

Progression of Modarabah Rules in the Formative Period of Sunni's Legal Text

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Introduction:

This fact is above board that our ancestors and the great jurists and well known scholars of early ages provided gigantic works and literature on each and every vista of knowledge. Special attention was paid to trade activities to boost the economic and financial matters in early period. Modaraba a form of partnership was much common among the ancient Arabs even at present age it is the only solution to run a purified Riba free economic system. In Modarabah form of partnership money is given by one partner to another for investment in a business venture. Investor is termed as "Rabb-ul-mal" whereas the other partner who manages the work is termed as "Mudarib".

The rules of Modarabah have been elaborated in great detail in the text of classical fiqh (Islamic jurisprudence). Separate chapters or sections have been devoted for the subject of Modarabah in all most all the the earliest texts of the four Sunni schools of law although in their scope of discussion they are varying to each other. The earliest Hanafi rules on Modarabah are found in the works of al-Shaybani (d.189/205) namely his al-Jami al-Saghir and al-Jami al-kabir. In the other schools al-Muwatta of Malik (d. 179/795), Kitab al-Umm of al-Shafi'i (d.204/820) and Masayil Imam Ahmad of Ahmad ibn Hanbal (d.241/855) serve as the main source of text to find the earliest rules of Modarabah.

Progression of Modarabah rules in Hanfi's Legal text:

The Hanafi school of law is the creation of juristic rules and regulations as educated by Abu Hanifa. It is famed for pioneering more stress on Qiyas (Analogy) and Raa'y (personal opinion) than stress on adoptions and deductions from Hadith. The spread of Hanafi School was placed round the personality of Abu Hanifa and his two disciples, Abu Yusuf and Muhammad al-Shaybani. After Abu Hanifa his notable pupils played a key figure role in the propagation of Abu Hanifa's rulings; eventually it results towards the formation of a distinct school of law. Muhammad al-Shaybani got fame because of his distinct role towards the compilation of Hanafi's legal texts.

Al-Jami al-kabir and Al-Jami al-Saghir of Muhammad al-Shaybani

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It may be concluded that where ever we find the few examples relating to execution of the captives from the life of Holy Prophet (ﷺ), after a little consideration we also find a solid reason behind every case due to which the order of execution came from the court of the Holy Prophet (ﷺ). When the Holy Prophet (ﷺ) found some special situation which required this judgment, then due to that particular reason the Holy Prophet (ﷺ) exercised this exception, because in the case of captives execution is not a common rule but merely an exception in the common rule. The proof of this exception is that whenever thousands of captives were freed, there were a few whose order of execution came from the court of Holy Prophet (ﷺ). In view of Islam, war and captivity are no reasons for the execution of captives. And the people killed under captivity on the orders of the Holy Prophet (ﷺ) were not killed as prisoners rather some were killed under the charges of disrespecting a treaty, some were killed in *Qisas* and some were killed as convicts of war crime, The people who tortured the Holy Prophet SAW during his stay at Makkah were not killed when they were captured as prisoners because it would be against the high standards of courtesy of *Rasool Allah* (ﷺ).

حَلَفْنَا الْفِئْيِي عَن مَّالِكِ عَن ابْنِ شِهَابٍ عَن أَنَسِ بْنِ مَالِكٍ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ دَخَلَ
مَكَّةَ عَامَ الْفَتْحِ وَعَلَى رَأْسِهِ الْمَغْفَرُ فَلَمَّا تَرَعَهُ جَاءَهُ رَجُلٌ فَقَالَ لِي خَطْلٌ مَتَلَقْتُ بِأَسْتِرِ الْكُحْبَةِ فَقَالَ
اقتلوه قال أبو داود لئن خطل لسمه عبد الله وكان أبو هريره الأسلمي قتله

In the above, only Ibn-e-Khatal is mentioned which is also proved from the Sahih Bukhari. Bukhari recorded this Hadith at three different places in his book and in all three places the name of the slain is mentioned as Ibn-e- Khatal while Abu Dawood explains that Ibn-e- Khatal means Abdullah Bin Ibn-e- Khatal.

