

## Marrying a fornicatress and attributing baby to fornicator

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allaah, the Most Merciful, the Bestower of Mercy

**Question:** Can we adopt, in specific cases, the fatwa of the two Imaams Aboo Haneefah and Ibn Taymeeyah رحمهما الله which says that it is permissible for a fornicatress to marry the man who had illegal sexual intercourse with her, knowing that it is him who got her pregnant and not another man, and that this view contradicts the view of the majority of the scholars ?

**Shaykh Aboo `Abd-al-Mu`iz `Alee Ferkous al-Qoobee** (May Allaah the Most High preserve him): All praise is due to Allaah, the Lord of the Worlds. Peace and blessing be upon whom Allaah sent as a mercy to the Worlds, upon his Family, his Companions and his Brothers till the Day of Resurrection.

This question includes two issues:

- The first concerns marrying a fornicatress.
- The second concerns the ruling regarding the attribution of the illegitimate child to the fornicator.

As for the first issue: Ibn Taymeeyah, considered repentance as the first condition, following, thus, some Salaf (Predecessors) and Khalaf (Successors). This is also the opinion of Ahmad<sup>1</sup>. So, it is forbidden for a man to marry a woman who has committed an illegal sexual intercourse unless she repents, whether it is he who committed fornication with her or another. Allaah عزَّ وجلَّ said:

[الرَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرْمٌ ذَلِكَ عَلَى الْمُؤْمِنِينَ]

The meaning of the verse:

**[The adulterer marries not but an adulteress or a Mushrikah and the adulteress none marries her except an adulterer or a Mushrik [and that means that the man who agrees to marry (have a sexual relation with) a Mushrikah (female polytheist, pagan or idolatress) or a prostitute, then surely he is either an adulterer, or a Mushrik (polytheist, pagan or idolater, etc.) And the woman who agrees to marry**

<sup>1</sup> See "Al-Mughnee" of Ibn Qudaama: (6/601,602). "Majmoo` Al-Fataawa" of Ibn Taymeeyah: (32/109,110).

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**(have a sexual relation with) a Mushrik (polytheist, pagan or idolater) or an adulterer, then she is either a prostitute or a Mushrikah (female polytheist, pagan, or idolatress, etc.)). Such a thing is forbidden to the believers (of Islamic Monotheism)]<sup>2</sup>**

And we should no longer attribute fornication to her after repentance, as the Prophet صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ said: **“The one who repents from sin is like the one who did not sin”**<sup>3</sup>. The previous meaning is supported by the saying of the Prophet صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: **“The adulterer who has been flogged shall not marry save the one like him”**<sup>4</sup>. Ash-Shawkaanee said: “There is a proof in this hadeeth that it is not permissible for a woman to marry a man we know he had fornicated and it is also not permissible for a man to marry a woman we know she had fornicated. This opinion is supported by the previous verse”<sup>5</sup>.

As for the opinion of Aboo Haneefah, Ash-Shaafi'ee and Maalik, they do not consider repentance a condition in order that the marriage might become permissible<sup>6</sup>. Although, there is in “Al-Mudawwana” what makes us think that there is such condition<sup>7</sup>; from this appears the divergence of opinions between Ibn Taymeeyah and Aboo Haneefah as regards this condition. Moreover, Ibn Taymeeyah adds to this condition, the examination of the fornicatress in order to ascertain if her repentance is true. This assertion is supported by Allaah's عَزَّ وَجَلَّ saying:

[إِذَا جَاءَكُمُ الْمُؤْمِنَاتُ مُهَاجِرَاتٍ فَامْتَحِنُوهُنَّ]

The meaning of the verse:

**[When believing women come to you as emigrants, examine them]**<sup>8</sup>

The appellation Muhaajir (emigrant) is also applied to a penitent, and the proof that the term Muhaajir includes the penitent is the saying of the Prophet صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: **“The true emigrant (Muhaajir) is he who abandons all of what Allaah عَزَّ وَجَلَّ has forbidden”**<sup>9</sup> and **“The**

<sup>2</sup> Soorah An-Noor (The Light): 3

<sup>3</sup> Reported by Ibn Maajah, chapter of “Asceticism” (hadeeth 4391), Al-Baihaqee (hadeeth 21070) from the hadeeth of `Abd Allaah Ibn Mas'ood رَضِيَ اللهُ عَنْهُ. This hadeeth is judged Hassan (good) in “Saheeh Al-Jaami” (hadeeth 3008) and in “Saheeh At-Targheeb Wat-Tarheeb” (hadeeth 3145).

