

FROM TEXTUALITY TO UNIVERSALITY The Evolution of *Ḥirābah* Crimes in Islamic Jurisprudence

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Abstract

*The issue of the escalation of crime, which is increasingly varied and is getting heavier, is becoming a global concern. The development and progress of the world seems to have contributed to changes in the type and quality of crime, not only in the form and method, but also in the damage it causes. Crime trends increasingly point to collective crimes, systematic crimes, and crimes with extensive and massive excess damage. This article intends to criticize the systematic change (evolution) that has occurred in the concept of *ḥirābah* crime in Islamic law from a classical to contemporary perspective. The qualitative analysis of this article is focused on three fundamental issues, namely; *ḥirābah* interpretation, *ḥirābah* liability, and *ḥirābah* punishment. The author reveals in the conclusion that; first, based on its elements and characteristics, the definition of *ḥirābah* can be expanded to include new types of crimes such as; terrorism, rape, and drug trafficking and smuggling. Second, it is necessary to reconstruct the *ḥirābah* responsibility theory into a formulation that considers the principle of legal certainty and the principle of equality before the law. The reconstruction model, among others, is the affirmation that all people who involve themselves in the crime are perpetrators of *ḥirābah* (with an *ishtirāk* approach). Likewise, reconstruction efforts are needed to enforce equality of accountability between male and female actors. Third, as a serious crime, *ḥirābah* deserves a severe punishment and has a strong deterrent effect, as offered by Islamic law. However, the opportunity to give dispensation to the punishment will always*

be open if the perpetrator can prove his seriousness in repenting.
[Eskalasi kriminalitas yang semakin beragam dan berat telah menjadi perhatian global saat ini. Pembangunan dan kemajuan dunia berkontribusi pada perubahan pola dan tingkat kriminalitas, tidak hanya bentuk dan cara, tetapi juga akibat yang ditimbulkan. Trend kriminalitas berkembang mulai dari yang berkelompok, sistematis, hingga menyebabkan kerusakan yang masif dan lama. Tulisan ini mengkritisi perubahan sistematis pada konsep jarimah *ḥirābah* dalam hukum Islam dari pendekatan klasik hingga kontemporer. Analisis kualitatif dalam tulisan ini fokus pada tiga hal mendasar yaitu pemaknaan, pertanggungjawaban dan hukuman *ḥirābah*. Kesimpulan pertama tulisan ini adalah bahwa definisi *ḥirābah* berdasarkan unsur dan karakteristiknya dapat diperluas mencakup terorisme, pemerkosaan, perdagangan dan penyelundupan obat-obat terlarang. Kedua, perlu rekonstruksi teori pertanggungjawaban *ḥirābah* menuju formulasi yang mempertimbangkan kepastian hukum dan kesetaraan hak dimuka hukum. Ketiga, sebagai kejahatan serius, *ḥirābah* pantas mendapat hukuman berat dan mempunyai efek pencegahan yang kuat seperti halnya dalam hukum Islam. Meski demikian, ada peluang dispensasi hukuman jika pelaku dapat menunjukkan kesungguhan untuk bertobat.]

Keywords: *Ḥirābah*, Human Rights, Islamic Criminal Law

A. Introduction

This article focuses on the new perspective of *ḥirābah* as classical and contemporary issue. The assumption lies on the existence of a systematic change in the concept of *ḥirābah* in Islamic jurisprudence. This article is also based on the argument that the issue of the escalation of crime, which is increasingly varied and is getting heavier, is becoming a global concern. The development and progress of the world seems to have contributed to changes in the type and quality of crime, not only in the form and method, but also in the damage caused by the crime. Crime trends increasingly point to collective crimes, systematic crimes, and crimes with extensive and massive excess damage. Therefore, fresh thinking is needed which can be a legal solution for the rise of new and modern types of crimes in accordance with the new and better world order.

The first aim of this article is to critically analyse about the interpretation of *ḥirābah* crime in Islamic jurisprudence. The criminalization concept of *ḥirābah* is merely unclear in describing violations of the law. That is why this sparked debate among the jurists. For example, in the case of defining *ḥirābah*, Islamic criminal law interprets *ḥirābah* as type of crime which is related to taking property of others by force and openly. There is a significant difference in the interpretation of *ḥirābah* between classical Muslim's scholar and contemporary Muslim's scholars. Classical Muslim's scholars define *ḥirābah* textually, and even tend to be conservative. This interpretation results in the definition of *ḥirābah* being unclear and absurd. *Ḥirābah*'s limits still overlap with other types of criminal acts, such as theft, robbery and rebellion.

Meanwhile, in the context of the trend of evil in modern times, this *ḥirābah* crimes also becomes interesting to discuss because of the increasing number of types of evil that tend to be close to the character with it. These characters, such as collectivity, systematic, social and political potential conflicts, and the effects of the damage they cause are very close to the *ḥirābah* crimes. The perpetrators of the theft no longer commit crimes by secretly and alone. Likewise, other perpetrators of this crime, dominated by crimes committed collectively, organized and systematic. Therefore, some researchers include several types of serious crimes as *ḥirābah* because of their close nature and character to it. For example, security disturbances,¹ robbery,² terrorism,³ smuggling and trafficking drugs,⁴ and rape.⁵

This article is also aim to critically analyse the debate among jurists about the *ḥirābah* crimes in other concepts, such as who is the perpetrator

¹ See Ahmad Hanafi, *Asas-Asas Hukum Pidana Islam* (Jakarta: Bulan Bintang, 2005), pp. 273–7.

² See Abd al-Qādir 'Audah, *al-Tashrī' al-Jinā'ī al-Islāmī* (Beirut: Dār al-Kitāb al-'Arabī); M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (London; New York: Oceana Publications, 1982); Nik Rahim Nik Wajis, *The Crime of Ḥirābah in Islamic Law* (Glasgow: Glasgow Caledonian University, 1996).

³ Mohammad Hashim Kamal, "Terrorism, Banditry and Hirabah: Advancing New Shariah Perspectives", *Islam and Civilisational Renewal*, vol. 8, no. 1 (2017), pp. 11–34; Wajis, *The Crime of Ḥirābah in Islamic Law*.

⁴ Wajis, *The Crime of Ḥirābah in Islamic Law*, pp. 197–200.

⁵ *Ibid.*, pp. 169–70.

of the *ḥirābah*, how is the liability of the *ḥirābah*, and the problem of applying the *ḥirābah* punishment. This discussion and debate on the one hand certainly represent different arguments from jurists, but on the other hand contain interesting material when analyzed with a modern and universal perspective, like human rights. As stated by Rudolph Peters that, although Islamic criminal law protects a number of important fundamental rights, such as the rights to life and the integrity of the holy, the *syari'a* criminal law as applied today is in conflict with human rights standards in the following areas; a) the principle of *nulla poena sine lege*, i.e. that punishment may be awarded on the strength of law defining the offence and its punishment; b) the principle that all persons are equal before the law; c) the ban on cruel, degrading or inhuman punishment; d) freedom of religion and freedom of expression; e) the basic right of children not to be subjected to the death penalty, life imprisonment and cruel, degrading or inhuman punishment.⁶

Specifically, the report focuses on four principal issues in *ḥirābah* discourse: interpretation of *ḥirābah*, liability of *ḥirābah*, and punishment of *ḥirābah*, –issues which can be regarded as the key elements of *ḥirābah* discourse.

