proper upbringing, sound morals, and the rejection of social vices? What are the causes behind the emergence of such moral crimes? And what is the position of Islamic jurisprudence on the crime of adultery in general, and on incest in particular?

Previous Studies:

Through a review of the relevant sources and references, the following studies were identified:

1. **Mazran Farida and Massoun Naima**, *Incest in Algerian Families*, Master's Thesis, Djilali Bounaama University, Khemis Miliana, Faculty of Social Sciences, 2014–2015. This study addressed some of the social causes that contributed to the emergence of this moral crime and presented field statistics on the reality of incest in Algerian families.
2. **El-Messaoud Yekhlef, Mohamed Amine Mouda, and Jamila Fchar**, *Incest under the Amendment of the Algerian Penal Code*, Afaq Journal of Sciences, Issue 11, March 2018.
3. **Kachour Iman and Dech Moussa**, *Crimes of Incest in Families under Algerian Legislation: A Comparative Study*, Ijtihad Journal of Legal and Economic Studies, Vol. 12, Issue 2, 2024.

The latter two studies mainly examined the legal dimension of the crime in light of the principle “no crime and no punishment without a legal text,” clarifying its constitutive elements and the types of penalties imposed on perpetrators.

This present study differs by expanding the legal analysis with another type of discussion, focusing on the constitutive elements of the crime, the

prosecutorial procedures followed by the Public Prosecutor to prove and punish perpetrators, the causes of its spread within families, and the preventive stance of Islamic Jurisprudence against this moral crime.

Research Structure:

This study is divided into an introduction, four sections, and a conclusion:

- **Section One:** Incest between relatives and its real-life causes, defining the concept linguistically and terminologically, and discussing the main causes of its spread within families.
- **Section Two:** The constitutive elements of the crime of incest, focusing on the principle of legality in criminalization and punishment, and the three elements of the crime: the legal element, the material element, and the moral element.
- **Section Three:** Prosecution and penalties for incest between relatives, addressing judicial procedures, methods of proof, and the sanctions prescribed for perpetrators.
- **Section Four:** Incest between relatives in Islamic Jurisprudence, outlining the position of Jurisprudence on adultery in general and incest in particular.
- **Conclusion:** Summarizing the main findings related to the subject.

Section One: The Crime of Incest Between Relatives and Its Real-Life Causes

Subsection One: Definition of Incest

1. Linguistic Definition:

Ibn Faris, in *Mu'jam Maqayis al-Lughah*, stated that the root (faḥasha) denotes ugliness and repulsiveness in something; hence the words *fuḥsh*, *fahshā'*, and *fāḥisha* (Ibn Faris, 1392H, 4/478). It is said: "Everything that exceeds its limit is described as *fāḥish*; to speak obscenely is to commit *fuḥsh*; and fornication (*zinā*) is referred to as *fāḥisha*." The Qur'an states: "Do not approach adultery. Indeed, it is an abomination and an evil way" (Qur'an, Al-Isra, 17:32). Ibn Kathir interpreted this verse by saying that adultery is "a grave sin" (Ibn Kathir, 1431H, 5/72).

2. Terminological Definition:

Jurists noted that the term *fāḥisha* in the Qur'an carries various meanings. For example, in "*When they commit a shameful deed (fāḥisha)*" (Qur'an, Al-Araf, 7:28), it refers to acts severely condemned among sins. In another verse: "*Those [women] who commit adultery (fāḥisha)*" (Qur'an, Al-Nisa, 4:15), it means *zinā*. In "*My Lord has forbidden immoralities (al-fawāḥish)*" (Qur'an, Al-Araf, 7:33), the word denotes all disgraceful deeds. According to Arab linguists, *fawāḥish* refers to abominations, and Ibn 'Arafah defined it as "everything prohibited by God" (Al-Harawi, 1419H, 5/1415).

From these definitions, it can be concluded that *fāḥisha* refers to reprehensible and detestable acts rejected by sound minds, acts that plunge the perpetrator into grave sin.

