A COMBATING *IRHAB* (TERRORISM) VIDE *AFWU* (AMNESTY GRANT) UNDER *SHARI'AH*: A SYSTEMATIC COMPARISON WITH NIGERIAN LEGAL REGIME

By

Ahmed A. Muhammed-Mikaaeel*
Kamaldeen O. Olaitan**
&
Abdulrazaak O. Zakariya***

Abstract

Terrorism has been a cankerworm inflicting pain on all and sundry across the universe. The innocent civilians have been at the receiving end. The ugly situation is not an exception in Nigeria. The legal regime criminalises the act of terrorism and searches for permanent preventive measures which culminates in the amnesty grants to terrorists in the country. Despite several amnesty grants to the terrorists in the country, it has not led to prevention due to incessant unexpected attacks by the terrorists. This article looks beyond the Nigerian legal regime of amnesty grants and ventures into the position under Shari'ah jurisprudence regarding combating terrorism vide amnesty grant with a systematic comparison with the Nigerian legal regime. The article purely adopts the doctrinal method of legal research and finds that the grant of amnesty to terrorists under Shari'ah jurisprudence is conditioned upon genuine repentance on the part of the terrorists before their arrest and non-commission of murder during the previous act of terrorism which conditions are absent in the Nigerian legal regime. The study recommends the Shari'ah jurisprudential conditional approach to the Nigerian government.

Keywords: **Irhab, Afwu, Shari'ah Jurisprudence, Systematic Comparison, Nigerian Legal Regime**

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*Lecturer, Department of Islamic Law, Faculty of Law, Kwara State University, Malete-Nigeria, Tel: 07035064745; ahmed.muhammed-mikaaeel@kwasu.edu.ng
**Lecturer, Department of Islamic Law, Faculty of Law, Kwara State University, Malete-Nigeria, Tel: 08034673505; kamaldeen.salman@kwasu.edu.ng
***Lecturer, Department of Islamic Law, Faculty of Law, Kwara State University, Malete-Nigeria, Tel: 08036116406; abdulrazaak.zakariya@kwasu.edu.ng

[1] Prophet Muhammad (PBUH)

1.0 INTRODUCTION

The best of mankind once prophesised that when the world is coming to an end, mass killings would become the new normal.[1] The prophesy has indeed come to pass with the menace of terrorism being felt almost across all the continents in the world over. The leading world news day-in-day-out seem not to be complete without capturing one terrorist attack or the other. Nigeria, as an independent nation, is one of the worst hit of terrorist attacks in the West African region. The rate at which lives are being lost due to the insurgence of terrorism is at a geometric rate.

The incessant attacks on the innocent Nigerians made the government to embark on the voyage of discovery of the lasting solution to prevent the menace of terrorism in the country. Aside criminalization of the act of terrorism in the country, the government also fares beyond litigation with a view to legalizing amnesty grant to terrorists as a form of permanent preventive measure. Despite the regime of legalisation of amnesty grant to terrorists by the Nigerian government, total prevention of terrorism has not been achieved.

The foregoing spurs this study to shift attention to *Shari'ah* jurisprudence by examining the way and manner amnesty grant (*Afwu*) are adopted to combat terrorism (*Irhab*) by systematic comparison with the Nigerian legal regime.

2.0 UNDERSTANDING *AFWU* AND *IRHAB* UNDER *SHARI'AH* JURISPRUDENCE

In Islamic jurisprudence, the Arabic word for 'amnesty' is *'afwu'* which means waiver or exemption of wrongdoing from liability.[2] Another word that is commonly used is *as-safh* which nearly means pardon. *maghfirah* (forgiveness) is another Arabic terminology that is synonymously used to *afwu*. The difference between amnesty/pardon and forgiveness is that while the former means waiver of blame and shame without redeeming the wrongdoer as a virtuous person, the latter redeems the wrongdoer into a newborn baby as if he never committed the wrong.[3] Technically, the concept of *afwu* connotes amnesty and pardon in Islamic legal parlance implicating waiver of punishment that should ordinarily be inflicted on the culprit for his committed crime(s).[4]

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[2] P Huda, '*Al-Afwu* in Qur'an and Relevance with Forgiveness in Psychology (Study of Semantic)' 1-52 <http://repositry.uin-suska.ac.id/60173..>.accessed on 04 March 2024

[3] MH Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice' *Islam and Civilizational Renewal*, (2015) 6(4) 3. <https://icrjournal.org/index.php/icr/article/view/297> accessed on 3 March 2024

[4] ibid

In the same vein, jurisprudence of Islamic law perceives 'terrorism'*"al-Irhab"*from linguistic realm.[5] It is etymologically deduced from the word *"ra-ha-ba"* which means to instill fear. It must be noted that the word *"al-irahab"* was not originally used to mean terrorism in most archaic Arabic dictionaries until the emergence of political agitations around the world which include gross violence and destruction of lives and properties. Thus, the new Arabic dictionaries started incorporating words like *"al-irhabiy" and "al-irhabiyyun."*In *Mu'jamul-Wasit*, the concept "*irhabiyyun*" (terrorists) has been used as the quality of those who employ the use of ferocious force and terror to actualize their political aim and objectives.[6] In another dictionary, it was defined as the instilling of fear that is activated by violent activities like genocide, bombing and dilapidation of properties in order to seize the political control of a state.[7]

