



EXAMINATION OF AL-HUKM AL-WAD'I (DECLARATORY LAW) UNDER THE SHARI'AH LEGAL SYSTEM

SABO KARABI GIADE

A.D.Rufa'i College for Legal and Islamic Studies, P.M.B. 004 Misau, Bauchi State, Nigeria.

Abstract:

This write up is aimed at having a thorough examination of the rules of shari'ah pertaining to HUKM or rules which in the bases of understanding the rules as to whether they are obligatory, recommended, prohibited, disapproved or permitted. The HUKM or rule can be perceived in two different categories as HUKM At-Taklifi (a rule that demand, prohibit or give option) and Hukm Al-wadi (explain the relationship between the different obligatory rules) it will therefore be observed that Hukm Taklifi requires the performance of an act from a mukallaf (subject law) prohibiting him or giving him option while Hukm wad'i is not concerned about that, but it borders on the fact that doing a particular act is a condition for another thing to happen or it prevents a particular rule to take effect. Example, presence of witnesses or payment of dowry is a condition for marriage contract.

INTRODUCTION

Praise be to Allah, the beneficent the merciful. Master of the Day of Judgment may the peace and blessings of Allah be upon his last prophet Muhammad bin Abdullah (SAW)

We can refer to the last verse of the Surah At-teen where Allah (SAW) said:

"Is not Allah the wisest of Judges?"¹

Shari'ah means a complete way of life. It touches all Human acts be they religious, political, financial, social, etc.

Allah, the Omnipotent is the law giver or law maker who sent down His injunctions through his prophet in form of Qur'an (the most glorious) He as well is the law giver who commands the doing or abstaining from some acts for the

reason that such acts may be beneficial or harmful to human beings. He said in his book;

“verily, when He intends a things, His command is, Be and it is”²

THE MEANING OF HUKM

Hukm as the name suggest, literally means a command, and technically, it means a “rule”

The rule here encompasses so many dimensions as rational rule, rule perceive by senses or a rule based on Experience 3

- a- Rational rule:- this is the rule that we use our rationale to deduce it’s meaning E.g.1+4=5
- b- Rule perceive by senses:- this is the rule deductable by our senses for example fire burns.
- c- Rule based on experience or experiment. This is just like something that is judicially noticed, that is, there is no need of proof. E.g. sun rises from the east and set at the west or alcohol intoxicates, aspirin relives pain etc.

There is no controversy among the Islamic just as to the fact that Hukm come from Allah Q: An’am verses 58.

The meaning of Hukm Shar’i

It is important and essential to give a brief explanation of the Hukm Shar’i because it is the bases where we obtain the topic under discussion (Hukm Wad’i). Hukm Shar’i is a communication from Allah the exalted through a demand option or declaration. From the above definition, we can deduct that Hukm Shar’i has three component parts as communication from Allah related to the acts of a subjects.

- a. Demand
- b. Option
- c. Declaration

There is no controversy among the jurists also on the fact that Allah is the law giver. The controversy is only on what is the rule of law.

Al-hukm shar’i from the Usuli point of view is a command from Allah (the lawgiver) requiring the subject giving him option to do on act.

We can see Surat Al-Ma’idah verse one where Allah Said :

“Oh you who believe, fulfill obligations”

We can also see the following prophetic hadith where the prophet (SAW) said

*The killer does not inherit*⁵

Al-hukm from the Faqih point of view is a rule that requires the subject to do an act in form of Wajib, haram or mubah.

An example is where Allah says:

“Fulfill your obligations”⁶ this is wajib

Another example is where Allah (SAW) said: Do not go nearer to adultery⁷
The above verse showed the prohibition of going nearer to adultery.

From the above, it entails that Hukm Shar’i: consist of the following:

1. Hukm Shar’i is a communication from Allah which is treated as a command. But it is to be noted that a communication from anyone else cannot be considered as a Hukm, be he a ruler or a person in authority.
2. The communication gives a rise to rule that enables the jurists to understand whether the requirement is for the commissioner or omission of an act.
3. Hukm may be expressed through a demand for either commission or omission.
4. Al-Hukm May grant a choice or option to the subject for ether commission or omission of an act.
5. The commission may be expressed through a declaration. The communication therefore declares that an act is the
 - a. Cause (Sabab)
 - b. Condition (Shart) or
 - c. Impediment (Mani) for the application of the Hukm.