B. Definition and Meaning of *Ḥirābah*; Textual and Universal Perspective

Criminal law in other legal systems tends to be organized according to the nature of crimes, but under classical Islamic law are categorized according to the nature and sources of punishments. Islamic criminal offenses are divided into three categories: (1) offenses and punishments fixed in the Qur'an or *Sunna* (*ḥudūd*); (2) offenses against the person, including intentional injury and homicide, which are considered matters to be settled between the offender and victim, and for which remedies include retaliation (*qiṣās*) and financial compensation (*diyāt*); and (3) Offenses not fixed in the Qur'an or *Sunnah*, for which punishments are discretionary (*ta'zīr*). In recent years, Islamic criminal law has been the subject of commentary and critique by scholars and activists within the

⁶ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2005), pp. 174–5.

international human rights community.

Ḥirābah is usually equated with *qaṭ'u al-ṭariq*, a group of people who cause trouble, bloodshed, seizure of wealth, honor, order, and create chaos on earth.⁷ The Hanafi's scholars, al-Kasani (d.1191/587), defined *ḥirābah* (or *qaṭ'u al-ṭariq*) as 'attacks upon pedestrians for the purpose of taking their property by force in such a way that people are rendered unable to pass freely through the streets. The attacker/s may be a group or a single person that possess[es] overwhelming power to obstruct the public passage, and maybe using weapons or weapon-substitutes such as sticks and stones.'⁸ The Maliki school defined the agents of *ḥirābah* as "anyone who brandishes weapons in order [to] obstruct free passage in the streets rendering them unsafe to travel by killing people, taking their money, and spreading corruption in the land. The agent of *ḥirābah/ muḥārib* may be a Muslim or a non-Muslim, free or slave, and it may be committed in city or countryside, by an individual or group—simply because the Qur'an has not specified the perpetrator in any such ways."⁹

Meanwhile, Shafi'i's school identifies the agents of *ḥirābah* in similar terms, but while stressing that the perpetrator must be a competent person (*mukallaḥ*) and either a Muslim, a *dhimmi* or an apostate who is bound by the injunctions of Islam and has overwhelming power to subjugate others and take their money and property in an area away from a main city.¹⁰ A slightly different definition is conveyed by Imam Malik, that *ḥirābah* is taking wealth with deception (tactics), whether using force or not.¹¹ *Ḥirābah* is also understood as an act of crime or destruction using weapons/tools carried out by humans openly anywhere, whether done

⁷ Sayyid Sābiq, *Fiqh Sunnah*, vol. 2 (Cairo: Dār Faṭḥ al-Ilām al-'Arabī, 1999), p. 393.

⁸ 'Alauddin Al-Kasāni, *Bada'i' al-Sana'i fi Tartib al-Sharā'i*, vol. 7 (Beirut: Dār al-Kutub al-Ilmiyyah, 1997).

⁹ Sābiq, *Fiqh Sunnah*, 2: 298; Ibn 'Abd Al-Barr, *al-Kāfi fi Fiqh al-Madīnah al-Mālikī* (Beirut: Dar al Kutub al-Ilmiyah, 1999), pp. 582–3.

¹⁰ Shamsuddīn Muḥammad bin Muḥammad al-Khatīb al-Sharbīnī, *Mughni al-Muḥtāj ilā Ma'rifaṭ Ma'āni al-Af'āz al-Minhāj*, vol. 4 (Cairo: Muṣṭafā al-Bābī al-Halabī, 1933).

¹¹ *Ibid.*, p. 641. Imam Malik believes that assassinations carried out by ruse are more dangerous than open killings. This has implications for allowing apology in the type of murder openly. Therefore, this action falls into the category of *qīṣāṣ* and murder by deception falls into the category of *ḥirābah*.

by one person or in a group without thinking about who the victims are accompanied by acts of violence.¹² The Prophet even categorized the perpetrators of *ḥirābah* as not including Muslims, based on the hadith: “*man ḥamala alayna al-ṣilāḥ fa laysa minna*” (narrated by Bukhari and Muslim, from ibn Umar).¹³

According to Sayyid Sābiq, crime of *ḥirābah* can take several forms; *First*, someone comes out with the intention of taking property openly and intimidating, but does not taking the property and does not killing.¹⁴ If they only scare not to seize property and not commit murder, they will simply be jailed and *ta'zīr*.¹⁵ *Second*, someone comes out with the intention of taking the property openly, so that he can take the property but not killing.¹⁶ If they only confiscate property of approximately one *niṣāb*, such as theft and murder, then their hands and feet must be cross-cut.¹⁷ The right hand must be cut off because of the act of seizing property, such as the penalty stipulated in ordinary theft. The left leg was cut off because of an attack.¹⁸ *Third*, someone departs with the intention of taking property, but commits murder and does not taking property.¹⁹ If they commit murder without taking property, they must be put to death for following the provisions above. Why should they be sentenced to death, even though the guardian of the victim has forgiven him? Because, they try to integrate fear using methods that demand heavier penalties into their crimes.²⁰ *Fourth*, someone intends to take the property, so that

¹² Abdur Rahman I. Doi, *Tindak Pidana dalam Syariat Islam* (Jakarta: Rineka Cipta, 1992), p. 57.

¹³ Muhammad bin Ismail bin Ibrahim Al-Bukhari, *Sahih al-Bukhari* (Beirut: Dar al-Fikr, 1994), p. 1246.

¹⁴ Sābiq, *Fiqh Sunnah*, 2: 87.

¹⁵ Wahbah Al-Zuhailī, *al-Fiqh al-Shāfi'i al-Muyassar*, vol. 3, ed. by Muhammad Afifi Abdul Hafiz (Beirut: Dar al-Fikr, 2008).

¹⁶ Sābiq, *Fiqh Sunnah*, 2: 87.

¹⁷ Sayyid Bakri bin Sayyid Muḥammad Shaṭa, *I'ānah al-Ṭālibīn*, vol. 4 (Surabaya: Ḥaramain, 2007).

¹⁸ *Ibid.*

¹⁹ Sābiq, *Fiqh Sunnah*, 2: 87.

²⁰ Taqī al-Dīn Abū Bakr ibn Muḥammad Ḥiṣnī, *Kifāyat al-akḥyār fī ḥall Ghāyat al-ikhtisār*, vol. 2 (Beirut: Dār al-Kutub al-ʿIlmiyah, 2012).

later managed to take the property and kill the owner,²¹ then they must be put to death and then crucified for three days so that these conditions are published and the deterrent effect is perfect.²²

Among three terms that are commonly used to describe this type of crime, *ḥirābah* (armed robbery), *qaṭ'ū l-ṭāriq* (highway robbery), *sariqah kubrā* (grand theft), *ḥirābah* is considered the most representative term because of its closeness to the text of the verse which is the proposition, *yuhāribu*. Therefore, armed robbery becomes a very familiar meaning for the term *ḥirābah* even by most jurists. Nevertheless, limiting the definition of *ḥirābah* crimes as armed robbery feels very simplistic and out of context. At least there are two important reasons; firstly, the indicator shown by Qur'an, 5: 33. The verse uses specific terms -but has a general meaning- to describe the *ḥirābah* crimes, which is uniquely different from the term used in the other crime of *ḥudūd*, like *zīna*, *qadzāf*, *sariqah*, and *syurb al-khamr*. These terms are: *yuhāribūna Allāh wa rasūlahu*, and *yas'auna fī al-arḍi fasādan*. Both phrase of the criminalization of the *ḥirābah* crimes indicate the existence of an unusual and not simple category of crime, so that at least a comprehensive understanding is needed to know the purpose of the two limits. Therefore it is necessary to have a broader meaning (extended definition) to the term *ḥirābah*.

The uniqueness of *ḥirābah* can be seen from both, the threat of punishment and the background of legislation (*asbāb al-nuzūl*). Unlike other *ḥudūd*, *ḥirābah* is threatened with four heavy and varied punishment, namely: killed, crucified, crossed with arms and legs, and exiled. Characteristics of punishment like this clearly show that this type of crime is different from ordinary *ḥudūd*, which is usually only threatened with one type of punishment. *Asbāb al-nuzūl* and the historical setting of Qur'an, 5: 33 also have crucial meaning for *ḥirābah*. Scholars differ about the historical setting of the verse.