In short, by analyzing the narrations present in the Hadith books, it is found that in most narrations merely the numbers of these people is mentioned to whom the Holy Prophet (ﷺ) sentenced to death and that their number does not exceed six, men and women combined. However from the narration of *Sunan Nisai* and *Sunan Daraqutni*, the names of all these people are known and in this way due to the difference of name in these two narrations, their number becomes eight. But in the two narrations the delimitation is present separately that their number is six. On this basis, it is not difficult to judge that on this occasion merely the names of that narration are acceptable whose *isnad* are strong. This narration belongs to *Sunan Nisai* and according to it Abdulah Bin Khatal, Muqees Bin Sababa, Ikramah bin Abu Jahl, Abdullah bin Saad bin Abi Sarh and two female slaves were sentenced to death. However out of these only two men were practically killed i.e. Abdulah Bin Khatal and Muqees Bin Sababa. So from the authentic Hadith we find no practical example of execution of any woman prisoner.

It is clear from the narrations, related to the execution of prisoners of war after the conquest of Makkah, which are present in the books of *Seerat* that the number of killed persons is greater than the above mentioned number and that their crime was tormenting Holy Prophet (ﷺ) in the era of Makkah, but from the point of view of Hadith criticism it is not right. There are two reasons to it. One reason is that almost all the people of Makkah were guilty of this crime. The greater a person was in status the greater was his crime. There was no one among the disbelievers of Makkah who hadn't tormented Holy Prophet (ﷺ). And the killed people mentioned in the books of *Seerat* were relatively lesser in status. The second reason for this is that the credibility of these narrations is not reliable.(41) The two persons who were executed after conquest of Makkah were murderers, these two persons were guilty of reverting to disbelief and murder. So they were killed because of their crimes and not in the capacity of prisoners of war.

Though in this narration the order of the killing of four men and two women is mentioned but except Ibn-e-Abi Sarh, who at the end got shelter, no mention about any of the others is found. However, the names of four men are found in the narration of *Sunan* Nisai and their end is also found.(36) But the name and end of the two women cannot be found even here. Out of these four men only two were practically executed. The important thing is that by recording these narrations in *باب الحكم في المرتد*, Nisai explains the real reason behind their killing. In other words, the title of the chapter is disclosing the reason that is apostasy.

Narration Number Two:(37)

حللنا محمد بن العلاء قال حللنا زيد بن الحباب قال أخبرنا عمرو بن عثمان بن عبد الرحمن بن سعيد بن يربوع المخزومي قال حللني جدي عن أبيه أن رسول الله صلى الله عليه وسلم قال يوم فتح مكة لربعة لا يؤمنهم في حل ولا حرم قسما هم قال وقتبتين كاتبا لمقيس فقتلت إحداهما وأفلت الأخرى فأسلمت

In this narration , Imam Abu Dawood himself has written in the end of narration that he had not fully learned its *sanad* from his Shaikh Ibn-ul-Ala and this very *sanad* is also recorded with detailed text (but the *sanad* is same) by Daraqutni in *Kitab-ul-Haj*.(38) In the mentioned narration of Abu Dawood, there is description of the decree of Holy Prophet (ﷺ) relating to the execution of four men and two women but there is no mention as to the end of any man, but there is a reference of killing of a slave girl without mention of name. However from the narration of Daraqutni apart from this information there is information about the name and end of these four men. But the important thing is that the name of the man who was killed according to the authentic Hadith of Abu Dawood and *Sunan* Nisai is omitted here, i.e., Hilal Bin Khatal is mentioned instead of Abdullah Bin Khatal. Furthermore amongst the names of the four executed persons in the narration of *Sunan* Nisai the names of Abdullah Bin Khatal and Ikramah has been replaced here by the names of Hilal Bin Khatal and Haweras. As for its authenticity, the explanation of Imam Abu Dawood is enough to deem it untrustworthy. Allama Nasir ud Din Albani has also declared it to be *Daif*.(39)