<sup>4</sup> Reported by Aboo Daawood, chapter of “Marriage” (hadeeth 2052), Al-Haakim in “Al-Mustadrak” (hadeeth 2784), Ahmad (hadeeth 8101), Al-Baihaqee (hadeeth 14197) from the hadeeth of Aboo Hurairah رَضِيَ اللهُ عَنْهُ. Ibn Katheer said in “Irshaad Al-Faqeeh” (2/149): “Its Isnaad (chain of narration) is strong and good”. Al-Albaanee judged it as authentic in “As-Silsilah As-Saheehah” (hadeeth 2444), Muqbil Al-Waadi'ee judged it as Hassan (good) in “As-Saheeh Al-Musnad” (hadeeth 1451).

<sup>5</sup> See “Nayl Al-Awtaar” of “Ash-Shawkaanee” (7/320).

<sup>6</sup> See “Al-Hidaaya” of “Al-Marghinaani” (1/194) and “Takmilat Al-Majmoo` Sharh Al-Muhadhab” (16/220,221).

<sup>7</sup> See “Al-Mudawwana” of Ibn Al-Qaassim (2/187).

<sup>8</sup> Al-Mumtahana (The Woman to be examined): 10

<sup>9</sup> Reported by Al-Bukhaaree, chapter of “Faith” (hadeeth 10), Abu Daawood, chapter of “Jihad” (hadeeth 2483), An-Nasaa'ee, chapter of “Faith and its prescriptions” (hadeeth 5013), Ahmad (hadeeth 6671) and Al-Humaydi in his “Musnad” (hadeeth 623) on the authority of `Abd Allaah Ibn `Amr Ibn Al-`Aas رَضِيَ اللهُ عَنْهُمَا.

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**true emigrant is he who abandons evil**<sup>10</sup>. So, as long as the allegation of abandoning evil is existing, it is permissible to examine the person, as the previous verse states.

The second condition made by Ibn Taymeeyah is to establish that the woman is not pregnant by waiting one menstrual cycle. Whereas the pregnant woman should wait until she gives birth. This is the opinion of Maalik and Ahmad<sup>11</sup>, contrarily to Aboo Haneefah who thinks that it is permissible to conclude the marriage contract if she is pregnant before childbirth. It is also the view of Muhammad Ibn Al-Hassan Ash-Shaybaanee, contrarily to the view of Aboo Yoosuf<sup>12</sup>. Starting from this condition and that before, the difference between the view of Aboo Haneefah and Ibn Taymeeyah becomes evident. As for Ash-Shaafi'ee, he considers the marriage contract and coitus absolutely permissible, since the semen of the fornicator is not valued<sup>13</sup>. It is evident that Ash-Shaafi'ee's mental opinion and that before (of Aboo Haneefah) are weak if we consider the reported texts in the context of this condition which is Al-Istibraa'<sup>14</sup>. Among these texts, the saying of the Prophet صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: **"Do not have intercourse with a pregnant woman until she gives birth, or with one who is not pregnant until she has menstruated once"**<sup>15</sup> and the Prophet's صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ saying: **"It is not lawful for a man who believes in Allaah and the Last Day to water what another has sown with his water (meaning intercourse with women who are pregnant); it is not lawful for a man who believes in Allaah and the Last Day to have intercourse with a captive woman till she is free from a menstrual course or she gives birth"**<sup>16</sup> and the Prophet's صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ saying: **"Do not have intercourse with a pregnant woman until she gives birth nor with a non pregnant until she is free from a menstrual cycle"**<sup>17</sup>.

<sup>10</sup> Reported by Al-Haakim (hadeeth 25), Ahmad (hadeeth 12151), Abu Ya'la in his "Musnad" (hadeeth 4187) from the hadeeth of Anas رضي الله عنه and Ahmad (hadeeth 6886) from the hadeeth of `Abd Allaah Ibn `Amr رضي الله عنهما. This hadeeth is judged authentic by Ahmad Shaakir in his recension of "Musnad Ahmad" (11/190) and Al-Albaanee in "Saheeh At-Targheeb" (hadeeth 2555).