3. Legal Definition:

'Abd al-'Aziz Saad defined incest between relatives as: "*Any act of direct sexual contact occurring between a person, male or female, and one of their relatives prohibited in Sharia, whether through blood ties, in-laws, or otherwise, with their mutual consent*" (Saad, 2002, p. 45).

The definition provided by 'Abd al-'Aziz Saad focuses on **direct physical contact**, which involves various acts of bodily intimacy and interaction, rather than mere intentions, sexual suggestions, or non-physical forms of inappropriate behavior. The definition also emphasizes the element of **mutual consent** between individuals prohibited from marrying under the rules of Islamic Jurisprudence. This implies that if one of the parties is subjected to coercion, or is unable to give valid consent (such as in the case of a minor or a legally incapacitated person), the act would fall under a different category of crimes, such as **sexual assault or rape**.

Subsection Two: Real-Life Causes of the Crime of Incest

Incest is strictly prohibited both in Sharia and in law. While in the past it was extremely rare to hear of such incidents, today cases are increasingly reported to the extent that many families have been broken apart as a result (Mazran & Massoun, 2015, pp. 131–134).

The Prophet Muhammad (peace be upon him) illustrated the enormity of this act by comparing it to one of the gravest sins, namely usury (*ribā*). He said:

“Usury has seventy-two doors; the least of them is like a man having intercourse with his mother. And the worst form of usury is violating the honor of one’s brother” (Al-Tabarani, 1995, Hadith, No 7151).

This abnormal phenomenon, which is foreign to our Islamic society, has led to the fragmentation of many families and the violation of their sanctity. The spread of this crime can be traced back to several causes, including:

1. **Weak religious commitment and shifting social values:** The decline of spiritual deterrence, coupled with exposure to non-conservative societies with different moral standards, has contributed to the normalization of immoral behaviors (Hadid & Bouamousha, 2018, p. 241). The diminishing fear of divine punishment makes individuals more susceptible to urges that might otherwise be restrained by strong ethical and spiritual convictions. This can result in a loss of moral awareness, particularly regarding actions that violate family and social norms. The absence of spiritual guidance as a strong religious framework leads to the erosion of one’s moral compass in resisting temptations.
2. **Easy access to pornographic material:** Whether through the Internet or satellite channels, unrestricted exposure to pornography normalizes deviant sexual behaviors and blurs the boundaries between what is acceptable and unacceptable within family relations. It further fuels compulsive sexual desires, driving individuals to seek increasingly illicit or prohibited acts.
3. **Drug use:** Narcotics impair consciousness and plunge individuals into an altered state of mind. Under the influence, a person loses sound judgment and rational decision-making, becoming driven by instincts and immediate impulses, without moral or social restraint. Moreover, drug use may render individuals or their relatives vulnerable to exploitation, as they lose awareness and the ability to resist, creating opportunities for perpetrators to commit incest.
4. **Immodesty and indecent clothing within the family:** This phenomenon creates an environment conducive to immorality and forbidden acts, particularly among relatives. Although the home is supposed to be a safe and secure space, the absence of modesty in dress can have dire consequences. When nudity and provocative

clothing become normalized, individuals begin to accept what is religiously forbidden and socially unacceptable, weakening the moral and spiritual barriers against incestuous acts. It is also observed that some women neglect modest dress in front of their male relatives, assuming there are no limits. However, Islamic teachings establish that a woman's private parts (awrah) before her male relatives include the entire body except what is ordinarily exposed, such as the face, hair, arms, and feet. The use of short, transparent, or tight clothing further entices weak-willed individuals to commit zina (Hadid & Bouamousha, 2018, p. 242).