Narration Number Three:

The third narration of *Sunan* Abu Dawood is as follows:(40)

the order to kill his personal enemies. (29) As for the matter of reason behind Kanana's execution, the answer is Mahmood Bin Salma's *Qisas*.(30)

Conquest of Makkah and Execution of Captives:

At the time of conquest of Makkah, the Holy Prophet (ﷺ) gave general pardon to the people of Makkah, however some people were exempted from this general pardon due to their previous crimes. Different narrations, in which the numbers and names of these persons are given, can be found in the books of Hadith and *Seerat*. But there is a great contradiction as to the number and names of the persons. And then their *Isnad* and authenticity is not acceptable. If we keep in mind all these narrations, their number reaches fourteen which are collected by Hafiz Ibn-e-Hijar Al-Askalani from various sources.(31) But all these men were not killed; most of them became Muslims and were considered worthy of the general pardon. The narrations about the people who were ordered to be killed by Holy Prophet (ﷺ) are examined as follows.

As far as narrations relating to this topic in the books of Hadith are concerned, these narrations are the part of *Sahih Bukhari*, *Sunan Abu Dawood*, *Sunan Nisai Al Kubra*, *Sunan Behaqi* and *Al-Mu'jam Al-Kabeer* etc. Imam Abu Dawood in a chapter "قتل الاسير ولا يعرض عليه الاسلام" gives three narrations about the people who were exempted from general pardon. These three narrations are given along with their *isnad* and text as under.

Narration Number One:(32)

حلفنا عثمان بن أبي شيبة قال حلفنا أحمد بن المقضل قال حلفنا أسباط بن نصر قال زعم أسدي عن مصعب بن سعد قال لما كان يوم فتح مكة أمر رسول الله صلى الله عليه وسلم الناس إلا أربعة نفر وامرأتين وسماهم وابن أبي سرح قد ذكر الحديث قال وأما ابن أبي سرح فإنه اجتمع عند عثمان بن عفان فلما دعا رسول الله صلى الله عليه وسلم الناس إلى البيعة جاء به حتى أوقفه على رسول الله صلى الله عليه وسلم فقال يا نبي الله بايع عبد الله فرفع رأسه فنظر إليه ثلاثاً كل ذلك يأتي قباهه بعد ثلاث ثم أقبل على أصحابه فقال أما كان فيكم رجل رشيد يقوم إلى هنا حيث رأيته كيفت يدي عن بيعته فيقتله فقالوا ما نرى يا رسول الله صلى الله عليه وسلم ما في نفسك إلا أومات إلينا بعبتك قال إنه لا ينبغي لشيء أن تكون له حاجة الأعمى.

Nisai recorded this narration in detail with the same *sanad* in "باب الحكم في المرتد" (33). Allama Albani considers this narration of *Sunan Abu Dawood Sahih*.(34) But many other scholars of biography of narrators have shown doubt about the narrators: Ahmad bin Mafadl, Asbat bin Nazr and Suddi, especially about Asbat Bin Nazr.(35)

because this woman threw a part of grindstone from above due to which Khalaad Bin Sawaed (رضي الله عنه) was martyred. (24)

Ghazwa Khyber and Execution of Captives:

In the events of *Ghazwa Khyber* writers of *Seerat* have recorded a narration and then it was copied in many books. That from the captives of Ghazwa Khyber Holy Prophet (ﷺ) got two sons of Abul Haqeeq executed and their crime was that they hid the treasure of Hai Bin Akhtab.(25) This narration shows that from the captives of Khyber, Kanana and Rabee who were brothers were killed only for the crime of hiding the treasure. But this narration is not acceptable to the scholars.(26) Because one of the narrators of the narration is Muhammad Bin Abdul Rehman Bin Abi Laila and his memory was very weak. (27)

