

The Concept of *Hirabah* and its Punishments: The Views of Maliki School of Law

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Abstract

Hirabah is a form of violence which is related to terrorism targeting society as well as crimes related to freedom. Islam strictly forbids wrongful transgression and denounces all forms of aggression and the use of weapons of mass destruction. Indeed, the crime of 'hirabah' is one of the most heinous offence in the Islamic criminal law, due to its evil goals, serious complication and its terrifying method, as it amounts to revolting against the rules of Allah, the government, terrorizing people, attacking, private and public property and attacking people's honour and endangering their lives. On the other hand, the Glorious Qur'an, the Sunnah of the Prophet and the unanimous agreement of Muslim scholars indicate that fighting the 'muharibun and inflicting punishment on them is an obligation. This paper attempts to examine the concept of Hirabah, its types, conditions, as well as its punishments. The paper postulates that Hirabah is not merely an offence against the human society, but it tantamount to waging war against Allah (S.W.T) and His Messenger through the use of sheer force. And waging war against the Creator and His Messenger amounts to a clear rebellion against the established principles of justice, equality and respect for all.

Keywords: *Hirabah*. Punishment, Maliki School.

Introduction

Sympathy is a noble act, no doubt about it. It is for this reason Islam exhorts Muslims to adopt a sympathetic attitude and approach, not only towards human beings but also to other creatures such as animals and plants. It is also regarded by Islam as sheer injustice to allow criminals to wreak havoc and play with the life and honour of innocent people and make them victims of their high handedness. It is then incumbent upon the state to ensure free movements, grant full security and protection to its law-abiding citizens so that they may live in peace. It is for this reason that Islam prescribes the severest punishment for those who commit heinous crimes such as *Hirabah* to deter others. According to Bambale (2003:69) "Those engaged in this crime kill innocent persons with unspeakable tortures for no fault of theirs and take away their properties. Such heartless and treacherous persons hardly deserve any leniency since they not only subvert the security of the society but also serve as incentive to other criminals to commit heinous crimes".

However, Islam ordains that a Muslim is permitted to acquire wealth, as much as he desires, so long as he acquires it through lawful means and increases it through lawful investments. Therefore, since *Shari'ah* sanctions the right to person's property, it protects it, both by means of moral exhortation and legislation, from robbery, theft and fraud. In this context, the Prophet (S.A.W) mentioned the sanctity of property in the same sentence with the sanctity of life and honour and considered robbery as contradictory to faith.

Definition of Brigandage/Highway Robbery (*Hirabah*)

Three terms are used for this crime: *al-Hirabah* (armed robbery or brigandage), *al-Sariqah al-Kubra* (the great theft) and *Qat'u al-Tariq* (high-way robbery). The three terms are used interchangeably by the jurists and in the book of

Fiqh. El-Awa (1998:7) says that, “the first term, *al-Hirabah*, is preferable as it expresses the spirit of the crime as mentioned in the relevant verses of the Qur'an”.

Doi (2007:250) states that, *al-Hirabah* or highway robbery “is a serious crime according to the Glorious Qur'an. It is an exercise of a group of armed people or a single person who may attack travelers or wayfarers on the highway or any other place depriving them of their property through the use of force in the circumstances when the victims are away from receiving any immediate help”. The Glorious Qur'an calls it “a war against Allah and His Messenger” and an attempt to spread mischief in the world.

Al-Tilmisani (2009:155) defines *Hirabah* as “that of a group of Muslims in a Muslim land cause chaos, shed blood, rob property, dis-honour people and destroy crops and cattle, thus defying the religion, morals and laws”. El-Awa (1998:8) sees it as “waiting by the way (or highway) to steal travelers' property by force and by this means obstructing travel on this road”.

Al-Jaza'iri (1996:439) and Abi al-Azhari(n.d:294) postulates that *al-Hirabah* means “a group of people pulling out their weapons in the face of the people, cutting their ways by the usurping the passersby, killing them or taking their property by force and overpowering them”. al-Asqalani (1996:440) states that, *al-Hirabah* means “depriving people of their wealth in an openly heavy-handed means”. While Sabiq (1999:557) expound that, *al-Hirabah* means, “pulling out of armed by group of people in an Islamic state to cause disturbances, bloodshed, taking people's property, destroying of crops, cattle, etc., challenging with it the religion, morals and laws in general”.

