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AN EXAMINATION OF THE SCOPE OF THE OFFENCES O BANDITRY (*HIRABAH*) AND INSURGENCY (AL-*BAGHYU* IN ISLAMIC LAW

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Abstract

In recent times, Nigeria has been bedevilled by terrorism championed by the *Boko Haram* on one hand and banditry on the other. Both offences are not only violent in nature, but they threaten the existence of the whole society by destroying the six interests which the Sharia intends to protect. Such as life, property, dignity and lineage. The Nigerian state has tried to tame/solve this problem either through enacting laws or amending the existing laws, use of force all to no avail and hence, this research. The aim of the research is to examine the Islamic law provisions as it relates to these offences with the intent of finding solutions where our laws have failed. This was done while utilizing the doctrinal research method which led to a finding that there is the need for amendment of the punishment section of the Zamfara Sharia Penal Code- for the offence of *hirabah* to properly reflect its definition section and also the position of the Maliki School of jurisprudence which was found to be all encompassing and accommodates the changing nature of the two offences. It was also observed that there is a conspicuous misunderstanding of the Sharia and the methodology of Islamic politics and public policy by the *Boko Haram* and hence it is recommended that students of religious training should be properly thought Islamic Sciences that relates to Islamic jurisprudence.

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1.1.1 Introduction

It is the responsibility of a state to ensure the protection of the six essential interests known as the *dharuriyyat* which are life, religion, property, intellect, honour and lineage. Failure to do so shall lead to chaos and anarchy in that society and hence the need to proscribe certain acts that threaten such interests. This is one of the *maqasid* (objectives) of the Shariah. While some offences target some of these interests, the offences of *hirabah* (Banditry) and *Baghyu* (insurgency) target all these six interests. Wherever any of these two offences exist with impunity, there is bound to be anarchy and nobody is safe. It is due to the consequences of these offences that the Almighty Allah (S.W.A) in Suratul Ma'idah equates it with 'waging war against Allah and the Prophet.'[1] The Prophet said whoever takes up arms against us is not one of us.[2]

The two offences are similar in nature because they all involve high degree of violence. They also have similar consequence which is creation of chaos and anarchy in the society. They are however different both in motive and the *mens rea* (evil intent). While in *hirabah* the intent is to plunder with impunity, in *baghyu* the intent is to change the government with or without a justifiable reason. This subtle distinction is not discernable to many, and has led to a botched approach by the security forces in Nigeria toward the groups so that the problem has worsened over the years.

Nigeria, for over a decade, has been faced with these two offences. The escalation could be traced to certain factors such as poverty, globalization, moral decadence, failure in parental upbringing, injustice, among others.[3] The Nigerian civil war of 1966, led to the proliferation of arms and after the war, bandits had access to such weapons and some of the war veterans also turned to bandits or abettors of such and this led to the escalation of the hitherto existing acts of armed robbery and its further spread from the southern part of the country to the northern part. The government reacted to this by promulgating/amending existing laws and providing stiffer penalty of death.[4] Similarly, with the *Boko Haram* crisis, more sophisticated arms became available. In addition to

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[1] Al-Qur'an 5 v. 33

[2] Al-Asqalani, H.H., (nd), *Bulugh al-Maram min Adillatil Ahkam*, Dar-us Salam, Riyadh. Hadith No.1022 p.424.

[3] Ejekwonyilo, A. UPDATED:Nigerian Government Gazettes declaration of Bandits as Terrorists-January 5, 2022. Retrieved from https://www.premiumtimes.com. On27/8/23 at 5.10pm.

[4] Assanvo W and Okereke D. (2019), Nigeria's Kidnapping Crisis- ENACT Africa. Retrieved from www.enactafrica.org. on December 2, 2021 at 3.00pm.

insurgency, the *Boko haram* terrorists also engaged in *hirabah* as a means of acquiring funds, forced fighters, forced wives and also as a show of might and in the process they have killed, kidnapped, raped, seized property, forcefully married their female victims and destroyed property amongst others.[5]

With the decimation of the insurgents by the government, most of them, armed with sophisticated weapons turned to pure banditry and spread chaos across the country. The government responded both by the force of arms and amendment of the laws. It went to the extent of declaring them as terrorists in November 2021[6] but the number of victims of such a violent crime is still on the rise. Statistics available according to the United Nations Office of Drug Control (UNODC), has shown a consistent increase in the number of victims of both banditry and insurgency.[7] In 2007, 277 persons were kidnapped, 309 in 2008. In 2009, 703 persons were kidnapped and the figure rose again to 738 in 2010. In 2012, it came down to 600 persons. However, in 2013 it rose to more than 1000 persons. It went down again to 886 in 2015 and between May 2016 and May 2017 it went down further to 630 persons. It was said to be relatively stable between 2017 and 2018 and in September of 2017, the Senate passed a bill imposing death penalty for abduction, wrongful restraint and confinement for ransom.[8] In 2019, over 1.071 were reported as killed and 4,556 in 2020. However, in the first quarter of 2021 (Jan.–March), banditry alone claimed 906 lives followed by insurgency by *Boko Haram* claiming 207 lives while 1,774 persons were abducted.[9] A total of 2887 were kidnapped in 2021 alone. Even though these statistics may not have captured unreported cases, it is evident that these atrocities are on the rise. There is clearly a decline in the destruction of life and property by the insurgents but there is a rise in that caused by the bandits.