In the same way, from the authentic narration of Sunan Abi Dawood we find the execution of only one man, but the reason behind his execution is not known. However it negates the concept that Holy Prophet (ﷺ) got him killed in the crime of hiding the gold. Only the killing of son of Abul Haqeeq is written in this narration.(28) According to this narration, Holy Prophet (ﷺ) asked the uncle Saeyah of Hayi Bin Akhtab about his nephew's treasure, by making excuse that the treasure was spent on the war, he committed the crime of withholding facts but neither in this Hadith nor in any other Hadith, or narration of *Seerat* and history his execution is reported. This is the evidence that Kanana was not killed in the crime of withholding facts.

If the order of execution was given because of the crime of hiding treasure then how come the other criminals of the same crime were exempted from this order? Furthermore, killing someone merely for hiding treasure is far below the grandeur of Holy Prophet (ﷺ). The person who attended that heathen woman who threw garbage on him, the person who forgave the one who poisoned him, the person who even after extremely painful and humiliating behavior of the aristocrats of Taif prayed to Allah for their growth and guidance, the person who kept absolutely no offence against the leader of the hypocrites who accused his most beloved wife, the person who did not keep any offence against the one who exercised magic on him and the person who allowed that man (Habar Bin Al-Aswad) who wasted the pregnancy of his daughter, into the circle of Islam just when he was the conqueror of Makkah. Does this verdict match the stature of such a personality that he would give the order of execution in the crime of hiding treasure? Not at all, for sure it is not possible, because it is way below *Rahmatun-lil-Alameen*'s great moral and holy grandeur that he would give

Therefore after Battle of Khandaq, the Holy Prophet (ﷺ), by order of Allah, besieged their territory and Hazrat Saad bin Muaaz (رضي الله عنه) was recognized as the judge between the two parties. Hazarat Saad Bin Muaaz (رضي الله عنه) gave the judgment that the men of Banu Qurayza who took part in the fight should be killed and the children and women should be made captive, it was done.(19)

As far as the execution of the captives of Banu Qurayza is concerned, it is proved through many *sahih* Hadiths. Through the narration of *Sahih* Bukhari, *Sahih* Muslim, *Musnad* Ahmad, *Sunan* Tirmazi, *Sunan* Daarmi and *Sunan* Behaqi this incident is proved. However the number of the executed is explained differently in various books of Hadith and *Seerat*. The number of executed person is from four hundred to nine hundred but the authentic narration is that of Musnad Ahmad, in this narration the number is four hundred and its authenticity level is *Hasan*.(20)

The way Banu Qurayza breached the pact, the demand of wisdom and prudence was that such a pact should not be made again. In other words, they themselves closed the way to any kind of pact. Their residence was connected to Madina and due to this leaving them on their own and ignoring them would have been dangerous. If this situation was to be handled in the same way as done to their brothers Banu Nuzair i.e they would be exiled, that experiment failed disastrously in the past because they planned with great meditateness of invading Madina and attacked the Muslims after amassing forces. But despite all this sensitivity Holy Prophet (ﷺ) himself did not order any punishment but with their own free will their former ally Saad Bin Muaaz (رضي الله عنه) became the mediator and in reality the judgment related to the war captives was result of this arbitration and their verdict was according to the law of the Jews as it is in Torah:

“But if it makes no peace with you, but makes war against you, then you shall besiege it; and when the LORD your God gives it into your hand you shall put all its males to the sword, but the women and the little ones, the cattle, and everything else in the city, all its spoil, you shall take as booty for yourselves; and you shall enjoy the spoil of your enemies, which the LORD your God has given you.”(21)

When Saad Bin Muaaz (رضي الله عنه) gave the above mentioned verdict then Holy Prophet (ﷺ) said, “you have given the heavenly judgment”.(22) It was a signal that the judgment was according to Torah. This is the reason that when this decree was read to the Jews they also found it according to the law of the Lord. (23) Only one woman was executed out of all the captives of Banu Qurayza. That woman was slayed on the basis of *Qisas*