For example as in the case of payment of Zakat, the cause is the possession of the minimum amount (Nisab), having retain the wealth for a year is the condition for the Hukm, and the existence of debts against the subject, give rise to impediment or an obstacle in the way of fixing liability for Zakat.

HUKM TAKLIFI

It is equally important to briefly explain Hukm Taklifi before finally going to the topic under discussion.

Hukm Taklifi is a rule that demand, prohibit or give option to the subject. Example of

1. Demand – *Khuz min amwaalihim sadaqah*
2. Prohibition - *Laa yaskhar Qaumun an Qaumun*
3. Option- *Fa izhaa Qadhaitumussalaat fantashiruu*

Meaning

This Hukm is called Taklifi because it brings about putting on a subject to act, refrain from give him option. ¹¹

HUKM AL-WAD'I UNDER ISLAMIC LAW (declaratory rules). Declaratory rules or Wad'i is a rule that facilitate the operation or the obligation or explained the relationship between the different obligatory rules ¹²

In other words, Hukm Wad'i does not create an obligation. It is just regarded as a secondary rule. This gives the meaning of law in Shari'ah a wider dimension that the simple definition of law by John Austin, as a "command"

As it has been stated earlier, that the declaratory rule facilitate the application of the obligatory rules, it accordingly include three elements.

1. Cause of Hukm
2. Condition for Hukm
3. Obstacle to the Hukm

1. Causes or Sabab

Literally cause (sabab) can be said to be the means we can get to a particular thing.

Technically however, it means what the law giver has determined to be the identifier of a legal rule so that it's experience of the rule, for example, unlawful sexual intercourse is a cause for the obligation of implementing Hadd, while *Safah* and insanity are the causes for interdiction. But when this causes are missing, there is no obligation to impose Hadd or interdiction.

Sabab itself is sub-divided in to two according to the act of the subject.

A. The causes that is neither dependent of the act of the subject nor is it within his power to bring about, yet when such a cause is found, the Hukm (rule) exist. E.g. the rising or setting of the sun is the cause of the obligation of Morning Prayer or evening prayer. The beginning of the month of Ramadan is a cause for the obligation of fasting.

This is the cause that is dependent on within the power of the subject to bring about, and such act may be required, prohibited or recommended.

E.g. the cause of setting a lawful journey is the permissibility of not fasting in the month of Ramadan. The act of contracting murder is the cause of the obligation of Qisas (retaliation). The act of contracting a marriage is a cause for the permissibility of sexual intercourse.

2. Condition (Shart)

Where the lawgiver declares that the set of fact must exist before the cause can take effect and invoke the related Hukm (rule), the existence of such a set of fact is called a condition (Shart).

In its technical sense, condition implies a necessary condition for a rule. Example is the presence of witness or payment of dowry as a condition for marriage contract. The existence of either dowry or witness however does not necessarily mean that a marriage has taken place. Yet without either of the two or any of the two a marriage will not be valid.

Consider or Shart is sub-divided into two according to the jurists viz:-

- a. Shart Shar'i (Imposed by lawgiver) beginning of Ramadan
- b. Shart Ja'ali (Imposed by the subject) committing murder

3. Obstacle (mani).

The obstacle or mani is a factor whose existence indicates the negation of Hukm (rule) or its Sabab (Cause). Eg. Zakat/indebtedness,

A condition or set of fact may exist that prevent the Hukm (rule) from being applied, even if the cause is found and the condition is met. In yet another development, Abdulwahab Khallaf in his book of usual fiqh defined Hukm wad'i as a rule that command an act as Sabab, Shart or Mani ¹³

He went further to buttress his view with so many Qur'anic verses on the three rules he cited

- a. Sabab, we can see Suratul Ma'ida verses 6 and 38.

