THE CONCEPT OF LAW
A COMPARATIVE STUDY OF THE *SHARĪʿAH* CONCEPT OF *ḤUKM* WITH VARIOUS RELEVANT THEORIES OF LAW IN WESTERN JURISPRUDENCE

BY

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ABSTRACT

For an appropriate concept of law to be developed, an appropriate dual relation has to be formulated between law and ethics on one hand, and law and the state on the other. The formulation of such an appropriate dual relation accounts for the three aspects involved by law as a social phenomenon, namely, the ethical, social and political. Interestingly, the development of a concept of law as a consequence of the formulation of the dual relation just mentioned results in the recognition of a concept wider than the concept of law of which the concept of law is only a derivative and in terms of which the concept of law is necessarily intelligible. Fortunately, this concept is believed to be the concept of *ḥukm* already existing in Islamic jurisprudence, nevertheless it cannot be said to be perfect. On the other hand, the concept of law supposed to be derived from it does not exist or, in other words, the perspective from which it is addressed is an individual-based that does not stress the distinguishing line between law and *ḥukm*. On the contrary, the concept of *ḥukm* in Western jurisprudence does not exist, and because of that the various Western approaches to the concept of law are defective. In light of the aforementioned background, this study seeks to achieve the following objectives: First, to introduce a slightly modified version of the *Sharīʿah* concept of *ḥukm* in Islamic jurisprudence. Second, to synthesize a concept of *ḥukm* in Western jurisprudence distinguishable from the concept of law and modelled on the concept of *ḥukm* in Islamic jurisprudence. Third, to synthesize an institution-based concept of law in Islamic jurisprudence that is distinguishable from the concept of *ḥukm* and articulated along the analytical lines drawn in Western jurisprudence. Fourth, to criticize the defective approaches to the concept of law in Western jurisprudence so as to reconstruct them in the way the concept of law is constructed in Islamic jurisprudence. This descriptive, analytical and critical comparative library-based study of the concept of law in both Islamic jurisprudence and Western jurisprudence is a qualitative research that follows an inductive and deductive methodology in order to achieve its objectives. It follows an inductive methodology in the sense that it reviews the relevant literature in both schools of jurisprudence so as to identify how law is seen and conceptualized. Such an inductive methodology is reflected in the descriptive approach to the literature reviewed. It also follows a deductive methodology in the sense that it subjects the literature reviewed to an analytical and critical treatment so as to figure out the true characteristic features of the phenomenon intended to be designated, viz. law. Having followed the aforementioned methodology, the study has arrived at the conclusion that law is a coercive institutional subset of standards that belongs to a wider set that is ethical in nature. This subset of standards has been institutionalized by the state responsible for its creation and application in order to protect it by its coercive power. The state's creation and application of the law takes place by virtue of paying obedience to the value system to which the law created and applied belongs. Law, then, is a political regulatory system that is subordinate and subservient to an ethical regulatory system. What accounts for the subordination and subservience of the law to the ethical system is the concept of *ḥukm* and not the concept of law. In other words, what accounts for the creation and application of the law is the concept of *ḥukm* and not the concept of law whereby it could be asserted that if law is to be appropriately designated and interpreted, the task of elucidating it has to be shifted from the concept of law to the concept of *ḥukm*.

