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Towards Finding Suitable Punishment for Kidnapping in Islamic Jurisprudence: Case Study of Hirabah

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Abstract

Kidnapping has been reported as the most prevalent crime against humanity in the recent time. Almost every part of the globe felt its menace. Little wonder most countries begin to enact stiffer punishment for the offence to serve as deterrent. Islamic jurisprudence recognises offence of kidnapping as a cankerworm tormenting humanity. Despite the seriousness of the offence just like that of specific offences categorised as Hudud, the punishment regime of kidnapping is left to the discretion of Judge in Islamic jurisprudence. This informs the reason the paper attempt to find suitable punishment for the offence of kidnapping using Hirabah as a case study. The study adopts doctrinal method of legal research with content analysis of the relevant provisions of the primary sources of Shari'ah as well as the various juristic opinions. The paper examines the detailed analysis of the rules and procedure of Hirabah under Shari'ah and finds that offence of kidnapping has great semblance and similarity with offence of Hirabah. The paper finds further that the line of difference between the offences of kidnapping and Hirabah is that the former is categorised under Ta'azir while the latter is categorised under Hudud. The paper recommends amongst others that with the discretion regime under Ta'azir offences, rules and procedures of Hirabah regarding its punishment can be made applicable to the horrible offence of kidnapping to serve as deterrent.

Key words: Kidnapping, Punishment, Islamic Jurisprudence, Case Study, Hirabah

1. INTRODUCTION

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Kidnapping as an offence against humanity is age-long. There were instances of its occurrence during the time of Prophet Muhammad (PBUH). Despite its age, it continues to be one of the commonest, recurrent and prevalent crime in the recent time. From Islamic perspective, kidnapping is recognised as a crime under the category of Ta'azir. But it is an offence that requires serious attention like Hudud offences expressly stipulated by the Law Giver.

In the time past, kidnapping was not a prominent offence in Nigeria. It was hardly up for trial in the courts, let alone being the subject of daily media reports. The narrative has changed now. There is hardly any day without one kidnapping incident or the other being reported in the news. Arguably, the only offence that is having as much media mention as kidnapping in Nigeria currently is corruption.

Kidnapping as an offence categorised under Ta'azir does not have specific punishment as its punishment regime is left to the discretion of the judge determining such case. This thus prompted the issue finding appropriate and suitable punishment for the offence of kidnapping with a view to taming its menace in the society.

In view of the above, this paper looks at the position of Islamic Law regarding the offence of kidnapping with particular concentration on the offence of Hirabah with a view to finding appropriate punishments and solutions within the context of Islamic Jurisprudence.

2. CONTEXTUAL MEANING OF HIRABAH UNDER SHARI'AH

Hiraba under Islamic law is what is known as brigandage or highway or armed robbery.¹ It is also called *QAT'AL-TARIQ*. Hiraba is an offence or an act of robbery by a group of armed men within the territory of Islamic state so as to create anarchy under which the property, privacy, safety, dignity and religious value of the people would be violated.² It is immaterial whether the person committing

¹ Zubair. A. Qodir, *Exigesis of legislative version in the Quran and the relevant Traditions* (Almadinal Heritage, Lagos) at 111

² Bambale Y.Y; *Crime and punishment under Islamic Law*, second edition (Mathous press limited) p87

the crime is Muslims or non-Muslims, or that the act is committed by a group or individual.³ This offence is regarded as offence against the state and not individual.

Maliki School defines Hirabah as a criminal act by a person or persons who obstructs the highway or any other place by causing disorder among the community or by attacking people with the intention of appropriating their property by use of force in a situation where victim(s) is/are unable to defend himself/themselves or get immediate help. It makes no difference whether such a person has killed people or not and whether he is known or famous for that same act or not.⁴

From the above definition given by the Maliki School, it is obvious that the offence of Hiraba can be committed by one or more persons who obstructs the highway or any other place. It must be noted that during the commission of this crime, kidnapping may be involved. The element stated by the Maliki School here is more or less the same with element of Kidnapping. This is because taking people by force to unknown destination with the purpose of extorting or demanding money from their family or killing them at the end is known as kidnapping. This is an act of transgression which Allah forbids Muslims to refrain from.