1.1.2 Robbery/Banditry (*Hirabah*)

Ibn Qudamah defines *hirabah* as the use of a weapon against people in order to appropriate their property through the use of force in situation where assistance

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[5] Adesomoju, A. 4,556 Persons Killed in Violent Attacks, kidnappings, clashes in 2020-Report.February 22, 2021. Retrieved from https://www.premiumtimes.com. On27/8/23 at 5.15pm.

[6] Federal Republic of Nigeria Official Gazette dated November 29, 2021. Volume 108.

[7] Ewepu G. Insecurity: Violence Kills 4,556 Nigerians in 2020- Global Rights-February 27, 2021. Retrieved from www.vanguardngr.com.

[8] Assanvo W and Okereke D. (2019), Nigeria's Kidnapping Crisis- ENACT Africa. Retrieved from www.enactafrica.org.

[9] Ewepu G. Insecurity: Violence Kills 4,556 Nigerians in 2020- Global Rights-February 27,2021. Retrieved from www.vanguardngr.com.

or help is difficult.[10] It is also defined as the use of arms by a group of people within the territory of Islam for the purpose of creating chaos under which the sanctity of lives, property, religion, honour, dignity and public order will be violated.[11] Ibn Juzay, on the other hand, defined *hirabah* as the act of taking up arms and preventing the use of roads or highways for the purpose of plundering the property of people, regardless of whether this was done within the city or outside of it.[12]

Under Maliki principles, it appears that this offence is extremely vast and it covers the case of a thief who, after being confronted by an owner, turns violent against him.[13] It also covers those who harbour robbers or act as guides for them.[14] Hirabah may be committed against property, life and honour.[15] In Nigeria the offence has been referred to in recent times as "banditry" in which acts of robbery, kidnapping, rape and extortion of property are freely committed.

1.1.3 Proof of *Hirabah*

The offence of *hirabah* can be proved by confession and also by two honourable witnesses (*'adlain*).[16]

(a) Confession:

Concerning the matter of confession it should be understood that if the *Muharib* turns himself in before he is apprehended, all public rights against him which were committed by way of *hirabah* will lapse and he will be held responsible for all atrocities that were committed against public rights (but not in the act of *hirabah*) such as *zina, Shurb al-khamr,* and also for private rights violated (even if in the act of *hirabah*) as violations against private rights are not extinguished by repentance.[17] Here it should be stated that homicides will be dealt with under the heading of *qisas*, and not under the heading of *hirabah* which means that the robber can negotiate his way out of the death penalty if he is able to convince the

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[10] Ibn Qudamah (1969) *Al-Mughni*, Vol.9 p.146 as quoted in Said M.I. Islamic Criminal Law And Practice in Nigeria (20111/1432 AH) UDUS Printing Press, Sokoto p.38.
[11] Sabiq S (1985/1405) *Fiqhus Sunnah*, Dar Al-Kitab Al-Arabi, Vol.2 7Ed. p.464.
[12] Ibnu Juzay, (n.d.), *al-Qawanin al-Fiqhiyyah*, Dar al-Fikr, p.311.
[13] See Ibn Farhun, (n.d.), *Tabsiratul Hukkam fi Usul al-Aqdiyah wa Manahij al- Ahkam*, Mustafa al- Babil Halabiy (Misr) vol.II, p.273.
[14] Al-Dasuqi, *Hashiyah al-Dasuqi 'ala al-Sharh al-Kabir lil 'Allamati al-Dardir*. vol.IV, p.348.
[15] Sabiq S, Op. Cit. Vol.2 7Ed. p.464.
[16] Ibnu Rushd, (n.d.), *Bidayatu al-Mujtahid wa Nihayatu al-Muqtasid* Dar al-Fikr, Vol. II, p.343.
[17] Al-Adawiy, (n.d.), *Hashiyatu al- 'Adawi, Sharh Abi al- Hasan al-Musamma al-Kifayatu al-Talib al-Rabbani li Risalati ibni Abi Zaidin al-Qairawani fi Madhhabi al-Imami Malik*, Dar al-Fikr, Vol.II, p.320. See also al-Dasuqi, op. cit. vol.IV, p.350.

heirs of his victim(s) to collect compensation or to pardon him.[18]

(b) Testimony of Witnesses:

The offence of *hirabah* may also be proved by way of testimony of witnesses who may even be the victims of the offence. This is the opinion of the majority of jurists.[19] Imam Ahmad does not allow the evidence of victims because, to him, they are enemies of the offender and cannot be expected to maintain credibility in their testimony.[20]

It is humbly submitted here that the position of the majority is more in line with ensuring justice considering the nature of the offence. This is an offence that is committed where the only persons present are the victims. If their testimony is rejected for fear of lack of credibility in the testimony of the victims, then, such offenders will never be apprehended. Especially in view of the fact that, being a *hudud* penalty, technology cannot be utilised for the purpose of evidence.