Technically, the concept of terrorism *(al-irhab)* is not an already existing terminology in the *Shari'ah* because there is no any express contemplation of the word in the *Shari'ah* provisions or on the scholarly exegeses of the Islamic jurists during their Quranic or Sunnatic exegeses. The reason is not far-fetched. Islam did not have experience of any terrorism in the same manner as it occurs in these modern days.[8] However, the contemporary Islamic jurists and researchers have developed *Shari'ah* definitions of the concept from their own understanding of the process or its effects on the society. It has been defined as the distillation of fear to the physical and mental condition of the people or a way through which an organized group of criminals strive to actualize their objective through the use of violence.[9] Some of the violent components of terrorism include killing, assassination, destruction, vandalism, spreading of rumors and threats, violent vampirism, extortion, and robbery which are employed as part of their political strategy.[10] Invariably, *al-irhab* refers to an organized violence which is designed and planned to intimidate the public as a way of forcing the government to dance to their political requests.[11] Also, it has been defined as the use of unlawful

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5 T Ushama, 'The Phenomenon of *Irhab* (Terrorism): Meaning, History and Causes' *Al-Shajarah* (2018), 23(1), 1-40

6 M Ibrahim,*Mu'jamu-l-Wasit*(1st edn, Majma'u-l-Lugatu-l-Arabiyyah, 1972) 282

7 MJ Jamiu,*Ar-Ra'id: Mu'jamunLugaqiyyuHasriyyun* (1stEdn, Daru-l-Ilm li-l-malayyin, 1967) 88

8 ibid

9 AJ Izzu-d-Deen, 'Al-irhabwa-l-UnfusSiyasiy' in *Kitab Al-Huriyyah* (Vol. 10, DarulHuriyyah, 1986) 20.

10 ibid

11 League of Scholars, *Mawsu'atNadrati-l-Na'im* (1stEdn, DarulWasilah, 1997), 3828

violence or threat of any form in actualizing certain political objectives.[12]
The above definitions have clearly established what terrorism is all about, especially how dangerous it is in the usage of violence, ferocity, force and vandalism in the actualization of a political objective. A careful perusal of the provisions of the *Shari'ah* from the Quran to the Sunnah clearly shows that *Shari'ah* goes against all acts of terrorism for any reason.[13] There are various authorities from the Qur'an where Allah (SWT) clearly places primacy on the importance of life and its sacredness when Allah (SWT) ordained:[14]

> On that account: We ordained for the Children of Israel that if anyone slew a person unless it be for murder or for spreading mischief in the land it would be as if he slew the whole people: and if anyone saved a life it would be as if he saved the life of the whole people. Then although there came to them Our apostles with clear Signs yet even after that many of them continued to commit excesses in the land.

The above verse clearly shows the importance of life and how valuable *Shari'ah* deems it. Life of human beings are very sacred in the eyes of Allah notwithstanding religious differences. So, all lives, whether Muslims or non-Muslims, are sacred under *Shari'ah* and are jealously guarded. To this end, Allah says in another verse thus: '…take not life which Allah hath made sacred except by way of justice and law…'[15] The importance of life is strengthened by the fact that it is placed as the second objective of *Shari'ah*. In other words, in the hierarchy of the five primary objectives of *Shari'ah* consensually agreed upon by Islamic jurists, protection/preservation of life is the second.[16]

Despite the avalanche of the clear provisions under *Shari'ah* singling out the sanctity of lives and properties, some odious and atrocious practices by acclaimed Muslims have thrown the world into the controversy of liking terrorism with the *Shari'ah* concept of *Jihad*. Thus, thereis a misconception between the two concepts: Jihad and *Ir'hab*. Many non-Muslims have been portraying *Shari'ah* as the positive legal framework for terrorism due to some terrorist groups who claimed to be engaging in *jihadist* activities while terrorising their nations or communities to sub due the government of such countries to dance to their political goals.[17] Truly, the concept of *Jihad* exists in

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12 Z Abdulsalam, *Al-Irhabbaina-l- Amswal-yawm* (Daru Garib 1990), 15

13 This is the fulcrum of the Maqasidush-Shari'ah which outlaws destruction of lives and properties amongst other.

14 Qur'an Chapter 5 verse 32

15 Qur'an Chapter 6 verse 151

16 ZM Ar-Romany,*Maqasidu As-Shari'atu Al-Islamiyatu* (1st Edn, Daru-l-Gayth, 1994), 83

17 AA Muhammed-Mikaaeel, and FE Ikebundu, 'Misconception of the Legalisation of Armed Conflicts under Shariah: A Review of Shari'ah Ethical Standpoint' *NnamdiAzikwe Journal of*

Islamic jurisprudence as part of the compulsory activities which all Muslims are enjoined to observe in their activities. However, the real meaning of *Jihad* can be categorized into general meaning and particular meaning. The general meaning connotes the act of striving towards the path of Allah through the observance of His do(s) and don't(s), engaging in righteousness, and preservation of the religion.[18] The authorities on the general connotation of *Jihad* are evident in the first primary source of *Shari'ah* thus:

> And strive in His cause as ye ought to strive (with sincerity and under discipline):[19]
>
> And if any strive (with might and main) they do so for their own souls: for Allah is free of all needs from all creation.[20]
>
> And those who strive in Our (Cause) We will certainly guide them to Our Paths: for verily Allah is with those who do right.[21]

The particular connotation of *Jihad* is that it deals with the act of calling non-Muslims to profess Islam and defend the religion from the attacks of the disbelievers.[22] It is this connotation of *Jihad* that has been misused by some extremists which amounted to labeling *Shari'ah* as a violent prone legal system sanctioning the act terrorism. It must be noted that the encounter that is sanctioned by Allah for the Muslims against the non-Muslims is defensive in nature. In other words, *Shari'ah* does not give room for confrontational fight or war against the non-Muslims. This can be understood from the provision of the Holy Qur'an that says:

> Allah forbids you not with regard to those who fight you not for (your) Faith nor drive you out of your homes from dealing kindly and justly with them: for Allah loveth those who are just.[23]

Commercial and Property Law (2024) 11(2) 92-102

[18] ASR As-Suhaimy,*Al-Jihad fi-l-Islam: Maf'umuhuwadowabituhu, waanwa'uhu, waa'dafuhu* (DarulMadinat An-Nabawiyyah, 2008), 28

[19] Qur'an Chapter 22 verse 78

[20] Qur'an Chapter 29 verse 6

[21] Qur'an Chapter 29 verse 69

[22] As-Suhaimy (n 16)

[23] Qur'an Chapter 60 verse 8

> Allah only forbids you with regard to those who fight you for (your) Faith and drive you out of your homes and support (others) in driving you out from turning to them (for friendship and protection). It is such as turn to them (in these circumstances) that do wrong.[24]

It is important to note that *Jihad* starts from the use of soul (mind) and hands before resorting to the use of swords. This is unlike *irhab* (terrorism) which is ordinarily the usage of violence to advance a political motive. Although, terrorism may be for the advancement of a religious motive, but *Jihad* only allows use of violence as a defensive strategy against the suppression and oppression of the Muslim community. This can be understood from the verse of the Holy Qur'an that says:[25]

> Fight in the cause of Allah those who fight you but do not transgress limits; for Allah loveth not transgressors.

By implication, defensive war is only permitted under *Shari'ah* as a reactive response to the confrontation of the non-Muslims. In fact, most of the places where Allah refers to war or armed struggle, He does not use the word *"Jihad"*, but other words like *"qitaal"* (fight), or "*fitnah"* (war).[26] Also, the objective of terrorism is destruction of the people and the society through the commission of crimes against humanity, while the *maqsid* (objective) of *jihad* is mainly to establish an Islamic order according to the dictates of Allah (SWT). Notably, the concept of terrorism *(irhab)* in Islamic jurisprudence falls under the auspices of *al-fasad* (mischief)[27] which is clearly in *Shari'ah* jurisprudence. Hence, Allah warns:

> *...and seek not (occasions for) mischief in the land: for Allah loves not those who do mischief*[28]

Also, in Also, in another injunction of the Holy Qur'an, it provided that:

> Say: The things that my Lord hath indeed forbidden are: shameful deeds whether open or secret; sins and

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[24] Qur'an Chapter 60 verse 9

[25] Qur'an Chapter 2 verse 190

[26] L Amir and SM Hafiza, 'Terrorism and Jihad: An Islamic Perspective'*Journal of Islamic Studies and Culture*, (2014) 2(1) 71.

[27] Qur'an Chapter 28 verse 77

[28] Qur'an Chapter 5 verse 33

> trespasses against truth or reason; assigning of partners to Allah for which he hath given no authority; and saying things about Allah of which ye have no knowledge[29]

Islam, as a religion of peace, brought to the fore the *Shari'ah* legal system which is built on the fulcrum of peace, tranquility and serenity. The strategies and methodologies of *Shari'ah* jurisprudence in disseminating its messages render terrorisman illegal mission which all Muslims are enjoined to distance themselves from.

3.0 PERCEPTIVE NOTION OF *IRHAB* UNDER *SHARI'AH* CRIMINAL JURISPRUDENCE

It is noted above that the concept of *irhab* is a new terminology in Arabic dictionary having been said not to have been known in the Prophet era especially in the present form it is surfacing across the globe. However, upon close scrutiny into the processes, methods, instrumentalities, effects and consequences of terrorism by Islamic scholars, it is regarded as part of *fasaad* (mischief) which Allah contemplated in the verse of *hirabah* thus:

> The punishment of those who wage war against Allah and His Apostle and strive with might and main for mischief through the land is: execution or crucifixion of 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.