ملخص البحث

وضع مفهوم صحيح للقانون يستلزم صياغة علاقة ثنائية صحيحة بين القانون والاخلاق من جهة، وبين القانون والدولة من جهة أخرى. صياغة علاقة ثنائية كهذه من شأنها أن تأخذ بعين الاعتبار العناصر الثلاثة التي تتألف منها الظاهرة، وهي العنصر الأخلاقي، العنصر الاجتماعي والعنصر السياسي. الطريف في الأمر أن وضع مفهوم للقانون بناءً على صياغة العلاقة الثنائية سالفة الذكر يترتب عليه إدراك حقيقة أن مفهوم القانون لا يعدو كونه مفهوما جزئيا مختزلا من مفهوم كلي يستمد منه المفهوم الجزئي معقوليته بالضرورة. هذا المفهوم الكلي موجود لحسن الحظ في الفقه الإسلامي، وهو المفهوم المعروف بمفهوم الحكم الشرعي، إلا أنه وبالرغم من صحته لا يخلو من أوجه النقص أو القصور. أما المفهوم الجزئي وهو مفهوم القانون فغير موجود، أو لنقل أنه يتناول من منظور فردي لا يسمح بالتركيز على الحد الفاصل بين القانون والحكم. هذا المفهوم المفقود في الفقه الإسلامي موجود في الفقه الغربي، إلا أن مختلف التصورات الموضوعة له تعتبر تصورات معيبة لافتقار الفقه الغربي إلى مفهوم الحكم. في ضوء ما تقدم، تسعى هذه الدراسة إلى تحقيق الأهداف التالية: أولاً، طرح تصور معدل لمفهوم الحكم الشرعي في الفقه الإسلامي.ثانياً، وضع مفهوم للحكم في الفقه الغربي على غرار مفهوم الحكم الشرعي الموضوع في الفقه الإسلامي. ثالثاً، وضع مفهوم للقانون في الفقه الإسلامي وفقا لذات الأنماط التحليلية الموضوع وفقا لها مفهوم القانون في الفقه الغربي. مفهوم يتناول الظاهرة موضوع الدراسة من منظور مؤسساتي وليس من منظور فردي. رابعاً، بيان أوجه الخلل والقصور في التصورات الموضوعة للقانون في الفقه الغربي بغية إعادة صياغتها على نحو يكفل إعادة وضع مفهوم القانون في الفقه الغربي على ذات النحو الذي وضع عليه مفهوم القانون في الفقه الإسلامي. هذه الدراسة الوصفية، التحليلية، النقدية والمقارنة لمفهوم القانون في كل من الفقهين الإسلامي والغربي عبارة عن بحث كيفي يسعى إلى تحقيق الأهداف سالفة الذكر من خلال اتباع المنهج الاستقرائي والاستنباطي. أما اتباعه للمنهج الاستقرائي فمتمثل في مراجعته للأدبيات ذات الصلة بهدف التعرف على طبيعة التصور النظري للقانون في كل من هذين الفقهين، وقد بدا هذا المنهج الاستقرائي واضحا من خلال التناول الوصفي للآدبيات المراجعة. وأما اتباعه للمنهج الاستنباطي فمتمثل في إخضاع الأدبيات المراجعة للتحليل النقدي بهدف التعرف على الخصائص المميزة للظاهرة المراد تحديد ماهيتها، ألا وهي القانون. وكمحصلة لاتباع المنهجية سالفة الذكر، خلصت الدراسة إلى أن القانون عبارة عن مجموعة من المعايير المؤسساتية ذات الصفة الجبرية المنتمية إلى مجموعة أكبر من المعايير ذات الصفة الأخلاقية. يرجع اكتساب هذه المعايير للصفة المؤسساتية إلى تبني الدولة لها عن طريق الوضع والتطبيق بغية حمايتها بسلطتها الجبرية. يجيئ وضع الدولة للقانون وتطبيقها له نتيجة لالتزامها بمجموعة المعايير الأخلاقية التي ينتمي إليها القانون محل الوضع والتطبيق. القانون إذن نظام حكم سياسي خاضع وخادم لنظام حكم أخلاقي، ومن ثم فإن المعني بتوصيف خضوع نظام الحكم السياسي لنظام الحكم الأخلاقي وخدمته له هو مفهوم الحكم وليس مفهوم القانون. بعبارة أخرى، إن المعني بتوصيف وضع القانون وتطبيقه هو مفهوم الحكم وليس مفهوم القانون. وعليه، إذا ما أردنا تحديد القانون تحديداً دقيقاً وتفسيره تفسيراً سليماً، تعين علينا نقل مهمة شرح وتحليل الأحكام القانونية من مفهوم القانون إلى مفهوم الحكم.

APPROVAL PAGE

The Thesis of Saad Abu Elgasim Saad has been approved by the following:

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Saad Abu ElGasim Saad

Signature:…… Date:……...