Abou el-Fadl notes that there are at least six opinions about the historical setting of the verse. Firstly, it relates to the people of the book who had an agreement with the Prophet, but they betrayed the agreement and caused damage on earth, so this verse came down. Secondly, the narratives related to the tribe of Hilal bin 'Uwaymir, which involved a

²¹ Sābiq, *Fiqh Sunnah*, 2: 87.

²² Al-Zuhailī, *al-Fiqh al-Shāfi'i al-Muyassar*, 3: 326.

mutual agreement not to attack any groups that passed in front of the Hilal tribe to face the Prophet. But when a group from Banū Kinānah passed by to join the Prophet, the Hilal attacked, killed people, and stole their properties. Thirdly, that the verse was revealed in connection with a polytheist group that attacked Muslims, made mischief on earth, and then fled to non-Muslim territory before they were captured. Fourthly, with a brief elaboration, stating that the verse came down related to the *Bani Israel*. Fifthly, the verse is related to the *Ḥurriyyah* group (the forerunner to the Khawarij). Sixthly, a statement supported by many controversies, that a group of people from the Uraynah tribe embraced Islam and came to Medina in a state of illness. They complained to the Prophet that they were people from the desert so they could not live (adapt) well in Medina. The Prophet sent a camel to them so that, in accordance with their customs in the village, he could drink his milk and urine to restore his health. The Prophet also included with them a shepherd from the *Nubian* tribe named Yasar. The people of the Uraynah tribe lived in a place about 6 miles from Medina, named *Liqābah*, until they were well again. But it turns out that later they apostatized and tortured the shepherd, by chopping his limbs, putting thorns in his eyes, and crucifying him. They stole their camels and ran away. After capturing them, the Prophet cut off their arms and legs crossed, blinded their eyes, and crucified them and then left them to die in the desert. According to some accounts, after killing them, the Prophet also burned their bodies.²³

Based on some of the thoughts above, it is reasonable if the researchers recommend expanding the understanding of *ḥirābah*. Some latter scholars, like Abdullahi Ahmed an-Na'im,²⁴ Khaled M. Abou el-

²³ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, First edition (Cambridge; New York: Cambridge University Press, 2001), pp. 49–50.

²⁴ Abdullahi Ahmed al-Na'im (from Sudan) is Charles Howard Candler Professor of Law at Emory Law, associated professor in the Emory College of Arts and Sciences, and senior fellow of the Center for the Study of Law and Religion of Emory University. An internationally recognized scholar of Islam and human rights and human rights in cross-cultural perspectives, An-Na'im teaches courses in international law, comparative law, human rights, and Islamic law. His research interests include constitutionalism in Islamic and African countries, secularism, and Islam and politics. An-Na'im directed the following research projects which focus on advocacy strategies for reform through internal cultural transformation: Women and Land in Africa, Islamic Family Law, Fellowship Program in Islam and Human Rights, The Future of

Fadl,²⁵ and M. Hashim Kamali²⁶ have valuable attention to this discourse. An-Na'im states that one of the striking weaknesses of classical criminal law is that there is too much legal uncertainty, such as the absence of a clear-cut definition of what is meant by *muhāribūn* (rebel). Even some jurists call it the *qaṭ'u ṭarīq* (robbery) even though in fact the two

Sharia: Islam and the Secular State. An-Na'im's current research projects include a study of Muslims and the secular state, and of human rights from state-centric to people-centered. He continues to further develop his theory of Islam and the Secular State. Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge: Harvard University Press, 2008). Also published in Arabic and Indonesian. Translations of this manuscript in Bengali, Persian, Urdu, Bengali, Turkish and Russian, are available for download free of charge at sharia.law.emory.edu. See 'Abdullahi Ahmed An-Na'im, Emory University School of Law', Profile, <http://law.emory.edu/faculty/faculty-profiles/annaim-profile.html>, accessed 2 Nov 2020; Abdullahi Ahmed An-Na'im, *Future of Shari'a*, <https://scholarblogs.emory.edu/aannaim/future-of-sharia-2/>, accessed 11 Feb 2020.

²⁵ Dr. Khaled Abou El Fadl is one of the world's leading authorities on Islamic law and Islam, and a prominent scholar in the field of human rights. He is the Omar and Azmeralda Alfi Distinguished Professor in Islamic Law at the UCLA School of Law where he teaches *International Human Rights, Islamic Jurisprudence, National Security Law, Law and Terrorism, Islam and Human Rights, Political Asylum and Political Crimes and Legal Systems*. He is also the Chair of the Islamic Studies Interdepartmental Program at UCLA. He has lectured on and taught Islamic law throughout the United States and Europe in academic and non-academic environments for over twenty years. His work has been translated into numerous languages including Arabic, Persian, French, Norwegian, Dutch, Ethiopian, Russian, and Japanese, among others. See "Khaled Abou El Fadl", *Program in Islamic Law* (30 Apr 2019), <https://pil.law.harvard.edu/advisors/khaled-abou-el-fadl/>, accessed 11 Feb 2020.

²⁶ Mohammad Hashim Kamali, Founding CEO of IAIS Malaysia, graduated from Kabul University, and then obtained his PhD in Islamic and Middle Eastern Law at the University of London in 1976. He served as Professor of Islamic Law and Jurisprudence at the International Islamic University Malaysia (1985–2004), then Dean of the International Institute of Islamic Thought and Civilization (ISTAC) from 2004–2006. He was Asst Professor at McGill University's Institute of Islamic Studies; Visiting Professor at Capital University, Ohio; and the Wissenschaftskolleg, Berlin. He was a member of the Constitution Review Commission of Afghanistan (2003), and a UN shariah expert on the constitutions of Iraq, the Maldives and Somalia (2004–2005). He has published over 200 academic articles and 35 books. See "Professor Kamali", International Institute of Advanced Islamic Studies (IAIS) Malaysia, <https://iais.org.my/staff-sp-2037227643/professor-kamali>, accessed 11 Feb 2020.

are very different.²⁷ This criminal offense always refers to Qur'an, 5: 33. The question is what is meant by rebels? Are they critical of the government? Are those who have deliberately attacked the government? Are those who have attacked the government with weapons? Or those who are indifferent to the government that they no longer like? And what is meant by the perpetrators of damage/corruption on earth? All of this has not been well defined by classical Islamic law, so various interpretations emerge.²⁸

Abou el-Fadl said that: "some scholars state that the traditional definition of *hirābah* should be extended to include acts of terrorism. Theoretically, the language 'cause corruption on the earth' (*yas'auna fi 'l-ard' fasādan*) could be applied to a wide range of activities including anything from writing heretical poetry to raping and pillaging".²⁹ He even added: "Significantly, the language of the verse lends itself to use in the political field, and could easily be applied to rebellion or sedition.³⁰ The Qur'an repeatedly condemns those who cause corruption on the earth. And in one verse, it associates *fitna* with corruption on the earth".³¹

Meanwhile, according to Hashim Kamali, *hirābah* in the Qur'an is envisaged as a composite crime, subsuming banditry, highway robbery, terrorism, theft, and murder. It is a *hadd* crime consisting usually, but not necessarily, of collective or group activity committed by more than one person on behalf of that group.³² The Qur'anic phrase 'waging war on

²⁷ Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990).

²⁸ Muhyar Fanani, *Membumikan Hukum Langit: Nasionalisasi Hukum Islam dan Islamisasi Hukum Nasional Pasca Reformasi*, ed. by Ibnu Burdah (Yogyakarta: Tiara Wacana, 2008), p. 186.