While Maliki School (2007) and al-Amin (1989) 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 the use of force in a situation where the victim(s) is or are unable to defend himself or themselves or get immediate help. It makes no difference whether such a person(s) has killed people or not and whether he is known or famous for that same act or not. Ibn Rushd (1996:547) adds that, jurists unanimously agreed that, *Hirabah* is a show of armed force and the obstruction of the highways outside the city. He further states that, *Imam* Malik maintained that they are the same whether they committed the robbery inside or outside the city.

Al-Dhahabi (1993:211) viewed it as “an attempt to spread mischief, horror, grave or widespread breach of public peace, mutiny, sedition, riotous tumult e.t.c in the world”. Therefore, it is worthy to state here that, the definitions of *Hirabah* given above clearly indicates that, robbers or briganders are those people who raise arms against the innocent people with whom they have no previous grudges or enmity.

However, there is no difference whether the groups are Muslims or non-Muslims; so far it is in Islamic state. As this is applied group of people, it is also applied to a single person if he has the strength to force and overpower people and take away their property only, kill them or not (Malik as in Sahanun 2004:641). Thus, the majority of the Malikites maintain that a person is considered *muharib* whenever he commits a crime that constitutes the crime of *hirabah*, motivated by a desire to waylay people even if this act is not accompanied by seizing money, killing or injuring honour (Al-Hattab, 1428 A.H).

Types of *Hirabah*

Hirabah can be committed through various ways. Jurists of Maliki School say that the act of *Hirabah* can be identified in the following ways as follows:

1. Robbers who could only kill but could not get away with their loot, that is to say murder is committed but no property robbed. Still it amounts to robbery.
2. Robbers who killed and took away property, that is to say, murder is committed and property is robbed.
3. Robbers took away property with the use of force without killing that is, no murder is committed but property is robbed.

4. No murder committed; no property robbed that is the robbers only frightened the residents without succeeding to rob. This is also regarded as robbery (Ibn Rushd, 1996: 459).

The four types of *Hirabah* indicated above show how robbery can take place. The first one is where murder is committed but no property robbed. It is termed as robbery. The second one is where murder took place and the robbers are able to take away the property, this is also robbery. The third one is where the robbers use their force without killing and get away with the property, this again act of robbery. The fourth one is where no murder is committed and no property is robbed, the robbers only succeeded in frightening the residents without succeeding to rob, it is still robbery.

Conditions for *Hirabah*

There is consensus among the *Fuqaha'* as the general rule that all *Hudud* offences are proved by either confession of the accused person(s) or the testimony or evidence of the two reliable persons (witnesses).

According to Sahanun (2004:643) and Bambale (2003:71), a person is said to have committed the crime of *Hirabah* when the following conditions are met:

- a) Legal capacity of the accused person(s). The jurists are unanimous that the accused should be adult and sane, as insane and minor persons are not strictly responsible for committing *Hirabah*. This is based on the Prophetic tradition thus:

رفع القلم عن ثلاثة: الصبي حتى يبلغ وعن المجنون حتى يفريق وعن النائم حتى يستيقظ (المدونة، Vol.

(4, P. 645

Three categories of people are exempted from punishment and religious accountability: an infant or minor until he attains majority; and insane person until he regains sanity and a person who is asleep until wakes up (Mudawwanah, Vol. 4, P.645).

However, jurists are divided as to the position of insane and minor person taking part in robbery together with other adults and sane. Sahanun (2004:644) opines that, *Imam* Malik is 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 punishable by *Hadd*”.

He further highlighted on the position of female robbers taking part with their opposite sex (male robbers). Malik School does not differentiate between male and female robbers, only that, the female robbers will not be crucified or exiled as the male robbers, but will be killed or amputated.

Imam Malik as in Sahanun (2004:644) attempts to explain the conditions of *Hirabah* that the brigands may be male or female as long as they are sane and adult, and as soon as they confess of committing the act or if two adult Muslims witnesses give evidence against them even if they were from those who were victims, the punishment is to be accorded.

In his discussion on the conditions of *Hirabah*, Sabiq (1996) adds that, “there must be the availability of weapons while carrying out the act of robbery and it is distant from structure”. He further elucidates that, it is stipulated in the fighters that they carry with them weapons, because it is their power which they depend on in the highway robbery.

On the issue of distance from structure, he maintains that some jurists stipulated that robbery only takes place in the desert. If they do that amongst the building, they would not be termed as fighters. This is because the obligatory is called the punishment of the highway robbery and the highway robbery in the desert.