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Affirmed by Saad Abu ElGasim Saad

…… ……

Signature Date

To those who have supported me with much love and patience despite having been late in completing my research, namely, my beloved family members especially my parents, I dedicate this work

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CHAPTER ONE

INTRODUCTION

The relation that characterizes the notorious dispute between naturalism and positivism is one of either inclusion or exclusion. It is one of inclusion on the part of naturalism for it denies any existence of positive law apart from it. Correspondingly, it is one of exclusion on the part of positivism for it denies that natural law has any relation to it. This mutual denial of existence either by inclusion or exclusion has manifested itself in the defects from which these two schools of thought suffer. As regards natural law, our daily talk of law in terms of its creation, promulgation, enforcement and amendment is quite indicative of the state-based nature of law. The recognition of this nature leaves no room for the recognition of the plausibility of the naturalists' assertion that any positive law that contradicts natural law is deemed to be void. As regards positivism, its failure to discern the moral standards that transcend the law and yet direct all what relates to it in terms of its creation, promulgation, interpretation and enforcement has caused it to fail in designating the true essence of positivism and the relation in which state stands to law. As far as the researcher thinks, the *Sharīʿah* concept of *ḥukm*,[1] as an analytical instrument, bridges the gap between these two schools. It bridges, in addition, the gap between these two and legal realism, especially the Scandinavian realism. The researcher does not agree with Scandinavian realists on their psychological interpretation of law, nevertheless he thinks that they have shed a very illuminating light on the real nature of law. Therefore, it is believed that the Scandinavian realists' distrust of legal concepts has to

[1] What is meant by that '*shariʿah* concept of *ḥukm*' is simply the classical concept of *ḥukm sharʿī* known in *uṣul al-fiqh*.

be revisited. The building up of the bridges between naturalism, positivism and realism is realized through its sole notion of communication.

According to this notion, Allah (s.w.t.) is the *Ḥukmgiver* who addresses His communication to the *ḥukm* subjects. The totality of this communication makes up the Islamic value system often referred to as the *Sharīʿah*. The *ḥukm* subjects are the competent individuals whether in their private capacity or official capacity. The communication addressed to private individuals is aimed at governing the private life of individuals. On the other hand, the communication addressed to officials is aimed at governing the public life of the community. For example, the decree that no one will commit theft is directed toward private individuals. On the contrary, the decree that he who commits theft will be punished is directed to officials. Paying obedience to these two directives is a matter of religion, the reason for which is essentially one's religious commitment. However, paying obedience to the communication directed to private individuals, in case the religious commitment fails to generate the required obedience, might be caused by the threat of the sanction that would be inflicted upon the individual if he commits any forbidden act. Such a threat of a sanction may not be attached to other communication directed to private individuals such as the command to offer prayer. Therefore, if the religious commitment fails to generate the required obedience, no other deterrent will step in its place and, consequently, if he complies not with the command, no coercive action will ensue on the part of officials either to force him to comply or to punish him for his non-compliance. The command not to commit theft is an example of a type of communication directed to private individuals that lies between two other types; one directed to private individuals, and the other directed to officials. Yet, both of them are not backed by the coercive power of the state to secure their observance. The lack of coercion on the part of the

communication directed to private individuals is due to the fact that they are considered personal in the sense that they do not directly affect the public life of the community. However, the lack of coercion on the part of the communication directed to officials lies in the fact that their addressees represent the state's instrument that is set up to secure through coercion the observance of communication. Therefore, if this instrument fails to observe the commands, there is no other instrument that can force it to do so.

The communication backed by the state coercive power implies, in addition to Allah's will, the will of the state. When the state declares that it will react with coercion against a particular performance or forbearance, it means that it commands private individuals to forbear or perform respectively. Bearing in mind that the content of the communication of the state originates in the communication of Allah (s.w.t.), it follows that the communication of the state does not go beyond the conferment of a formal status upon certain communication of His. In other words, when the state commands, it commands individuals to pay obedience to the command of Allah (s.w.t.) because it itself is commanded to do so. Now we are before three types of communication: the communication of Allah (s.w.t.) directed to private individuals, the communication of Allah directed to the state, and the communication directed to private individuals by both Allah (s.w.t.) and, subsequently, the state. All three of these types of communication are termed *ḥukm* for they all originate from the will of Allah (s.w.t.). However, only the third one, in which the communication of Allah and the communication of the state merge, is what is termed ‘law’, for the existence of law lies in the existence of the state's coercion as a social means of control to secure its observance. Hence, every law is a *ḥukm* and every *ḥukm* is not a law. Ultimately, law is the communication directed to private individuals by the state which bestows the

formal status of law upon the communication directed to the same addressees by Allah (s.w.t).