Hanafi School and a view in Hambali schools define Hiraba as a criminal act which involves the use of force and causes considerable insecurity along the Highways.⁵ In the same vein, Shafi'i school define Hiraba as a criminal act in which the offender(s) unlawfully appropriated other people's property by the use of force and instil fear or terror in the minds of the community.⁶ Therefore, based on the definitions from different schools of thought, we can safely conclude that the offence of Hiraba have similar and same features with the offence of kidnapping and this is regarded as an act of waging war against Allah and His Messenger and in attempt

³ Ibid

⁴ Al-amin, Alhaji Muhammad Ahmad (1998); Yasir fil hudud wal jinayat wal al-Ta'zir; Darul Matbuat al-Hadithah, Jeddah; p. 155

⁵ Bambale Y. Y (n2) p 86

⁶ Ibid

to spread mischief, horror, grave or widespread breach of public peace, mutiny, sedition, riotous tumult etc, in the world.

Hiraba is therefore referred to as robbery or brigandage. It is called Highway robbery according to jurists if the number of robbers is between one and four while it is referred to as brigandage if the number of robbers is from five and above.⁷

3. UNDERSTANDING KIDNAPPING FROM SHARI'AH PERSPECTIVE

Kidnapping on the other hand means 'carrying a person away, without his consent, by means of force, threats or fraud.'⁸ Similarly, it has been defined as 'to unlawfully and forcibly take and carry away a person.'⁹ The purpose of kidnapping is nothing but to cause mischief on the land which Allah has frowned at.

Under Islamic law, kidnapping can be viewed as heinous crime in the category of Hudud such as Zina, Qadhf, Sariqah, Shurbul-khamr, al-Ri'dadah and al-Baghy as expressly mentioned in the Holy Qur'an. It is noteworthy that the word 'kidnapping' seems to share similarity with Al-Hirabah but does not linguistically have the same meaning with the word Al-Hirabah. However, a closer look at the procedure and method of committing the offence of Hirabah would definitely give one no other option than to equate the offence of kidnapping with that of Hirabah within the understanding of the legal sources of *Shari'ah*. Hence, a brief exposition of the sources of *Shari'ah* becomes expedient.

The legal sources of *Shari'ah* includes but not limited to Quran, Sunnah, Ijma and Qiyas.¹⁰ Quran and Sunnah are the basic primary sources of Islamic Law and the rules in these two binding on all Muslims. Although some jurist categorised Ijmah as part of the primary sources of *Shari'ah* but this is not in line with the view of majority. Qiyas is analogical deduction. This simply means using the Hukum or rules of a particular case for another case that have similar

⁷ Ibid

⁸ Elizabeth A. Mathin, *A Dictionary of Law* (5th edition, oxford University Press, 2003) at 276

⁹ Amy H. Blackwell, *The Essential Law Dictionary* (Illinois: Sphinx Publishing, 2008) at 278

¹⁰ Abdul-Qadir Zubair (2005), *The Major Sources of Islamic Law*, Nigeria p.55

or has same features of the previous incident. Therefore, using the word Hirabah and applying the punishment provided for it for the offence of kidnapping would be in line of using Qiyas to determine the rules on kidnapping. It is important to note that country like Islamic Republic of Iran has changed their Criminal Law Code by given same punishment given to Armed Robbery (Hirabah) to Kidnapping.¹¹

In Islamic jurisprudence, a lot of reasons have been canvassed to outlaw act of kidnapping. For instance, Islamic law forbids banishing people from their homes unjustly and regarded this act an aggression deserving of punishment. It is also strictly forbidden to target non-combatants by killing or kidnapping or taking them as hostages, or inflicting any kind of harm on them. Even if they are combatants, there are rules on how to deal with them. A Muslim is not permitted to harm anyone that is not armed. Even in the battlefield during the time of the Prophet in Badr, Uhud, Khandaq and others, Muslims didn't raise their swords against anyone without a sword. It was not permitted.¹² There are rules guiding the prisoners of war which Muslims must follow strictly and these are to the effect that kidnapping of any form is forbidden under Shari'ah.

Against the above backdrop, explanation of Hiraba and kidnapping show that the two offences have same elements and could also have the same consequence in form of punishment. The pertinent question at this juncture is whether the rules, procedures and guiding principles designed for Hiraba in Islamic jurisprudence can be made applicable to kidnapping? To answer this question, it becomes expedient to cursory look at Hiraba in terms of legal backing, site of commission of the offence, condition for infliction of *hadd* punishment, proof of element of the offence, punishment and mode of execution as well as juristic opinion.