The Execution of *Ghazwa Uhad's* Captives:

After the battle of Uhad, Abu Izza' Jumhi came in the possession of muslims and according to some narrations the Holy Prophet (ﷺ) decreed his execution and he was killed. But there is no credible Hadith about it. There is a narration in *Seerat Ibn-e-Hisham* which describes this incident in following words.(15)

قال أبو عبيدة وأحد رسول الله صلى الله عليه وسلم في جهة ذلك قبل رجوعه إلى الملائنة معاوية بن المغيرة بن أبي العاص بن أمية بن عبد شمس، وهو جد عبد الملك بن مروان، أبو أمه عائشة بنت معاوية وأبنة أبا عزة الحمصي وكان رسول الله صلى الله عليه وسلم أسره بيلد ثم من عليه فقال يا رسول الله صلى الله عليه وسلم أقتني، فقال رسول الله صلى الله عليه وسلم والله لا تمسح على رضيعك بمكة بعدها ونقول: خلعت محمدا مرتين اضرب عنقه يا زبير - فاضرب عنقه.

Ibn-e-Ishaq recorded it without any reference, therefore this narration is infirm.(16)

Relating to Abu Izza' Jumhi's execution, Imam Behaqui records another narration with reference of Muhammad bin Umar Waqdi but it is also rejected, because Waqdi is *Matruk*.(17)

If the above mentioned narration of *Seerat Ibn-e-Hisham* is considered correct, ignoring all the technical requirements, even then the reason behind Abu Izza's execution is explained in this narration and that is breaching the pact. He violated the terms of the pact due to which he was freed after the conquest of Badar. So he was not killed as a captive but because of breaching the pact. In the Battle of Uhad not only did he arrayed himself against his benefactor but also persuaded many others to the fight.(18)

Execution of Male Captives of Banu Qurayza:

These people were Jews and before the arrival of Holy Prophet (ﷺ) they lived around Madina like other Jew tribes Banu Qainqah and Banu Nazir. While making pact with the other Jew clans, Holy Prophet (ﷺ) also included them. After the war with Banu Nazir, Holy Prophet (ﷺ) again offered contract to Qurayza and renewed the old pact but during *Ghazwa e Ahzab* they openly breached it. The Holy Prophet (ﷺ) sent Hazarat Saad Bin Muaaz, Saad Bin Abaada, Abdullah Bin Rawaha and Akhwat Bin Jubair for the investigation of this breach of pact. When they reached there, the reply of Banu Qurayza was, "Who is Holy Prophet of Allah? There is neither any promise nor any treaty between us and Muhammad (ﷺ)." "

the narration of *Sunan* Abi Dawood in which the execution of only Uqba bin Abi Mu'et is mentioned is acceptable.(8) However, another narration of execution of Uqba is found in the books of *Seerat*, in which only his execution is mentioned, Hafiz Ibn-e-Kaseer records it:(9) This narration is also *Mursal*. In short, the narration of execution of only Uqba among the captives of Ghazva Badar is acceptable, in which there is mention of pre-war crimes.

Uqba bin Abi Mu'et is counted among that group which used to harm the Holy Prophet (ﷺ) merely because of the offence of declaration of prophethood and preaching of monotheism. Though along with him other clan heads of the disbelievers were equally involved but as this man was Prophet's (ﷺ) neighbor, when he was save from the evils of others, he constantly tormented him. One of his ways of teasing was that whenever the Holy Prophet (ﷺ) offered his prayer at home he would throw the uterus of sheep in such a way that it fell on him. When a pot was put on fire, he would throw the uterus in such a way that it would fell in it straight away. The Holy Prophet (ﷺ) was compelled to make a small temporary room so that he would not be disturbed by him and neighbors like him during prayers.(10) This man not only harassed Holy Prophet (ﷺ) in Makkah but also kept on the front foot in the vile act of tormenting him.(11) Besides giving mental and physical torture once, the above mentioned person attacked the Holy Prophet (ﷺ) with the intention of murder but failed due to the efforts of Abu Bakar.(12) Not only one time Uqba plotted the Holy Prophet (ﷺ) murder but also when Satan came in the *Sheikh Najdi's* form in the meeting of the disbelievers and when with the counsel of Abu Jahel, the criminal resolution of killing the Holy Prophet (ﷺ) was made with the selected persons of all clans, this man was present in those selected people.(13)