5. **Failure to separate boys and girls in sleeping arrangements:** Not distinguishing between boys and girls in beds after a certain age poses a significant risk to both individuals and families. This practice contradicts the explicit guidance of the Prophet Muhammad (peace be upon him), who instructed: *“Teach your children to pray at the age of seven, discipline them for it at ten, and separate them in their beds”* (Al-Bayhaqi, 2011, 2/229, Hadith No. 3361). In another hadith, he said: *“A man must not look at the private parts of another man, and a woman must not look at the private parts of another woman. Two men must not lie under one cover, nor two women under one cover”* (Al-Bayhaqi, 2000, 4/374, Hadith No. 5456). These prophetic guidelines are not merely recommendations but preventive educational principles intended to safeguard natural disposition (*fitrah*) and protect honor.

Section Two: Constitutive Elements of the Crime of Incest Between Relatives

Subsection One: The Legal Element

Article 337 bis of the Algerian Penal Code stipulates the following:

Incest is considered to include sexual relations committed between:

1. Ascendants and descendants.
2. Brothers and sisters, whether full siblings or from the father's or mother's side.

3. An individual and the son or daughter of his/her brother or sister, or with one of their descendants.
4. A mother or father with the spouse, widow, or widower of their child, or with any of their descendants.
5. The father or mother of a spouse, the stepfather, the stepmother, or the descendants of the other spouse.
6. Persons where one is the spouse of a brother or a sister.

The punishment shall be imprisonment from ten (10) to twenty (20) years in cases (1) and (2); imprisonment from five (5) to ten (10) years in cases (3), (4), and (5); and imprisonment from two (2) to five (5) years in case (6). The same penalty applies to sexual relations between a guardian (kafil) and the child under guardianship (makfoul) as in the case of ascendants and descendants. Any judgment against the father, mother, or guardian entails the forfeiture of parental authority and/or guardianship. (Algerian Penal Code, art. 337 bis).

From this provision, it is clear that the Algerian legislator explicitly defined the relatives whose sexual relations constitute incest (*faḥīsha bayna dhawi al-maḥārim*). They are classified into six distinct categories, with each category carrying a specific penalty. The severity of the punishment is directly proportional to the degree of kinship: the closer the familial relation, the harsher the punishment.

Subsection Two: The Material Element

For the crime of incest (*faḥīsha bayna al-aqribā'*), the material element requires the existence of two components:

1. The commission of consensual sexual relations:

This refers to the occurrence of a complete sexual act between a man and a woman, or between two men (sodomy), or between two women (lesbianism), based on their explicit mutual consent, without the use of violence, fraud, threat, or physical or moral coercion by one party against the other.

If the act is accompanied by threats or coercion, the crime is reclassified as rape rather than incest, and in such cases, Article 336(1) of the Penal Code applies instead of Article 337 bis (Algerian Penal Code, art. 336).

Consent is deemed absent if the victim is a minor under the age of sixteen and lacking discernment; in such cases, the act constitutes rape of a minor or an indecent assault with aggravating circumstances.

It is also assumed that incest involves direct physical contact with the victim's body. Thus, acts performed by the perpetrator on his or her own body in the presence of the victim, regardless of their obscenity or psychological effect, do not constitute incest. Such acts may instead be classified as public indecency, which falls under Article 333 of the Penal Code (Algerian Penal Code, art. 333).

Moreover, the material element does not require vaginal intercourse in the strict sense (i.e., penile-vaginal penetration). It extends to any sexual penetration, whether anal or oral, regardless of whether the perpetrator is male or female. Consequently, sodomy and lesbianism are also included within the scope of incest.

2. Familial relationship:

For incest to exist under the law, there must be a family tie, whether by blood (*nasab*), marriage (*muṣāharah*), or affinity, between the offenders, or the existence of one of the prohibitions listed in Articles 24–30 of the Algerian Family Code (Algerian Family Code, arts. 24–30).

The question arises regarding foster kinship (*raḍā'a*): does the rule “breastfeeding creates the same prohibitions as blood relations” apply by analogy, as in marriage? The answer is generally yes, (Bouskia, 2012, p. 143) though the prohibition is limited to the breastfed child alone, not his or her siblings. Article 28 of the Family Code specifies: “*Only the breastfed child, and not his or her siblings, is considered the child of the nursing woman and her husband, and the sibling of all their children; the prohibition applies to the child and his or her descendants*” (Algerian Family Code, art. 28).

