HUKM *SHAR'Ī* AND THE RECIPROCAL IDENTIFICATION BETWEEN ITS DEFINITION AND SUBJECT MATTER: THE MISSING LINK

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Abstract

When the nature of a particular notion is sought to be known, one often resorts to look for its definition, and that definition, by its nature, often identifies the subject matter. Conversely, the definition sought for identifying the subject matter could not have been articulated before investigating the nature of the notion and designating its subject matter. This logical link of reciprocal identification between the definition of ḥukm and its subject matter is assumed missing. In order for it to be recovered, this paper investigates the nature of ḥukm shar'ī from both the perspective of its definition and that of its subject matter. From both perspectives, that is, that of the definition of ḥukm and its subject matter, the nature of ḥukm will be investigated through the presentation of the different views of the subject matter of dispute. This is to be followed by a critical analysis of that which searches for the truly distinctive character that provides the subject matter of dispute with its significance so that it can be used in selecting the appropriate view of the disputing views or, if not, searching for it elsewhere. The distinctive character of ḥukm is thought to be embedded in legitimacy to which bindingness is tied, and therefore the definition suggested by theologians which identifies ḥukm with the communication of the ḥukm-giver is thought to be the appropriate definition. The definition

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suggested by jurists, however, is thought to designate the subject matter of hukm rather than hukm itself. This entails that the subject matter of hukm is the effect of the communication of the ḥukm-giver concerning the conduct of the competent person rather than the conduct of the competent person itself. Therefore, 'al-mahkūm bih' is thought to be the appropriate term that signifies it as compared to 'al-mahkūm fih'.

Key words: *Ḥukm*. Right of God. Right of Man. Religious Right. Judicial Right.

INTRODUCTION

What has triggered this piece of writing is a phenomenon that seems interesting if not surprising. Muslim scholars have argued over the nature of *hukm shar'ī,* and each party to the dispute has introduced its own definition of *ḥukm* whether the theologians or the jurists. Contentious, they have not disputed over the nature of the subject matter of *hukm* supposed to have been identified by the definition of *hukm* disagreed upon, yet they have differed from each other with respect to the term that signifies it. In other words, having disagreed on what is to be referred to as *hukm shar'ī* should have entailed having disagreed on the identification of the subject matter of the entity disputed. Having agreed on the subject matter of the disputed entity should have entailed having agreed on the term that denotes it. Moreover, the subject matter of each disputation is believed, by its nature, to have been enough to settle the matter with respect to the subject matter of the other dispute. In other words, the definition of *ḥukm* itself, whether as understood by theologians or jurists, determines what term should be used to refer to the subject matter of *ḥukm*. Likewise, the subject matter of *hukm* in the way the disputing parties discuss it determines which definition of the two definitions is more indicative of its nature.

This interesting, if not surprising, phenomenon is thought to have come into existence as a result of the non-existence of the logical link of reciprocal identification between the definition of

ḥukm and its subject matter alleged to be missing in Islamic jurisprudence. Muslim scholars are thought to have overlooked this logical link of reciprocal identification and introduced their two definitions of *ḥukm* in total isolation from their understanding of its subject matter which necessarily prefers one of the two definitions introduced to the other. Correspondingly, they have introduced two terms denoting the subject matter of *ḥukm* in total isolation from the definitions introduced which necessarily prefers one of the two suggested terms to the other. This paper attempts to recover this missing link through discussing the two major issues related to the two parties to the relation of reciprocation: the controversy that has arisen as to the definition of *ḥukm* and the other controversy that has arisen as to the terminology of its subject matter. As for the first controversy, the paper will discuss the two competing definitions so as to prefer one of them to the other after having identified the nature of *ḥukm* defined. Whereas for the second controversy, the paper will discuss the two competing terms so as to prefer one of them to the other after having identified the nature of the subject matter termed. The paper will discuss another two issues though of a minor nature, viz. the classification of the subject matter of *ḥukm* into right of God and right of man, and its other classification into religious rights and judicial rights. The former classification is intended to sort out the controversy that has arisen as to its nature. It is also intended to be discussed in order to counter the tendency of some contemporary Muslim scholars to take such a classification as the basis of the concept of right in Islamic jurisprudence; a tendency thought to be inappropriate. The latter classification, on the other hand, is intended to be indicative of the delicate relation between the ethical level and the legal level on which *ḥukm shar'ī operates.*

DEFINITION OF *ḤUKM*

If a British non-Muslim asks you: Why do you perform ***ṣalāh*** (prayer) five times a day? You might recite the following *Qur'ānic* verse:

وأقيموا الصلاة.[1]

"And perform prayer".

[1]*Al-Qur'ān*, *Sūrat al-baqarah* 2: 43.

He would reply by saying: I did not understand; could you translate what you just recited? If you translate that verse into his mother tongue, he might further ask: but why do you think that such a text is binding on you so as to pay obedience to it? Then, you would have to say that because this text, according to our faith, is the message of Allah, who is our creator and *ḥukm* giver, addressed to us who are His creatures and subjects. The proper understanding of this dialogue is going to help us, at a later stage of this section, to find the simple way out of the complex controversy that has taken place between Muslim scholars as to the definition of *ḥukm.*

Literally, *ḥukm sharʿī* consists of two words: '*ḥukm'* and '*sharʿī'*. '*ḥukm'* is a noun, and '*sharʿī'* is an adjective. *Ḥukm* in its absolute sense means the attribution of something to another whether positively or negatively. To attribute something to another positively is to assert the latter's possession of the former, whereas to attribute it negatively is to assert its lack of it. The means by virtue of which something is attributed to another positively or negatively might be reason and might be habit. In case it is the former, it is called *ḥukm 'aqlī* (rational judgment) such as one is half of two, and the impossibility of the reconciliation between two contradictory things. In case it is habit, it is called *ḥukm 'ādī* (habitual judgment) such as that fire burns and wood floats. In addition, the means by virtue of which something is attributed to another whether positively or negatively might be *sharī'ah*;[2] and here lies the relevance of the characterization of the noun '*ḥukm*' by the adjective '*sharʿī.*

The adjective '*sharʿī*' is derived from the noun '*shar''* whose meaning is supremacy and loftiness, and therefore Islam is referred to as *sharīʿah* because it is loft and supreme. '*Shar''* is also said to mean the water place, and therefore Islam is referred to as *sharīʿah* because it is the source of life just as water is the source of life[3].

Having literally defined *ḥukm sharʿī* has made us know that the words defined mean the attribution of something to another according to *sharīʿah*. However, having literally defined it has not

[2]Aḥmad al-Ḥusāri, *Al-Ḥukm al-Sharʿī Wa maṣādiruh*, 3rd edition, (Beirut: Dār al-jīl, 1997), p.18.

[3]Saʿd al-Dīn Musʿad Ḥilālī, *Al-mahārāt al-uṣūliyyah Wa Āthāruhā Fī al-nudj Wa al-tajdīd al-fiqhī,* (Kuwait: Majlis al-nashr al-ʿilmi, 2004), p. 217.

made us know the nature of both the thing attributed, and the other thing to which the first thing is attributed. It has also not made us know the nature of the *sharī'ah* means by virtue of which the attribution occurs. Such knowledge can only be obtained by resorting to the terminological definition of *ḥukm sharʿī* over which the aforementioned controversy has taken place between Muslim scholars.

Terminologically, Muslim theologians (*uṣūliyyīn*) have defined *ḥukm* as: "The communication of God concerning the conduct of the competent persons by way of command, option or declaration".[4] Muslim jurists (*fuqahā*), on the contrary, have defined *ḥukm* as: "The effect of the communication of God concerning the conduct of the competent persons by way of command, option or declaration".[5] As an illustration, the verse:

يا ايها الذين امنوا اوفوا بالعقود

"O you who believe! fulfill the contracts".