According to the Malikis and Shafi'is, the evidence of the victims is admissible only where they testify for other victims and not for themselves or close relatives.[21]

In the words of Ibn Farhun:

> The testimony of victims of *hirabah* is admissible to prove that they were robbed. This is the opinion of Malik, Ibn al-Qasim and Ashhab. This is because it is a *hadd* offence specified by Allah Most High but it is the evidence of one *for* the other that is admissible, not the testimony of a victim/witness in his own favour or of his son. However, he may testify that his son was killed by the offender because the homicide was brought about by way of *hirabah* and not by way of *qisas* as there is no room for pardon. And if he had so testified against the offender after he had repented, the evidence will not be admissible because that will be giving evidence in respect of his own claim.[22]

According to the Malikis, only the evidence of honourable witnesses is admissible. However, where several non-honourable but male witnesses such as slaves, and other non-Muslims testify against a suspect, that would amount to a

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[18] See al-Dasuqi, op. cit. vol.II, p.350.
[19] Ibn Rushd, op. cit. vol.II, p.343, Ibn Juzay, op. cit. p.311.
[20] Ibn Qudamah, (1348) *al-Mugniy*, Matba'ah al-Manar, (Cairo) vol.IX, p.324.
[21] Ibn Rushd, op. cit., vol.II, p.343.
[22] Ibn Farhun (1958), Op. cit vol.II, p.280.

ground for punishing the offender by way of exile and beating (*ta'deeb*).[23] It is also trite law under Maliki Jurisprudence that where there is overbearing evidence against a person known to take to offences such as *salabah* i.e. *hirabah*, (brigandage), such evidence having been received from victims of their offences who are honourable witnesses and who testify to acts of homicide, or where a lady "clutches" a man and screams rape and there is clear evidence of her being defiled - all these cases are to be enforced without allowing the offender to enter into his defence.[24]

This position has been strongly advanced by Ibn Farhun, in the *Tabsirah*. He argues that this is the opinion of eminent Malikis such as Ahmad bn Mutarrif, Ishaq bin Ibrahim and even Imam Malik himself. He mentions that, on one occasion, Malik was present at the execution of the penalty of 600 lashes upon the person of one offender who was "clutched" by a boy who claimed he had defiled him and was bleeding as a result, and Malik did not express disapproval of the penalty. According to Ibn al-Qasim, "twenty witnesses are sufficient to me, how can their testimony be dispelled"?[25] Ibn Farhun rounds off this discussion by saying:

> The clear truth about this is that where there is overwhelming evidence against a suspect relating to heresy or similar offence, attempting to repel all that evidence is fruitless because he cannot impeach each and every (one of the twenty honourable) witnesses, or adduce contrary evidence that would counter theirs. The right of defence has only been advocated in the sense of its being obligatory in matters relating to financial matters, and the one who stretches his legal mind will find the right legal conclusion if Allah wills so.[26]

This position is obviously due to the principle of *maslahah* (public policy). Where the offender becomes notorious so that scores of honourable people know him by that reputation of his, then there is no need to waste the court's time by allowing him to enter into his defence. What, for instance, can a person such as Lawrence Anini ("The Law") possibly present as his excuse for committing his

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[23] ibid.

[24] ibid, vol.I, p.169. It should be noted that where the standard of the *hudud* has not been attained, the prevention of the suspect from entering into his defence must be understood to mean he will be punished by *ta'zir* and not *hadd*.

[25] Ibid. By the way, 'clutching' (*ta'leeq*) which literally means to cling to or to clutch, does not mean the physical act of holding onto the accused but, rather, the victim being able to report the matter promptly so that his or her allegation becomes highly probable. It is this element that the jurists rely upon in this type of matter.

[26] ibid.

so many acts of robbery? In the case of *Guri v. Hadijia N.A.*[27] the accused was sentenced to death upon a charge of homicide and armed robbery. The Emir's Court of Hadejia refused to allow him to enter a defence and also to give evidence on his own behalf because, according to them, under the principle discussed above, where there is evidence against the accused, his right to enter a defence is lost and the rule of *I'dhar* lapses. Secondly, a party cannot be a competent witness for himself under Islamic Law.[28]

It is clear that the trial court misunderstood this subtle point and ended up misapplying the law. It appears that this misunderstanding found its way even to the Federal Supreme Court. The error was in the misreading of the text of the *Tabsiratul Hukkam*, and the trial court's reliance on the opinion of assessors who obviously did not understand the position well, and holding that the Maliki principle that jettisons the defence of hoodlums and bandits in the face of overwhelming evidence also applies to scanty evidence, which was the case in Guri's matter. This is certainly not the position stated in the *Tabsirah*, and the Federal Supreme Court failed to find the true position of the Law and simply assumed the declaration of the trial court to be the correct position of the Malikis even though they must have known that that conclusion was absurd. It is our humble opinion that the appellate court should have read the words of the *Tabsirah* over again since it was the primary authority cited by the lower court. It is also likely that the members of the appellate court were not capable of comprehending the text of the *Tabsirah* as it is written in the Arabic script, not intelligible to many common law trained lawyers.