However, under Article 1 of the Penal Code, “*No crime, penalty, or security measure exists without a law*” (Algerian Penal Code, art. 1). This means the principle of foster kinship (*raḍā'a*) does not apply in criminal matters, since the law has not explicitly provided for it. Criminal law does not allow

analogy (*qiyās*). The principle of legality requires that acts be punishable only when expressly stipulated by law. This ensures that individuals are not punished for actions unless they are clearly defined as crimes, thereby protecting them from judicial arbitrariness and guaranteeing that no penalty is imposed except on acts known to be criminal under explicit legal provisions.

Subsection Three: The Moral (Mental) Element

The law requires the presence of **general criminal intent** for the crime of incest to be established. This intent is fulfilled once both defendants are aware that the other party with whom they engage in the act is one of their prohibited relatives (*maḥārim*).

If neither of the perpetrators is aware, or if it is not possible for one or both of them to know of the kinship, then the criminal intent is absent, and the crime is not established. Conversely, if one party is unaware while the other is aware, punishment is imposed only on the one who had knowledge of the familial relationship (Bouskia, 2012, p. 144).

The issue of **criminal intent** becomes particularly complex in cases involving foster kinship (*radā'a*). In such situations, knowledge of the familial bond is presumed unless proven otherwise. Thus, the burden of proof lies with the defendant, who must provide evidence that he was unaware of the foster kinship relation with his partner in the act. This presumption applies if foster kinship is analogically treated like blood kinship in matters of incest.

Additionally, general criminal intent requires the exercise of **free and voluntary will**, without coercion, to commit the act of incest with a relative (Algerian Penal Code, art. 1).

Section Three: Prosecution and Penalties for the Crime of Incest Between Relatives

Subsection One: Judicial Prosecution

The prosecution of this crime is subject to the **general rules governing the Public Prosecutor's initiation of criminal proceedings** on behalf of society. This differs from the crime of adultery, where the legislator requires initiation by the aggrieved spouse, as an exception to the general principle.

Incest, by contrast, is a crime so grave that it is said to “shake the Throne of the Almighty.” It threatens the very structure of society, undermining public order, the family unit, and social stability far more than it harms the individual victim.

Thus, the Algerian legislator was correct in assigning prosecution authority to the Public Prosecutor, who retains discretion in whether to proceed. It is incumbent upon the Prosecution to establish the crime of incest by all available means and methods of proof (Algerian Penal Code, art. 337 bis).

The crime of incest may be proven through **witness testimony** or **oral evidence**, unlike the crime of adultery, where proof is strictly limited by Article 341 of the Penal Code to a closed set of evidentiary methods (Algerian Penal Code, art. 341).

Subsection Two: Prescribed Penalties

A close reading of Article 337 bis of the Algerian Penal Code reveals that it provides for **two categories of penalties depending on the degree of kinship**:

1. Felony punishment:

When the act qualifies as a felony, the prescribed penalty is imprisonment from ten (10) to twenty (20) years. This applies to incest committed between ascendants and descendants, as well as between siblings, whether full or half (Algerian Penal Code, art. 337 bis, paras. 1–2).

In addition to the principal penalties, the convicted offender is also subject to both **mandatory and optional supplementary penalties** as set out in Articles 9 bis and 9 bis 1 of the Penal Code (Algerian Penal Code, arts. 9 bis, 9 bis 1).

2. Misdemeanor punishment:

Where the act qualifies as a misdemeanor, the punishment varies according to the category of kinship.

- For uncles, aunts, and their descendants, as well as in-laws such as the father-in-law or mother-in-law, the penalty is imprisonment from five (5) to ten (10) years (Algerian Penal Code, art. 337 bis, paras. 3–5).

- For affinal relatives (sons- and daughters-in-law of siblings), the legislator prescribed imprisonment from two (2) to five (5) years (Algerian Penal Code, art. 337 bis, para. 6).