<sup>11</sup> See "Majmoo'Al-Fataawa" of Ibn Taymeeyah (32/109,110).

<sup>12</sup> See "Al-Hidaaya" of Al-Marghinaani (1/194).

<sup>13</sup> See "Al-Mughnee Al-Muhtaaj" of Ash-Sharbeenii (3/187).

<sup>14</sup> Al-Istibraa': period of sexual abstinence for a woman after divorce or widowhood so that there may be no question of the paternity of a baby she might be carrying.

<sup>15</sup> Reported by Aboo Daawood, chapter of "Marriage" (hadeeth 2159), Ahmad (hadeeth 11911), Ad-Daarimee in his "Sunan" (hadeeth 2350), Al-Haakim in "Al-Mustadrak" (hadeeth 2790), Al-Baihaquee (hadeeth 11105) from the hadeeth of Aboo Sa'eed Al-Khudree رضي الله عنه. This hadeeth is judged Hassan (good) by Ibn `Abd Al-Barr in "At-Tamheed" (3/143) and Ibn Hajar in "At-Talkhees Al-Habeer"(1/275). Al-Albaanee judged this hadeeth as authentic in "Saheeh Al-Jaami" (hadeeth7479).

<sup>16</sup> Reported by Aboo Daawood, chapter of "Marriage" (hadeeth 2160), Ahmad (hadeeth 17435), Al-Baihaquee (hadeeth 16002) from the hadeeth of Ruwayfi' Ibn Thaabit Al-Ansaaree رضي الله عنه. This hadeeth is judged authentic by Ibn Katheer in "Irshaad Al-Faqeeh" (2/236). Al-Albaanee judged it Hassan in "Al-Irwaa'" (5/140).

<sup>17</sup> Reported by `Abd Ar-Razzaaaq in "Al-Mussannaaf" (hadeeth 12903), Al-Albaanee said in "Al-Irwaa'" (1/200): "Ibn Abee Shayba reported in "Al-Mussannaaf" as it is stated in "Nasb Ar-Raaya" (4/252) according to Ash-Sha'bi that he said: The Prophet صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ prohibited, on the day of Autaas, to copulate with a pregnant woman until she gives birth. It is also reported by `Abd Ar-Razzaaq, and its chain of narration is Mursal [a Mursal hadeeth is a hadeeth where the chain of narration only goes up to a Taabi'ee (Successor)] authentic".

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As for the second issue, concerning the ruling of attributing an illegitimate child to the fornicator, there is an evident conformity between Aboo Haneefah and Ibn Taymeeyah as regards the outcome and the ruling. In fact, Aboo Haneefah thinks that there is no harm if the fornicator marries the woman he got pregnant during her pregnancy and not divulge her act, and the child is his. The opinion of Ibn Taymeeyah converges also at this ruling; if a man attributes the illegitimate child to himself and the woman is not the wife or the slave-woman of another man, the child will be attributed to him<sup>18</sup>. However, the difference between their statements (i.e. Aboo Haneefah and Ibn Taymeeyah) is what has been previously said in the second condition of the first issue, namely, setting the condition of giving birth for the pregnant woman and waiting one menstrual cycle for a non-pregnant; contrarily to Aboo Haneefah. Besides, this opinion of attributing the child to the fornicator is not limited to these two Imaams; it is also the opinion of Ishaq Ibn Raahawayh, Sulaymaan Ibn Al-Yassar, Ibn Seereen, Al-Hassan Al-Basree, Ibraahim An-Nakha`i and others. This opinion is opposed by the majority of the scholars and among them the three Imaams who consider that the illegitimate child should not be attributed to the fornicator if he claims him, whether the woman who gave birth to the child is married (or she is a slave-woman) or not<sup>19</sup>.