Etymologically, the word *Hirābah* is an Arabic word from *Harb*, meaning war or the opposite of peace.[30] This grammatical meaning has been used in the Qur'an when Allah said '*If ye do it not, take notice of war from God and His Apostle.*[31]' It is also used to refer to any act of robbery or pillage.[32] A person that engages in *Hirābah* is therefore referred to as Muhārib. Importantly, there is nexus between the grammatical meaning of *Hirābah* and its technical meaning. Technically, *Hirābah* refers to the setting out of an armed individual or group of armed individuals in the abode of Islam to cause chaos, rob properties, shed blood and destruct farm land.[33] It is inferable from the definition that any act of using arm to distort the peace of the Islamic state, either by confiscation or stealing of property

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[29] Qur'an Chapter 7 verse 33

[30] AA Abu-Mansur, *Tahdheeb Al-Luga'* (Vol. 4, Darul-Kitab Al-Ilmiyyah, 2004ā) 21

[31] AA Yusuf, *The Holy Qur'an: Translation and Commentary* (Islamic Propagation Center International, 1946), Qur'an Chapter 2 verse 279

[32] AA Ibn-Mandhur, *Lisanu-l-Arab* (Vol. 1, Darul-Sadir, 2010), 294

[33] I Muhammad-Bakr, *Al-Fiqh Al-Wadih* (2nd Edn, Vol. 2, DarulManar, 1997), 252.

or by murdering of soul will amount to *Hirābah* in the Islamic penal system. According to SayyidSalim, *Hirābah* occurs when there is unlawful grabbing of property, or waging of war or terrifying the calmness of the people openly through the use of force in such a way that the victim could not find help or be helped.[34]

The offence of *hirabah* is considered as one of the *Hudud* offences in the Islamic penal system. It has the following features:[35]

a. Firstly, the offence of *Hirābah* can be committed by an individual person and may be committed by group of persons.
b. Secondly, there is need for proof of use of force (not arms or weapons) in the proof of *Hirābah*.
c. Thirdly, the offence of *Hirābah* is not restricted to hijacking of properties, but it captures other criminal acts like terrorism, murder, kidnapping, abduction, human trafficking and so on.

The verse of the Holy Qur'an on *Hirābah* is explicit on different punishments that should be meted on the person that is convicted for the offence. The punishments stipulated in the verse include execution, crucifixion, cutting of hands and feet from opposite sides, and exile from land. The first divergence that surrounds these punishments among Islamic jurists is whether the punishments are in variations (*tanwi'*) or alternatives (*takhyir*). By *Tanwi'* (variation), it implies that the punishments mentioned vary accordingly in sequence of the severity of the offence committed.[36] On the other hands, *takhyir* (alternative) implies that the Imam in the Islamic State has the discretion to choose from the four stipulated punishments as he so wishes and not based on the severity of the offence committed. The arguments among the jurists on this categorization is not the focus of this study, thus, the majority view will be restricted to. It is the view of the majority that the punishments vary according to the severity of the offence committed. The punishments are as follows:[37]

I. If the *Hirābah* only involves terrorizing and intimidating the passers-by or road-breaking without killing, or stealing, or injury, the punishment will be exile from the city. The exile is expected to be faraway from the city where the crime was committed. Exile, according to the Hanafi

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[34] AK Sayyid-Salim, *Sahih Fiqh Al-Sunnah* (Vol. 4, DarulTaofiqiyyah Lit-Turoth, 2010), 123
[35] Muhammad-Bakr (n 32)
[36] Muhammad-Bakr (n 32), 252-253
[37] AI Doi, *Shari'ah: The Islamic Law* (Percetekan Zafar Sdn Bhd, London, 2007) 252-253. See also, YY Bambale, *Crimes and Punishments under Islamic Law* (2nd Edn, Malthouse Press Limited, Lagos, 2003) 89-90

School, is imprisonment.

ii. If the *Hirābah*h only involves the unlawful taking of property without any act of killing, the punishment will be cutting of hands and feet in opposite sides. That is, when the right hand is cut-off, the left leg will also be cut-off, and vice versa. If there is recurrent perpetration of the crime by the same person(s), the remaining hand and feet will be cut-off. There is however another contention as to whether the value of property robbed is up to *Nisab*. Having examined the views of the contenders, there seems to be no express Quranic verse or Hadith that incorporates this requirement. The requirement was mainly based on *Qiyas* from the *Hadd* of *sarqa* (theft).

iii. If the *Hirābah* was committed and it only involves killing of soul without necessarily taking away any property, the punishment is execution. Even where there are *Muharibun*, and only one of them killed a soul, all of them will be executed as conspirators.

iv. However, where the *Hirābah* involves both killing of soul and taking of property, the punishment will be execution, then crucifixion.

In view of the foregoing, the treatment of *hirabah* is usually adopted for terrorism by way of analogically deduction (*qiyas*) since there is no express provision for it in Islamic jurisprudence.

4.0 LEGALITY OF *AFWU* UNDER *SHARI'AH* JURISPRUDENCE

Legality of *Afwu* is traceable to the various injunctions in the Holy Quran and the Sunnah of Prophet Muhammad (PBUH). *Shari'ah* jurisprudence orchestrates that Allah (SWT) qualifies Himself in several verses of the Holy Qur'an as the Most Forgiving *(Al-Gafur)*[38] and Most Condoning *(Al-Afuwu)*[39] The implication is that Allah (SWT) is always ready to forgive His servants of their sins and crimes. In fact, He enjoined that victims of wrong-doing should find peace in pardoning the wrongdoers in the following words:[40]

> The recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation His reward is due from Allah: for (Allah) loveth not those who do wrong.