In all cases, if the crime is committed by an **adult against a minor under 18 years of age**, the penalty imposed on the adult must necessarily exceed that imposed on the minor.

This crime is prosecutable even if one of the parties has not reached the age of criminal responsibility, since Article 337 bis does not specify any minimum age. This differs from the crimes of indecent assault or acts of public indecency, in which the legislator explicitly distinguishes between adult and minor victims. This interpretation has been confirmed in rulings of the Algerian Supreme Court.

Furthermore, a judgment rendered against a father or mother entails **forfeiture of parental authority or guardianship**, pursuant to the final paragraph of Article 337 bis. The judge must impose this consequence *ex officio*, at the request of the Public Prosecutor, or upon request of the person responsible for the minor.

3. The security period:

Article 341 bis 1 provides for the application of the **security period** stipulated in Article 60 bis to any person convicted under Article 337 bis, regardless of the classification of the offense (Algerian Penal Code, arts. 341 bis 1, 60 bis).

Accordingly, when a custodial sentence equal to or exceeding ten (10) years is imposed, the convicted person is automatically subject to a security period equal to **half of the imposed sentence**. In cases of life imprisonment, the security period is fixed at twenty (20) years (Algerian Penal Code, art. 60 bis).

Section Four: Incest in the Perspective of Islamic Jurisprudence

Subsection One: The Prohibition of Adultery in Islamic Law

Allah Almighty warns His servants against committing adultery (*zinā*) or approaching its causes and temptations:

{وَلَا تَقْرَبُوا الزَّوْجَاتِ إِنْهَ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا} (الإسراء: 32)
“And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.” (Qur’an 17:32).

Al-Zuhaylī, in his commentary, explains: “It is a shameful deed, manifestly evil. {وَسَاءَ سَبِيلًا}—an evil path it is, for it constitutes an assault on honor and chastity, leading to the mixing of lineages and severing kinship ties” (Al-Zuhaylī, 1991, 15/65).

It is also established in the authentic Hadith that adultery is among the gravest sins that incur the wrath of Allah. ‘Abdullāh ibn Mas‘ūd reported:

“I said: O Messenger of Allah, which sin is the greatest? He said: To set up a rival unto Allah though He created you. I said: Then which? He said: To kill your child out of fear that he may share food with you. I said: Then which? He said: To commit adultery with the wife of your neighbor.” (Al-Bukhari, 2012, 5/250, Hadith No. 6001)

Ibn Battāl reported consensus (*ijmā‘*) among scholars that adultery is a **major sin (kabīrah)** (Ibn Battal, 2003, 8/429).

And while adultery itself is heinous, adultery with one’s close kin (incest) is considered even more reprehensible. Therefore, the Sharia came with explicit texts forbidding marriage to certain categories of women on a permanent basis. Allah says:

{حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأُخْتِ وَأُمَّهَاتُكُمْ
 اللَّائِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُمْ مِنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّائِي فِي حُجُورِكُمْ مِنْ نِسَائِكُمُ
 اللَّائِي دَخَلْتُمْ بِهِنَّ فَإِنْ لَمْ تَكُونُوا دَخَلْتُمْ بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَنْ
 (النساء: 23) {تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ إِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا

“Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your paternal aunts, your maternal aunts, your brothers’ daughters, your sisters’ daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives’ mothers, and your step-daughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your loins, and that you take two sisters simultaneously, except for what has already occurred. Indeed, Allah is ever Forgiving and Merciful.” (Qur’an, Al-Nisa, 4:23)

Imam al-Kāsānī explains: “If a woman is permanently prohibited, her marriage is unlawful, because marriage is meant to permit sexual relations, and it is impossible to permit what has been made permanently unlawful. Such permanent prohibitions fall into three categories: by blood, by marriage, or by fosterage. Marrying these women leads to the severance of kinship ties, since marital relations entail intimacy and, at times, conflict, which results in cutting off family bonds. Since severing kinship is forbidden, anything leading to it is likewise forbidden” (Al-Kasani, 1982, 2/257).