"O you believe when you prepare for prayer, wash your faces and your hand (and alms) to the elbows..."¹⁴

"As to thief, male or female, cut off his or her hands: a punishment by way of example from Allah, for their crime: and Allah is exalted in power."¹⁵

- b. Shart, we can see verse 98 of Suratul Ali Imran.

"...pilgrimage thereto is a duty men owe to Allah for those who can afford creatures."⁽¹⁶⁾

- c. Mani, here there is a Hadith of the prophet (SAW) that says that there is no *mirath* (inheritance) for the killer

Hukm wadi is further categorized in to:-

1. Sahih (valid)
2. Batil (null and void)
3. Fasid (vitiated)
4. Azimah (initial or general rule) and
5. Rukhsa (exceptions)

1. Sahih (VALID): An act that is obligatory, recommended or permissible is required to be performed in a certain manner by the lawgiver, when the act is performed properly, it is deemed as valid.

On the other hand, if the act is not done as commanded, that act will be said to be null and void. For instance, the act of *Siyam* or fasting may either be obligatory if it is during Ramadan period or permissible (if done on any day not during the Ramadan). *Siyam* (fasting) has its rules and conditions which if not followed, the act will be null and void e.g. eating and drinking or having sexual intercourse.

1. Batil (Null and Void): things that are obligatory, recommended or permissible and not done in a manner prescribed by observing the elements, conditions and rules can be (null and void).
2. *Fasid* (Vitiated). An act that is obligatory, recommended or permissible if performed with an offending condition or the cause of irregularity is removed otherwise it stands. This classification is added by the Hanafi School.

An example is a case of contract involving Riba (usury). According to the Hanafis, the offending condition (i.e the riba) is to be removed for the contract to be valid. To them, the contracting parties have no option to remove such offending condition.

3. *Azimah* (initial or general rules):- this is a situation where the lawgiver indicates initially as a general rule that a rule is to be considered as an obligation. A good example is the prohibition of wine drinking as a general rule. To some extent in case of necessity, it may be allowed. Another example is the case of dead animal. The Qur'an stated clearly the prohibition of eating the dead animal. However, there is a Hadith of the prophet (P.B.U.H) that allowed the eating of dead animal in case of necessary to a person who is on journey and has no food to eat, he is allowed to eat and continue eating up to the time when he reaches a place where he can get food, that is permissible.

4. *Rukhsa* (exception) *Rukhsa* as the name suggests means exception. It goes hand in hand with *Azimah*, it is a situation though the lawgiver indicates as initial rule to be considered as an obligation, but it is followed by another rule that is an exception. A good example is that, though wine drinking is prohibited as a general rule as cited above under *Azimah*, it is followed by an exception that in case of necessary one is allowed to drink.

It is further stated that classification of the secondary rules in to *sabab, shart* and *Mani* is what the *Usuli* is concerned about.

On the other hand, classification into *Sihha, Butlan and fasad* (validity, Nullity and vitiating) is more important for the *Faqih* because it pertains to the performance of acts.

However, classifications into *Azimah and Rukhsa* (General rule and exception) refers the Jurists to identify the general principles of the law and the exception to the general principles. It is therefore, a tool for achieving analytical consistency. *Hukm wad'I* or declaratory rule is called positional rule of law by professor Abdulqadir in his book "The rules of law in the shariah" ¹⁷

He went further to state that the numerous types of acts of *mikallaf* demand that the position rule of law, which is to guide them, should be numerous in kind. This lead to some Jurists to divide the position rule of law into about (11) division namely:-

- Al-sabab i.e. cause
- Al-shart i.e. condition
- Al-mani i.e. preventive
- Al-sihah i.e. correction
- Al-illah i.e. reason
- A-fasad i.e. incorrectness
- Al-rukhsa i.e. permission
- Al-azimah i.e. resolution
- Al-qada i.e. payment of an act as debt.
- Al-ada i.e. performance of an act in due time
- Al-I'ada i.e. repeats. ¹⁸

In yet another development, some Jurists united the division in to seven (7) namely:-

- Al-sabab

- Al-shart
- Al-mani
- Al-rukhsa
- Al-azimah
- Al-sihhah
- Al-butlan ¹⁹

CONCLUSION

While concluding this write up, it is important to draw a distinction between Hukm Taklifi and Hukm wad'i.