In another ordinance of the holy Qur'an, it is posited thus:[41]

> …and so for all things prohibited there is the law of

[38] The word *Al-Gafur* was repeated by Allah (SWT) 71 times in the Holy Quran.
[39] The word *Al-Afuwu* was repeated by Allah (SWT) 5 times in the Holy Quran.
[40] Qur'an Chapter 42 verse 40
[41] Qur'an Chapter 2 verse 194

> equality. If then anyone transgresses the prohibition against you transgress ye likewise against him. But fear Allah and know that Allah is with those who restrain themselves.

In the same vein, Allah ordains that:[42]

> But indeed, if any show patience and forgive that would truly be an exercise of courageous will and resolution in the conduct of affairs.

Apart from the above textual verses of the Holy Quran, there are also different reports about the forgiving and condoning nature of the Prophet. The Prophet Muhammad is frequently reported to have granted pardon to those who wronged him. Jabir bin 'Abd Allah has thus narrated that when a Jewish woman from Khaybar served the Prophet some poisoned mutton, he took a small amount, but some of his Companions took more and fell ill. When the Prophet questioned her later: "did you poison that meat? She said 'yes.' Some of the Companions present asked the Prophet 'would you not order that she be killed!' The Prophet replied in the negative, and granted her pardon. Here was a great leader showing the way, so graphically exhibited, as to how Islam values forgiveness by one who has the power to strike back.[43]

According to another *riwaayah* (report), on the authority of 'Abd Allah ibn Mas'ud, the Prophet was wounded by an enemy soldier in the Battle of Uhud and was wiping blood from his face while also uttering the words: 'O my Lord! Forgive my people, for they do not know the very same prayer that was once uttered by the Prophet Noah.[44]

Jabir bin 'Abd Allah reported that on one occasion he fought a battle in the company of the Prophet and upon return the Prophet rested under the shade of tree and hung his sword, "and we all fell asleep. The Prophet then alerted us when he caught red-handed a Bedouin who had taken the Prophet's own sword and attempted to strike him, at which point the Prophet woke up and questioned the man, but then pardoned him and let him go."[45]

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42 Qur'an Chapter 42 verse 43

43 Al-Bukhari, *Sahihi Al-Bukhari* (Vol. 4, Dar al-Hadith, 2004) Hadith No. 2617

44 ibid, Hadith No. 6929

45 ibid, vol. 2, Hadith No. 2910

5.0 THE APPLICABILITY OF *AFWU* TO COMBAT *IRHAB*: *SHARI'AH* PERSPECTIVE

Under *Shari'ah* jurisprudence, *Hudud* offences are made up of right of Allah *(haqq Allah)* and right of man *(haqq al-Adami)* or a combination of the two rights, depending on the nature of the offence. The general rule is that there is no amnesty in *Hudud* offences and the *Qadi* (judge) has no discretion in punishing a convict for any *Hadd* offence.[46] The majority of schools of Islamic jurisprudence held that amnesty cannot be granted in *hudud* offences of adultery, intoxication, theft, wine-drinking, slander and apostasy, while Hanafi submitted that in cases of slander and apostasy, amnesty may be granted.[47] Another important point to note is that amnesty is allowed before the reporting of a criminal allegation to the government authority in Islamic state. So, a thief who returns the property stolen to its owner before it is reported to the authority may be granted amnesty.[48]

In considering amnesty in *hirabah* cases, there is exception created in the provisions of the Holy Qur'an.[49] The Qur'an provides exceptional circumstances under which *Afwu* may be granted to the culprit(s) against the punishments legislated in Qur'an Chapter 5 verse 33 as follows:[50]

> Except for those who repent before they fall into your power: in that case know that Allah is Oft-Forgiving Most Merciful.

The above verse gives room for repentance from the criminals before they are arrested. This implicates that where terrorists *(al-Irhabiyyun)* or *(Muharibun)* repent and surrender their arms, stolen and robbed property before they are arrested, then amnesty can be granted to them. However, the repentance only relates to a situation where no life has been taken during the terrorist operation. But where lives have been taken, then no amnesty can be considered in their favour. This thus makes grant of amnesty to be unique under *Shari'ah* because it is granted to the deserving criminals who had already repented from the terrorist activities, purged himself of the crimes and have being in constant regrets of his previous actions.[51] This shows that amnesty grant under *Shari'ah* is a viable tool

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46 N Hussin, 'Revisiting Islamic Punishment and its Implementation in the Contemporary World' (International Conference of on Humanity, Law and Sharia (ICHLaSh), November, 14-15, 2018).

47 ibid

48 AO Naseef, *Encyclopedia of Seerah* (Vol. II, The Muslim Schools Trust, London, 1982) 804-805

49 Qur'an Chapter 5 verse 34

50 ibid

51 KM Salman, 'Amnesty as Antidote to Terrorism: Legality or Otherwise under International and Islamic Laws'*Al-Hikmah University Journal of Islamic Law (HUJIL) (*2019) 3, 33-37

towards combating terrorism as assurances are given that the criminals to whom it is granted cannot go back to the act of terrorism and that such person had never taken life of anyone during his illegal terrorist activities.[52]

6.0 COMPARING THE APPLICATION OF *AFWU* TO *AL-IRHABIYYUN* UNDER NIGERIAN LEGAL REGIME AND *SHARI'AH* JURISPRUDENCE

There exist significant and notable similarities and differences between under Nigerian legal regime and *Shari'ah* jurisprudence with respect to the application of amnesty grant (*Afwu*) to terrorists (*Irhabiyyun*). The similarities and differences are systematically examined below under different subheadings.