Is considered by *Uṣūliyyīn* to be the *ḥukm sharaʿī*, i.e., the text itself, whereas its requirement, i.e., what is understood from it, viz. the obligation of fulfilling the contracts, is considered by *fuqahā* to be the *ḥukm sharaʿī*.[6]

Fuqahā, as the term denotes, are concerned with *sharī'ah* as a set of standards of behaviour that bind Muslims and regulate their conduct. On the other hand, *uṣūliyyīn*, as the term denotes too, are concerned with the principles that justify why and how such a set of standards bind and regulate. Therefore, *fuqahā* have seen *ḥukm* as the content of the standard or its requirement being the effect of the communication of God. On the other hand, *uṣūliyyīn*, have seen *ḥukm* as the standard of behaviour itself being the communication of God on the basis that its nature rather than its content is what justifies its binding and regulatory character. After all, it is intelligible to arrive at these two different views of *ḥukm* for the latter's being approached

[4]Ibid.
[5]Ibid, p. 222.
[6]ʿAbd al-Wahhāb Khallāf, *ʿIlm Uṣūl al-fiqh Wa Khulāṣāt al-tashrīʿ al-Islāmī,* (Cairo: Dār al-fikr al-ʿarabī, 1995), p. 97.

from two different perspectives, and this is what might have caused Ibn Al-Humām and Al-Taftazāni to see *ḥukm* as a homonym (*mushtarak)* which designates the communication, its effect and, moreover, the effect of the effect of the communication.[7]

Practically speaking, it is implausible to spend much time trying to determine whether *ḥukm* is the communication containing a rule or a rule contained by the communication, for it is not plausible to spend the same amount of time trying to determine whether man is a body occupied by a soul or a soul occupying a body. When people talk about man, they refer to that combination of body and soul for body cannot exist without being occupied by soul, and soul cannot be perceived without occupying body. Likewise, when scholars talk about *ḥukm*, they refer to that combination of text and meaning, for text conveys nothing without meaning carried by it, and meaning cannot be conveyed unless it is carried by text; And who wants to set apart the communication from its effect is exactly like that one who wants to set apart body from soul without causing death. Therefore, theologians could not avoid stating in their definition that the communication of God, which is *ḥukm*, takes the form of command, option or declaration, which, in turn, cannot be ascertained without understanding properly the content of the communication. Correspondingly, jurists could not escape stating in their definition that the communication, whose effect is *ḥukm*, is the communication of God. Anyhow, according to the above-quoted verse, prayer is obligatory.

So far it has become obvious that failure is the inevitable end of any attempt to settle the dispute between the communication of the *ḥukm* giver and its effect by resorting to one of the parties independently of the other. This sad destiny entails the need for an exterior factor whose vital role can be explained with the help of the dialogue with which we began this section. When the British asked about the reason for the conformity to a certain pattern of conduct, the provided answer referred to the text of the verse. And when he asked about what it meant, the provided answer referred to its meaning. But when he asked about the reason for the obligatoriness

[7]Mohammed Tahir Haji Mohammad, "Rights and Duties in *Sharīʿah* and Common Law" (PhD Thesis, International Islamic University Malaysia, 2001), 31-32.

of the verse, the provided answer referred neither to the text nor to the content. Instead, it referred to the belief that such a text is obligatory by virtue of being the communication of the *ḥukm*-giver addressed to His subjects. This belief cannot be claimed to be derived from the verse in question. This belief falls under Islamic theology and not Islamic jurisprudence. What follows from this is that *ḥukm* is the communication of the *ḥukm*-giver and not its effect, for the obligatoriness, which is the distinguishing mark of *ḥukm*, rests on the communication itself and not what is conveyed by it. In other words, the verse:

وأقيموا الصلاة[8]

"And perform prayer"

is *ḥukm* by virtue of its nature being the communication of the *ḥukm* giver and not its effect being the command to perform prayer, for the command to perform prayer can be addressed by a father to his naughty son without constituting *ḥukm*. Strictly speaking, *ḥukm* is the theological triangle consisting of the *ḥukm*-giver, His communication and His subjects [9] simply indicated by reference to the communication being the link between the previous and the subsequent. Eventually, it is submitted that the correct definition of *ḥukm* is the definition proposed by theologians and not that one proposed by jurists which designates the subject matter of *ḥukm* (*al-maḥkūm fīh*) rather than *ḥukm* as such.

In an attempt to defend the jurists' view which is opposed by that one adopted by theologians and just preferred by us, al-Isnawi raised the following two objections:

In the first place, *Khiṭāb* (communication) means speech. So if we attribute it to Allah the Almighty by saying *Khiṭāb al-shara'ī* (the communication of the *ḥukm* giver, we would be referring to one of His attributes (*Al-Ṣifāt Al-dhatiyyah*). Consequently, *ḥukm* would be one of these attributes, and this is what had never been held by

[8]Al-Qur'ān, Sūrat al-baqarah 2: 43.

[9]This theological triangle has been introduced to in Abdul Haseeb Ansari and Saad Abu Elgasim, "Command Theory of Legal Positivism and *Ḥukm Shar'ī*: A comparison." *Journal of Islamic Law Review*, Vol. 3, 2007: 77-95.

anyone. Secondly, a distinguishing line has to be drawn between *ḥukm* and evidence (*dalīl*). *Ḥukm* is the rule given by the *ḥukm*-giver whereas *dalīl* is the guide thereto. This distinguishing line can only be drawn by adopting the jurists' view whereby *ḥukm* is the effect of the communication of the *ḥukm* giver and *dalīl* is the communication itself. But if *ḥukm* is taken to mean the communication of the *Ḥukm-giver*, *ḥukm* and *dalīl* would be identical. Al-Isnawi says:

> The definition concerned is objectionable in more than one respect. In the first, according to al-Asfahānī in Sharḥ al-Maḥṣūl, speech, for those who advance such a definition, is one of the essential attributes of Allah (s.w.t), whereas according to Islamic theology (*ʿilm al-kalām*), the *Sharīʿah ḥukm* is one of Allah's additional attributes and not the essential ones. Thus *ḥukm* cannot be identified with the primordial speech and consequently cannot be defined as the communication of Allah (s.w.t.). In the second respect, communication is not *ḥukm* itself rather than its evidence. That is because Allah's saying: "Establish prayers" is not the *ḥukm* itself rather than the evidence thereto. Do not you see them saying that absolute command proves obligation thereby proof differs from what is proven[10].

In response to the first objection, we would say this: *Khiṭāb al-sharaʿī* (Allah Speech) is of two kinds between which we need to distinguish. The first kind means the primordial speech which subsists in His inner self (*kalām nafsi ʿazali*).[11]This kind is what is one of the attributes of Allah and this is what is not meant by theologians when introducing their definition as opposed to the jurists' definition. The second one means the verbal speech *(kalām*

[10]Jalāl al-Dīn ʿAbdul-Raḥīm ibn al-Ḥasan Al-Isnāwi, *Nihāyah al-Sul Fī Sharḥ Minhāj al-Uṣūl,* (Damanhūr: Maktabah Baḥr al-ʿUlūm, 1343HJ), vol. 1: 57-58.

[11]Ahmad Hasan, *The Principles of Islamic Jurisprudence: The Command of the Sharīʿahand Juridical Norm,* (Islamabad: Islamic Research Institute International Islamic University, 1993), p. 25.

lafẓī) which is the manifestation of the first kind constituting *ḥukm* in the strict sense and by which we refer directly to the *Qur'ān*, and indirectly to the other sources of *ḥukm shar'ī* in the jurists' sense.[12] Apart from this, even if we perceive *Khiṭāb al-Shara'ī* as His primordial speech and therefore it could not be *ḥukm*, the ensuing result would be as unacceptable as the rejected one, for *dalīl*, which no one has regarded as one of Allah's attributes, would be *Khiṭāb*.

With respect to the second objection, it is that distinguishing line which need not be drawn in the first place, and which need be erased if it has been drawn. *Ḥukm* and *dalīl* are really identical, and the difference between them relates to the context in which each term is used and not to the subjective meaning of each. The context in which *dalīl* is used is *sharī'ah* in the sense that it is expressive of the existence of the rule moving downwards from the *ḥukm* giver to the subjects, whereas the context in which *dalīl* is used is polemical in the sense that is expressive of the function of the rule being a support backing up the debater's opinion.