²⁹ Fadl, *Rebellion and Violence in Islamic Law*. Khaled explain, this is so in legal theory, but the Qur'an limits corruption on the earth to the destruction of property; such as crops or, perhaps, the economic system, and the destruction of lives (*ihlak al-ḥarṣi wa al-nasli*). See Qur'an 2: 205. The Qur'anic concept of corruption appears to be specific and limited although in Muslim practice it has been used rather expansively.

³⁰ Abdullah Yusuf 'Ali, *The Meaning of the Holy Qur'an* (Beltsville, MD: Amana Publications, 1995); Khaled Abou El-Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2001).

³¹ Fadl, *Rebellion and Violence in Islamic Law*, p. 48.

³² Kamal, "Terrorism, Banditry and Hirabah: Advancing New Shariah Perspectives", p. 12.

God and His Messenger' placed jurists in a quandary as to its precise import and implications. A generic expression, it was evidently not meant literally. Since it is immediately followed by 'making mischief in the land—*fasād fi'l-ard*,' the two phrases have been read together in order to provide a clearer understanding of the verse. Yet this latter phrase, too, is less than specific, for '*fasād fi'l-ard*' can also include a variety of criminal activities and transgressions. Indeed, it has even been suggested that the latter phrase is wider than the former, in that spreading 'corruption in the earth' can include criminal activities that may not qualify as *ḥirābah* as such. Hence, the relationship between the two phrases is seen as one of the particular (*ḵbās*) to the general (*āmm*), in which case *ḥirābah* is seen as only one of the many manifestations of '*fasād fi'l-ard*'.³³

Kamali seems agreed with al-Shawkani's thought (d.1835/1250) that the manifest meaning of '*fasād fi'l-ard*' is broad enough to subsume not only highway robbery, but also propagation of false deities (*shirk*), destruction of people's lives, looting their properties and attacking their dignity, as well as the destruction of trees, waterways and livestock, aggressive dictatorship and so forth. Some commentators have also included recidivist thieves and burglars, notorious rapists and homosexuals under *ḥirābah*, as those who's evil and mischief-making cannot be stopped other than by execution.³⁴

When Kamali explain about *ḥirābah* and terrorism, he said that concerning terrorism, it has proven difficult to find a comprehensive definition; as many years of fruitless debate in the United Nations shows, it cannot be defined to the satisfaction of everyone. The one factor that underlines all terrorism, however, also underlies *ḥirābah*: the desire to cause fear, terror, and insecurity in society through the indiscriminate use of violence, often for political ends. This characterisation of both terrorism and *ḥirābah* covers acts of terror perpetrated by individuals, groups and even states (as exercised by Israel against the Palestinian people).³⁵ In line with them, Sherman Jackson also carried out a rigorous analysis with the *ḥirābah*'s perspective to terrorism crimes that occurred in the United

³³ *Ibid.*, p. 13.

³⁴ Kamal, "Terrorism, Banditry and Hirabah: Advancing New Shariah Perspectives".

³⁵ *Ibid.*, p. 12.

States.³⁶ Expression, Frank E. Vogel states that tragedy of September 11th 2001 in the United States, if it is processed by the Islamic justice system, then the perpetrators will certainly be found guilty because they have been accused of committing *ḥirābah*.³⁷

Initiatives to expand the meaning of *ḥirābah* have also been carried out by several Islamic countries through their constitution. Iran's Criminal Law (Islamic Penal Code of Iran) is one of them. In the stipulations concerning crime of *ḥirābah* in article 183, it is stated that: "Any person who resorts to weapons to cause terror and fear or to breach public security and freedom shall be considered as a mohareb and corrupt on earth (*mofsed fel-arz*)".³⁸ Likewise in article 185, it is stated: "If an armed robber or a highway robber, by resorting to weapons, disturbs public security or the security of roads, and causes fear and terror, shall be considered as a mohareb."³⁹

Meanwhile, in Saudi Arabia, in the case of *ḥirābah*, during the last two decades it seems that there has been a tendency for the King to withdraw from giving *siyāsa* sentences and to leave the trial of serious crimes to the judiciary. This was heralded by a fatwa on the exact meaning of the crime of banditry (*ḥirābah*). In Fatwa No. 85 of the Board of Senior 'Ulama' (*Hay'at al-Kibār al'Ulamā*), issued on 9 September 1981, the law of *ḥirābah* was authoritatively expounded. The fatwa was motivated by reports of an increase in violent crimes in cities, in cases of abduction for sexual purposes and in drugs-related offences. The fatwa consists of two parts. The first one extends *hadd* offence of banditry by adopting the Malikite definition. The muftis rule that henceforth *qāḍis* may award the fixed punishments for banditry in case of armed attacks in cities and that abduction for sexual motives must be put on a par with the taking of property. Further, the *fatwā* stipulates that the punishment imposed

³⁶ See Sherman A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition", *The Muslim World*, vol. 91, nos. 3–4 (2001), pp. 293–310.

³⁷ Frank E. Vogel, "The Trial of Terrorists under Classical Islamic Law", *Harvard International Law Journal*, vol. 43 (2002), p. 53.

³⁸ Legal Affairs Commission of the Islamic Consultative Assembly, *Islamic Penal Code of the Islamic Republic of Iran: Book One & Book Two* (New Haven: Iran Human Rights Documentation Center, 1991), p. 28.

³⁹ Legal Affairs Commission of the Islamic Consultative Assembly, *Islamic Penal Code of the Islamic Republic of Iran*.

for banditry is no longer related to the existence of specific aggravating circumstances in addition to the ‘hold up’ and that judges, therefore, are free to choose any of the punishments mentioned in Qur’an, 5: 33-34 (banishment, cross-amputation, death or death with crucifixion). The second part of the *fatwa* deals with the trafficking and smuggling of drugs. It sets forth that these crimes fall under the notion of ‘spreading corruption on earth’ (Qur’an, 5: 3-4) and provides that the first offence shall entail a severe discretionary punishment (imprisonment, flogging, fine) and that for a second offence that court may impose any penalty, including death. This applies also to drug users who are convicted for the second time.⁴⁰

Hadd sentences for banditry can be inflicted by the courts for drug-related offences and in cases of burglary and robbery committed in cities. The following case shows the extent to which the definition of banditry (*ḥirābah*) has now been stretched:

Three men, two of whom were dressed in women’s clothes, including the face veil that is obligatory in Saudi Arabia, had gained access to a home, where, at that moment, only the lady of the house was present. They had phoned her earlier and told her that they had to deliver documents for her husband. Once inside, they had threatened the women with a knife, taken her jewellery and forced her to undress. Then they had taken pictures of her in the nude with polaroid camera. After they had left, they had contacted her by telephone and demanded money in exchange for the picture. Shortly thereafter they were caught and confessed to their crime. The men were then sentenced to death penalty for banditry.⁴¹

Meanwhile, Makhrus Munajat stated that given the crime in the modern age was very well organized, then the classical cleric’s requirements regarding the provisions of the crime of *ḥirābah* need to

⁴⁰ Issam Saliba, “Saudi Arabia: Twin Brothers Charged with Islamic Crime of Hiraba”, *Global Legal Monitor* (2018), //www.loc.gov/law/foreign-news/article/saudi-arabia-twin-brothers-charged-with-islamic-crime-of-hiraba/, accessed 12 Feb 2020; Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*.