6.1 CRIMINALIZATION OF *IRHAB*

From a cursory study of the Nigerian legal regime and *Shari'ah* jurisprudence, it is discernible that the two systems of law criminalized terrorism (*Irhab*). Observantly, the similitude of the offence of terrorism (*Irhab*) under the Nigerian criminal system is found in the *hadd* offence of *Hirabah* within the context of *Shari'ah* jurisprudence. Terrorism refers to the use of violence and ferocity to disrupt public peace as a way of pressurizing or forcing the government to dance to a political or religious interest. The danger of terrorism has been succinctly explained in the case of Karumi v. FRN,[53] where the Court of Appeal held that:

> The gravity of the offence of terrorism which involves the use of violence or force to achieve something, be it political or religious, is a grave affront to the peace of society with attendant unsalutary psychological effect on innocent and peaceful members of the society who may be forced to live in perpetual fear. It is an offence that may even threaten the stability of the state. The sophisticated planning and execution of the acts of terrorism show it is an offence that requires premeditated cold-blooded organization. The circumstances under which such a crime is organized calls for appropriate sentencing to deter its recurrence by potential or prospective offenders.

Under *Shari'ah*, chaotic degeneration of public peace through genocidal killings and destruction of property is greatly prohibited, including any act of instilling fear in the minds of the people. It is an odious act considered as the act of waging

[52] ibid
[53] [2016] LPELR-40473 (CA)

war against Allah and His Prophet as orchestrated in Qur'an Chapter 5 verse 33. Beyond the fact that the two legal systems consider terrorism as heinous criminal act, there exist certain similarities in the ingredients or elements required to secure conviction for the offence of terrorism. To secure conviction for the offence of terrorism under the Nigerian criminal law, the following ingredients must be present:[54]

i. Seriously harming or damaging a country or an international organization;
ii. Reasonably and unduly compelling a government or an international organization to perform an act or abstain from doing an act;
iii. Seriously intimidating a population;
iv. Seriously destabilizing or destroying the fundamental, political, constitutional, economic or social structures of a county or an international organization;
v. Influencing a government or international organization by intimidation or coercion;
vi. Attacking a person's life;
vii. Kidnapping a person;
viii. Destruction of government or public facility (such as infrastructure facility, information system etc.); and
ix. Seizure of an aircraft, ship, other means of public or goods transportation;

Any of the above listed acts constitutes the *actus reus* of the offence of terrorism. As for the *mensrea* of the offence of terrorism, the Act provides for the proof of "malice after thought."[55] The requirement of proof of malice afterthought is however doubtful considering the fact that there is now plethora of cases in Nigeria noting that the issue of "malice afterthought" is no longer part of the Nigerian criminal jurisprudence and it does not govern criminal responsibility.[56] However, it is suffice to dispense with malice afterthought if the knowledge of the probable consequence of the action is proved.

In the same vein, the ingredients of *Hirābah* which encompasses terrorism *(al-Irhab)* under the Islamic law are also *sine qua non* to convicting culprits under *Shari'ah* criminal jurisprudence. These ingredients are not unanimous among all the Sunni schools. This is because, there are ingredients that they held divergent opinions on, though they are unanimous on certain ingredient of the offence of *al-Irhab*. To this end, Sayyid Salim structured the ingredients of *al-Irhab* as follows:[57]

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[54] Terrorism (Prevention) Act 2011, s. 1(2)
[55] ibid
[56] See generally, the cases ofSuleiman v. Kano State [2014] LPELR-23601 (CA); Nwali v. State [1991] 3 NWLR (Pt. 182) 663; and Adekunle v. State [2006] 14 NWLR (Pt. 1000) 717
[57] Sayyid-Salim, (n 33), 123

a. The defendant (accused) must be legally competent (*Taklif*);
b. The defendant (accused) must be bound by *Shari'ah* rules (*Iltizam*);
c. The defendant (accused) must be masculine;
d. The defendant (accused) used arms, ammunition, or weapon;
e. The locus *criminis* (place of crime) is in the outskirt of the city; and
f. The act of *Hirābah* was committed publicly and overtly.

It is noteworthy that the ingredients pertaining to masculinity, possession of arms, and commission at the outskirt of the city are not among the unanimous conditions agreed upon by the Islamic schools. However, the majority of the schools held that the act of *hirabah* (terrorism)[58] needs not be at the outskirt of the city and it is needless to prove that the culprit possessed ammunition. Also, they opined that a female can also commit *Hirabah* as against the Hanafi School which held otherwise.[59]

Thus, a close perusal of the ingredients of the offence of terrorism under the Nigerian criminal law and *Shari'ah* jurisprudence shows that the ingredients are nearly the same, except that the Nigerian law seems to have a more explanatory law on terrorism. This does not mean that the offence of terrorism under *Shari'ah* is not as wide as that of Nigerian law (if not wider), however, the Nigerian law outlined, in a more clarified manner, what constitutes as offence of terrorism. It is important to note as well that the offence of *Hirabah* encompasses all heinous crimes that one could think of, except that the crimes become *Hirabah* when they are used to threaten, coerce or instill fear or intimidation in the public. So, *Hirabah* includes murder, theft, kidnapping, trespass to property (destruction of private and public property), rape, and so on.