Among the criticisms leveled at the traditional definition of *ḥukm* is what had been pointed out by some scholars that this definition is exclusive of any act other than the act of the *Sharī'ah* competent person (i.e. the major and the sane), while, for instance, the act of a minor or an insane, let alone the act of an animal, may be the cause of compensation. Therefore, it is needful to distinguish between defining rule (*ḥukm taklīfī*) which concerns the conduct of the *sharī'ah* competent person by way of command or option, and declaratory rule (*ḥukm waḍ'ī*) which declares a thing to be a cause, condition or an impediment whose concern is not necessarily the conduct in question. Accordingly, *ḥukm* has been defined as: ("The communication of the lawgiver which commands the person, who is subject of law to perform or refrain from an act, or gives him a choice between them or declares a thing to be a cause, condition or an impediment".)[13]

Adopting the foregoing criticism and going further, it has been, in an attempt to lay foundations for the concept of right and duty in *sharī'ah* resting upon the assumption that *ḥukm* is but a right

[12]Ibid, pp. 25-26.
[13]Ibid, p.30.

conferred or a duty imposed, pointed out that the same definition falls short of including the rights of embryo and animals and the rights and duties of the minor, the insane and juristic persons.[14]

The flaw in the first criticism lies in its failure to distinguish between the conduct which is the subject matter of *ḥukm* and the conduct which is dealt with by it although it is not its subject matter. This point can be illustrated by reference to the situation in which a minor has damaged someone's property and, consequently, the owner has been compensated by the minor's guardian. Now we are before two acts: the guardian's act which is the subject matter of *ḥukm* (the obligation to pay compensation), and which has been performed by a competent person, and the minor's act which is not the subject matter of *ḥukm* though it is dealt with by it and which has been committed by a person who is not a subject of *Sharīʿah*.

As the first criticism is flawed, the second one is. The rights of animals and embryos and the rights and duties of non-subjects of *Sharīʿah* or juristic persons are actually defining rules (*ah)* addressed to competent persons either acting towards them or on behalf of them operating within the framework of various types of juristic fiction such as legal personality *(dhimmah),* legal capacity (*ahliyyah)* and juristic personality (*shakhṣiyyah iʿtibāriyyah).* As an illustration, reference may be made to the embryo's right to get a *share* in the deceased's estate which is in fact a duty placed upon those who are responsible for the distribution of the estate to allocate a share to the embryo, And the child's duty to pay *zakāh* which is in fact a duty placed upon his parent or guardian to pay it on his behalf.

Having resorted to the terminological definition of *ḥukm shar'ī*, whether the one given by *uṣūliyyīn* or that one given by *fuqahā,* the *sharī'ah* means by virtue of which a thing is attributed to another is the communication of Allah (s.w.t.). The difference between the two, that is *uṣūliyyīn* and *fuqahā*, is that this *sharī'ah* means to *uṣūliyyīn* is itself *ḥukm shar'ī*, whereas to *fuqahā ḥukm shar'ī* itself is the thing attributed, viz. command, option and declaration. Command, option and declaration, despite being of the same genus, viz. *ḥukm shar'ī*, are not of the same kind. *Ḥukm shar'ī* is classified into *ḥukm taklīfī* (defining rule) and *ḥukm waḍ'ī*

[14]Mohammed Tahir, "Rights and Duties in *Sharīʿah* and Common Law", pp. 32-33.

(declaratory rule). Command and option are of the former, and declaration is of the latter.[15]

Ḥukm taklīfī may be defined as: "The communication of Allah (s.w.t.) concerning the acts of the competent person by way of command or option."

As a category of *ḥukm taklīfī*, command itself is divisible into a command to commit a certain act and a command not to commit, i.e. a command to omit. The command to commit is further divided into the decisive command to commit an act which is termed '*al-ījāb*' (obligation), and the indecisive command to commit an act which is termed '*al-nadb*' (recommendation). Compliance with obligation by way of commission entails reward, while non-compliance with it by way of omission entails punishment. Recommendation, however, in case it is complied with by way of commission, like obligation, causes the competent person to be rewarded. Nevertheless failing to be complied with, unlike obligation, does not cause the *mukallaf* to be punished[16]. An example of obligation is the Quranic verse which reads:

لينفق ذو سعة من شعته[17]

"Let him who ample means spend in accordance with his amplitude".

Recommendation can be exemplified by the Quranic verse which reads:

يا أيها الذين آمنوا إذا تداينتم بدين إلى أجل مسمى فاكتبوه[18]

"O you who believe, when you contract a debt for a fixed term, record it in writing".

On the contrary, the command to omit is further divided into the decisive command to omit which is termed '*al-taḥrīm*' (prohibition), and the indecisive command to omit which is termed

[15]Abdul Haseeb Ansari and Saad Abu Elgasim, "Command Theory of Legal Positivism and Hukm Sharʿī: A comparison." *Journal of Islamic Law Review*, Vol. 3, 2007: 78.
[16]See Ibid, 81-82.
[17]Al-Qur'ān, Sūrat al-Ṭalaq 65:7.
[18]Al-Qur'ān, Sūrat al-Baqarah 2:282.

al-karāhah (reprehension). Obeying prohibition by way of omission makes the competent person entitled to reward, while disobeying it by way of commission makes him entitled to punishment. Obeying reprehension by way of omission, like prohibition, makes the *mukallaf* entitled to reward, whereas disobeying it by way of commission, unlike prohibition, does not render the *mukallaf* liable for punishment.[19]

A good illustration of Quranic prohibitions is the verse which reads:

ولا تأكلوا أموالكم بينكم بالباطل وتدلوا بها إلى الحكام[20]

> "And consume not your property among yourselves by false means, and offer it not to the authorities".

Quranic reprehensions may be illustrated by the verse which reads:

يا أيها الذين آمنوا لا تسألوا عن أشياء إن تبد لكم تسوءكم وإن تسألوا عنها حين ينزل القرآن تبد لكم عفاء الله عنها والله غفور رحيم[21]

> "O you who believe, ask not questions about things which if made plain to you, may cause you trouble; and if you ask about them when the Quran is being revealed, they will be made plain to you. Allah will forgive those; and Allah is oft-Forgiving, most Forbearing".

Option, unlike the previous four, does not involve any command to commit or omit whether decisive or indecisive whereby it is valid for the *mukallaf* whether to commit or omit. This neutral category of *ḥukm taklīfī* is termed '*al-ibāḥah*' (permission). Observing permission whether by way of commission or omission, unlike the previous four, neither makes the mukallaf entitled to reward nor renders him liable for punishment[22].

Of the acts made permissible by Quran is what had been

[19]See Abdul Haseeb Ansari and Saad Abu Elgasim, "Command Theory of Legal Positivism *and Ḥukm Sharʿī*: A comparison.": 82.
[20]Al-Qur'ān, Sūrat al-Baqarah 2: 188.
[21]Al-Qur'ān, Sūrat al-Maidah 5:101.
[22]See Abdul Haseeb Ansari and Saad Abu Elgasim, "Command Theory of Legal Positivism and *Ḥukm Sharʿī*: A comparison.": 83.

conveyed by the verse that reads:

> **اليوم أحل لكم الطيبات وطعام الذين أوتوا الكتاب حل لكم وطعامكم حل لهم**[23]
> "This day are (all) things good and pure made lawful for you. And the food of those who have been given the Book is lawful for you and your food is lawful for them".

In regard to the second kind of ḥukm sharʿī, ḥukm waḍʿī may be defined as: "The communication of Allah which declares a thing to be a cause, a condition or an impediment to another thing." [24]

Ḥukm waḍʿī, according to the aforementioned definition, is subdivided into three categories, namely, *sabab* (cause), *sharṭ* (condition) and *mānis* (impediment). Cause is: "That one whose existence entails the existence of *ḥukm*, and whose non-existence entails the non-existence of *ḥukm*."[25] For example, Allah (s.w.t.) says:

> **أقم الصلاة لدلوك الشمس.**[26]
> 'Establish regular prayers at the sun's decline".

According to this verse, the sun's decline is the cause of offering noon prayer. If the sun declines, the obligation to offer noon prayer comes into existence. If it does not, the obligation ceases to do so.[27]

Condition, on its part, is: "That whose non-existence entails the non-existence of *hukm*, and whose existence does not necessarily entail the existence of *ḥukm*."[28] Purity, for instance, is a condition

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[23]Al-Qur'ān, Sūrat al-Maidah 5:5.

[24]Saʿd al-Dīn Musʿad Ḥilālī, *Al-mahārāt al-uṣūliyyah Wa Āthāruhā Fī al-nudj Wa al-tajdīd al-fiqhī*, p. 280.