However, according to Maliki School, wherever this criminal act is committed it is *Hirabah* and *Hadd* punishment is applicable (al-Ghazali, (n.d) and Ibn Rushd, 1996).

Punishment for *Hirabah*

Hirabah is one of the most heinous crimes and that is why its punishment is one of the severest in Islam. The Glorious Qur'an describes *Hirabah* as a grave crime and its punishments are enumerated in the Glorious Qur'an:

ثُمَّ أَتَى النَّبِيَّ الْكَافِرُ يُرِيدُ أَنْ يَبْغِيَ عَلَى النَّبِيِّ وَيَبْغِيَ عَلَى النَّاسِ كُلِّكُمْ كَيْ لَا يَكُونَ لَكُمْ عَذَابٌ
قِي كَا كَلْ كَم كِي كِي لَمْ لَمْ لِي لِي مَامَم نَرْنَزْنَم نَنْ نِي نِي
المائدة:

The recompense of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from the opposite that is their disgrace in this world, and a heavy punishment is theirs in the hereafter (al-Ma'idah, 5:33).

While giving the *Asbab al-Nuzul* for the above verse, Doi (2003:251) recorded *Imam* Bukhari reports:

... قدم رهن من عكل على النبي صلى الله عليه وسلم كانوا في الصفه فاحتوا المدينة فقالوا: يا رسول الله، أبغنا رسلاً فقال: ما أجدلكم إلا أن تلحقوا بابل رسول الله صلى الله عليه وسلم، فأتوها فشرّبوا من البأخا وأبواها حتى صحوا وسمّوا، وقتلوا الراعي واستاقوا الذود. فأتى النبي صلى الله عليه وسلم الصريح فبعث الطلب في آثارهم فما ترجل النهار حتى أتى بهم، فأمر بمسامير فأحميت فكحلهم وقطع أيديهم وأرجلهم وما حسمهم. ثم ألقوا في الحرة يستسقون فما سقوا حتى ماتوا (إمام البخاري، Vol. 8, P. 522)

Some people from the tribe of Ukul came to Prophet in Madinah pretending that they want to accept Islam. They complained to the Prophet that the weather in Madinah was not favourable to them and they suffered ill-health. There upon the Prophet ordered that they should be taken to outside Madinah to stay where the weather was better for them and drink milk from the cattle belonging to the state. They then killed the keeper and ran away with the cattle. When the matter was reported to the Prophet, he ordered that they should be chased and brought back. This verse was revealed about them (Imam Bukhari, vol. 8, P.522).

According to El-Awa (1998) there are two views concerning the link between this case and the above Qur'anic verses. First, some commentators on the Qur'an such as al-Tabari (1988) say that this case was dealt with solely according to the Prophet's own decision and the Qur'anic verses were later revealed to guide him. The other view which is held by the majority of the jurists as according to Ibn Hazam (n.d:310-312) is that these verses were revealed after carrying out the punishment in question to indicate its correctness.

However, at this juncture, it is worthy and interesting to note that, some jurists, and even some Western writers, understood that the punishment of *Hirabah* mentioned in the Qur'an and as executed in the case of the people of 'Ukal and 'Uraynah by the Noble Prophet (S.A.W) to be the punishment for apostasy in Islam.

Thus, the above verse mentioned four different types of punishment on armed robbers, which according to *Jurists* is to be applied according to the type of crime committed by the robbers. These punishments are:

1) Execution:

This is where murder is committed but no property is robbed, the punishment here is death sentence. The death sentence is to be inflicted by the sword. According to Bambale (2003:73) there is consensus on this method of execution. Death sentence by sword then, is the common method of execution of inflicting the capital punishment. 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 use of gun.

It is important therefore, to state here that all those involved in the act of robbery which causes the death of the victim must be killed. Ibn Hajar (1996:441) maintains that, in such a case neither pardon of the next of kin nor is his acceptance of compensation considered, because these are only granted in *Qisas* but not in robbery granted in *Qisas* (law of equality in punishment) not in robbery case.

2) Crucifixion:

This should be done in a situation where murder is committed and property robbed. That is to say if they kill a person(s) and take away the property, then, they should be crucified. And as for the issue of crucifixion, there are two opinions among the jurists. The first is that the criminal(s) should be crucified alive and then be thrust by a javelin. This view was held by Ibn al-Qasim of the Maliki School of law and others. The second view is that the criminal(s) should first be executed in the usual manner and his or their bodies should subsequently be crucified for three days as warning and deterrent to others. This view is canvassed by some of the Maliki jurists (El-Awa (1998:10-11).