⁴¹ Muḥammad ibn ‘Abd Allāh ‘Umayrī, *Musqīṭāt Ḥadd al-Ḥirābah wa Taḥbiqātuhā fī al-Mamlaka al-‘Arabiyya al-Sa’ūdiyya* (Riyadh: Akādīmiyyāt Nayif al-‘Arabiyya lil al-‘Ulūm al-Aminyya, 1999), pp. 201–5.

be revised, especially the requirements relating to the place and target. *Hirābah* is not only happening in a place far from the crowd, because there are indications when it is done in a place far from the crowd it is impossible for the victim to get help. Crimes can now occur in crowded places such as banks, supermarkets with automatic weapons that perpetrators are free to carry out their actions and others are afraid to provide help. Targets are not only limited to property and lives, but security disturbances, such as sabotage, power outages, destruction of roads, drinking water channels, bombings, rape, and other forms of crime that have cause casualties, even lives, property and honor.⁴²

C. New Formulation of *Hirābah* Crimes⁴³

1. Terrorism as *Hirābah* Crimes

Some scholars state that the traditional definition of *hirābah* should be extended to include acts of terrorism.⁴⁴ The relationship and legal differences between brigandage and rebellion is explored in

⁴² Makhrus Munajat, *Dekonstruksi Hukum Pidana Islam* (Yogyakarta: Logung Pustaka, 2004), p. 120.

⁴³ Why should *hirābah*? There are at least two reasons. First, Conceptually, the categorization as *hirābah* reflects: 1) the heavy *jarimah* because it belongs to the *ḥudūd* category, while *ta'zīr* is a common *jarimah*; 2) the high level of damage contained by the *jarimah*. *jarimah ḥudūd* has the character as *jarimah* which is dominated by Allah's right. Allah's right is a representation of the universal benefit (*maslahat 'ammah*). Second, the perspective of the principle of legality, namely the exception of the principle of retroactivity (the principle of *raj'iyah*) in Islamic criminal law. This principle applies against to the crime which is considered very dangerous (extra ordinary crime). The three *jarimah* which are categorized as very dangerous are *qadḥāf*, *hirābah*, and *zīhar*. This categorization is also to some extent a maximum law enforcement effort, which is not possible if these very dangerous *jarimah*, such as terrorism, drug trafficking & trafficking, genocide, rape & serious sexual violations, "only" categorized as *jarimah ta'zīr*. See Muḥammad Abū Zahrah, *al-Jarimah wa al-'Uqūbah fī al-Fiqh al-Islāmī* (Cairo: Dār al-Fikr al-'Arabī, 2013); Muḥammad Iqbal Ṣiddīqī, *The Penal Law of Islam* (New Delhi: International Islamic Publishers, 1994); Topo Santoso, *Menggagas Hukum Pidana Islam: Penerapan dalam Syari'at Islam dalam Konteks Modernitas* (Bandung: Asy-Syaamil Press & Grafika, 2000); 'Audah, *al-Tasbīr al-Jinā'ī al-Islāmī*, Bassiouni (ed.), *The Islamic Criminal Justice System*.

⁴⁴ Hikmahanto Juwana, *Catatan Singkat RUU Anti Terorisme* (Jakarta, 2002); Indriyanto Seno Adji, "Bali, Terorisme, dan Hak Asasi Manusia", *Kompas* (29 Oct 2002).

Abou el-Fadl. He states: “theoretically, the language ‘cause corruption on the earth’ (*yas’anna fi al-ardi fasādan*) could be applied to a wide range of activities including anything from writing heretical poetry to raping and pillaging.” He also interpreted *ḥirābah* by relating it to the political field. He states that: “significantly, the language of the verse lends itself to use in the political field, and could easily be applied to rebellion or sedition.” According to him, The Qur’an repeatedly condemns those who cause corruption on the earth. And in one verse, it associates *fitna* with corruption on the earth.⁴⁵

In line with el-Fadl, Taqīyyuddin also categorizes terrorism as *al-baghy*, because in reality, the practice of terrorism also threatens the security and integrity of the country. Etimologically, *al-baghy* means wrongdoing or persecution, while terminologically, *al-baghyu* means people who oppose a just government and do not want to carry out what is their duty.⁴⁶

The September 11th, 2001 tragedy has at least inspired the emergence of two important research. Starting from the assumption that there is a strong connection between Islam and the September 11th tragedy, Sherman Jackson and Frank E. Vogel, tried to study deeply the Islamic concept of crime. Finally, Jackson demonstrates that “the classical Islamic law of *ḥirābah* corresponds in its most salient features to the law of terrorism in the United States. This article presents a clear, thorough analysis of the law of *ḥirābah*”⁴⁷ As for Vogel argues that: “if the perpetrators of the attack of September 11th 2001, were tried under classical Islamic law, they would be probably be found guilty of *ḥirābah*”.⁴⁸

Terrorism in Arabic is known as *irḥāb*, which means to frighten (cause fear). *Irḥābi* (terrorist) means a person who makes others feel scared, someone who scares others.⁴⁹ Initially, the term terrorism was categorized as a crime against the state. One of them is the definition according to the 1937’s UN Convention, that terrorism is any form

⁴⁵ Fadl, *Rebellion and Violence in Islamic Law*, p. 48.

⁴⁶ Ḥiṣnī, *Kifāyat al-akhyār fi ḥall Ghāyat al-ikbtīṣār*.

⁴⁷ Jackson, “Domestic Terrorism in the Islamic Legal Tradition”, pp. 293–310.

⁴⁸ Vogel, “The Trial of Terrorists under Classical Islamic Law”.

⁴⁹ Abduh Zulfidar Akaha (ed.), *Terorisme & Konspirasi Anti Islam* (Jakarta: Pustaka al-Kautsar, 2002), p. 28.

of crime committed directly against the state with the intention of creating terror against certain people, or groups of people or the wider community.⁵⁰ However, it is feared that this understanding will lead to multiple interpretations that lead to the interests of the state where the authorities can expand the definition of terrorism according to their own interests. Therefore, in the next development, the definition of terrorism has shifted towards a more democratic understanding. Terrorism is then formulated as crimes against humanity which can be international, regional, and national in nature, especially when directed at the souls of innocent people (public by innocent). The definition of terrorism like that can be found in the European Convention on the Suppression of Terrorism (ECST) 1977.⁵¹

Terrorism can be categorized as crime of *ḥirābah*, due to consideration of its constituent elements. Hashim Kamali implies that there are factors that underlines terrorism as *ḥirābah*; like the desire to cause fear, terror, and insecurity in society through the indiscriminate use of violence, often for political ends.⁵² In line with Kamali, Nurul Irfan identified that *ḥirābah* contains elements of robbery, torrents, amusement, hijacking, as well as other terms. *Ḥirābah* is an act of violence committed by a person or group of people to others to control the property of others by frightening and sometimes accompanied by murder. In this case the perpetrators scare the victim with threats, criticism, and violence. Thus for the present context, assembling bombs and detonating them includes *ḥirābah*.⁵³ Islam, represented by *Ijtima'* of 'The Indonesian Council of Ulama' (MUI) in Jakarta on December 14-16 2003 included terrorism as *jarimah ḥirābah*, based on Qur'an 5: 33. The characteristics of terrorism according to the MUI *fatwa* are: 1) destructive (*ijfād*) and anarchic (*fauḍā*) in nature; 2) the aim is to create fear, insecurity and/or destroy other groups; 3) done without rules and unlimited goals.⁵⁴

⁵⁰ Loudewijk F. Paulus, "Terorisme", *Buletin Litbang Dephan*, vol. v, no. 8 (2002).

⁵¹ Adji, "Bali, Terorisme, dan Hak Asasi Manusia".

⁵² Kamal, "Terrorism, Banditry and Hirabah: Advancing New Shariah Perspectives", p. 12.

⁵³ M. Nurul Irfan and Masyrofah, *Fiqh Jinayah* (Jakarta: Amzah, 2015), p. 127.

⁵⁴ Komisi Fatwa MUI, *Terorisme* (2004), <https://mui.or.id/produk/fatwa/754/terorisme/>.