[25]Abdul Haseeb Ansari and Saad Abu Elgasim, "Command Theory of Legal Positivism and Hukm Sharʿī: A comparison." 84.

[26]Al-Qur'ān, Sūrat al-Isra 17:78.

[27]Badran Abū al-ʿaynayn Badran, *Uṣūl al-fiqh al-islāmī*, MuÒassasah Shabāb al-jāmiʿah, n.d. p 286.

[28]Abdul Haseeb Ansari and Saad Abu Elgasim, "Command Theory of Legal Positivism and Hukm Sharʿī: A comparison." 84.

for the validity of prayer. If it does not exist, prayer will not be valid, but if it exists, that does not mean that the *mukallaf* has to offer prayer.[29] Purity has been stipulated as a condition for the validity of prayer by the following Quranic verse:

يا أيها الذين آمنوا إذا قمتم إلى الصلاة فاغسلوا وجوهكم وأيديكم إلى المرافق وامسحوا برءوسكم وأرجلكم إلى الكعبين[30]

> "O ye who believe when ye prepare for prayer, wash your faces and your hands (and arms) to the elbows; rub your heads (with water); and (wash) your feet to the ankles".

Impediment, lastly, is: "That whose existence entails the non-existence of *ḥukm*, and whose non-existence does not necessarily entail the existence of *ḥukm*"[31]. Fatherhood, for example, is an impediment to just retaliation. Nevertheless that does not mean that in case the murderer is not the father of the victim, just retaliation will necessarily be taken on him[32]. Fatherhood has been declared as an impediment to retaliation by the following Prophetic tradition:

عن عمر بن الخطاب رضي الله عنه قال: سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ "لاَ يُقْتَلُ الْوَالِدُ بِالْوَلَدِ". وفي لفظ: "لا يُقاد الوالدُ بالولد".[33]

> Narrated Umar Bin al-Khaṭṭāb: I heard the Prophet (peace be upon him) saying: retaliation will not be taken upon a father for having killed his son.

Having explained briefly what both *ḥukm taklīfī* and *ḥukm waḍ'ī* mean, we have identified the nature of the thing to be attributed by *ḥukm shar'ī*. Now we need to identify the nature of the thing to which the thing whose nature has already been identified is attributed, that is the acts of the competent person. To identify the

[29]Badran Abū al-ʿaynayn Badran, *Uṣūl al-fiqh al-islāmī*, p 290.
[30]Al-Qur'ān, Sūrat al-Maidah 5:6.
[31]Abdul Haseeb Ansari and Saad Abu Elgasim, "Command Theory of Legal Positivism and Hukm Sharʿī: A comparison," 85.
[32]See Ahmad Hasan, *The principles of Islamic Jurisprudence*, p. 193-194.
[33]Al-Tirmidhī, kitāb al-diyāt, bāb mā jāÒa fī al-rajul yaqtul ibnahu yūqaḍu minhu am lā, vol. 5, at 434

nature of this thing, the nature of the two things of which it consists, need to be identified: the competent person and his acts. The word '*af'āl*' (acts) generally signifies what issues from the *mukallaf* as a matter of performance in contradistinction from what issues from him as a matter of utterance or belief. However the word concerned used in the definition concerned signifies all what issues from the competent person regardless of its mode of issuance whether physical, aural or theological. Meaning to say, it covers, that is the word '*af'al*', the acts of limbs, tongue and heart.[34]

These acts, more importantly, must be of a competent person, for if they are not, regardless of their nature, they will not be the concern of *ḥukm shar'ī*. the competent person is a person who is to be held accountable for the acts that issue from him, and for a person to be so, he has to be possessed of both majority and sanity. That is to say, he has to have *ahliyyah* (capacity). That is in principle. In detail, however, *ahliyyah* is of more than one type between which one ought to distinguish when it comes to the acts of the competent person. *ahliyyah* is classified into *ahliyyat wujūb* (receptive capacity) and *ahliyyat adā'* (creative capacity). Receptive capacity itself may be either partial or full. Partial capacity is one's entitlement to have rights alone, and because of its limited scope, it is scribed only to embryos. After birth, partial capacity transforms into full capacity so as to signify one's entitlement to have both rights and duties. However, both are not of significance when it comes to the acts of the *mukallaf*, for they concern the rights conferred and the duties imposed that do not require acts to be performed by the person himself. The capacity which is of much significance to the acts of the *mukallaf* is creative capacity. Creative capacity is one's having his acts recognized by *sharī'ah*. Like receptive capacity, creative capacity is also subdivided into partial and full. Partial capacity is scribed to a person when he attains the age of discretion, that is the age of seven. By virtue of this age, his acts, subject to certain conditions, will be counted. His acts are classified into devotional acts and non-devotional acts. Devotional acts are counted without being obligatory on him whereby if he decides not to observe them, he will not be held liable for having neglected them. Non-devotional

[34]Ahmad Hasan, *The principles of Islamic Jurisprudence*, p. 27.

acts, on the other hand, are classified into what are purely harmful, purely beneficial, and which run between harm and benefit. If the acts are fully harmful such as making donations, they will not be counted. But if they are fully beneficial such as the acceptance of donations, they will be counted. In case they run between benefit and harm such as entering into a sale contract, they will be dependent on the approval of his guardian. Full creative capacity, finally, is attained when one reaches the age of majority with a sound mind. Having attained this age, the competent person will be held responsible for all the acts that issue from him, and by virtue of being so he will be the typical addressee of the communication of Allah (s.w.t.), i.e. *al-mahkūm ʻalayh*[35].

According to what has been discussed so far, *ḥukm* came to be pictured as a *sharīʿah* standard which regulates the behaviour of the *sharīʿah* subjects who ought to comply with it and whose conduct ought to be measured by it. Consequently, Mulla Jiwan's assertion that *ḥukm* is an attribute of the human conduct[36] is mistaken.

THE SUBJECT MATTER OF *HUKM* (*AL-MAHKŪM FĪH*)

The subject matter of *ḥukm* is termed *al-maḥkūm bihī* or *al-maḥkūm fīhī*. Ibn al-Humām has preferred the latter because it is more indicative of what is meant to be termed, and because it prevents the confusion that might arise between *ḥukm* and its subject matter in case the former is used.[37] If we relate each one of the two suggested definitions of the subject matter of *ḥukm* to each one of the two terms just mentioned, we would find Ibn al-Humām'sprecaution reasonable. If we term the subject matter of *ḥukm, al-maḥkūm fīh*, it would be defined as: the act of the *mukallaf* to which the communication of the *Hukm* giver relates. But if we term it *al-maḥkūm bihī*, it would be defined as: the communication of the *Ḥukm giver* which relates to the act of the *mukallaf*.

If the resemblance, if not the similarity, between the definition of *ḥukm* and *al-maḥkūm bihī* is what had caused Ibn al-Humām to

[35]See Abdul Haseeb Ansari and Saad Abu Elgasim, "Command Theory of Legal Positivism and Hukm Sharʿīʿ: A comparison." 91-93.
[36]Mohammed Tahir, "Rights and Duties in *Sharīʿah* and Common Law", p 33.
[37]Ahmad Hasan, *The principles of Islamic Jurisprudence*, p. 251.

prefer *al-maḥkūm fīhī*, it is what had caused us to prefer *al- maḥkūm bihī* to what has been preferred by Ibn al-Humām. *Ḥukm* and *al-maḥkūm bihī* are two sides of one coin. If we were to use the terminology of Hans Kelsen,[38] we would say that *ḥukm* implies the objective meaning of the rule being the source of *ḥukm*, and *al-maḥkūm bihī* implies the subjective meaning of the same rule being the prescription of a certain act. Hence *ḥukm* is the text and *al-maḥkūm bihī* is the meaning. Therefore, what is called the subject matter of *ḥukm* should have been called the content of *ḥukm*. Not taking note of the subjective and objective meaning of *ḥukm*, and, consequently, tending to draw a distinguishing line between *ḥukm* and *al-maḥkūm bihī*, Muslim scholars have conceived of the content of *ḥukm* as its subject matter in the sense that it constitutes an act of the *mukallaf* described and not prescribed by *ḥukm*. Accordingly, such scholars as al-Ghazālī, al-ʿĀmidī and Ibn al-Ḥājib have termed it *al-maḥkūm fīhi*.[39]

This misconception of the content of *ḥukm* has manifested itself in a conceptual problem concerning the definition of *ḥukm*. Since the subject matter of *ḥukm* is the conduct (*fiʿl*) of the *mukallaf*, and the communication of the *ḥukm* giver concerns that conduct, prohibitions and reprehensions being two of the main subdivisions of *ḥukm taklīfī* seem to be excluded by the definition of *ḥukm*: for they are mere restraints from doing certain acts and do not constitute acts as such. To come out from this predicament, it has been argued that *fiʿl* is always the subject matter of the communication. But in the case of obligation and recommendation, it takes the form of the commission of the act. Whereas in the case of prohibition and reprehension, it takes the form of restraining oneself from committing it. Thus an act is always carried out whether to comply with the command by doing the act obligated or recommended or to comply with the command by refraining from the act prohibited or reprehended.[40]

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[38]See Hans kelsen, *Pure Theory of Law*, 1960, trans. Max Knight, (Berkeley: University of california Press, 1967), pp. 7-8.