Imam al-Kāsānī presents a comprehensive analysis of the prohibition of incestuous marriage, combining both the strict legal dimension and the higher objectives (*maqāṣid*) of Islamic law.

1. The Legal Dimension (The impossibility of legalizing what is permanently forbidden):

He emphasizes that the prohibition is absolute and eternal, incapable of alteration. The very purpose of marriage is to render lawful what is otherwise prohibited, and what Allah has permanently forbidden cannot be rendered lawful under any circumstance.

2. The Maqāṣid Dimension (The wisdom behind the prohibition – preventing the severance of kinship ties):

Al-Kāsānī highlights the profound wisdom underlying this prohibition: the preservation of family bonds and the safeguarding of kinship ties. Marital relationships, with their inherent intimacy, emotional exposure, and occasional disputes, if introduced into kinship relations that are meant to be based on unconditional respect and natural affection, would corrupt these sacred bonds. Such interference could lead to conflicts and even animosity, ultimately resulting in the severance of kinship ties. Since Islamic Jurisprudence seeks to strengthen and protect family relations, the prohibition of incestuous marriage serves as a vital means to achieving this higher objective.

Subsection Two: The Punishment of Adultery in Islamic Law

The punishment for adultery (*zinā*) in Islamic Jurisprudence differs according to the marital status of the offender, specifically whether the individual is *muḥṣan* (previously married under a valid contract) or *non-muḥṣan*. The

condition of *iḥṣān* requires that the person be free, adult, sane, and has consummated a lawful marriage (Ibn Qudāmāh, *al-Mughnī*).

1. The Punishment of the Non-Muḥṣan Adulterer (al-Bikr)

The majority of jurists (*jumhūr al-fuqahā*) hold that the punishment for an unmarried adulterer, male or female, is **one hundred lashes and exile for one year**.

They support this position with the following evidence:

- The Qur’anic verse:

(2) {الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ} (النور: 2)
“The woman and the man guilty of fornication—flog each one of them with a hundred stripes.” (Qur’an, Al-Nur, 24:2)

- The authentic hadith reported in *Sahih al-Bukhari* and *Sahih Muslim*:

Abu Hurayrah and Zayd ibn Khalid al-Juhani narrated that two Bedouins came to the Messenger of Allah ﷺ. One of them said: *“O Messenger of Allah, my son was a hired servant for this man and he committed fornication with his wife. I ransomed my son with one hundred sheep and a servant girl. I asked the people of knowledge, and they informed me that upon my son is one hundred lashes and exile for a year, and upon this man’s wife is stoning.”*

The Prophet ﷺ said: *“By Him in Whose Hand is my soul, I will judge between you according to the Book of Allah. The servant girl and the sheep are to be returned, your son will receive one hundred lashes and be exiled for a year. O Unays (a man from the tribe of Aslam), go to this man’s wife; if she confesses, then stone her.”* He went to her, and she confessed, and the Prophet ﷺ ordered that she be stoned (Al-Bukhari, 2012, Hadith No. 2696; Muslim, 1955, Hadith No. 1698).

- Abū Ḥanīfah differed, holding that exile (*taghrīb*) is not obligatory but rather left to the discretion of the ruler. If he chooses, he may enforce it as a discretionary punishment (*ta’zīr*), but it is not a fixed *ḥadd* penalty (Al-Kasani, 1982, 7/39).

2. The Punishment of the Muḥṣan Adulterer (who has a wife)

The majority of jurists state that the punishment for an adulterer who is *muḥṣan* (previously married and consummated) is **stoning to death (rajm)**.

They differed, however, on whether stoning should be combined with flogging: the majority held that stoning alone suffices, while Imam Aḥmad ibn Ḥanbal, in one narration, maintained that both flogging and stoning should be applied together.