2. Rape (*al-Ighṭisāb*) as Ḥirābah Crimes

Ibn ‘Arabi relates that there was a woman who was kidnapped and raped. When the case was brought to court, some people claimed that the case was not part of the crime of *ḥirābah*, because *ḥirābah* was only related to material (property). Responding to this argument, ibn ‘Arabi stated: “Isn’t rape worse than robbery?”⁵⁵ Explaining his argument, Ibn ‘Arabi stated: “Humans usually will not fight to protect their property if their lives are threatened, but will fight for things the same if his wife, his daughter will be raped or if honor is betrayed”. It is clear that according to ibn ‘Arabi, honor is more valuable than wealth and therefore deserves more protection from the law.

Other jurists like Ibn Hazm, Ismail, Mujahid also agreed that rape should be categorized as *ḥirābah*. Ibn Hazm stated that “the *muharib* is a person who scares others, also kills, takes property or rapes”.⁵⁶ Ismail states that “*ḥirābah* is the act of a group of armed men who frighten in an Islamic state by killing people, robbing, raping, or damaging their plants.” Even some Shafi’i and Malikiyah jurists also agree that rape is considered *ḥirābah*.⁵⁷ Meanwhile according to the Dzahiriyah, the person who commits *ḥirābah* (*muhārib*) is anyone who threatens passers-by and scares road users and kills people, takes property or destroys *farjī* (adultery). However, not all rape is punished by *ḥirābah*. Only sexual relations that are carried out with violence, the use of weapons, and drugs, or any item that can eliminate consciousness can be categorized as *ḥirābah*.⁵⁸

Thus rape, in Islamic criminal law, is closer to the understanding of the crime of *ḥirābah* regulated in the Qur’an 5: 33, not as crime of adultery. Adultery is more likely to occur on agreement; agreement between the perpetrators, without any victims, while rape emphasizes the existence of victims who suffered great losses. In other word, by

⁵⁵ Abū Bakr Muḥammad bin ‘Abdullāh al-Ma’rūf bi Ibn ‘Arabī, *al-Aḥkām al-Qur’ān*, vol. 2 (Riyadh: Markaz al-Turāth lil-Barmajīyāt, 2013).

⁵⁶ ‘Alī b. Aḥmad Ibn Hazm al-Andalusī, *al-Muḥalla*, vol. 11 (Beirut: Dār al-Kutub al-‘Ilmiyah, 2010).

⁵⁷ Muḥammad ibn Aḥmad Ramlī, *Nihāyat al-Muḥtāj ila Sharḥ al-Minhāj*, vol. 8 (Beirut: Dar al-Fikr, 2009).

⁵⁸ Wajis, *The Crime of Ḥirābah in Islamic Law*, pp. 169–70.

Kamali, by categorizing notorious rapists as *ḥirābah*, the opportunity to stop them by executing them becomes more realistic.⁵⁹

Rape occurs because of coercion from the perpetrator. The concept of forced action in Islamic law is known as *ikrah* or force. Etimologically, *ikrah* described by Alauddin as an act of bringing humans to a case that is definitely not the case he wanted. The word *ikrah* is found in the Qur'an, 4: 19. According to Ibrahim Halabi, as quoted by Khalida, formulates *ikrah* in terms of Shari'a, is an act that occurs to someone by someone else where that action escapes of willingness or free will (*ikhtiar*) from that person. So this indicator of coercion includes the lack of willingness and/or lack of will of someone who is the object of coercion.⁶⁰

In Pakistan, one of the Islamic countries, the issue of rape has been approached from three different perspectives: *First*, the traditional scholars insist that rape is a form of *zina* and that it can only be proved by the confession of the culprit or the testimony of four witnesses in accordance with the prescribed standard; *Second*, Mawlana Islahi developed the wider doctrine of *ḥirābah* that includes all forms of *fasād* (mischief), including rape, and also asserted that circumstantial evidence can also prove a *hadd* offence; *Third*, some of the traditional scholars who uphold the concept of "conflation" (*talfiq*), or mixing of the opinions of the various schools of law, tried to make a kind of compromise between these diametrically opposed views by suggesting that even if rape was covered by the law of *zina* it could be proved on the basis of circumstantial evidence.⁶¹ But The Federal Shariat Court concluded in *Rashida Patel* that rape is a form of *ḥirābah*, not *zina*. Influenced by the theory of Islahi, Fida Muhammad Khan J, observed: "*Zina bi 'l-jabr* is different from the other cases of *zina* and in our opinion it is a serious kind of *fasād fi 'l-ard* (creating mischief and disorder in the land) and *ḥirābah*. Hence, for proving this offence the required standard of evidence is that of *ḥirābah*, not *zina*."⁶²

⁵⁹ Kamal, "Terrorism, Banditry and Hirabah: Advancing New Shariah Perspectives", p. 12.

⁶⁰ Khalida Zia Istiqomah, "Reformulasi Pengaturan Sanksi Tindak Pidana Perkosaan di Indonesia: Studi Perbandingan Hukum Pidana Positif dan Hukum Pidana Islam", *Kumpulan Jurnal Mahasiswa Fakultas Hukum*, vol. 1, no. 1 (2014), pp. 1–19.

⁶¹ See Mushtaq Ahmad, "The Crime of Rape and the Hanafi Doctrine of Siyasah", *Pakistan Journal of Criminology*, vol. 6, no. 1 (2014), pp. 161–92.

⁶² *Ibid.*, pp. 167–8.

3. Smuggling and Trafficking of Drugs as Ḥirābah Crimes

Smuggling and trafficking of drugs is a crime that is very dangerous for human life. Placement of drugs smuggling and trafficking into *ḥirābah* basically follows the nature of *kbamm* which does contain danger. Therefore, consuming *kbamm* has been determined by the nass as a serious crime and is included in the *ḥudūd* category. What are the arguments underlying the construction of drugs smuggling and trafficking as *ḥirābah*? Nik Rahim explained that:

When acts of scaring people and robberies committed without killing can be categorized as *ḥirābah* then there is actually no valid reason to prevent the crime of smuggling and drug trafficking as a crime of *ḥirābah*. This is simple because the consequences of terrorism and robbery are less dangerous to humans, both physically and psychologically when compared to the consequences of drug smuggling and trafficking. Some people might argue that the crime of smuggling and trafficking in illegal drugs itself does not cause damage or harm to others. Damage only occurs when people misuse the item. Therefore, drug smugglers and traffickers should not be held responsible for this damage because these people have the choice not to buy or abuse the illegal drugs. But if we take a closer look at this argument, it will be seen that drug smugglers and traffickers in fact must be held responsible for causing damage to people indirectly.⁶³

Ḥirābah has two special elements, namely fighting God and His Messenger and making mischief on earth. So, the smugglers and drugs traffickers allegedly violated the two elements concretely. With regard to the second element, the smugglers and traffickers of the drug have violated two things: *first*, the law prohibiting illegal drugs can be sold to the public; *secondly*, by smuggling and trafficking in illegal drugs, this crime has caused damage to the community. Because of the damaging effects of drug smuggling and drug trafficking on society, their actions must be stopped. One way to stop their actions is to impose severe penalties on them by including these actions in the crime of *ḥirābah*.⁶⁴

Some countries consider smuggling and trafficking drugs to be very serious crime. Saudi Arabia is presumed to have implemented the law of *ḥirābah* for the smugglers of drugs. Recently, eight foreigners who were

⁶³ Wajis, *The Crime of Ḥirābah in Islamic Law*, pp. 217–8.