[39]Ahmad Hassan, *The Principles of Islamic Jurisprudence*, p. 251.

[40]ʿAbd al-Wahhāb Khallāf, *ʿIlm Uṣūl al-fiqh Wa Khulaṣāt al-tashriʿ al-islāmī,* p. 120.

Based upon the above-mentioned distinction between the objective and the subjective meaning of *ḥukm*, it is thought that the suggested way out of the predicament leads to the demolition of the supposition from which the problematic question has arisen. The conduct need be carried out in order to commit an act or refrain from committing it indicates that the so called *maḥkūm fīhī* is not an act of the *mukallaf* whose obligatory or prohibitory character is described by *ḥukm* rather than a particular standard of behaviour with which the *mukallaf* ought to comply by way of commission or omission. In other words, the conduct of the *mukallaf* stated in the definition of *ḥukm* refers to the pattern of conduct required to be committed or omitted and not the commission or omission.

Our point of view would seem more convincing if we consider it in view of the conditions of *al-maḥkūm fīhī* laid down, discussed and debated by Muslim scholars. Three conditions have been stipulated for the validity of *al-maḥkūm fīhī*. They are as follows:

1. The knowledge of the act. The act which has to be the subject matter of knowledge is the act required by the *ḥukm* giver to be committed or omitted by the *mukallaf*. The *mukallaf* of course is not expected to commit or omit in compliance with or defiance of the communication before having been acquainted with the standard of behaviour he is required to observe. Therefore, the Qur-ānic standards that the mukallafīn have to observe had not been binding on them until they were explained in detail by the Sunnah of the Prophet (s.a.w.). for example, the verse:

وأقيموا الصلاة[41]

"Perform prayer"

had not been binding until the Prophet (s.a.w.) said: "Pray as you have seen me praying"[42]

However, it must be born in mind that the knowledge of the act stipulated here is the possible knowledge and not the actual knowledge. Meaning to say, the *mukallaf* is presupposed to know the

[41]Al-Qur'ān, Sūrat al-baqarah 2: 43.

[42]Muḥammad Ibn Ismāʿīl al-Bukhārī, *Ṣaḥīḥ al-Bukhāri,* 3rd ed. Kitāb al-Adhān, Bāb al-Adhān Lil musāfīr, (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2003), p. 127.

act even if he does not know it actually. The *mukallaf* is presupposed to know the act when he is adult, sane and capable of accessing the source of knowledge whether by himself or through those capable of accessing it by themselves.

2. The knowledge of the source of the command to act. Like The knowledge of the act, the knowledge of the source of the command to act required according to this condition is the possible knowledge and not the actual knowledge. The need for this condition, unlike the previous condition, is ethical rather than logical. The *mukallaf*'*s* recognition of the authority by which the command has been issued establishes the legitimacy of the command issued and, consequently, its bindingness on him. So to require the *mukallaf* to observe a particular command and to blame him for having not observed it can only be justifiable in case he is aware that the source of the command is the authority recognized by him.

3. The possibility of the act. If the need for the first condition is logical, and the need for the second one is ethical, the need for this third condition is both logical and ethical. It is not accepted logically to command a person to commit an act despite the fact that the act required to be committed is an impossible act that can never be committed. Ethically, it is not accepted too to command a person to abide by a certain standard of behaviour despite the fact that abiding by such a standard is beyond his capability.

Abiding by a certain standard of behaviour lies beyond one's capability when the act required to be committed by the *mukallaf* is impossible either rationally or habitually. Rationally impossible acts are deemed to be beyond the *mukallaf*'*s* capability because of being contrary to reason. An example of such acts is to do opposite things at once such as to be awake and asleep at the same time. On the other hand, habitually impossible acts are deemed to be beyond the *mukallaf*'*s* capability because of being contrary to natural laws. An example of such acts is to fly without an airplane.[43]

Because of being contrary to human nature, Abiding by certain standards of behaviour such as not to feel sad, happy or afraid is considered impossible and thereby they cannot be the subject matter of *ḥukm*. However, whenever the communication of the *Ḥukm giver*

[43]Abd al-Wahhāb Khallāf, *ʿIlm ʿUṣūl al-fiqh*, pp. 128-30.

indicates that they are so, that is, such standards of behaviour are the subject matter of *ḥukm*, it must be born in mind that the subject matter is not the act contrary to human nature rather than another act related to it. For example, Allah says:

لكي لا تأسوا على ما فاتكم ولا تفرحوا بما آتاكم[44]

> "In order that you may not grieve about the things that you fail to get, nor rejoice over that which has been given to you".

It is not a command to feel sad or happy when the situation requires. It is in fact a command to refrain from the bad consequences of sadness such as despair and the bad consequences of happiness such as pride. Similarly, the Prophet (s.a.w.) said: "Do not get angry".[45] In fact, what is commanded is to refrain from the bad consequences of anger such as revenge.[46]

Despite all of that, some *Uṣūliyyīn*, however, are of the view that an impossible act can be the subject matter of *ḥukm*. They have relied on a communication of the *Hukmgiver* that cannot be interpreted to be concerning an act related to the impossible act. They have cited the Qur'ānic verse which reads

سواء عليهم ءأنذرتهم أم لم تنذرهم لا يؤمنون[47]

> "It is the same to them whether you warn them or you warn them not, they will not believe"

In countering this argument, it has been argued that Allah's awareness of the future fact that the *mukallaf* will commit the act of disbelief does not entail the *mukallaf*'s inability to commit the act of belief. That is to say, the *mukallaf* has the full liberty to believe or disbelieve, yet Allah (s.w.t.) knows that he will choose freely to disbelieve.[48]

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[44]Al-Qur'ān, Sūrat al-Ḥadīd, 57-23.

[45]Al-Bukhāri, *Ṣaḥīḥ al-Bukhāri*, Kitāb al-Adab, Bāb al-Ḥadhar Min al-ghaḍab, p.1122.

[46]Abd al-Wahhāb Khallāf, *ʿIlm ʿUṣūl al-fiqh,* pp 130-32.

[47]Al-Qur'ān, Sūrat Yāsīn, 36: 10

[48]Muhammad Al-Khudari, '*Usl Al-fiqh*, (Cairo: Dār Al-hadith, 2001), p. 87.

The acts that are characterized as impossible and because of having been characterized as so they cannot be the subject matter of *ḥukm* are not only confined to those acts that cannot be actually committed whether because of rational or habitual reasons. They also include those acts that can actually be committed by the *mukallaf*, nevertheless their commission accompanies with it much difficulty and severe hardship incurred by the *mukallaf*. Assigning the character of impossibility to such acts despite the *mukallaf*'s ability to commit them is based on the following justifications[49]:

One of the objectives of *sharī'ah* is to lift difficulty and hardship from upon the *mukallafīn* (the competent persons). This is proven by several Qur'ānic verses some of which are the following:

> **يريد الله بكم اليسر ولا يريد بكم العسر.**[50]
> "Allah intends every facility for you; He does not want to put you to difficulties"

> **لايكلف الله نفسا إلاّ وسعها.**[51]
> "On no soul doth Allah Place a burden greater than it can bear"

> **يريد الله أن يخفّف عنكم وخلق الإنسان ضعيفا.**[52]
> "Allah doth wish to lighten your (difficulties): for man was created weak"

Another justification is the permissibility of acting upon dispensations such as shortening the prayers and breaking fast in Ramadan while traveling.