The reason of divergence among scholars as regards this issue is due to their interpretation of the hadeeth: **“The child goes to the (owner of the) bed<sup>20</sup>, and the fornicator gets nothing but deprivation (lit., stones)”<sup>21</sup>**. In fact, Ibn Taymeeyah رحمه الله thinks that the ruling included in this hadeeth concerns only the woman who is the wife of another man (other than the fornicator). Thus, the child will be attributed to the husband or master of the adulteress, unless he denies it by Al-Li`aan<sup>22</sup>, and the stone (deprivation) will be for the fornicator<sup>23</sup>, that is to say, the fornicator will receive nothing but disappointment<sup>24</sup>; this meaning is not included in the hadeeth if the woman is neither married nor a slave (lit., if the woman is not a bed). The woman is precisely called a bed conventionally and by linguists after the consummation of the marriage; that is why Ibn Taymeeyah thinks that the

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<sup>18</sup> See “Majmoo` Al-Fataawa” of Ibn Taymeeyah (32/112,113, 139).

<sup>19</sup> See “Al-Mughnee” of Ibn Qudaama (6/266).

<sup>20</sup> Bed is used metaphorically to indicate a woman.

<sup>21</sup> Reported by Al-Bukhaaree, chapter of “Transactions” (hadeeth 2053), Muslim, chapter of “Suckling” (hadeeth 3686), Aboo Daawood, chapter of “Divorce” (hadeeth 2275), An-Nasaa'ee, chapter of “Divorce” (hadeeth 3497), Ibn Maajah, chapter of “Divorce” (hadeeth 2082), Maalik (hadeeth 1424), Ahmad (hadeeth 25717) and Ad-Daaraqutnee (hadeeth 3895), from the hadeeth of `A'isha رضي الله عنها.

<sup>22</sup> Al-Li`aan : an oath which is taken by both the wife and the husband when he accuses his wife of committing illegal sexual intercourse. (The Qur'aan, Soorah An-Noor, 24 :6,7,8,9).

<sup>23</sup> Reported by Al-Bukhaaree, chapter of “Transactions” (hadeeth 2053), Muslim, chapter of “Suckling” (hadeeth 3686), Aboo Daawood, chapter of “Divorce” (hadeeth 2275) An-Nasaa'ee, chapter of “Divorce” (hadeeth 3497), Ibn Maajah, chapter of “Divorce” (hadeeth 2082), Maalik (hadeeth 1424), Ahmad (hadeeth 25717) and Ad-Daaraqutnee (hadeeth 3895), from the hadeeth of `A'isha رضي الله عنها.

<sup>24</sup> The meaning of “He has the stone” is: disappointment, i.e. the child is not his, the Arabs say: he has the stone and in his mouth, there is earth. They mean by this: he has nothing but disappointment, it is also said that it is meant by a stone that the fornicator should be stoned if he commits fornication in case he is married. See “Nayl Al-Awtaar” of Ash-Shawkaanee (8/88).

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woman is considered a bed after the ascertainment of consummating the marriage and not only by concluding its contract, contrarily to Aboo Haneefah رحمه الله. Consequently, we do not attribute the child to the fornicator if the woman has not yet consummated the marriage with her husband. If the woman is not married, she is not considered a bed and is not concerned thus by the ruling of this hadeeth, and if she commits an illegal sexual relationship and gives birth to a child, the child will be attributed to his father if he claims it. It is previously said that the majority of the scholars think that the child should not be attributed to the fornicator, whether the child is given birth by a married woman (or a slave-woman) or an unmarried one (or not a slave-woman), and this according to their interpretation of the hadeeth. Apparently, the occasion of the hadeeth goes, in its context and content, with the distinction made by Sheikh Al-Islam (Ibn Taymeeyah), because the Prophet صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ judged in the story of Zam`a Ibn Al-Aswad's slave, who was impregnated by `Utba Ibn Abi Waqqaas as follows: Sa`d and `Abd Ibn Zam`a argued about the child, so Sa`d said: "This is the son of my brother `Utba who authorised me to take him into my custody. He said that the child is his son. `Abd Ibn Zam`a said, "He is my brother, the son of my father's slave-woman and he was born on his bed. Allaah's Apostle صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ said: **"It is for you, O `Abd Ibn Zam`a, the child goes to the (owner of the) bed<sup>25</sup>, and the fornicator gets nothing but deprivation (lit., stones). Screen yourself from him O Sauda"**<sup>26</sup>. So, the Prophet صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ decided that the child will go to the one who owns the slave-woman and not another, despite the clear resemblance to `Utba. This indicates that this hadeeth is specific to the case in which the woman is one's wife or slave-woman, and the ruling of this hadeeth does not concern a woman who is not one's wife or slave-woman.