1.1.3 Punishment for *al-Hirabah*

The punishment for *hirabah* can be said to be the severest of the *hudud* punishments and it is stated in Suratul Ma'ida[29]where Allah said:

> 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 off of hands and feet from opposite sides, or exile from the land. That is their disgrace in this world, and a heavy punishment is theirs in the hereafter."

[27] (1959) 4 F.S.C. 44.
[28] See Ibn Rushd, op. cit., vol.II, p.343.
[29] Al-Qur'an 5 v. 33

The Prophet □ is also reported to have said that "Whoever raises weapons against my nation is not of us."[30] The jurists are divided as to how these punishments should be inflicted which is mainly due to the interpretation of the word 'او'(or). While some of the jurists interpret it as conjunctive, some regard it as disjunctive. Imam Malik understands it to mean that the judge is given an option to choose which of the punishments to apply; except where the offence is accompanied by killing then the judge is bound to sentence the offender to death by execution or impalement.[31] But this can only be done by a judge who is a qualified *mujtahid.*

The jurists of the Zahiri School state that the judge has the option to apply only one of those punishments and not two of them at the same time bearing in mind the gravity of the offence.[32]

As to the other schools, which form the majority, each of those punishments is designed for the different offences that might be committed according to its gravity. Therefore, where the offender(s) merely terrorized without doing more, the punishment is exile according to Imam Abu Hanifah and Ahmad which could also mean imprisonment while Imam al-Shafi'i prescribes ta'zir.[33] Where the offender(s) terrorized and seized property, the punishment is amputation of the right hand and left foot.[34] Where they terrorized and killed the punishment is execution by the sword.[35] And where the offender(s) terrorized, seized property and killed, then, according to Imams al-Shafi'i, Ahmad, the two disciples of Abu Hanifah and the Zaydiyyah, the punishment shall be execution and then impalement. Imam Abu Hanifah gives the judge two options, either to amputate the right hand and left leg, then execute (by the sword or by impalement) or execute by the sword only.[36]

It is humbly submitted here that the position taken by the Maliki School is a better one considering the fact that *hirabah* is such a violent act which in the process, a lot of other offences, not restricted to frightening, seizure of property or killing can be committed. Therefore restricting the punishments to these

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[30] Al-Asqalani, H.H., (nd), *Bulugh al-Maram min Adillatil Ahkam*, Dar-us Salam, Riyadh. Hadith No.1022 p.424.
[31] Ibn Rushd, Op. Cit., Vol. II, p.341.
[32] El-Imairi M. T. (1983) Crimes with Fixed Punishments in Islamic Law (AL-HUDUD) (unpublished) p.147.
[33] ibid
[34] Ibn Rushd, Op. Cit., Vol. II, p.341.
[35] ibid.
[36] El-Imairi, M.T. Op. Cit., p.151.

offences is constricting the scope of *hirabah*. Any person present in Nigeria can attest to the fact that the *muharibun* commit more than these crimes in their act of *hirabah*. They seize property, kill, abduct/kidnap, rape, utilize drugs, extort among other acts. By adopting the position of the majority in S153 of the Zamfara Shari'a Penal Code, the same mistake is made. While S152 of the Code provided a vast scope that could encompass all offences, its S153 negated it. We may be quick to exonerate the drafters of the Code as the authority given by the Malikis to administer such verdicts is limited to the *Mujtahid fil-Madhhab*.

1.1.4 Mitigating Circumstances for Cases of *Hirabah*

There are certain situations where the offender will not be inflicted with the *hudud* penalty due to certain reas. . either inherent in the accused or due to certain circumstances. These are regarded as mitigating factors, and are discussed hereunder.

1. **The female bandit (*al-muharibah*).**

   She has the same status with the male robber according to the Maliki, Shafi'i, Hanbali and Zahiri Schools and, as such, the *hudud* penalty applies. But the punishment of exile and crucifixion do not apply to her because that might lead to immorality and also because the body of a woman is *aura* and should be decently covered and it may be exposed during crucifixion.[37]

   Imam Abu Hanifah, on the other hand, does not apply the *hadd* punishment on the female bandit but rather *ta'zir*. He placed reliance on the *hadith* of the Prophet □ which says: "Do not kill a woman" the interpretation of which he extended to cover the female bandit. And, as a result, other members of the gang will also not be punished by *hadd* because of the presence of a female. Imam Abu Yusuf, however, followed the majority. But as stated by the majority relying on the actions of the Prophet | | and that of his *sahaba*, the *hadith* only contemplates women that do not participate in situation of war. It is reported that the Prophet | | had ordered the stoning to death of *Ghamidiyya* for committing *zina*.[38] He also ordered the killing of Um Marwan when she apostatised.[39] Hence it is submitted that the analogy made by the Hanafi School should be rejected as it contradicts clear texts and practice of the Prophet | | and also the present reality of the nature of banditry in existence, especially in Nigeria, where

[37] ibid.
[38] Al-Asqalani, H.H. Op. Cit. Hadith No. 1041 p.432-434.
[39] ibid p.434.

women have been found to be not only active participants but leaders of such gangs. Otherwise all the bandits will need to escape the *hadd* punishment is to co-opt a female into their group.