The insistence on the qualification of difficulty by being much and hardship by being severe is intended, for the mere and bearable difficulty and hardship is part and parcel of any obligation. But this difficulty and hardship are not intended for themselves. They are meant to help the *mukallafīn* discipline themselves and purify their

[49]Badran Abū al-ʿaynayn Badran, *Uṣūl al-fiqh al-islāmī*, p 302-303.
[50]Al-Qur'ān, Sūrat al-Baqarah 2: 185.
[51]Al-Qur'ān, Sūrat al-Baqarah 2: 286
[52]Al-Qu'ān, Sūrat al-Nisā' 4: 28

hearts so as to be conscious of their creator as much as possible for as long as possible.[53]

The act that will be committed by the *mukallaf*, as the previous three conditions have made it clear, is not the actual act said to be the subject matter of *ḥukm*. Instead, it is the pattern of conduct or standard of behaviour by which the *mukallaf* ought to abide. Let's take the first one being the knowledge of the act. If the subject matter of *ḥukm* is the actual act of the competent person, it would not be acceptable to consider the knowledge of such an act a condition of its validity, because definitely there is no competent person who is ignorant of the act that issues from him. In fact it is considered a condition because what is meant here is the command to act and not the act commanded, and of course the competent person may and may not know that a particular act is required or not.

The same mode of understanding applies to the second condition. If the subject matter of *ḥukm* is the actual act of the *mukallaf*, knowledge of the source of the command that requires it is of no significance. It is of significance because what is meant by this condition, like the previous condition, is the command to act, for the knowledge of its source bares the reason for its bindingness upon the *mukallaf*.

As for the last-listed condition, the possibility of the act is not a subject of consensus among Muslim scholars. On the one hand, the Mu'tazilites have maintained that an impossible act cannot be the subject matter of *ḥukm*. On the other, the Ash'arites have maintained the opposite.[54] To discuss whether an impossible act can be the subject matter of *ḥukm* is itself decisive evidence that the so called *al-mahkūm fih* is not an act of the *mukallaf*; for an impossible act can never be carried out by the *mukallaf*, but, of course, it can be the content of a command to do so.

The misconception of the content of *ḥukm* has given rise to another conceptual problem related to the classification of *ḥukm*. Since the conduct of the *mukallaf* is the subject matter of *ḥukm*, the definition of *ḥukm* seems to fall short of including *ḥukm waḍ'ī* for its subject matter may be an act and may not. Murder, for instance, is an

[53]See Badran Abū al-ʿaynayn Badran, '*Uṣūl al-fiqh al-islāmī*, p 304.
[54]Ahmad Hasan, *The Principles of Islamic Jurisprudence*, p. 260.

act constituting the cause of retaliation. On the other hand, the arrival of time is the cause of the obligation of offering prayer, yet it is not an act. In an attempt to stretch the definition of *ḥukm* so as to include *ḥukm waḍ'ī*, it has been argued that whether *ḥukm waḍ'ī* is an act or not, it includes the act of the *mukallaf* and ultimately relates to it. Thus the act of the *mukallaf* is the subject matter of *ḥukm* whether directly, in the case of *ḥukm taklīfī*, or indirectly in the case of *ḥukm waḍ'ī*.[55]

The foregoing defensive attempt to save the definition of *ḥukm*, though tacitly, almost conceded that the subject matter of *ḥukm* is in fact the content of *hukm* which constitutes a pattern of conduct or a standard of behaviour that ought to be complied with and not an actual human act. Let's get back to the arrival of time claimed to be *ḥukm waḍ'ī* related to offering prayer constituting *ḥukm taklīfī. In what sense can such a natural phenomenon relate to such an act of the mukallaf*? In fact it relates to it in no sense. Instead, it relates to the obligation of offering prayer which is a standard of behaviour whose observance consists in offering prayer committed by the mukallaf in order to comply with the content of the command of offering prayer communicated by the *Ḥukm* giver. Offering prayer thus *has turned out to be an act committed to comply with the content of ḥukm rather than to constitute the subject matter of ḥukm. Eventually, it could be said that ḥukm waḍ'ī in the sense of the arrival of time and the like where it does not consist in a human act does relate to the conduct of the competent person. But it relates to the standard of behaviour with which the conduct of the competent person has to comply and not to the conduct of the competent person itself.*

CLASSIFICATION OF (*AL-MAḤKŪM BIHĪ*)

It is not to be understood, not even in an embryonic form, from the dispute that has taken place among Muslim scholars over the meaning of the right of God (*ḥaqq Allah*) and the right of man (*ḥaqq al-'abd*) that Islamic jurisprudence knew the concept of right.

[55]Ahmad Hasan, *The Principles of Islamic Jurisprudence*, p. 253. Badran Abū al-'aynayn Badran, *Uṣūl al-fiqh al-islāmī*, p. 299.

Muslim scholars have dealt with the right of God and the right of man as the main categories of *al-maḥkūm bihī*. However, some contemporary Muslim scholars tend to take the classification of the right of God and the right of man as the foundation for the classification of rights which presumes the existence of the concept of right in Islamic jurisprudence in the first place. As an attempt to counter this contemporary tendency, this section, through examining the main views as to the nature of the right of God and the right of man, tries to prove that these notions must be read within the concept of *ḥukm*, and to let them function within the concept of right is to display a misconception of the concept from which they are imported and the concept into which they are incorporated.[56] Furthermore, the classification of *al-maḥkūm bihī* into religious (*diyānī*) and judicial (*qaḍā'*) will be considered so as to show how the concept of *ḥukm* functions efficiently whether we are dealing with *sharīʿah* as a value system or a legal system.

RIGHT OF GOD AND RIGHT OF MAN

Despite the Muslim scholars' disagreement on what is to be meant by the right of God and the right of man, they have unanimously held that the former, as opposed to the latter, is not subject to inheritance or waver. Their disagreement could not be avoided although they have agreed that right of man centers upon his interest.

Ḥanafis have classified *al-maḥkūm fīh* into four categories: pure right of God, pure right of man, the combination of the right of God and the right of man where the former is predominant, and the combination of the right of God and the right of man where the latter is predominant.[57]

Pure right of God

Pure right of God is the act of the *mukallaf* with which the communication of Allah is concerned and meant to serve the interest

[56]This misconception displayed has been exposed in Abdul Haseeb Ansari and Saad Abu Elgasim, "Rights and Duties in Civil Law and *Sharīʿah*: A comparative appraisal." *Journal of Islamic Law Review*, Vol. 2, 2006: 155-164.

[57]Badran Abū al-ʿaynayn Badran, *Uṣūl al-fiqh al-islāmī*, p.304-311.

of the community at large without being exclusive to a particular individual. Such an act to which such an interest is attached has been referred to as so because the significance of its nature and the generality of its benefit. *Ḥanafis* have further subdivided this right of God into eight subdivisions as follows:

1. Pure acts of devotion. They are meant to establish the religion of Islam and protect the society in general. Believing in Allah and the five pillars of Islam such as performing prayers and paying *zakāh* are good examples of this subdivision of the right of God.
2. Acts of devotion which have an aspect of impost such as *ṣadaqat al-fiṭr* (alms paid at the end of the month of Ramadan). It is considered an act of devotion because it is paid to please Allah (s.w.t.) and get closer to Him. However, an aspect of impost is also considered because it is seen as some sort of tax imposed on the individual for having his life been saved and protected. Or because of having been able to sustain himself and those whom he is required to maintain such as his wife, children and servant.
3. Acts of impost which have a devotional aspect, e.g. *ʿushr* and *niṣf al-ʿushr* (the tenth and the half of a tenth imposed on agricultural land). It is considered an act of impost because impost is the means by which a thing is sustained, and by virtue of this tax, agricultural lands are maintained and protected. A devotional aspect is considered to have been involved by this tax in addition to the financial aspect because of its nature as the type of *zakāh* imposed on such a kind of lands. However, since the land, which is a property, is considered central to both the financial aspect as well as the devotional aspect, the former has been considered to be the predominant.
4. Acts of impost which has a punitive aspect. *Kharāj*, for instance, is considered to be an act of impost because it is a tax imposed on land and meant to be spent in the public interest of the community such as the construction of roads. It is considered to have involved an aspect of punishment, on the other hand, because taking care of the land indicates the pursuance of life and the neglect of religion and jihad, and this is an attitude which is worth of punishment. This mode of justification of the involvement of the punitive aspect by this act of impost is questionable. That is because *kharāj* was imposed by Omar Ibn al-Khaṭṭāb on the Iraqi lands owned by non-Muslims conquered

by way of jihad as an equivalent to *zakāh* imposed on lands owned by Muslims.
5. Pure acts of punishment such as the enforcement of prescribed punishments (*ḥudūd*). The punishment of theft and that of drinking liquor furnish good examples of such acts. Such acts are considered pure rights of God because of the public nature of the harm ensuing from the crimes committed and the benefit ensuing from the punishments inflicted. They are also considered so because of the public nature of the mode of enforcement whereby the task of enforcement is the duty of the ruler alone whereby no individual including the victim himself has the right to enforce the punishment or waive it.
6. Imperfect punishments. Forbidding a murderer from his entitlement to a share in the estate of his slain relative, for example, is considered a punishment because it constitutes a deprivation of a particular right. Nevertheless it is characterized as imperfect because it has not affected the culprit adversely whether in terms of his life, body or property.
7. Acts of punishments which have a devotional aspect. These acts of the *mukallaf* are deemed to be punishments because they ensue as painful consequences of wrongful acts committed. They are also deemed to have involved an aspect of devotion because of the form they take and the conditions they stipulate such as intention and having been performed by the wrong doer himself. These acts of the *mukallaf* can be exemplified by the expiation for manslaughter and that for deliberately breaking fast in Ramadan.
8. Rights standing on their own such as the one fifth of treasure and the spoils of war. These rights of God have stood on their own because they are not observed as one's own devotional obligation. Instead, they have been established by Allah (s.w.t.) as a favour bestowed by Him on those entitled.

RIGHT OF MAN

Right of man, contrary to the right of God, is deemed to be the exclusive interest of a particular individual, and since it is exclusive of anybody other than him, he is deemed to be the only one who is entitled to enforce it or waive it in case he wishes. The right of a

creditor against his debtor and the right of the leasee to the usufruct of the property leased are good examples of such a right.

The combination of the right of God and the right of man where the former is predominant

In this kind of the act of the *mukallaf*, both the right of God which represents the public interest of the community in general and the private interest of an individual merge. This kind of rights can be illustrated by the punishment of slanderous accusation (*ḥad al-qadhf*). It involves the right of God because its observance serves the public interest in maintaining peace and public order by preventing the occurrence of disputes between the members of the community which might urge them to resort to violence. It involves the right of man, on the other hand, because it serves the private interest of the accused person in the protection of his honour and reputation. Each one of these two rights accompanies with it its own set of rules that are to govern the act of the *mukallaf* involving them. Since these two sets of rules cannot be applied to the same act at the same time, one of them has to preponderate over the other and this is what had happened when the set accompanied by the right of God preponderated over that set accompanied by the right of man. As a consequence of this preponderance, this had, that is the punishment of slanderous accusation, has to be enforced by the ruler, and cannot be waived by the person accused.

The combination of the right of God and the right of man where the latter is predominant

In this kind of the act of the *mukallaf*, like the previous act, both the right of God and the right of man merge. However, in this act of the *mukallaf*, unlike the previous act, the right of man preponderates over the right of God. This kind of act can be illustrated by the right to just retaliation (*qiṣāṣ*). Right to just retaliation involves the right preponderated over, that is the right of God, representing the public interest in having the right enforced so as to serve justice and let the right enforced serve as a deterrent that helps maintain peace and public order. On the other hand, the preponderant right, that is the right of man, represents the private interest of the family of the victim in having the culprit punished and their revenge taken. The preponderant right, as a consequence,

accompanies with it its own set of rules by virtue of which the family of the victim are entitled to waive their right and enforce the right itself in case they know properly how to do so.

Whittling down the varieties of *al-maḥkūm bihī*, al-Qarāfī says:

> Right of God is his commanding and forbidding, and right of man is his interests. However, rights by which the *mukallaf* has to abide fall into three categories: pure right of God such as faith, pure right of man such as debts and prices, and a third category over which dispute has arisen as to which one of the two rights just mentioned is preponderant such as slanderous accusation (*ḥadd al-qadhf*). Despite having fallen into an independent category, the purity of the right of man is not meant to indicate its total independence of the right of God, for there is no right of man which is devoid of the right of God. What is meant is that it can be waived in case the right holder decides to do so.[58]

Al-Qarāfī has conceived of the right of God as His commands, while the right of man as his worldly interest. However, when he came to classify *al-maḥkūm bihī* he divided it into three categories, viz. Pure right of God such as the belief in Allah, pure right of man such as the right of the vendor to the price of the goods he has sold, and the combination of both over which scholars have disputed as to which one is predominant; such as slanderous accusation (*qadhf*). After mentioning these three categories of *al-maḥkūm bih*, al-Qarāfī identified the pure right of man with the man's ability to waive it for there is no right of man which is totally devoid of the right of God. Continuing the process of whittling down the varieties of *al-maḥkūm bih*, al-Shāṭibī says:

> No *sharīʿah ḥukm* is devoid of the right of God which is the devotional aspect of that *ḥukm*. That is because the

[58]Shihāb al-Dīn Aḥmad ibn Idrīis Al-Qarāfī, *Sharḥ Tanqīh al-Fuṣūl Fī Ikhtiṣār al-Maḥṣul Fi al-ʻUṣūl,* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 2007), p. 114

> right of God availing against his servants is to worship Him and not to associate anything with Him. To worship God is to absolutely abide by His obligations and prohibitions. But if one comes across a *hukm* which exhibits the characteristic of being a pure right of man which is totally devoid of the right of God, such exhibition will be understood as a matter of preponderance of the right of man over the right of God in worldly matters. Similarly, no *sharīʿah ḥukm* can be said to be devoid of the right of man whether in this life or the hereafter. That is because *sharīʿah* has been based on the interest of man, and that is why it has been said in the tradition that the right of servants availing against Allah is not to punish them in case they worship him and do not associate anything with him.[59]

Al-Shāṭibī has regarded the right of God as the devotional aspect of the act, while right of man is his interest or benefit whether that benefit is in this life or in the hereafter, and whether it is general or particular. Thus, every act consists of both the right of God and the right of man. So to assert loosely that a given act is the right of one of them to the exclusion of the other is to indicate the prevalence of the devotional aspect of the act over the beneficial aspect in the case of the right of God, or the prevalence of the beneficial aspect over the devotional aspect in the case of the right of man. The prevalence of one of these two rights over the other, consequently, determines the act's subjection to the regulations illustrated by the ones mentioned above and with which this section has been started.

Of the three accounts indicated above, al-Shāṭibī's account provides the best understanding of the right of God. Being for the interest of the community at large does not justify why it is termed the right of God; for it could have been termed the right of people or the public right. What justifies such terminology is the fact that the legitimacy of the act or the command to act, in the absence of a direct beneficiary, rests on nothing but being commanded by the *Ḥukm*

[59]Abū Isḥāq Ibrāhim Ibn Mūsā al-Shāṭibī, *Al-Muwāfaqāt Fī ʿUṣūl al-Sharīʿah,* 3rd ed. (Beirut: Dār al-kutub al-ʿilmiyyah, 2003), vol. 1: 538.

giver. Therefore, al-Qarāfī has maintained that right of God is his commands, and His right is involved in any act whether it constitutes a right of man or not. But when he came to explain his statement, he mentioned that right of God might be the command to perform an act of worship, or the act of worship itself.[60] In fact, right of God is the act of worship and the command to perform such an act combined. In other words, right of God is the act of worship being commanded by god. Since the act is commanded by God, and since payment of obedience to divine injunctions is a matter of devotion, and that matter of devotion relates to every act, al-Shāṭibī is right in asserting that the devotional aspect is involved in every act and therefore no act can be said to be devoid of the right of God.