The *Sharīʿah* concept of *ḥukm*, as it has just been portrayed, is comprised of two elements: the content and the structure. While the content consists of the value system, the structure consists of the mode of analysis of the operation through which the value system gets implemented or adhered to. The content is of course Islamic for it comprises the communications of Allah (s.w.t). The structure, however, is neutral for it is concerned with a social phenomenon that exists in all human societies. According to this phenomenon, any society has a value system to which it adheres. By virtue of this value system, individuals are commanded to carry out certain performances, observe certain forbearances and permitted to perform or forebear. Among these performances that have to be carried out is the task of setting up a system whose task would be to serve the interests of the community and uphold through coercion its highly important values as specified by the value system itself. This system, set up to carry out this task, is what is commonly referred to as the state. Given that the task of the state, that is its officials, is to secure the individual's observance of the value system, it follows that when that state commands that a particular pattern of conduct ought or ought not to be performed it means that the value system commands it to do so. Now we, as we were, are before three types of commands: the command of the value system directed to private individuals, the command of the value system directed to the state, and the command directed to private individuals by the value system and the state. Hence, what is needed for the *Sharīʿah* concept of *ḥukm* to be used as an analytical instrument in any legal system is only to keep the structure as it is and eliminate its content in order to be replaced with another one. Accordingly, the Islamic value system has to be replaced with the value

system of that legal system in which it is intended to be used. Having said this, law can be said to be the communication directed to private individuals by the state. The state communication bestows the formal status of law upon the communication directed to private individuals by the value system of the society to which the state adheres.

The above replacement of the Islamic value system is one step in a two-step process that aims at letting the concept of *ḥukm* function properly as an analytical instrument in any legal system. The second step aims at making Western jurisprudence receptive of the concept concerned. For such a step to be taken, the current legal structure existing in Western jurisprudence has to be deconstructed and then reconstructed in the light of the understanding of the structure of the *Sharīʿah* concept. The dual process of the replacement of the Islamic value system and the reconstruction of the western legal structure is the task performed by this work through a descriptive, analytical and critical comparative study of the concept of law in Islamic jurisprudence and Western jurisprudence.

1.1 THE SCHEME OF THE STUDY

This study is comprised of seven chapters which attempt to make the researcher's point in the following way:

As an introductory chapter, chapter one introduces the reader to the topic by stating the research problem and reviewing the literature indicative of the problem stated. It also states the hypotheses put forward to resolve the problem stated and the methodology followed in order to prove the hypotheses true. Not to mislead or upset high expectations, the objectives of the study are specified, its scope is demarcated, and its limitations are pointed out in advance. Although it is not a concept of law,

Chapter Two presents the *Sharīʿah* concept of *ḥukm* as the best conceptual instrument to elucidate law. However, it is not alleged to be perfect, therefore some improvements and refinements of it are suggested. Given the fact that such a concept does not exist in Western jurisprudence, chapter three is concerned with its articulation in the way the *Sharīʿah* concept of *ḥukm* is articulated. Such a concept will be referred to throughout this study as the *non-Sharīʿah* concept of *ḥukm.* Chapter four attempts to articulate an original Islamic concept of law derived from, and intelligible in terms of the *Sharīʿah* concept of *ḥukm*. A concept that does not constitute the first conceptual account of law in Islamic jurisprudence, yet it is thought that it constitutes the first conceptual account that can be designated as law in the strict sense or, in other words, that has been articulated along the analytical lines known in positive law jurisprudence. The reasons why the conceptual account of law already existing in Islamic jurisprudence cannot be referred to as law as well as the differences between it and the newly articulated one are discussed in this chapter through a distinction made between the classical approach that has been referred to as the individual-based approach, and the suggested one that has been referred to as the institution-based approach. The task assigned to this newly articulated concept is the dual task assigned by Raz to legal philosophy being the identification of the legal system, and the individuation of laws. The concept articulated attempts to perform the dual task concerned in a way that avoid the shortcomings of the unsuccessful attempts made in Western jurisprudence to perform the same dual task. The shortcomings of the unsuccessful attempts made in Western jurisprudence just mentioned are highlighted in chapter five. Not only this, the failed attempts are critically analysed in an integrated manner so as to identify the legal system in Western jurisprudence in the way the legal system is identified in Islamic jurisprudence. The identification of the