Ibn Taymeeyah supports the view of attributing the fornicator's illegitimate child to him if the woman with whom he had a sexual intercourse is not his wife or slave-woman by what was reported by Maalik in "Al-Muatta'" that `Umar Ibn Al-Khattaab رضي الله عنه used to attribute the children born during the Pre-Islamic period (Al-Jahileeyah) to those who claimed them during the Islamic period<sup>27</sup>. It means that he attributed the children to them, though they are illegitimate children. Indeed, `Iissa reported from Ibn Al-Qaassim that some people who embraced Islam attributed illegitimate children to themselves. If they are free and none claims them to be his, they are considered theirs. `Umar Ibn Al-Khattaab attributed the illegitimate children born in the period of Al-Jahileeyah to those who claimed them during the period of Islam unless the master of the slave-woman who gave birth to the child or the husband of the free woman claim them, since the Prophet صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ

<sup>25</sup> See note 22.

<sup>26</sup> Reported by Al-Bukhaaree, chapter of "Manumission" (hadeeth 2533), Maalik in "Al-Muwatta'" (hadeeth 1424), Ad-Daarimee in his "Sunan" (hadeeth 2292), Ad-Daaraqutnee in his "Sunan" (hadeeth 4652) and Al-Baihaqee (hadeeth 11795) from the hadeeth of `A'isha رضي الله عنها.

<sup>27</sup> Reported by Maalik in "Al-Muwatta'" (hadeeth 1426), Al-Baihaqee (hadeeth 21799), from the narration of Sulaymaan Ibn Yassaar. Al-Albaanee said in "Al-Irwaa'" (6/25): "The reporters of this hadeeth are trustworthy and meet the conditions of trustworthiness made by Al-Bukhaaree and Muslim, but this hadeeth is Munqati` (interrupted), because Sulaymaan Ibn Yassaar did not meet `Umar, but this hadeeth is narrated in another way which is Maussool (connected)..."

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وسلم said: “The child goes to the (owner of the) bed, and the fornicator gets nothing but deprivation (lit., stones)”. So, the husband or the master of the woman or the slave are more entitled to attribute the child to them<sup>28</sup>.

If it turns out, with proofs, that one of these two opinions is more likely to be correct, it will be obligatory for the observer or the Mujtahid (studious jurist) to issue fatwas accordingly. He should issue fatwas according to what he is convinced of absolutely, in all cases, and should not issue a fatwa which goes against what he thinks in some cases, as there is a scholarly consensus that a Mujtahid or someone on which the same rulings are applied, like Al-Mujtahid Al-Mutajazzi' (partial Mujtahid) should follow what his Ijtihad (juristic effort) led him to and issue fatwas according to it. It is not permissible for him to issue fatwas contrarily to what he thinks; unless it turns out for him that what he adopted as opinion was wrong, so, he should change his wrong opinion, choose the correct one and follow the opinions that are supported with proofs. All this of course, if the truth is apparent and corresponding to the Book and the Sunnah; in such case, the mufti must follow the truth and issue fatwas according to the true proofs albeit it goes against his school of thought. If the mufti, who has an opinion which is contradicted by another opinion which is right, it is not permissible for him to issue a fatwa that is based upon a less strong opinion. As for the matters of Ijtihad in which the proofs are equivalent, the mufti may issue a fatwa or not, according to his Ijtihad and the proofs he has, as Ibn Al-Qayyim رحمه الله stated these different categories<sup>29</sup>. There is not among these categories that the mufti can issue different fatwas in the same matter according to the cases.

The perfect knowledge belongs to Allaah سبحانه وتعالى. Our last prayer is all praise is due to Allaah, the Lord of the Worlds. Peace and blessing be upon our Prophet, his Family, his Companions and his Brothers till the Day of Resurrection.

Algiers, Jumaada Al-Oola 20th, 1427 H. Corresponding to: June 16th, 2006

<sup>28</sup> See “Al-Muntaqa” of Al-Baaji (6/11).

<sup>29</sup> See “I’laam Al-Muwaqqi’een” (4/237).