As for the right of man, the shortcomings in the account of al-Shāṭibī and that of the Ḥanafīs prove al-Qarāfī's account the best. To interpret the right of man as the individual worldly interest that can be waived implies the element of desirability pertaining to the nature of right being beneficial, and the element of exclusiveness pertaining to the person being the right holder. But to interpret right of man as the mere interest whether it is in this world or in the hereafter, and whether it is particular or general is to dilute the term to the extent that there would be no difference between one's right and his interest. It is true that right of man, according to Ḥanafīs, is the individual worldly interest, but not being stipulated that it should be subject to waiver has reduced it to a mere interest that may exist in the pure right of God even in their own scheme as we will see.

By Identifying the right of God by reference to al-Shāṭibī's account, and identifying the right of man by reference to that of al-Qarāfī, no chance is given to the Ḥanafīs' account to prove its relevance. Instead, a chance is given to prove its consistence. The interest of the family of the slain in the punishment inflicted upon the murderer resembles the interest of the person whose property has been stolen in the punishment inflicted upon the thief. But while the former is considered involved in a combination of it and the right of God where it is predominant, the latter is ignored and the right is considered purely the right of God. Conversely, the right of God in

[60]Shihāb al-Dīn Aḥmad ibn Idrīis Al-Qarāfī, *Sharḥ Tanqīh al-Fuṣūl Fī Ikhtiṣār al-Maḥṣul Fi al-'Uṣūl,* p. 216.

the prohibition of suicide resembles the right of God in the obligation imposed upon the wealthy to spend on his poor relative. But while the former is considered a combination of it and the right of man where it is predominant, the latter is ignored and the right is considered purely the right of man.

Another chance to prove consistence is given to al-Qarāfī. He has divided *al-maḥkūm bihī* into the right of God, the right of man and the combination of both over which scholars have disputed as to which one is predominant. According to his methodology, the third category should have been omitted, for the right of God is his commands which are involved in every act, and the right of man is his worldly interest that can be waived. What can be inferred from this is that what distinguishes the right of God from the right of man is its subjection to waiver whereby what cannot be waived by man is the right of God and what can be waived is the right of man. But to let into the scheme the combination of both with the possibility of each to be predominant is to show his being influenced by the tendency that views right of man as a mere interest. This swinging attitude of al-Qarāfī is obvious in the light of the fact that he has given two definitions to the right of man. One applies to the right of man as a notion, and the other, which has been selected by us, applies to it as a category of *al-maḥkūm bihī*.

In view of what has been unanimously agreed upon that man has an interest in every *ḥukm* whether particular or general, and whether in this life or in the hereafter, the assertion that right of man is his worldly interest that can be waived carries the implication that the distinctive character of the right of man is not his interest as such. It is his interest's capability to be waived by him on the basis of being authorized by god to waive it, and this is what had been pointed out by al-Shāṭibī when he held that the right of man is his right because of being conferred upon him by god and not because of the man's entitlement to it because of who he is.[61] Ultimately, right of man is but *ḥukm taklīfī* constituting an obligation placed upon another person. But what distinguishes this obligation from the other obligations is its capability to be waived in case the right holder wishes.

[61]Aḥmad al-Ḥuṣari, *Al-Ḥukm al-Shar'ī Wa maṣādiruh*, p. 220.

RELIGIOUS RIGHT *(HAQQ DIYĀNĪ)* AND JUDICIAL RIGHT *(HAQQ QAḌĀ`Ī)*

The involvement of the devotional aspect in *al-maḥkūm bihī* makes every act the right of God either fully or partially. The right of God of which every act consists either fully or partially makes every act a religious right (*ḥaqqdiyānī*). This religious right may or may not be judicially enforceable. It may be enforceable in principle but may not be in practice. If the religious right is enforceable it is termed a judicial right (*ḥaqq qaḍāʾī*). Hence every judicial right is a religious right and not vice versa. Offering prayer is a religious right of God in the sense that it cannot be judicially enforced in case the person obliged neglects it. On the other hand, the creditor's right to have the debt paid back to him by the debtor is a judicial right in the sense that it can be judicially enforced in case the debtor fails to discharge his obligation. But if the debtor denies the right of the creditor and the latter fails to prove his right before the court, his right cannot be enforced and therefore it becomes religious in the sense that it depends only on the debtor's religious and moral commitment.

Religious and judicial rights represent the two levels on which *sharīʿah* operates. On the primary level, *sharīʿah* as a value system operates providing for a standard of behaviour, guide to conduct and a way of life in which the Muslim ought to behave towards himself and the others. On the secondary level, *sharīʿah* as a legal system operates providing for a means of social control by virtue of which the society as a whole is maintained. This indicates that what guides the behaviour of people in the Muslim society is the value system. As an only aspect of this value system, law functions as the coercive instrument placed in the hand of the community in order to safeguard the main principles of that community.

As a value system, *sharīʿah* directs its commands to individuals in their private capacity. But as a legal system, it directs them to individuals in their official capacity. Functioning on the religious level, the permission of entering into a sale contract and the obligation of the vendor to transfer the goods to the purchaser, for instance, both constitute directions to individuals in their private capacity. Functioning on the legal level, the obligation of the judge, in case the vendor fails to deliver the goods to the purchaser, is to

make a decision to the effect that the goods must be forcibly delivered. This obligation and that of the executive officer to forcibly deliver the goods are both directions to individuals in their official capacity. On the first level, the direction takes the form: you ought to, ought not to or you may. For example, you ought to pray, you ought not to steal or you may enter into a sale contract. On the second level, the direction takes the form: in case A happens, you ought to do B. For example, in case the vendor fails to deliver the goods to the purchaser, the judge ought to make a decision to the effect that the goods ought to be forcibly delivered. Similarly, in case a judge makes a decision to such an effect, the executive officer ought to act accordingly.

CONCLUSION

The subject matter of *ḥukm* has been preferred to be referred to as '*al-mahkūm bihī*' rather than '*al-mahkūm fih'* despite Ibn al-Humam's justifiable precaution that such a term might raise confusion between hukm and its subject matter. Such preference has been made on the basis that *ḥukm* and *al-mahkūm bihī*, despite being distinguishable, are inseparable. *Ḥukm* and *al-mahkūm bihī* are two sides of one coin in the sense that *ḥukm* is the form and *al-mahkūm bihī* is the content. To put it differently, *ḥukm* is the communication of the *Ḥukm* giver as suggested by theologians for its distinctive character is tied to the element of legitimacy based on its nature being the communication of the *Ḥukm* giver. *Al-mahkūm bihī*, on the other hand, is the command conveyed by that communication and intended to regulate the conduct of the competent person. The subject matter of *ḥukm*, then, is the effect of the communication of the *Hukm* giver thought by jurists to be *ḥukm*.

Having preferred one definition of *ḥukm* to the other, and one term designating its subject matter to the other, the hypothesis that has triggered this piece of writing seems to have been proven true. The conclusions jurisprudentially arrived at and just summarized could have been arrived at logically and more easily if the alleged link of reciprocal identification between the definition of *ḥukm* and its subject matter had not been missing. The jurists' definition of *ḥukm*, like that of theologians, characterizes the subject matter of

ḥukm as a standard of behaviour or a pattern of conduct which the competent person has to observe. The difference between the two, that is the definition of theologians and that of jurists, is that the former refers to the standard itself as a source of *ḥukm* regardless of the way it regulates the behaviour of the competent person, whereas the latter refers to it as a particular positive or negative way of regulating the competent person's behaviour. By no means, then, the subject matter of *ḥukm* can be understood as the actual act of the competent person rather than the standard of behaviour ought to be actualized by the competent person's act. This actual act which by no means can be considered the subject matter of *ḥukm* is what is denoted by the term '*al-mahkūm fihī*', and therefore '*al-mahkūm bihī*' which denotes the standard of behaviour ought to be actualized is the appropriate term. This appropriate term represents the subject matter of *ḥukm* as a particular standard of behaviour or a pattern of conduct that ought to be observed, and not as a mere source of *ḥukm* regardless of its requirement. In other words, '*al-maḥkūm bihī*' denotes the subject matter of *ḥukm* in the way jurists define *ḥukm* whereby the latter's definition of *ḥukm* is in fact a definition of its subject matter. The theologians' definition of *ḥukm* which characterizes *ḥukm* as a mere source of *ḥukm* regardless of its requirement, then, is the appropriate definition.