It is known from the above debate that the execution of Uqba was not due to his act of war rather his personal crimes and war crimes became the reason of his execution. As far as the matter of Nazr Bin Haris's execution is concerned there is no authentic narration in this regard. However his crimes were also grave. This man was present in that meeting in which the vile resolution of murdering the Holy Prophet (ﷺ) was passed under united agreement and among those people who surrounded the house of the Holy Prophet (ﷺ) on the night before migration to Madina so that he can be murdered (God forbid).(14)

death penalty was not inflicted upon the captive as such or in exercise of the Imam's discretionary power to decide the captive's fate, but as a penalty for acts committed by the prisoners prior to captivity and outside the scope of the battle during which they were taken prisoner.”(4)

After research of the incidents of execution of the captives, which occurred in the age of Holy Prophet (ﷺ), it becomes clear that there was some special background behind each incident. Therefore, all such incidents are discussed individually as follows:

Execution of Few Captives of Ghazwa Badar:

In *Ghazwa Badar* seventy people of the disbelievers were killed, among them there was majority of their frontline line leaders. Almost the same amount of disbelievers were slayed at the hands of Muslims during this *Ghazwa*, but from the books of Hadith and *Seerat* there are common narrations about the execution of two persons: Uqba bin Abi Mu'et and Nuzr bin Haris. As far as these narratives are concerned, which report the execution of above mentioned persons, they are not trustworthy according to the technique of Hadith. In this context following narration of Imam Behaqi is presented as follows: (5)

أخبرنا أبو عبد الله الحافظ ثنا أبو العباس محمد بن يعقوب أن أبا الربيع بن سليمان أنباء الشافعي أن أبا عبد الله من أهل العلم من قريش وغيرهم من أهل العلم بالمعزى: أن رسول الله صلى الله عليه وسلم أسر النضر بن الحارث العبدي يوم بدر وقتله بالبادية أو الأكلب صبيرا وأسر عقبة بن أبي معيط فقتله صبيرا -

2) The second narration records Ibn e Hisham in these words.(6)

قال ابن إسحاق: حتى إذا كان رسول الله صلى الله عليه وسلم بالصفراء قتل النضر بن الحارث قتله علي بن أبي طالب، كما أخبرني بعض أهل العلم من أهل مكة - قال ابن إسحاق: ثم خرج حتى إذا كان بعرق لظبية قتل عقبة بن أبي معيط - قال ابن هشام: عرق لظبية عن غير ابن إسحاق - قال ابن إسحاق: والذي أسر عقبة عبدا لله بن سلمة أحد بني العجلان - قال ابن إسحاق: فقال عقبة حين أمر رسول الله صلى الله عليه وسلم بقتله فمن للصبية يا محمدا؟ قال لا - فقتله عاصم بن ثابت بن أبي الأفلح الأنصاري أخو بني عمرو بن عوف كما حدثني أبو عبيدة بن محمد بن عمر بن ياسر - قال ابن هشام: ويقال قتله علي بن أبي طالب فيما ذكر لي ابن شهاب الزهري وغيره من أهل العلم -

From the narrations given above, there is discontinuity in *isnad* of the first narration due to which it is *mu'del*. While in the second narration the words upto “*Al-Ansar*”*i* are from the narration of Ibn-e-Ishaq and while further on from *وقال قتله* it is the narration of Ibn-e-Shahab Zohri and both these narrations are *Mursal* therefore these are not acceptable.(7) However