

Classical Classification of Divine Rule (*HukumShari'i*): The Denial of Declaratory Rule (*HukumWada'i*)

¹Saad Abu Elgasim, ²Abdul Haseeb Ansari and ³Mohamad bin Arifin

¹Ph.D holder who has recently obtained his Ph.D degree from the International Islamic University Malaysia, Malaysia.

²Professor at the Department of Civil Law at Ahmad Ibrahim Faculty of Laws International Islamic University Malaysia, Malaysia.

³Associate Professor at the Department of Islamic Law at Ahmad Ibrahim Faculty of Laws International Islamic University Malaysia, Malaysia.

Abstract: Divine rule (*Hukmshar'i*) has classically been classified into two kinds, namely, *hukmtaklifi* (defining rule) and *hukmwad'i* (declaratory rule). This classical classification, despite having been the mainstream opinion in Islamic jurisprudence, has been challenged by a dissenting opinion to the effect that the independent existence of *hukmwad'i* is denied. In other words, *hukmtaklifi* has been alleged to be the sole kind of which *hukmwad'i* consists. This dissenting opinion in Islamic jurisprudence has been unsuccessful to the effect that it is hardly mentioned, and even when it is mentioned, it is mentioned in passing. This dissenting opinion, despite having been marginalized, is believed to be correct and, consequently, the main-stream opinion, despite having been established, is believed to be false. To justify such a daring submission, this paper takes it upon itself to revisit the classical classification of *hukmshar'i* so as to prove the structural dependence of *hukmwad'i* upon *hukmtaklifi*. To prove that, the paper will first present the subdivision of *hukmwad'i* challenged in a fair manner so as to help the reader develop a clear and complete understanding of it. Subsequently, the subdivision presented will be scrutinized in an analytical manner so as to highlight the inevitable joints that connect *hukmwad'i* to *hukmtaklifi* and, consequently, emphasize the structural dependence alleged. Having done so, we have arrived at the conclusion that the sole kind of which *hukmshar'i* consists is *hukmtaklifi*. *Hukmwad'i*, as a consequence, is an integral part of *hukmtaklifi* under which it is subsumed and to which it is subservient. In other words, *hukmtaklifi* and *hukmwad'i* are structurally interlinked. Without *hukmtaklifi*, sense cannot be made of *hukmwad'i*, and without *hukmwad'i*, *hukmtaklifi* is incomplete.

Key words: Hukumshar'I, Hukumtaklifi, Hukumwad'i, Shari'ah, Sabab, Shart.

INTRODUCTION

Hukmshar'i is the means of governance by which the *Shari'ah* as a regulatory system controls human behavior. This means of governance is of two kinds, namely, *hukmtaklifi* and *hukmwad'i*. *Hukmtaklifi* aims at characterizing human behavior as an act that ought, ought not, or may be performed. *Hukmwad'i*, on the other hand, aims at identifying as to when, where and how such an act ought, ought not or may be performed. *Hukmtaklifi*, as has just been briefly explained, seems to be more central to the task of controlling human behavior than *hukmwad'i*. This centrality is understood from the definition of *hukmwad'i* itself, which reads: "The communication of Allah which declares a thing to be a cause (*sabab*), a condition (*shart*) or an impediment (*mani'*) to another thing" (Badran, n.d.).

The thing to which another thing is declared to be a cause, a condition or an impediment is one of the five categories into which *hukmtaklifi* has been classified. These five categories are: obligation, prohibition, recommendation, reprehension and permission. The thing declared to be a cause of one of these five categories is meant to give rise to its establishment. The thing declared to be a condition, secondly, is meant to provide validity for the establishment given rise to. The establishment given rise to, thirdly, is meant to be prevented by the thing declared to be an impediment. *Hukmwad'i* thus revolves around *hukmtaklifi* in one way or another whereby the latter does not get established unless the former has been considered. Therefore, a minority of scholars are of the view that *hukmwad'i* must be subsumed under *hukmtaklifi* and should not be considered as a species that is totally independent of it. That is because it is not intended to constitute an independent kind of *hukmshar'I* parallel to *hukmtaklifi*. Instead, it is intended to facilitate the establishment of *hukmtaklifi* of which it is alleged to be independent. The majority of scholars, however, have been unanimous on the *hukmwad'i* independence of *hukmtaklifi*. They have particularly been unanimous on the independence of the three categories stated in the aforementioned definition. However, they have not been so on the independence of

Corresponding Author: Abdul Haseeb Ansari, Professor, Ahmad Ibrahim Faculty of Laws, International Islamic University Malaysia, Malaysia.
E-mail: ahaseeb@iium.edu.my

some other more categories the most important of which are: validity (*sihahah*), invalidity (*butlan*), regularity (*'azimah*) and dispensation (*rukhsah*) (Ahmed Hasan, 1993; Muhammad, 2000). The independence of these four categories as well as that of the previous three categories is denied by this paper as it has been denied by the minority's opinion. To justify this denial, the independence of the four categories on which the majority of scholars have disagreed will be discussed to prove that they are neither *hukmtaklifi* nor *hukmwad'i*. More importantly, the independence of the three categories on which the scholars concerned have agreed will be discussed to prove that they are not even *hukmwad'i* in the first place. They, in fact, do not go beyond being an integral complimentary part of *hukmtaklifi*.