2. **The Minor Offender**

A minor is defined as a person who is under the age at which a person legally becomes an adult and is responsible for his actions.[40] A minor lacks complete legal capacity as such *hudud* penalty will not apply on the minor relying on the *hadith* where the Prophet □ is reported to have said: "Three persons are not responsible – a child until he attains the age of puberty, an individual in sleep until he awakes and an insane until he recovers." Punishment of an indiscreet child is purely disciplinary and not criminal and it is left to the person in authority to choose the appropriate punishment. In other words, *ta'zir* applies. Therefore, where a child is found to be part of a gang of bandits, the *hudud* penalty will not apply on him but the others will be subject to *hudud*. Imam Abu Hanifah, however, is of the view that this will not only be a mitigating factor for the minor but for the other bandits as well because of the existence of *shubhah*.[41]

It must be stated, however, as in the case of the female bandit, that the position of the majority is more realistic and tilted towards ensuring justice because the reason for the exemption of the minor, which is lack of understanding due to immaturity, does not apply to the adult bandits. Otherwise all the members of the gang of bandits need to do to evade justice is to co-opt a minor.

3. **Where the offender is an ascendant of the victim.**

Where the ascendant of the victim is the offender or a member of the brigands, the *hudud* penalty will not apply to him because of the presence of doubt of ownership of the property based on the provision of the *hadith* of the Prophet □ where he is reported to have said: "You and your property belong to your father."[42] And also the hadith which provides that "A father is not to be killed for a son'.[43]The majority of the jurists maintain that the

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[40] Oudah, S.A. (2005), Criminal Law of Islam, Adam Publishers and Distributors, New Delhi. Vol. II. p.330.
[41] Al-Kasani, infra. P.12
[42] Al_Asqalani, II. II. Op. Cit. p.409.
[43] ibid.

other gang members will be subjected to *hudud.* Imam Abu Hanifah, however, dissents.

It must be stated, however, as in the case of the female bandit, that the position of the majority is more realistic and tilted towards ensuring justice because the reason for the exemption of the father, which is the tradition of the Prophet (S.A.W), does not apply to the other bandits. Otherwise all the members of the gang of need to do to evade punishment, is to co-opt an ascendant of the victim. However, where the bandits commit other offences, apart from seizure of property, it is our humble opinion that the ascendant should be subject to the *hudud* penalty as the *hadith* above is in reference to ownership of pr rty or mistakenly, causing the death of his descendant.

Where the offender is unarmed

According to Imam Abu Hanifah, Ahmad and Shafi'i, it is a necessary condition that the offender be in possession of a weapon or, at least, something similar to a weapon such as a stick at the time of the commission of the offence. However, the majority of the jurists do not recognise this as a requirement. They maintain that it is sufficient if the offender displays his physical might.[44]Though some Maliki jurists such as Ibn Rushd have mentioned taking up of arms in their definition, Al-Dasuqi, whilst commenting on the text of the *Mukhtasar*, says: "it has been clearly stated in the *Mudawwanah* that if the bandit sets forth unarmed in order to rob, relying on his sheer physical might and obstinate defiance of the law, he shall be deemed a *muharib*."[45] The Maliki School even includes those who look out for the *muharibun* and those that act as guides or those that harbour them as equally guilty of the offence of *hirabah.*[46] This is because "their assistance dampens the chances of the victims of obtaining help and strengthens the chances of the *muharibun* succeeding.[47] What is important to the Malikis is that the victim is unable to obtain help even if he was capable of resisting the *muharib* himself.[48]

It is the humble submission of the writers that the position of Maliki is the most preferred considering the fact that, although the use of weapon creates

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)udah, S.A. Op. Cit. vol. iii, p. 91.
\l-Dasuqi, Op. Cit. Vol.V.p.348
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the impression that the criminals are serious in their threat, physical strength or force could also have the same effect of inflicting terror in the victim. Once physical strength instils fear and property is seized in the process, the cutting off should apply.

5. **Where the victim is not a 'protected' citizen of the state.**
According to the majority of the jurists, the victim must be either a Muslim or a *dhimmiy*[49] and it doesn't matter whether it is committed in non-Islamic territory (*dar al-harb*) or in Islamic territory (*dar al-Islam*), the *hudud* will apply. Where, however, the offence is committed by a member of Muslim Army in the *dar al-harb*, penalty will be suspended until the army returns to base.[50]
This position can be justified as more in line with justice as a person has to voluntarily subject himself to the jurisdiction of a particular law. A Muslim subjects himself to the jurisdiction of Islamic law by being a Muslim and a *dhimmy* by the payment of *jizyah*.