legal system in the way just mentioned indicates that the concept of law is only intelligible in terms of a wider concept which has been referred to as the *non-Sharīʿah* concept of *ḥukm*. Chapter six is concerned with the performance of the second task of the dual task assign by Raz to legal philosophy, i.e. the individuation of laws. Having developed the *non-Sharīʿah* concept of *ḥukm*, the *non-Sharīʿah* laws are individuated in this chapter in the way their *Sharīʿah* counterparts are individuated in chapter four. Chapter seven, as a concluding chapter, provides a summary of the findings and points to the direction in which the way forward lies.

1.2 THE STATEMENT OF PROBLEM

The concept of *ḥukm* is thought to be necessary for the intelligibility of the concept of law whether in Islamic jurisprudence or Western jurisprudence. In Islamic jurisprudence, the concept of *ḥukm* exists, nevertheless it cannot be said to be perfect, and therefore it needs to be refined. As for the concept of law, it addresses its subject from an individual-based perspective that does not stress the distinguishing line between law and *ḥukm*. For such a line to be stressed, law needs to be addressed from an institution-based perspective. In Western jurisprudence, on the other hand, the concept of *ḥukm* does not exist, and therefore it needs to be articulated. As for the concept of law, it exists, but because of the non-existence of the concept of *ḥukm* the current approaches to it are defective.

HYPOTHESIS

1. The current approaches to the concept of law in Western jurisprudence are defective.

2. The sole kind of which *ḥukm sharʿī* consists is the defining rule (*ḥukm taklīfī*).
3. The *Sharīʿah* concept of *ḥukm,* as an analytical instrument, can be used perfectly to elucidate the legal rules of any legal system.
4. A *non-Sharīʿah* concept of *ḥukm* modelled on the *Sharīʿah* concept can be articulated in Western jurisprudence.
5. Law is the communication of the sovereign (the state) concerning the conduct of the legally competent person by way of command or option.

1.3 OBJECTIVES

The main objectives of this study are as follows:

First, to introduce a somewhat different version of the *Sharīʿah* concept of *ḥukm* and demonstrate its relevance to the interpretation of one's behaviour in the Muslim society whether in his private capacity or official capacity together with the elucidation of the practical rules of *Sharīʿah* as a legal system.

Second, to synthesize a concept of *ḥukm* in Western jurisprudence modelled on the *Sharīʿah* concept.

Third, to synthesize an institution-based concept of law in Islamic jurisprudence that is distinguishable from ḥukm and articulated along the analytical lines drawn in Western jurisprudence.

Fourth, to criticize the main positivist approaches to the concept of law in Western jurisprudence so as to reconstruct them in the way the concept of law in Islamic jurisprudence is constructed.

Fifth, to prove the relevance of the *Sharīʿah* concept of *ḥukm*, as an analytical instrument, to the interpretation of one's behaviour in any society whether in his

private capacity or official capacity together with the elucidation of the practical rules of its legal system.

1.4 LITERATURE REVIEW

The *Sharīʿah* concept of *ḥukm* is a central topic that is discussed by Muslim scholars, whether classical or contemporary, in literature which concerns the principles of Islamic jurisprudence (*uṣūl al-fiqh*). One of the most famous and reliable of these books is *al-Iḥkām fī Uṣūl al-Aḥkām* by al-'Āmidī who belonged to the Shāfiʿī School. Another work by a Shāfiʿī scholar is al-Ghazali's book entitled *al-mustaṣfā' min ʿIlm al-Uṣūl*. *Al-Muwāfaqāt fī Uṣūl al- Sharīʿah* is the title of the book written by al-Shāṭibi who belonged to the Maliki School. To the same school belonged al-Qarāfi whose book is entitled *Sharḥ Tanqīḥ al-Fuṣūl fī Ikhtiṣar al-Maḥṣul fi al-Uṣūl*. In the Ḥanafī School, one of the most reliable works is *al-taḥrīr* by al-Kamāl Ibn al-Ḥumām. *Rawḍat al-Naẓir Wa jannat al-Manāẓir* by Ibn Qudāmah al-Maqdisi is an equivalent reliable work among the Hanbalis. As it was the concern of classical scholars, the concept of *ḥukm* has always been the concern of the contemporary ones such as Muhammad Abu Ẓahrah whose book is entitled *Uṣūl al-Fiqh*. The same title was given to a book written by Muhammad al-Khudhari. *Uṣūl al-Fiqh al-Islāmī* is the title of another book written by Badran Abū al-ʿAynayn Badran. No doubt that most of the works that have handled the concept of *ḥukm* are written in Arabic. However, some English works have been written; some of the most important and comprehensive of which are *The Principles of Islamic Jurisprudence* by Ahmad Hasan and *Principles of Islamic Jurisprudence* by Mohammad Hashim Kamali.