According to Ibn Hazm as in El-Awa (1998:11) "crucifixion is a separate punishment which should not be inflicted in conjunction with any other punishment, whether before or after it. Hence, if the judge chooses to impose this punishment, the criminal should be crucified alive, left until he dies and then taken down and buried".

Scholars disagree on whether execution, crucifixion, amputation, or exile should come first. The reason for their disagreement is whether the word "or" (aw) indicates discretion or the details of gradation in proportion to the gravity of the offence. *Imam* Malik interpreted it to mean detailed gradation for some offenders and discretion in the case of others. They disagreed about the meaning of the words "or crucified", with some saying that he is to be crucified till he dies of starvation, while others said it means he is to be executed and crucified at the same time. Among the latter were those who said that he is to be executed first and then crucified. This is the opinion of Ash'hab, but it is said that he is to be crucified first and then put to death on the wooden prop, which is the opinion of Ibn al-Qasim and Ibn al-Majishun (Ibn Rushd, 19996: 548).

However, some scholars are of the opinion that the *Imam* or judge has the right to choose any of them base on the fact that (أو) in the verse means optional, therefore *Imam* is given the option to choose among these punishments. Therefore, these punishments are to be followed in consideration to the nature of crime: One who kills should be killed, who kills and takes away property should be killed and crucified. But the one who takes property only without killing his hand and foot should be cut off and who frightens without killing or taking property should be exiled.

3) Cutting of a Hand or Foot

According to *Imam* Malik, this punishment is to be inflicted where no murder was committed but property was robbed. If they take away money or any property from the people but did not kill them, then their hands and feet should be cut off from opposite side that is to cut off the right hand and left foot. If they commit robbery again, then their left hand and right foot should be cut off in the second time. Ibn al-Qasim was of the view that his left hand and right foot are to be cut-off, while Ash'hab maintained that his left hand and left foot are to be cut off.

However, there are two opinions among the jurists with regard to group robbery. The first one opines that the share of what they robbed for each person must reach *Nisab* before the punishment takes place. The second group which are Malikites opines that, if they take what has reached *Nisab* in totality, their hands and feet should be cut off even if the share of each did not reach *Nisab* (Ibn Qudamah, n.d) and (Sahanun, 2004).

4) Exile from the land

According to *Imam* Malik, this is where no murder is committed and property is not robbed, but the road is made unsafe, the punishment is exile or imprisonment. If the robbers only frightened the passers-by and cut people's way without killing

anybody or taking their property, then such robbers will be punished with exile from the land they operate on, to a strange land where they will not have supporters neither from relatives nor friends, because feeling of strangeness will weaken their strength and is likely to stop them from mischief through the land. He further elucidates that, the *Imam* should continue surveillance on them from time to time by putting eyes on them, because in some instances they may become more dangerous and may be committing crimes greater than before (Ibn Rushd, 1996:549 and Isma'il, 1997).

Hirabah as the most atrocious crime imaginable is highly condemned not only by the Glorious Qur'an but also the *Sunnah* of the Noble Prophet (S.A.W.). Thus, the following *Ahadith* are the items of proof as well as the practical application of the punishments in *Hirabah*:

عن ابن عمر رضي الله عنه قال، قال رسول الله صلى الله عليه وسلم: من حمل علينا السلاح فليس منا. (رواه البخاري الجزء 7:9).

On the authority of the son of Umar (may Allah be pleased with him) who said: the Messenger of Allah (peace be upon him) said: that he who carries upon us the weapons, is not of us (Transmitted by Bukhari Vol. 9:7).

It is also stated that: "That who disobeys the community and goes out against them dies as a non-Muslim (Bambale, 2003:70).

Summarily, the Maliki School opined that a brigadier who kills and takes away property should be killed. However, there are some divergent views among the Malikites on how the punishment of a brigander who killed and took away property should be. Some said he is to be crucified till he dies of starvation, while others said that he is to be executed and crucified at the same time. Among the latter were those who said he is to be executed first and then crucified, which is the opinion of Ash'hab. But Ibn al-Qasim and Ibn al-Majishun were of the opinion that he is to be crucified first and then put to death on the wooden prop. However, those who said he is to be executed first and then crucified maintained that funeral prayers be said for him before execution. While some, who said he is to be executed upon the prop, maintained that funeral prayers are not to be said for him as a sign of his rejection. Sahanun however, maintained that, if he is executed upon the prop, he is to be taken down and then prayers are to be said (Ibn Rushd, 1996:548-9).