However, in the punishment regime, the punishment of terrorism under *Shari'ah* jurisprudence is severe[60] compared to that of Nigerian law which only punishes terrorism with life imprisonment or fine. In Islamic jurisprudence, the punishment of terrorism includes execution, crucifixion, cutting of hands and legs, and banishment of the convicts from Islamic state. However, the circumstance of each case determines which punishment to be imposed on the convict.

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58 ibid

59 ibid

60 Amongst the punishments are death sentence, crucifixion and amputation of a hand and a leg from the alternate side. See generally, Quran Chapter 5 verse 33

6.2 ADMINISTRATION OF *AFWU*

Legal regime in Nigeria perceives amnesty or pardon as the useful tool towards exonerating the criminals who have been convicted for criminal offences from observing their jail terms in full or partly or from being executed for the punishment of death sentence.[61] The basis for amnesty under the Nigerian law is traceable to sections 175 and 212 of the Constitution of the Federal republic of Nigeria, 1999 (as amended) which vest powers of granting prerogative of mercy to criminals in the President and the Governor respectively. It is important to note that the constitution does not make use of the word "amnesty" but it is inferable in meaning that prerogative of mercy is nearer in meaning to amnesty. The actual word used by the constitution is pardon. The difference between Amnesty and Pardon has been given in the case of Adeola v. State[62] where the Court held that:

> Amnesty' is an official statement allowing people who have been put in prison for crimes against the state to go free; while 'pardon' is an official decision not to punish somebody for a crime, or to say that somebody is not guilty of a crime (see Oxford Advanced Learner's Dictionary, 7th Edition, Pages 45 and 1058, respectively). The latter wipes out the conviction and sentence and in the event of a pending appeal the pardon renders the appeal academic and liable to be struck out; while the former (amnesty) does not extirpate the crime and conviction and sentence entered thereon. So it is, in my view, wise that the appeal was argued on the merit.[63]

Therefore, it is observed that the use of amnesty in Nigeria is wrong, especially in a non-international offence. Though, the Transfer of Convicted Offenders (Enactment and Enforcement) Act 1988 makes use of amnesty, but it is in relation to transfer of convicted persons to the sentencing countries.[64] Nonetheless, the provision of section 175 and 212 of the constitution on pardon are closely related to amnesty and this study considers them to be the same. However, before the President can exercise his power of pardon, he must have consulted the Council of state, and the Governor is to also exercise the power after consulting his advisory council of state.[65] Importantly, the essence of pardon or amnesty under the Nigerian law is to exonerate convicted persons by reducing the terms of their

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61 See ss. 175 and 212 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

62 [2017] LPELR-42327 (CA)

63 ibid

64 TCO (EE) Act, 1988, s. 13

65 CFRN 1999, ss. 175(4) and 212 (3)

sentence to a lesser one or by totally doing away with the sentence.

On the other hands, the concept of pardon, forgiveness, repentance and amnesty are well rooted in *Shari'ah* jurisprudence. It is important to note that amnesty is allowed and greatly enjoined in matters that involve private rights, such as cases of personal debt, ownership rights, right of retaliation/retribution *(Qisas),* right of preemption *(shuf'a)* and so on. It is not allowed in *Hudud* offences (except for *Qadhf*-slander) that have been completely committed, because they are offences violating the rights of Allah and not that of the creatures.[66] However, amnesty may be allowed before the *Hudud* offences are reported to the authorities and the accused person has shown remorse.[67]

6.3 APPLICATION OF *AFWU* TO *AL-IRHABIYYUN*

Under the Nigerian legal regime, it is clear that there is no any law (including subsidiary legislation) excluding terrorism from the list of crimes and offences which the President can grant pardon in favour of the convicts. In other words, the offence of terrorism, as heinous as it is, is among the offences which the President can validly pardon persons convicted of it. In Nigeria, the amnesty programme for convicted terrorists is structured in line with DDR policy which connotes (i) the Disarmament, (ii) Demobilization, and (iii) Reintegration.[68] It is important to note that Nigeria allows the grant of amnesty for persons already convicted for terrorism.

The contrary position is held in *Shari'ah* jurisprudence. No amnesty can be allowed in cases of *Hirabah* (terrorism) except where repentance is made before the carrying out of the crime without any loss of life, injury or property. This position is premised on the provision of Qur'an Chapter 5 verse 34 where Allah says:

> Except for those who repent before they fall into your power: in that case, know that Allah is Oft-Forgiving Most Merciful

Thus, where the repentance is made after the commission of the crime and the arrest of the terrorists, there is no amnesty grantable for such persons. Even any authority that grants authority to such persons is liable to the curse of Allah.[69]

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66 MH Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice' *Islam and Civilizational Renewal Journal* (2015) 447. <https://icrjournal.org/index.php/icr/article/view/297> accessed on 6 April 2024 at 12:10am.