The majority of scholars (*jumhūr al-‘ulamā’*) based their opinion regarding the punishment of stoning (*rajm*) for the *muḥṣan* adulterer on the following evidences:

1. **The Verse of Stoning (Naskḥ al-Tilāwah, Baqā’ al-Ḥukm):**
They argued that the verse of stoning was abrogated in recitation but remains binding in legal ruling. It was once part of the Qur’anic text, as authentically reported from Zayd ibn Thābit: *“We used to recite: ‘The old man and the old woman, if they commit adultery, stone them both to death.’”* (Ibn Kathir, 1431H, 5/487).
2. **The Statement of ‘Umar ibn al-Khaṭṭāb (RA):**
Ibn Mas‘ūd reported that Ibn ‘Abbās informed him that ‘Umar once stood up, praised Allah, and said: *“Indeed Allah sent Muhammad ﷺ with the truth and revealed to him the Book. Among that which was revealed to him was the verse of stoning. We recited it, memorized it, and the Messenger of Allah ﷺ stoned [the adulterer], and we also stoned after him. I fear that with the passing of time, people may say: ‘We do not find the verse of stoning in the Book of Allah,’ and thus they will go astray by abandoning an obligation which Allah has revealed. Stoning is therefore a right in the Book of Allah upon anyone who commits adultery if he or she is muḥṣan, whether male or female.”* (Al-Bukhari, 2012, Hadith No. 6829; Muslim, 1955, Hadith No. 1691)
3. **The Prophetic Practice (Sunnah al-Nabawiyah):**
The Messenger of Allah ﷺ ordered the stoning of the wife of the man whose servant had committed fornication with her, as well as the stoning of Mā‘iz al-Aslamī and the Ghamīdiyyah woman. In all of these cases, the Prophet ﷺ applied stoning only, without combining it with flogging. The authentic reports transmitted through multiple chains and wordings indicate the sufficiency of stoning alone, and do not mention flogging. This became the established position of the majority of scholars, including Abū Ḥanīfah, Mālik, and al-Shāfi‘ī. (Ibn Kathir, 1431H, 5/488).

4. **The Opinion of Imām Aḥmad ibn Ḥanbal (One Narration):** In one narration, Imām Aḥmad held that the punishment of the *muḥṣan* adulterer combines both flogging and stoning, reconciling the Qur’anic verse with the Sunnah. His evidence was the hadith of ‘Ubādah ibn al-Ṣāmit, who reported that the Messenger of Allah ﷺ said:

“Take from me, take from me. Allah has made for them a way: the virgin with the virgin—one hundred lashes and exile for a year; the married with the married—one hundred lashes and stoning.” (Muslim, 1955, Hadith No. 1690)

Ibn Muflīḥ commented: *“This hadith is explicit; it should not be abandoned except by evidence of equal clarity.”* (Ibn Muflīḥ, 1997, 7/381).

Section Three: The Punishment of Incest (Zinā al-Maḥārim) in Islamic Law

Incest is regarded as one of the most heinous of the major sins (*kabā’ir*) and among the gravest of transgressions in Islam. This is because it combines two enormities: the crime of *zinā* (fornication/adultery) and the severing of family ties (*qaṭ’ al-raḥim*). This dual violation intensifies its reprehensibility and seriousness. The punishment prescribed for incest differs according to the views of the various Islamic legal schools; however, it is generally treated more severely than ordinary *zinā*.

First: The Legal Characterization (Adjustment) of Incest.

- **As Zinā:** It falls under the general ruling of fornication/adultery, which necessitates the implementation of the *ḥadd* punishment under its known conditions.
- **As Severing Kinship Ties:** In addition to being *zinā*, it also constitutes *qaṭ’ al-raḥim*, which is among the gravest sins in Islam, thereby compounding the sin.
- **As Indecency and Transgression:** It is considered a gross violation of sanctities and prohibitions clearly defined in the Qur’an and Sunnah.