From the above Qur'anic verses, traditions of the noble Prophet (S.A.W.), Malikites view, it could be understood that, it is unequivocally stated that *Hirabah* is not only prohibited but totally condemned by the religion of Islam.

Repenting before Falling into the Hand of Authority

Repentance before it is too late is recognized as a ground for having mercy of Allah and hence *Shari'ah*. But the offender will still be held responsible for all other offences committed other than robbery and have to account for the properties of the innocent victims. Therefore, if those who committed the crime of *Hirabah* sincerely repent before they are arrested, Allah (S.W.T.) forgives them. The Glorious Qur'an substantiates the statement:

ثُمَّ لَئِنْ رَجَعْتُمْ بَعْدَ ذَلِكَ عَلَىٰ أَعْقَابِكُمْ لَنَنصَبَنَّ عَلَيْكُمْ نَارًا مِّنَ السَّمَاءِ تَلْقَاكُمْ فَوَلَّيْتُمْ وَلَوْلَا دَفْعُ اللَّهِ الدُّنْيَا وَالْآٰلَةَ وَالْآٰلَةَ وَالْآٰلَةَ لَكُنْ أَنتُمْ حَرًّا ۚ وَكَذَٰلِكَ يَجْزِي اللَّهُ الْفَٰسِقِينَ ۝٣٤ المائدة: ٣٤

Except for those who repent before they fall into your power; in that case, know that Allah is Oft-Forgiving, Most Merciful (al-Ma'idah, 5:34).

Scholars have three divergent opinions on the issue of repentance. Firstly, *tawbah* takes place in two ways. One of these ways is that the robber voluntarily relinquish his activities, without necessarily appearing before the *Imam*, while the second way is to cast away his weapons and surrender himself to the *Imam*, which is the opinion of Ibn al-Qasim. The second opinion is that he relinquishes his robbery

activities and then come to his community and socialize with his neighbours. If he is caught and brought to the *Imam* before his repentance becomes manifest, the *Imam* should apply *hadd* to him. This is the opinion of Ibn al-Majishun. The third opinion is that repentance is attended through only recourse to *Imam*. Therefore, if a robber decides to relinquish his activities without recourse to an *Imam* it will not absolve him from the application of any of the stipulated punishments as long as he was apprehended before surrendering himself voluntarily to the *Imam*.

Scholars therefore differed concerning the nature of such repentance from the act of robbery, the fairest view among the divergent views is that repentance of a robber cancels the stipulated punishment of *Hirabah* on him and all the rights of Allah (S.W.T.) which he violated. However, it does not cancel the rights of people that he violated except where he killed a person the *Waliyy* or *Auliya* of the killed deserve *Diyyah*.

Conclusion

To sum up here, *Hirabah* is not merely an offence against the human society, but tantamount to waging war against Allah (S.W.T) and His Messenger through the use of sheer force. And waging war against the Creator and His Messenger amounts to a clear rebellion against the established principles of justice, equality and respect for all. So also, to wage war against the community may result in confusion, disorder and loss of peace. Therefore, whoever disturbs or attempts to disturb the system of peace and life in a society or community deserves capital punishment.

Recommendations

Based on the discussions and explanations on this research, the researcher would like to give the following recommendations which if followed may go a long way in solving the problem of *Hirabah*:

1. Muslims should adhere to the teachings of the Glorious Qur'an and the *Sunnah* of the Prophet (S.A.W). This is because the two are the most authentic sources of guidance to mankind in all walks of life.
2. To minimize and even eradicate the menace of crime of *hirabah*, the punishments stipulated by the two primary sources of Islamic law together with the views of Maliki School of Law should strictly be applied by the *Shari'ah* courts.
3. Unnecessary adjournments of cases by the *Shari'ah* courts should be stopped.
4. Masses especially the youths, should be assisted right from the local level up to the federal level in apprenticeship training and entrepreneurship. Not only that, they should be given loans in order to reduce the indices of joblessness and at the same time minimize the rate of criminals and criminalities in our dear nation.

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