The issues falling within the purview of the concept of *ḥukm* discussed by classical scholars are almost the same. Nevertheless, the standpoint from which they

are addressed and the emphasis given to each one of them differs from one scholar to another. For example, al-Ghazālī, being a profound philosopher, has discussed at length the theological issues related to the *ḥukmgiver* (*al-ḥākim*). On the other hand, Ibn Qudāmah, being concerned with jurisprudence rather than theology, has emphasized the practical issues related to the classification of *ḥukm*. Al-Shāṭibī, on his part, has handled the matter proceeding from his central theme of the main objectives of *Sharīʿah* (*maqāṣid al- Sharīʿah*). In addition, the methodology adopted by those scholars in classifying and presenting such issues is not shared by all. For instance, the conditions that must be present in the competent person (*al-mukallaf*) are discussed by al-'Āmidī with the competent person (*al-maḥkūm ʿalayh*) being one of the constituents of *ḥukm*. Ibn Qudāmah, on the other hand, discusses them with the meaning and conditions of competence (*maʿnā al-taklīf wa shurūṭuh*) being a section that falls under the classification of *ḥukm taklīfī*. With respect to contemporary scholars, they are more unanimous in the way in which the concept of *ḥukm* is dealt with, for, the researcher supposes, their writings are expository in nature.

Ḥukm is commonly defined as: the communication of the *ḥukmgiver* (*khiṭāb al-shāriʿ*) concerning the conduct of the competent persons (*afʿāl al-mukallafīn*) by way of command (*al-iqtida'*), option (*al-takhyīr*) or declaration (*al-waḍʿ*).

This definition, which is thought to have been devised by Abū al-Ḥasan al-Ashʿarī or some other Ashaʿrī scholar, and all what relates to it have been the subject matter of inquiry by two main groups, namely, *Uṣūliyyīn* and jurists (*fuqahā'*). They have viewed *ḥukm* from two different standpoints. Whereas *Uṣūliyyīn* have looked at it as a matter of faith or bond between man and God; jurists have looked at it as a way of life or regulatory system. Consequently, it is intelligible that they have come up with different perceptions. One of the most famous points of disagreement that have

arisen between these two groups is the definition of *ḥukm* itself. *Uṣūliyyīn* have held that *ḥukm* is the communication of the *ḥukmgiver* as it has just been stated. Correspondingly, jurists have held that it is the effect of that communication.

Uṣūliyyīn are divided into Asharites, Mutazilites and Maturidites. The notorious dispute over the rationality of good and evil is a good illustration of the lines along which these factions have developed. Jurists, on their part, have often fallen into two camps, viz. *Ḥanafīs* and *Jumhūr*. For example, *Ḥanafīs*, as opposed to *Jumhūr*, have subdivided reprehension (*karāhah*) into reprehension by way of prohibition (*karāhah taḥrīmiyyah*) and reprehension by way of religious scruple (*karāhah tanzīhiyyah*).