Second: The Prescribed Punishments (al-Ḥudūd al-Shar’iyyah)

1. **The Majority View (Abū Ḥanīfah, Mālik, al-Shāfi‘ī, and one narration from Aḥmad):**

According to these jurists, incest carries the same punishment as ordinary *zinā* (stoning to death for the *muḥṣan*, flogging for the non-*muḥṣan*). (Al-Kasani, 1328H, 7/39; Ibn Rushd, 2004, 4/218; Al-Mawardi, 1999, 13/217; Ibn Qudama, 1969, 9/38). They relied on the generality of the Qur’anic verse:

{الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ}

“The woman and the man guilty of fornication—flog each one of them with a hundred stripes.” (Qur’an, Al-Nur, 24:2)

Since the verse is general, it applies both to fornication with a stranger and fornication with a relative. They also cited the hadith of ‘Ubādah ibn al-Ṣāmit (RA), which prescribes the punishments of flogging for the unmarried and stoning for the married.

2. The Alternate View (Imām Aḥmad – Second Narration, and preferred by Ibn al-Qayyim):

According to this view, incest is treated more severely than ordinary *zinā*. They held that the perpetrator should be executed in all cases, regardless of marital status (*muḥṣan* or not) (Ibn al-Qayyim, 1991, 2/249). Their evidence included:

- The hadith of al-Barā’ : “*I met my uncle Abū Burdah while he was carrying a banner. He said: ‘The Messenger of Allah ﷺ sent me to a man who had married his father’s wife, to execute him and confiscate his property.’*” (Al-Nasa’i, 2001, 5/210, Hadith No. 5464).
- The narration from Ibn ‘Abbās (RA): “*The Messenger of Allah ﷺ said: ‘Whoever commits intercourse with a maḥram relative, kill him.’*” (Ibn Majah, 2009, 3/996, Hadith No. 2564)

This position reflects the gravity of incest in Islamic law, as it entails not only illicit sexual conduct but also the desecration of sacred kinship bonds.

Conclusion

At the end of this study, the following key findings can be highlighted:

1. **Criminalization of the Act:** The Algerian Penal Code classifies actions that undermine the family structure as criminal offenses, including incest, as stipulated in Article 337 *bis*.
2. **Graduated Punishment:** The severity of the punishment for incest in Algerian law varies according to the degree of kinship; the closer the kinship, the harsher the penalty imposed.
3. **Material Element of the Crime:** The material element (*al-rukn al-mādī*) of the crime requires the existence of a consensual sexual relationship between two individuals bound by kinship or affinity, without the requirement of natural intercourse (*waṭ’*). It is also required that the act involves direct physical contact with the victim’s body.
4. **Absence of Consent:** If coercion or threats are present, the act is classified as rape (*ighṭiṣāb*) rather than incest. Consent is also deemed absent when one of the parties is a minor under the age of sixteen, in which case the act is categorized as rape of a minor.
5. **Mental Element of the Crime:** The law requires the general criminal intent (*al-qaṣd al-jinā’ī al-‘āmm*), meaning that both parties are aware that the relationship involves one of their *maḥārim*.

6. **Main Causes:** The primary causes contributing to the spread of this phenomenon include weak religious commitment, exposure to pornographic material, drug abuse, lack of modesty in dress within the family, and failure to separate boys and girls in sleeping arrangements.
7. **Position of Islamic Law:** Islamic law (*al-sharī'ah al-islāmiyyah*) strictly prohibits fornication/adultery (*zinā*) in general, and considers incest one of the most heinous of major sins, as it combines the crime of fornication with the grave sin of severing kinship ties (*qaṭ' al-raḥim*).
8. **Punishments in Islamic Law:** The punishment for fornication under *sharī'ah* varies depending on the offender's marital status:
 - **Unmarried (*non-muḥṣan*):** One hundred lashes and exile for one year, according to the majority of jurists.
 - **Married (*muḥṣan*):** Stoning to death, as upheld by the majority view.
 - **Incest:** According to the majority of jurists, it falls under the prescribed punishment for *zinā* (stoning for the married, flogging for the unmarried). Another opinion holds that the offender should be executed in all cases, whether married or unmarried.

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