67 ibid, 448

68 TM Ebiede, 'Assessing Effectiveness of Employment Programmes for Combatants: a Case Study of Nigeria' s Post Amnesty Proagramme (PAP)' (2018), 1. <https://www.researchgate.net/publication/330606632_Assessing_the_Effectiveness_of_Employment_Programmes_for_Ex-Combatants_A_Case_Study_of_Nigeria%27s_Post_Amnesty_Programme_PAP> accessed on 6 April 2024 at 12:15am

69 AA Onikosi, and AA Muhammed-Mikaaeel, 'Legal of Amnesty Grant as Mechanism for Combating Terrorism in Nigeria: Shari'ah Standpoint' *Al-Hikmah University Journal of Islamic Law (HUJIL) (*2023) Special Edition,163-166

7.0 LESSON FROM *SHARI'AH* JURISPRUDENCE

After comparing the position under the Nigerian legal regime and *Shari'ah* jurisprudence on the application of amnesty in cases of terrorism, it is important to note that the position of *Shari'ah* is more reasonable and logical. The position of Nigerian law is not prospective. Little wonder terrorism continues to rise in the country. Also, considering the gravity of the offence and the maximum socio-political and economic disruption that terrorism causes the country, it will be unreasonable to reintegrate them to the society. Their ungenuine repentance cannot recompense the lives loss and the properties destroyed. Nigerian legal regime must borrow a new leaf from *Shari'ah* jurisprudence. Hence, it is high time the administration and application of amnesty grant under the Nigerian legal regime is adjusted to align with the position of *Shari'ah* jurisprudence.

The grant of amnesty to culprits in Nigeria levities the great massacre and heinous crimes of mass destruction of lives by the terrorists. This is because before a terrorist can be pardoned under *Shari'ah* jurisprudence, he must not have committed murder during the terrorism. Once a terrorist is confirmed to have killed a soul, he lost the right to be pardoned.[70] Thus, Nigerian legal regime needs to begin to tow this line before the grant of amnesty can actually achieve the purpose for which it was envisioned.

More so, a striking difference in the administration and application of amnesty to terrorists between the *Shari'ah* jurisprudence and Nigerian legal regime is the assurance of genuine and convincing repentance on the part of the terrorists before their arrests. This implicates that under *Shari'ah* jurisprudence, before a terrorist could be entitled to amnesty grant (*Afwu*), the conditions of genuine repentance prior to arrest must have been met. The Nigerian legal regime does not however give credence to repentance prior to the arrest of the terrorists. The issue of amnesty is resorted to during bargain with the terrorists with a view to forestall further attacks without ensuring genuine repentance on the part of the terrorists. In most cases, amnesty is granted to the terrorists even after commission of great massacre on the land or after being convicted of the offence of terrorism. It is important to note that this amnesty grant style has not been able to curb terrorist attacks in Nigeria. This is signal to the effect that Nigerian legal regime has to emulate *Shari'ah* conditional amnesty grant for amnesty grant to actually work in the Nigeria.

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[70] The Supreme Being, Allah (SWT) stipulates the repercussion and implication of killing a soul in the holy Qur'an as equivalent to killing all mankind. See Quran Chapter 5 verses 32-33.

8.0 CONCLUSION

The article revealed that both the Nigerian legal regime and *Shari'ah* jurisprudence recognised amnesty grant to terrorists as a form of permanent preventive measure to combating their menace. Thus, by way of comparative analysis, it is discovered that there exists certain similarities and differences in the *Shari'ah* and Nigerian legal regimes for combating terrorism (*Irhab*) vide amnesty grant (*Afwu*).

Thus, amnesty grant is deeply rooted in the constitutional provisions of sections 175 and 212. The sections empowers granting of amnesty to terrorists notwithstanding the heinous nature of the offence of terrorism. The bottom line is that the Nigerian legal regime does not stipulate any condition for the grant of the amnesty grant. The grant is absolutely at the discretion of the President which is usually resorted to during settlement negotiation between the government and the terrorist group. This is without having recourse to the heinous acts of massacre they have committed on the land.

However, in the jurisprudence of *Shari'ah*, by way of analogical deduction (*qiyas*), the offence of *Irhab* (terrorism) is drawn from the jurisprudence of *Hirabah* having similar ingredients. Hence, the concept of *Afwu* in the *Shari'ah* jurisprudence extends to the boundary of *Irhab* in favour of the terrorists. It is thus noted that from *Shari'ah* jurisprudence, amnesty grant (*Afwu*) is not resorted to as matter of course. From the clear and unambiguous Quranic provisions, it can only be granted to the terrorists after the terrorists met the condition of genuine repentance prior to their arrest. It is therefore not gainsaid that the amnesty grant under *Shari'ah* jurisprudence is conditioned upon genuine repentance prior to arrest of the terrorists by the appropriate authority. It is equally important to note that this condition can only avail the terrorists who have never committed murder (*Qatl*) in their previous encounter(s).

By way of systematic comparison and analogy between *Shari'ah* jurisprudence and the Nigerian legal regime, it is safe to posit that the application of amnesty grant to terrorists under *Shari'ah* convincingly procure the situation of absolute prevention of further act of terrorism by the terrorists as a result of their genuine repentance prior to their being pardoned. This feature is lacking in the Nigerian legal regime approach. Hence, the country has not been able to boast of terrorist free atmosphere for its citizenry. Thus, great lesson abound for Nigerian government from the study of *Shari'ah* jurisprudence with respect to the way and manner of amnesty grant to terrorists.