6. **Where the value of the property seized is not up to the *Nisab*.**
The majority of the jurists will not inflict the *hudud* penalty where the value of the property is not up to the *nisab* which is 3 *dirhams* according to al-Shafi'i and Imam Ahmad; and 10 *dirhams* according to Imam Abu Hanifah.[51] They rely on a hadith of the Prophet ﷺ saying "There shall be no cutting off unless the value reaches ¼ of a *Dinar*.[52]And according to Imams Abu Hanifah and al-Shafi'i the *hudud* will only apply if each of the bandits takes away property amounting to the value of the *nisab* and not collectively while, Imam Ahmad says it should be collectively.[53]
The Maliki School however, dismisses this understanding on the basis that the above mentioned *hadith* relates to theft (*sariqa*) only and no such tradition or other directive has been stated in connection with banditry/*hirabah*.[54]In the absence of a clear text providing for *nisab* in the cases of *hirabah*, it is humbly submitted that it should not be considered at all.

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[49] ibid.
[50] Audah, A, (1969) Al-Tashri' al-Jina'iy al-Islamiy, Vol.II, p.287.
[51] El-Imairi, M.T., Op. Cit. p.141.
[52] Al-Asqalani, H. H. Op. Cit. Hadith No. 1053 p.439.
[53] El-Imairi M.T. Op Cit., p.142.
[54] ibid.

7. **Repentance of the bandit before arrest.**

The jurists consider the repentance of the bandit before being arrested as a ground for remitting the *hadd* punishment relying on the text of the *Qur'an* which provides thus: "Except for those who repent before they fall into your power. In that case, know that Allah is Oft-Forgiving, Most Merciful."[55]

Various opinions have been reported as to what constitutes repentance. Ibn Juzay reports that some jurists have held that repentance means the abandoning of the practice of the act of *hirabah*. Others say that it is his turning himself in, and others, still, have held that repentance can only be the *muharib's* abandoning of the practice of *hirabah* and turning himself in.[56]

Although the schools agree to waive the *hadd* of *hirabah* from the repentant bandit and although they agree that such a bandit should account for the rights of the individual violated, they disagree over the rights of Allah. The Maliki School says that the bandit who repents is to be punished for all the crimes he committed during the days of *hirabah* whether they are rights of Allah or that of an individual. This means he must account for all the killings, properties seized, adultery/fornication committed, intoxication, rape, defamation etc. they place reliance on the precedent of the Prophet □ that when Ma'iz and al- Ghamidiyyah confessed their commission of adultery, he did not pardon them but ordered the infliction of the *hudud* penalty of *rajm* on them. The Prophet □ also ordered the amputation of the hand of Umar Ibn Somra after confessing to the offence of theft.[57]

It is humbly submitted here that the position of Maliki School is the best for both the accused and the victim(s) or heirs to the victim(s) where the victims were killed. This is because this will help in ensuring justice and give the victim(s) or their families a closure. After all, justice is for the offender, the victim and the society.

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[55] Suratul Ma'idah:34.
[56] Ibn Juzay, Op. Cit. p.311
[57] El-Imairi, M.T., Op. Cit. p.141..

1.1.5 *Hirabah* (Banditry/Robbery) in Nigeria

Prior to the civil war, the offence of robbery in Nigeria was governed by the provisions of the Criminal Code[58] in the south and the Penal Code[59] in the north. But the incidence of armed robbery escalated after the civil war due to the mass abandonment of fighting zones which resulted in various types of weapons finding their way into the hands of criminals. As a result of this, Decree No. 47 of 1970 was promulgated with severe punishment and a speedier mode of trial. This Decree was amended in 1971 and 1974, 1986 and 1999 respectively.[60]

Section 1(1) of the Act[61] provides a punishment of 21 years imprisonment if the robbers are unarmed while subsection (2) provides for the death sentence by hanging or firing squad if armed with firearms or an offensive weapon, or in company of a person so armed or if immediately before or immediately after the time of the robbery, the offender wounds or uses any personal violence to any person.

Section 2(1) provides for a minimum of 14 years and a maximum of 21 years for attempted robbery without arms while Section 2 (2) provides for life imprisonment for attempted robbery with arms. Section 6 (4) provided that abettors are also to be punished in the same manner as the principals. In addition to these punishments, Section 7 provides for forfeiture of all the properties of the convict to the state where the property is situated or found.[62]

Notwithstanding this Act, we also have various state laws dealing with the problem of robbery such as the enacted Shari'a Penal Codes of the states. For example, Section 152 of the Zamfara State Shari'a Penal Code defines *hirabah* as:

> Whoever acting alone or in conjunction with others in order to seize property or to commit an offence, or for any other reasons voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant wrongful restraint in circumstances that renders such person helpless or incapable of defending himself, is said to commit the offence of *hirabah*."