3.1 *Legal backing of Hiraba from Primary Sources of Shari'ah*

¹¹ In Iran, hirabah is known as moharebeh and is translated variously in English-language media as "waging war against God" "war against God and the state," or "enmity against God. The charge is levied against people who commit acts against the government. Another related crime is Mofsede-fel-arz, which is "spreading corruption on the earth", which can be applied for political crimes such as treason. Both are often applied against armed robbers, kidnappers, and rapists

¹² <https://www.vanguardngr.com/2013/02/islamic-perspective-on-kidnapping-killings/access> on the 21/08/2022

Hirabah, as the most atrocious crime imaginable, is highly condemned by the Holy Qur'an and Sunnah of the Holy Prophet (S.A.W). The Holy Quran stated as follows:

*'The Punishment of those who wage war against Allah and His Apostle, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting of hands and feet from opposite sides, or exile from the land. That is their disgrace in this world, and a heavy punishment is their in the Hereafter.'*¹³

In the same vein, there are traditions of the Prophet (PBUH) relating to Hirabah as stated below.

- (a) 'That he who levels weapon against my community is not of us.'¹⁴
- (b) 'That who disobeys the community and goes out against them dies as a non-Muslim.'¹⁵

The above Quranic Verse and Traditions of the Holy Prophet (S.A.W) are the bases and clearly show that *Hirabah* is prohibited in Islam and punishment also provided for anyone who actually committed and found guilty of the offence. Although this is not without certain condition put in place before punishment could be inflicted on the accused. Most of these conditions are conditions are general conditions provided to be satisfied before the punishment is inflicted on the accused.

3.2 Conditions Precedent Prior to Infliction of Hadd Punishment for Hirabah

Before a person can be said to have committed the offence of Hirabah, there certain conditions stipulated to be met. One of such conditions is legal capacity of the accused person(s). The jurists

¹³ Qur'an Chapter 5 v. 36

¹⁴ Khan, M.M (N.D); *Sahih al-Bukahri*, Arabic English, Vol.12; Dar al-arabia, Beirut, Lebanon; pp.91-92

¹⁵ Siddiqi, A.H. (N.D); *Sahih al-Bukahri*, Arabic English, Vol.12; Dar al-arabia, Beirut, Lebanon; pp.101-102

unanimously agreed that the accused should be adult and sane as insane and minor persons are not strictly responsible for committing the offence of Hirabah. This is in line with the Prophetic tradition which provide thus:

*'Three categories of people are exempted from punishment and religious accountability: an infant or minor until he attains majority; and insane person until he regain sanity and a person who is asleep until he wakes up.'*¹⁶

It is important to note that jurists are divided as to the position of insane and minor person taking part in robbery together with other adult and sane robbers. Their views are expresses below.

Maliki, Shafi'i and Zahir School are of the opinion that the insane and minor are exonerated and may be punished by Ta'zir but the sane robbers are criminally liable and can be punished by Hadd.¹⁷ Therefore, it can safely be concluded based on the above view of Imam Maliki, Shafi'i and Zahir schools above that if minor or insane person takes part to commit the offence of Hiraba, they will not be punished by Hadd like adult but their punishment would be Ta'zir.

Hannafi School, on the other hand, held that the exoneration should cover both the sane and insane/minor robber.¹⁸ That is if the offence of Hirabah is carried out by both Adult and minor or same and insane person, both minor and adult should not be punished. This is because minor and insane person are not going to be punished with Hadd punishment provided for Sane and adult based on the above quoted of the hadith of the Prophet Muhammed (S.A.W).

3.3 *Juristic Opinions on Female Offenders/Kidnappers*

The jurists are divided as to the position of female Robbers/Kidnappers taking part with male Robbers/Kidnappers.