- HUKM TAKLIFI: Requires the performance of an act from a mukallaf prohibiting him or giving him option. Hukm wadi on the other hand is not concern with the above three elements, but it borders on the fact that doing a particular act is a condition for another thing to happen, or this act prevent a particular rule to take effect. ²⁰

In yet, another book, it described the differences between the two as "under Taklifi" we have five (5) categories of rules:

- Obligation (Wajib)
- Recommended (Nadb)
- Prohibition (Haram)
- Disapproval (Karahah)
- Permission (Ibahah)

Hukm wadi on the other hand considers an act to be valid, invalid or vitiated (voidable) ²¹

It was rightly observed by another author of Islamic Jurisprudence Nyazee who looked at the difference between the two as follows:-

1. The aim of Hukm Taklifi is to create an obligation for the commission or omission of an act or to grant a choice between the commission or omission of act on the other hand, the Hukm Wad'i has no such aim. It's purpose is to either inform the subject that a certain things is a cause of, condition for or obstacle to a Hukm or it is to explain the relationship that exist between two rules or to provide the criterion for judging whether an act performed is valid or void.
2. The act or event that is affected by the Hukm Taklifi is within the ability of the subject with respect to it's commission or omission, the act affected by the Hukm Wad'i may not be within the ability of the subject with respect to commission or omission.

In other words it is always possible for the subject to commit or omit an act affected by the Hukm Taklifi but it may not be possible for him to commit or omit all acts that fall within the domain of the Hukm Wad'i .

Thus, theft is an act, the omission of which is required and it is possible for the subject to avoid it, but the setting of the sun is the legal cause for the evening prayer, and it is not possible for the subject to bring it about. Rushd (discretion) is a necessary condition for contracts, but it is a condition that is beyond the power of the subject to create.

Insanity is a defence against criminal liability, that is, it is an obstacle (Mani) for the Hukm to take effect but it is beyond the power of the subject.

It is not to be assumed that the Hukm Taklifi and Hukm wad'i are always stated in separate texts. It is possible for them to exist in the same text. For example, the verse about theft states: "The thief, male or female, cut off their hands". Here, the Hukm is the obligation to cut off the hand, the cause for it is sariqa (Theft) thus both occur in the same text. ²²

ENDNOTES AND REFERENCES

1. Qur'an 95: 8
2. Qur'an 36: 82
3. Sadr Al-Shariah al-Tadib, vol.1 p.28
4. Imran Ahsan khan Nyazee, Islamic Jurisprudence (2000) at p.47
5. Qur'an 5:1
6. Qur'an 17:32
7. Qur'an 9:103
8. Qur'an 49:11
9. Qur'an 62:10
10. Dr H.H Hassan, an introduction to the study of Islamic law(2007) Adam Publishers Ganj, new Delhi 110002 India.
11. Al-sarakhsi S.A A.M.A, Usual al-sarakhsi ed-abu (1953) Al-Afghani, Cairo vol. :2 p. 301.
12. Abdulwahab khallaf, Ilmu usulul fiqhu (2002) Islamic law lecturer, univ. of al-qahira.
13. Qur'an 5:6
14. Qur'an 5:38
15. Qur'an3:98
16. Abdulkadir Zubair, the rule of law in the Shari'ah (1994) printed in 1995 by I.I.C publication Lagos.

17. Al-Amidi, Al-Ihkam fi Usul-al ahkam (1968) M.A. Subayhi press Cairo vol. I p.137.
18. Opcit kallaf at p. 127
19. Opcit kallaf at p. 18
20. Opcit H.H Hassan at or p-19
21. Opcit Nyazee at p-49
22. Nyazee at p-49 supra.