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[58] S406
[59] S296
[60] Presently Robbery and Firearms (Special Provisions) Act. Cap R11. L.F.N. 2004
[61] ibid
[62] Forfeiture of Assets No. 28 of 1986. (as amended).

According to the S153[63], merely being a member of a gang of *muharibun* attracts a ta'zir punishment. In fact going by the provision of S152 of the Code, any offence committed or attempted, either by a person or group of persons, in circumstances where fear is instilled and a person is rendered helpless amounts to *hirabah*.

It is evident from these definitions, though not exhaustive, that the offence of *hirabah* need not involve seizure of property but rather covers any act of chaos which threatens the six interests sought to be protected by the Shari'a which covers the protection of life, honour, intellect, lineage, property and religion.

On the 27/11/2021, the Federal government obtained an ex parte order proscribing bandits known as 'yan bindiga' and 'yan ta'adda' and declaring them as terrorists.[64] This means the activation of the Anti- Terrorism Act against the bandits. Specifically, the court declared "the activities of the 'Yan Bindiga Group'and the 'Yan Ta'adda Group', as well as other similar groups, either groups or as individuals by whatever names they are called, in any part of the country, particularly in the North-West and North-Central geographical zones, to be 'acts of terrorism and illegality and banned."[65]

1.2 *Al-Baghyu* (Rebellion):

The *ahl al-Bugat* are those who take up arms against a legitimate government basing their acts upon an erroneous justification such as the *Khawarij*,[66] or they could be persons who separate from the legitimate government by refusing to give allegiance to the Imam or refusing to pay tribute.[67]

The rule concerning their case is that they are to be required by government to return to the mainstream, and if they do so they shall be accommodated and there shall be no penalty. However, if they refuse the *Imam* may attack them and their blood ceases to be guaranteed. The implication of this is that they are liable to be killed in the course of battle, even though they are not confronted to be executed, but rather to be subdued.[68] Therefore, even on the battlefield, they are not to be treated as robbers (*Muharibun*) or disbelievers (*Mushrikun*). Their property shall not be confiscated and they are not to be executed after being captured unless

[63] Zamfara State Sharia Penal Code 2000
[64] Finally, Court declares bandits terrorists, FG to Gazette Ruling. November 27, 2021. Retrieved from www.thisdaylive.com.
[65] ibid
[66] Ibnu Juzay, op. cit. p.321; Ibnu Farhun, op. cit. vol. II, p.280.
[67] ibid.
[68] Ibnu Juzay, op. cit., p.321.

there is a strong indication that they will relapse into their rebellion, or the battle is still raging.[69] If they flee the battlefield, they are not to be pursued and they are not to be held liable for previous destruction to life and property except they rebelled without any justification (*ta'weel*).[70] Their injured are not to be finished off and the disbelievers are not to be used against them. They are however subject to imprisonment and lashes if captured.[71]

War against rebels is distinguishable from war against the polytheists in eleven ways:

1. Attacks against rebels are aimed at repelling them and not killing them;
2. Those fleeing amongst them shall not be killed;
3. Those injured shall not be finished off;
4. Their captives shall not be killed;
5. Their property shall not be treated as booty;
6. Their children shall not be taken captive;
7. The polytheists shall not be used against them;
8. Money payments shall not be collected from them in the name of a peace treaty or settlement;
9. Artillery power shall not be used against them;
10. Their houses shall not be burnt down; and
11. Their trees shall not be cut down.[72]

War against robbers is similar to war against rebels except in five instances.

1. It is permissible to shoot to kill robbers;
2. Their fleeing members can be killed;
3. They shall be held liable for the destruction to life and property during the conflict and even at other times;
4. It is lawful to imprison their captives in order to ensure their rehabilitation; and
5. Property seized by them as tax and *zakah* shall not lapse for those who are under obligation to pay as in the case of usury contrary to the view of Ibnu al-Majishun.[73]

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[69] Ibid. See also Ibnu Rushd, op. cit., vol.II, p.343.
[70] Ibnu Juzay, op. cit., p.321.
[71] ibid.
[72] ibid.
[73] ibid.

1.2.1 Insurgency in Nigeria Today

To the *Boko Haram*, and similar groups such as Ansaru, and ISWAP, the *Shari'ah* (Islamic law) should be implemented at all costs. To them, Muslims in Nigeria have failed to recognize the *Shari'ah* and have, therefore, become infidels that deserve to be killed. To them, whoever does not accept their point of view is an infidel. This position is very close to that of the Khawarijis that withdrew from the armies of 'Ali and Mu'awiyah (RA) after the Battle of Siffain. They argued:

1) That 'Ali and Mu'awiyah had left the fold of Islam by subjecting their differences to arbitration, whereas Allah states in the *Qur'an*,"*inil hukmu illa lillah*" meaning "the command is for none but Allah."(*al-Qur'an*:12;40). Therefore, those that elect to submit themselves for arbitration are disbelievers in Allah's exclusive rights to sovereignty or divinity;
2) That those who commit major sins are infidels. Therefore, one who steals, or commits adultery or who fails to perform an obligatory act must be seen as an infidel because of the statement in the *Qur'an*: "...The Station of Ibrahim, whoever enters it attains security; pilgrimage thereto is a duty men owe to Allah-those who can afford the journey; but if any deny faith, Allah stands not in need of His creation."[74]

To the proponents of this position, and many *Boko Haram* members, there is no justification left for a Muslim to keep away from the full enforcement of the Islamic Law. One must find a means to fight his way out of the "sinful *status quo*". The slogan "*Boko Haram*" literally means "The Book is not lawful. "We must be quick to add that the word 'book' (*boko*) represents the Latin script that replaced the Arabic *slate* (*lauh;allo* in Hausa). It should not be forgotten that after the invasion of the British Colonialists, much of the populace of Northern Nigeria refused to embrace the philosophy and culture of the Colonial Masters. Many avoided schools and the Northern leaders had to sue for a delayed independence date until the northern students that were ferried overseas for diplomas, degrees and other distinctions had started returning back to the country. It was as if the book system had defeated the *Allo* system and the attitude shown by many in the North was that of resentment, revilement and disgust. It is also true that the policies of the Colonial government also shunned the masses. The Indirect rule system, the Government Reserved Areas (GRAs)

[74] Qur'an:3;97.

and the tendencies of the white man to amorality, wine and wearing shorts created a large barrier between the British and the colonized northerners.[75]

After independence the lot of the ordinary man did not improve to any appreciable level, those who could not speak the official language were left out of the scheme of things, even if they were literate in *'Ajami* or Arabic scripts. Up to this day, Muslims still see themselves as the most financially excluded group in the country. In a recent study, Dogarawa (2011) found that the main reason for that is that the financial products available are interest based which is highly abominable in the *Shari'ah.* To make matters worse, many have argued that Nigeria is a secular state. Greeko-Romanic features are highly prized in Nigeria. The Solar calendar is preferred over the Lunar, Norse days of the week, names of the months, and Christian-based rest days of the week are imposed on Muslims, and the learning process in the schools is humanitarian and not based on religion. Furthermore, the political system of the country is democracy which is in many ways opposed to Islam especially because of its recognition of capitalism and free market and the election system which permits campaigning, lobbying and placing sovereignty in the people (not in Allah). These are all strongly prohibited under the *Shari'ah.* It can also be said with a very strong degree of accuracy that the exploits of the *al-Qa'idah, Shabab,* AQIM, ISIS/ISIL movements have also provided impetus to the defences held by the *Boko Haram* sect.[76]

1.3 Conclusion

The twin offences of *hirabah* and *baghyu* are the most violent of all offences. They are the two offences that can destroy an individual, a family and the society. The *Shari'ah* has provided laws that if well utilised, will certainly, address the menace of these offences and fill in the lacunae in our statutory laws. Even from the definition of *hirabah* in the *Shari'ah* it is clearly wider than that of Robbery under the Act. As such the scope is wider. The intent behind the two offences are not the same as such the approach in curbing them shouldn't be the same. And this is what the laws in Nigeria have missed by lumping the two together as terrorists. And this is what the Shari'ah has recognised and has provided not only different punishments but even difference in approach in tackling the menace. It provided both the kinetic and non-kinetic approach. Reacting to these points, one may safely deduce the following:

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[75] Uthman, M. B. (2016) Points to Note on The Security Crisis in Northern Nigeria With Specific Reference to Global Terrorism and the 'Boko Haram' Insurgency. Being a submission made to the Northern Elders Forum Annual Summit in Kaduna on the 10th and 11th of October, 2016.

[76] ibid.

The Zamfara State Penal Code in its attempt to provide for the prescription made by the majority of the schools of Islamic jurisprudence failed to capture the increasing sophistication of the crime. The Code widened the scope of the offence in the definition section but ended up not including the other serious dimensions of the offence such as rape in the punishment section. In other words, the definition section captured the position of Maliki School while the punishment section captured that of the other jurists excluding the Malikis.

That there is a conspicuous presence of a misunderstanding of the *Shari'ah* and the methodology of Islamic politics and public policy by the *Boko Haram*. Based on these findings, the following recommendations are hereby made:

1. There is the need for amendment of the statutory laws to expand the scope of the offence of banditry both in definition and punishment. Section 153 of the Zamfara Code should comply with the position of Maliki School. A holistic approach must be adopted, just like the position of Maliki in order to solve this problem. Islamic law is a living law hence, it needs to move with the speed of the changes in sophistication of crimes due to globalisation. This can be done through *Ijtihad.*
2. In the religious training that takes place in schools, proper care should be taken to train students in Islamic sciences that relate to jurisprudence. The benefit in this is that more persons will be capable of finding the true position of the law, thus gaining protection from misguidance.