Maliki, Shafi'i and Zahir School do not differentiate between male and female kidnappers, only that the female robbers/kidnappers

¹⁶ Khan, M.M (N.D) (n12) p. 528

¹⁷ Bambale Y.Y (n2) p. 466

¹⁸ Ibid.

are not to be crucified or exiled as the male robbers/kidnappers but may be killed or amputated.¹⁹

However, according to Hannafi School of thought, female robbers/kidnappers are not liable to Hadd for Hirabah and the male robbers/kidnappers who took part with the female robbers/kidnappers are to be treated the same way.²⁰ Hannafi School, used the same judgement on the minor and insane person for Female robbers participated with the act of robbery with Male counterpart. The male also are going to be exonerated like that of minor and insane. This is the position of Hannafi School.

3.4 Jurisprudence Surrounding Site of Commission of the Offence

It is important to consider the site of commission of Hirabah before punishment is given to the offender. The place of the robbery mostly happens on the highways, forests, where the victims cannot find help for rescue. It is important to consider the position of Jurist on this.

Hannafi School is of the view that armed robbery takes place only on the highway, outside towns and villages, because rescue in the towns and villages should always be available. But where it is committed in towns and villages where the victims(s) can be helped will not be considered as Hirabah.²¹ Maliki, Shafi'i Hanbali Zahiri, Zaydia and Imamia are of the view that Hadd is applicable wherever the act is committed. That is Hiraba can take place anywhere whether frightening is there and rescue is not available or the crime cannot be prevented. We have seen the act of Armed robber been committed within the town or city but nobody dares to move to the accused to rescue the victims because of fear of being attacked or killed by the accused.

3.5 Proof of Hirabah

¹⁹ Ibid p.88

²⁰ Ibid

²¹ Al-Sarakhsi (N.D); *Al-Mabsout*; Vol. IX; p.195

There is consensus among the jurists that as a general rule, all Hudud offences are proved either by confession of the accused or the testimony of two reliable witnesses except in case of Zinah where four male witnesses are required. Then the witness may have to come from the victims themselves. There are divided opinions as to whether the victims may give evidence against the robber or not.²² Two opinions are exercised here. One opinion is that the victims may give evidence against the robbers. But the other opinion is of the view that the victims should not give evidence against the robbers, because of the enmity between them, therefore competence of the victim to give a valid testimony against the robber or kidnappers becomes doubtful.

3.6 *Divine Punishment for Offence of Hirabah*

The crimes of waging 'war against God and His apostle' (Muḥāribah) and spreading 'disorder in the land' (*fasad fi-l-ard*) were originally punished either by exile or some combination of double amputation, beheading, and crucifixion.²³ This offence thus carries capital penalty as laid down in the Quran. The provision of the Holy Qur'an is emphatic thus:

*The Punishment of those who wage war against Allah and His Apostle, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting of hands and feet from opposite sides, or exile from the land. That is their disgrace in this world, and a heavy punishment is there in the Hereafter.*²⁴

The above quoted provision of the Holy Quran is the foundation and basis of the punishment for Hirabah (Robbery) under Islamic Law.

In Hirabah, there are several alternative punishments provided i.e. execution, crucifixion, amputation of hand and foot from the

²² Bambale Y. Y (n2) p.88

²³ El-Awa, MS (1982), Punishment in Islamic Law, American Trust Publications, Indiana Polis, 10-12

²⁴ Quran Chapter 3 Verse 33

opposite side and exile. Therefore, it is open to the judge to pass any one of these sentences which he thinks fit under the circumstances of each case. Some jurists consider the amputation for Hirabah to be due to the title of "corruption of the earth" but this theory cannot be proposed because it is not supported by Hadith. However, if the kidnapper is found to be a corruptor on earth, he must be punished according to the provisions of the punishment of the corruptor on earth.²⁵

Jurists have suggested the following punishment under the following circumstances:²⁶

- (a) Where murder is committed and the property robbed, the punishment is crucifixion. Therefore, it is safe to say that where murder is committed and the ransom is taken by the kidnappers, then punishment should be crucifixion.
- (b) Where murder is committed but no property is robbed, the punishment is death sentence. That is where murder is committed but no ransom paid to the accused, then punishment can be death sentence.
- (c) Where murder is not committed but property is robbed, the punishment is cutting off a hand and a foot. That is in a situation where the victim of the kidnappers is not killed but ransom was paid, the punishment should be cutting off a hand and a foot of the accused.
- (d) Where murder is not committed, property is not robbed but the road is made unsafe, the punishment is exile or imprisonment. This is the same thing in a situation where the accused didn't succeed in their act of kidnapping of victims but road is made unsafe as a result of their attempt to commit the offence of kidnapping, their punishment should be exile and imprisonment.