Both types of *karāhah*, however, are part of the defining rule (*ḥukm taklīfī*) which constitutes, in addition to the declaratory rule (*ḥukm waḍʿī*), one of the two categories into which *ḥukm sharʿī* has been classified. A marginalized opinion in Islamic jurisprudence considers *ḥukm taklīfī* as the sole kind of *ḥukm sharʿī* under which *ḥukm waḍʿī* is subsumed. The researcher agrees to a certain degree with this opinion whose rationality will be touched upon briefly. In general, *ḥukm taklīfī* is the communication of the *ḥukmgiver* by virtue of which an act is considered to be an obligation, recommendation, permission, reprehension or prohibition. On the other hand, *ḥukm waḍʿī* is the communication of the *ḥukmgiver* by virtue of which a thing is declared to be a cause, a condition or an impediment to one of the categories falling under *ḥukm taklīfī*. For example, the obligation of *zakāh* is *ḥukm taklīfī.* However, the ownership of the minimum amount of property (*niṣāb*) is its cause, the passage of the minimum amount of time (*ḥulūl al-ḥawl*) is its condition, and debt is its impediment. According to the marginalized opinion, it is not reasonable to think that the *ḥukmgiver* (s.w.t) commanded the obligation of *zakāh* intotal isolation from its cause, condition

and impediment to the extent to which it was needed to be addressed in a totally independent command. What happened, in fact, is that the *ḥukmgiver* (s.w.t) commanded individuals to pay *zakāh* in case the cause has taken place, the condition has been fulfillled, and the impediment is absent. That is to say, the centre of both types of *ḥukm shara'ī* is the obligation of *zakāh,* i.e. *ḥukm taklīfī.* Nevertheless *ḥukm taklīfī* specifies the act that ought or ought not to be carried out, and *ḥukm waḍ'ī* specifies the context in which such an act ought or ought not to be carried out. In short*, ḥukm waḍ'ī* is subservient to *ḥukm taklīf* and not independent of it.

Going further away from the main stream opinion, the researcher thinks that a close critical analysis of the main subdivisions of *ḥukm waḍ'ī* proves it to be illogical. Going back to the obligation of *zakāh*, the ownership of *niṣāb* is its cause. But if we look at it closely, we will find that it does not give rise to its effect unless its condition has been fulfillled and its impediment is absent. Given the fact that the cause causes nothing independently of the fulfilllment of conditions and the absence of impediments, it fails to be a cause in the strict sense. Consequently, the relation of the subdivisions of *ḥukm waḍ'ī* to each other and the relation of *ḥukm waḍ'ī* as a whole to *ḥukm taklīfī* needs to be reformulated.

Going away from the main stream opinion, the researcher, this time, agrees fully with the opinions of two prominent Maliki scholars pertaining to the identification of the right of God and the right of man, namely, al-Shāṭibi and al-Qarāfi. The commands of Allah (s.w.t.) are referred to as rights. These rights, on the basis of their right holder, have been classified into the right of God and the right of man. According to the majority opinion, which is the Ḥanafīs', right of God is what is meant for the interest of the community in general. On the contrary, right of man is what is meant for the worldly interest of a particular individual. Being for the interest

of the community at large does not justify its being termed the right of God, for it could have been termed the public right. What justifies that is the fact that in the absence of any direct beneficiary, the legitimacy of the act or the demand to act rests upon being commanded by God. Therefore, al-Shāṭibi is right in asserting that the right of God is the devotional aspect of the act. With respect to the right of man, the worldly interest of a particular individual can be found in the right of God such as the interest of one whose property has been stolen in the infliction of the prescribed punishment upon the thief. Therefore, al-Qarāfi is right in stipulating that the worldly interest must be subject to waiver. That is to say, right of man, according to al-Qarāfi, is that worldly interest that can be waived by its right holder. The commands directed to private individuals can be rights of God as well as rights of man. However, the commands directed to officials are always rights of God. One of the most important rights of God directed to officials is the command to enforce the commands directed to private individuals as it is stated in the following Qur'ānic verse: "And those who do not judge with what Allah has revealed are the disbelievers".[2] This Qur'ānic verse implies the relation between the value system and the legal system formulated within the concept of *ḥukm*. The command to judge with what has been revealed by Allah (s.w.t.) is directed to individuals in their official capacity. What has been revealed itself, however, is a command directed to individuals in their private capacity. For example, the command that contractual obligations will be enforced is directed to officials. On the contrary, contractual obligations themselves are commands directed to private individuals. Both of them are part of Islam as the value system of the Muslim society. Nevertheless, the latter, as opposed to the former, are backed by the coercive power of the state in case the parties obliged fail to comply with them. In

[2] Al-Qur'ān, Sūrat al-Mā'idah 5: 4