⁶⁴ Wajis, *The Crime of Ḥirābah in Islamic Law*.

found guilty of drugs smuggling were beheaded. Malaysia is another of the countries that has implemented a mandatory death penalty for the offence of smuggling and trafficking drugs which seems to be in line with the law of *ḥirābah* under the Sharia law.⁶⁵

D. *Ḥirābah* and the Problems of Criminal Liability

Another problem with classical Islamic law according to an-Naim is the existence of legal discrimination or the non-application of the principle of equality before the law, such as *diyyat* (fines) for the act of killing a woman according to the classical Muslim's scholars only valued half of the *diyyat* killing men guys.⁶⁶

This kind of problem also found in *ḥirābah* crime. The problem based on the question: Who is the *muḥārib*? this question arises from the background of debates by jurists about whether the perpetrators of the *ḥirābah* include all those involved in the *ḥirābah* crimes, from the beginning of the planning until the realization of the crime, or only those who are the main actors? In other words, is there a need to categorize the *ḥirābah* actors as the main actors and supporting actors or is it sufficient for one category to be the only actors?

In this case there are two opinions; first, those who argue that there is no need to distinguish between the main actors and supporting actors; second, those who consider it necessary to distinguish between the main actors and supporting actors. The first opinion was represented by the Abu Hanifah group, while the second opinion was represented by the Shafi'i group. Abu Hanifah stated that if the robbers conspired, then some of them carried out the action both killing and taking property while some others only helped it, then the legal status for those who helped remained the same as the other robbers. Therefore, it is sufficient that there is an attack both in whole or in part so that ḥad must be imposed on them. The condition is that the group of robberies must be all men. Thus, according to this opinion, people who participated directly involved in taking property, killing, and intimidating, including robbers. Likewise, those who help providing assistance, by way of consultation, instruction

⁶⁵ *Ibid.*, p. 190.

⁶⁶ Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (Cairo: Jumhūrīyat Miṣr al-‘Arabīyah, 2017), p. 447; ‘Audah, *al-Tashrī’ al-Jinā’ī al-Islāmī*, pp. 155, 214.

and help, also include the perpetrators of *ḥirābah*. This opinion was agreed upon by Imam Malik, Imam Ahmad and Zahiriyah.⁶⁷

Abū Hanīfah and his disciple al-Shaybani hold that the perpetrators of *ḥirābah* must be male so that if there is a female member in a *ḥirābah* group then the female member of the *ḥirābah* is not subject to punishment. The reason is because assault, deterrence and theft by force and violence usually cannot be done by women because of their tenderness and their physical weakness so it does not fit into the character of violence.⁶⁸ In other word, this is because the necessary show of power and strength is only suited to men.⁶⁹

Meanwhile Shafi'i chose to distinguish the perpetrators in the *ḥirābah* crimes, including the main actors and supporting actors. Imam Shafi'i believes that the so-called perpetrators of *ḥirābah* are those who directly conduct *ḥirābah*. Whereas those who did not participate directly, even though he was present at the scene, were not considered as perpetrators of *ḥirābah*, but only as servants who were threatened with *ta'zir* punishment.⁷⁰

Shafi'i also does not distinguish between male perpetrators and female perpetrators so that all punishments of *ḥirābah* are imposed on all *ḥirābah* perpetrators. This opinion is in line with Imam Malik, Imam Ahmad, Zahiriyah, Al-Thahawi, and Shi'ites Zaidiyah. According to them, women who participated in *ḥirābah* must still be subject to punishment. There is no distinction between male and female perpetrators as in other *ḥudūd* crime.⁷¹

The legal implications of the differences of opinion are certainly very significant. *First*, in terms of application of the elements of crime. Categorizing the perpetrators of *ḥirābah* differently will have implications

⁶⁷ Al-Kasāni, *Bada'i' al-Sana'i fi Tartīb al-Sharā'i*; Wahba az-Zuhaili, *Fiqh al-Islāmi wa-Adillatuhū* (Beirut: Dār al-Fikr, 1997).

⁶⁸ Abd. Rahman al-Jaziri, *Al-Fiqh 'alā Mazāhib al-Arba'ah*, vol. 5 (Beirut: Dar al-Fikr, 1986); 'Audah, *al-Tashri' al-Jinā'i al-Islāmi*.

⁶⁹ Al-Kasāni, *Bada'i' al-Sana'i fi Tartīb al-Sharā'i*; Kamal, "Terrorism, Banditry and Hirabah: Advancing New Shariah Perspectives".

⁷⁰ Wahba az-Zuhaili, *Fiqh al-Islāmi wa-Adillatuhū*, vol. 6 (Beirut: Dār al-Fikr, 1997), p. 130; Al-Kasāni, *Bada'i' al-Sana'i fi Tartīb al-Sharā'i*, 7: 135; 'Audah, *al-Tashri' al-Jinā'i al-Islāmi*, pp. 641–2.

⁷¹ Al-Kasāni, *Bada'i' al-Sana'i fi Tartīb al-Sharā'i*; 'Audah, *al-Tashri' al-Jinā'i al-Islāmi*.

for the application of different elements of crime. The group that embraces the opinion of all perpetrators as the main perpetrators in the *ḥirābah* crimes believes that all elements of the *ḥirābah* crimes perfectly exist in every perpetrator, whoever they are and whatever their duties and contributions. And vice versa, the opinion which holds that there is only one main offender, believes that everyone involved in the crime of *ḥirābah* represents himself, so that only relates to some elements of the crime. Therefore, they are only responsible for their roles and contributions.

Second, the implications of the criminal liability. This implication is based on the question, does the principle of inclusion in a criminal act (*ishtirāk*)⁷² apply in this kind of crime (*ḥirābah*)? *ishtirāk* is together in committing crime.⁷³ The opinion which states that all those involved as the main perpetrators (there is no participant perpetrators), certainly do not apply the principle of inclusion of criminal acts (*ishtirāk*) in the *ḥirābah* crimes. This is because all the people involved are categorized as actors with the same status, namely as the main actors. In contrast to those who hold only one main actor, so the principle of inclusion of a criminal offense (*ishtirāk*) will be applied in the crime of *ḥirābah*. It is also based on a theory that distinguishes the legal status between one offender and another in a crime in terms of their role and contribution.

Third, the implications on the application of punishment. This condition is a consequence of the different perspectives of criminal liability as explained in the second implication. When a crime of *ḥirābah* is treated as an *ishtirāk*, a variety of sentences will apply, depending on

⁷² *Ishtirāk* (deelneming) is the understanding that includes all forms of participation/involvement of people or people both psychologically and physically by carrying out each act so as to form a criminal act. The cooperation can be in the form of: a participant commits a criminal offense with another person; the perpetrators entered into an agreement (agreement) with another person to commit a criminal act; the offender incites others to commit crimes; or the perpetrator provides assistance or an opportunity to commit a crime in various ways, without participating in the act. Islam divides *ishtirāk* into two, namely *ishtirāk mubashir*, ie when someone participates directly in committing a crime; and *ishtirāk ghairu mubashir*, that is when someone participates indirectly in committing a crime. See Abdul Qadir Audah, *Ensiklopedi Hukum Pidana Islam*, vol. 2 (Jakarta: Kharisma Ilmu, 2008); H. Ahmad Wardi Muslich, *Pengantar dan Asas Hukum Pidana Islam* (Jakarta: Sinar Grafika, 2004); 'Audah, *al-Tashrī' al-Jinā'ī al-Islāmī*, Hanafi, *Asas-Asas Hukum Pidana Islam*.

⁷³ 'Audah, *al-Tashrī' al-Jinā'ī al-Islāmī*, p. 357.

the type of crime and the contribution of the perpetrator in the crime of *ḥirābah*. Likewise, when not treated as an *ishtirāk*, then the application of the *ḥirābah* criminal punishment in the form of one sentence of the same type, namely *ḥad ḥirābah*.