²² Hojjat Aziz Allai, The punishment of kidnapping in Imamiah jurisprudence and the statute laws,
http://fvh.journals.miu.ac.ir/article_4104.html?lang=en#ar_info_pnl_share
accessed on the 22nd August, 2022

²⁶ Waliullah, M (1968), Muslim Jurisprudence and the Quranic Law, Taj Company, New Delhi, p. 159

3.7 Mode of Execution

The death sentence to be inflicted is by the sword.²⁷ There is consensus or Ijma on this method of execution. But this method may seem outmoded and insistence on this means may not be in the public. Death sentence by the sword then, is the common method of execution of inflicting the capital punishment. However, this is not the case today and the method should be changed since the circumstances have changed. Death sentence may be inflicted now by the gun.

On the method of crucifixion, the jurists are divided on it. Hannafi school and Ibn al-Qasim of Maliki School are of the opinion that the criminal should first be crucified alive and then be thrust by a javelin.²⁸

The second view, is canvassed by Shafi'i and Hanbali Schools and some of jurists of the Maliki School. That is, the criminal should first be executed in the usual manner and his body should subsequently be crucified on the gibbet for three days as warning and deterrent to other.²⁹

4. APPLICATION OF THE RULES AND PROCEDURES OF HIRABAH TO KIDNAPPING

From the analysis of the offence of Hirabah above, it is clear that kidnapping no doubt has the same ingredients and element with Hirabah. The contextual meaning of kidnapping and Hirabah given above show that the two have much in common. With respect to the mode of commission of kidnapping, it is clear as crystal that the offenders employ force with the aid of arms and ammunitions. More so, just like the case of Hirabah, kidnapping can take place either in Town or at the highway or at the outskirts of the town. This also brings some similarity in the two offences.

It is noteworthy that the act of kidnapping is an act not only against humanity but akin to waging war against Allah and His Messenger. Hence, offence of kidnapping cannot be divorced from

²⁷ Ibn Hazm (N.D.), *Al-Muhalla*, Vol. XI, P.318

²⁸ El-Awa, M.S (1982); *Punishment in Islamic Law*, American Trust Publications, Indiana Polis, pp.10-12

²⁹ Ibid

Hirabah. Hence, the rules and procedures of Hirabah as elaborately contained in Islamic jurisprudence can be made applicable to kidnapping. This thus becomes expedient in view of the fact that offence of kidnapping does not enjoy specific provisions under Shari'ah.

The point needs be made that Hirabah is one of Hudud offences expressly stated in the Holy Qur'an with specified punishment(s). The contention for applicability of the rules and procedures of Hirabah to offence of kidnapping does not therefore elevate offence of kidnapping into Hudud. By the Fiqh of Ta'azir which gives discretion to judges determining Ta'azir offences to inflict reasonable and adequate punishment in view of the nature, seriousness, prevalence of the case in question, such discretion can therefore allow a Judge to inflict punishment of Hirabah in kidnapping cases to serve as deterrent and to curb the prevalence of the offence.

5. CONCLUSION AND RECOMMENDATIONS

The article embarked on the voyage of discovery of suitable punishment for offence of kidnapping in Islamic jurisprudence with focus on the punishment of the offence of Hirabah. The reason being that the offence of kidnapping has become a recurrent tormenting crime against humanity in the recent time. The article analysed the provision of Quran Chapter 3 verse 33 and Hadith of the Prophet Muhammed as well as the opinion of different scholars of Sunni schools with respect to the provision of Quran Chapter 3 verses 33-34. The offence of Hirabah as one of Hudud offences under Shari'ah shares a number of similarities with offence of kidnapping with respect to elements and ingredients of the offences. It is established that the offence of kidnapping falls within the ambit of Ta'azir offences whose punishments are left to the discretion of Judges. By way of analogical deduction and cursory examination of the rules and procedures for offences of Hirabah vis-à-vis its punishments regime, it is therefore recommended that the punishment stipulated for offence of Hirabah be adopted for kidnapping cases within the exercise of discretion by the judge. This will go a long way in curbing the menace of offence of kidnapping to a barest minimum.