Regarding the different sentences for these male and female perpetrators, Abd al-Azim Syaraf al-Din, as quoted by Paizah, stated: “The view that equates between men and women and the view that distinguishes between both of them in the punishment of *ḥirābah*, what is stronger is the view that equates between them. The reason that women are physically weak, so they should not be punished, is actually not a strong reason. Because if so, then the Prophet certainly did not order that women who steal and commit adultery be cut off their hands and also be chastened.”⁷⁴

The categorization of the perpetrators of *ḥirābah* in one type, namely as the main perpetrators appears to provide more legal certainty in the accountability of the *ḥirābah* crime. Simply define, this opinion look more appropriate with the equality before the law principle. Considering the size of a person’s contribution in a crime is indeed a fundamental aspect of criminal responsibility. However, in the case of *ḥirābah*, the existence of the intention to involve oneself in *ḥirābah* is the only determining factor that a person deserves to be categorized as the main actor, without considering his real position and contribution. Another important perspective to consider is the existence of repentance institutions. One of the differences between the *ḥirābah* verse and the other *hudud* crime verses is the explicit recognition of the repentance institution as an act that has significant legal implications for the perpetrators of *ḥirābah*. Namely if the perpetrators of the *ḥirābah* choose to repent before being caught, then the potential to be threatened with the sentence *ḥad* to be dropped (forgiven).⁷⁵

In the perspective of human rights, the three elements contained in the crime of *ḥirābah* legislation, i.e. the regulation of criminal acts that are inclusive (*yuhāribūnallāh wa rasūlabu wa yas’uuna fi al-arḍi fasādan*), the threat of severe and varied penalties, and the existence of institutions

⁷⁴ Paizah Haji Ismail, *Status Wanita dalam Undang-Undang Jenayah Islam* (Kuala Lumpur: Yayasan Dakwah Islamiah Malaysia, 2004), p. 284.

⁷⁵ Qur’an, 5: 34

of repentance are guarantees for the enforcement of justice for the community. That is, the three elements express the balancing of *ḥirābah* legal construction. Severe punishment provides a guarantee of legal protection for the people's right to their lives and property's security. But on the other hand, Islamic law also gives high appreciation and reward to the perpetrators of *ḥirābah* who choose to cancel their *ḥirābah* intentions by repenting.

Discrimination against *ḥirābah* perpetrators, as Hanafi's thought, is not accommodating to the characteristics of modern criminal law. Modern criminal law does not recognize the discriminatory nature between men and women and between Muslim and others. It must equalize all citizens and respect human rights. For this reason, the rules of the modern nation state require that all criminal provisions, before they are enacted, must first pass modern legislation procedures (tried in the legislature) to obtain prior approval. If it is not agreed upon, it must be abandoned.⁷⁶ The question is will Islamic law be accepted by non-Muslims, if they know that in reality the law is discriminatory and will harm them?

E. *Ḥirābah* and the Problems of Corporal Punishment

As stated before by Sayyid Sābiq, there are four classifications about the punishment of *ḥirābah* crimes; jailed and *ta'zīr*, cross-cut their hands and feet; put to death; and put to death and then crucified for three days so that these conditions are published and the deterrent effect is perfect. All kind of the punishment are based on physical punishment (corporal punishment).

Almost all provisions about human rights except Islamic concept, have extreme response to the punishment of *ḥirābah*. Even not only *ḥirābah*, but also in most of the concept of punishment in Islamic criminal law. They assumed that Islamic concept of punishment included in the type of corporal punishment, so tend to be cruel, unhuman, and degrading. Some of them are International Covenant on Civil and Political Right (ICCPR), the Convention Against Torture (CAT), and Other Cruel,

⁷⁶ Abdullahi Ahmed An-Na'im, *Dekonstruksi Syari'ah; Wacana Kebebasan Sipil, Hak Asasi Manusia, dan Hubungan Internasional dalam Islam*, trans. by Ahmad Suaedy and Amiruddin Arrani (Yogyakarta: LKiS & Pustaka Pelajar, 1994).

Inhuman or Degrading Treatment or Punishment. Cruel, degrading or inhuman punishment is outlawed by the ICCPR (art. 7). Articles 1 (i) and 16 (i) of the CAT stipulate that no person shall be subjected to torture or to cruel, inhuman or degrading punishment and that states shall take measures to prevent public servants from committing acts of torture or administering such punishment.⁷⁷

What is corporal punishment? The Special Rapporteur on Torture and Cruel, Degrading and Inhuman Treatment or Punishment to the UN Commission on Human Rights formulated this principle as follows:

Corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman, and degrading treatment or punishment enshrined, inter alia, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁷⁸

Meanwhile, according to International human rights organisations such as Amnesty International and Human Rights Watch hold that flogging, the amputation of limbs and retaliation for grievous hurt such as blinding or the pulling out teeth are indeed a form of cruel, inhuman, and degrading punishment. The same is true with regard to certain modes of carrying out the death penalty, such as stoning and crucifixion (at least if the latter punishment is taken to mean that the convict is subjected to it while alive, as is the case in Iran), execution in the same way as the culprit killed his victim (mentioned in Sudanese Penal Code and Some Northern Nigerian Shari'a Penal Codes), or execution by one of the victim's heirs (which, according to the Iranian Penal Code, the court may allow).⁷⁹ As if to agree with the opinion of critics of Islamic law, An-Na'im state that discrimination, unequal distribution of rights, restrictions on freedom of conscience and belief and denial of popular sovereignty have crept into

⁷⁷ Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*, p. 175.

⁷⁸ *Ibid.*, p. 176.

⁷⁹ *Ibid.*

all models where the supremacy of Shari'a is recognized.⁸⁰

It was interesting, that Islamic countries, such as Libya, Saudi Arabia, and Sudan have acceded to the CAT, without any reservation, although their legal systems allow severe punishments such as amputation and execution by stoning. A plausible explanation is that since the CAT does not define the notion of cruel, inhuman or degrading punishment, these states can argue that the syari'ah penalties, as they are based on God's law, cannot be regarded as cruel, inhuman or degrading. However, the prevailing interpretation of cruel, inhuman or degrading punishment is that it includes all form of corporal punishment.⁸¹

F. Concluding Remarks

Hirābah had been interpreted significantly different between classical Muslim's scholar and modern Muslim's scholars. The specific characteristic of *hirābah* in the Qur'an and Sunnah shows that the particular elements (*arkān al-khāṣ*) of its should be definite, clear, and distinct. In contrast with textuality approach by classical Muslim's scholars, modern Muslim's scholars have the same perception to reformulate *hirābah* from many perspectives, like definition, principle of liability, and formulation of punishment. This reformulation of *hirābah*, and also of Islamic criminal law in general, not only based on compatibility reasons to modernity, but also to harmonize with the changing of time and place. Textual understanding and the principle of individual and locality in *hirābah* are no longer competent with the principles of modernity which prior to collectivity and universality.

Several stipulations in crime of *hirābah* by classical scholars show variations in opinions that can affect the criminal liability aspects of crime of *hirābah*. For example, about the legal status of the perpetrators of *hirābah* which consists of many people who conspire (*isbtirāk*), or about the legal status of a women the perpetrator of crime of *hirābah*. Inaccuracy in responding to these problems can contribute to harm to the application of the principle of equality before the law.

In terms of punishment for *hirābah* perpetrators, Islamic law faces

⁸⁰ Tore Lindholm and Kari Vogt (eds.), *Islamic Law Reform and Human Rights: Challenges and Rejoinders* (Oslo: Nordic Human Rights Publications, 1993), p. 63.

⁸¹ Lindholm and Vogt (eds.), *Islamic Law Reform and Human Rights*, pp. 175–6.

many challenges from the outsider, including those from human rights activists. Many legal products from human rights institutions tend to be inconsistent with Islam, particularly with regard to the concept of punishment for the perpetrators of *ḥirābah*, and for perpetrators of crime in general. Among the triggering factors is disagreement in terms of physical (corporal) punishment and the function of punishment. Physical punishment in Islam is considered still needed because it relates to the deterrent effect and its effectiveness, while the human rights activists consider it a cruel, inhuman and degrading punishment.

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