Cause (al-Sabab):

Sabab has been defined as: "An evident and constant attribute that has been declared by the *hukm* giver as an indicator of *hukm* whereby its existence entails the existence of *hukm*, and whose non-existence entails the non-existence of *hukm* (Muhammad, 2000). As an explanation, it has been said that cause is what had been appointed by the *Hukmgiver* as a sign for the communication's having been addressed to the *mukallaf*. For example, the sun's decline has been appointed as a sign for the obligation of noon prayer. Similarly, the sale contract has been appointed as a sign for the vendor's loss of the ownership of the commodity and his gain of the ownership of the price. Correspondingly, it has been appointed as a sign for the purchaser's loss of the ownership of the price and his gain of the ownership of the commodity (Muhammad, 2001).

The inevitable relation of existence or non-existence between the cause and its effect makes the above-mentioned definition apply to *'illah* as well as it applies to *sabab*. Therefore, some of the *Usuliyin* hold that there is no difference between *sabab* and *'illah* and consequently they deal with them as synonyms. On the contrary, some other *Usuliyin* think that *sabab* is totally different from *'illah*. Whereas *'illah* has some rationale for its entailment of the effect, *sabab* has no such a rationale. For example, traveling is an *'illah* for the permission of breaking fast in the month of Ramadhan because the suspected hardship traveling involves is the underlying rationale of this *hukm*. Correspondingly, the sun's decline is a *sabab* for the obligation of the noon prayer and not an *'illah* because there is no rationale for such a relation between the sun's decline and the obligation of prayer. In between, a third group of *Usuliyin* are of the view that there is a relation of generality and peculiarity between *'illah* and *sabab*. According to them, there might be a rationale for the entailment of the effect by the cause and there might not. If the cause has such a rationale, it is called reason (*'illah*). But if it does not have, it is called cause (*sabab*). Hence *'illah* is a type of *sabab* whereby every *'illah* is a *sabab* and not every *sabab* is an *'illah* (Ahmed, 1997)

Al-Shatibi, however, has his own understanding of the meanings of these two terms and the difference that exists between them. According to him, *sabab* is what had been appointed by the lawgiver as the reason for a legal effect to get established. On the other hand, *'illah* is the interest lying behind the *Shari'ah* obligations and the evil lying behind the *Shari'ah* prohibitions (Muhammad, 2001).

In principle, lawful causes give rise to beneficial effects and unlawful causes give rise to harmful effects. However, it might seem sometimes that lawful causes give rise to harmful effects and unlawful causes give rise to beneficial effects. For example, *jihad* is a lawful cause because it leads to the spread of religion. Yet, it results in the destruction of property and the loss of life. Correspondingly, usurpation is an unlawful cause because it is an infringement of someone else's right of ownership, nevertheless it might result in the establishment of the right of ownership for the usurper over the usurped property (Muhammad, 2001).

In fact, the harmful effects of a lawful cause are actually not entailed by it. Instead, they are entailed by some other cause, which is compatible with it. Similarly, the beneficial effect of an unlawful cause is not entailed by it. It is entailed by some other cause, which is compatible with it (Muhammad, 2001). So, the relation between the effects and their incompatible causes is in fact a matter of coincidence and not causality.

The rationale that lies behind the appointment of the cause might be known surely or doubtfully and might not. If it is known, there would be no problem with respect to the cause's legitimacy. But if it is not, that might be because of the incompatibility of the subject matter with the rationale. In such a case, the legitimacy of the cause ceases to exist and consequently the cause fails to give rise to its effect. For instance, there is incompatibility of an insane with the rationale of deterrence with respect to the imposition of punishment. However, the rationale might not be known because of something external to the subject matter. In this case a reasonable dispute may arise over whether the cause will cease to exist and consequently fail to give rise to its effect, or it will continue to exist and therefore give rise to its effect (Abu Ishaq, 2003). Some may be of the view that the existence of the cause persists arguing that the general rule continues to exist despite the existence of exceptional individual cases. In addition, the rationale is either existing in the subject matter itself or it is applicable to it generally, and therefore its existence is presumed. If we prefer the former, that would entail the cause's failure to yield its effect whenever the rationale is not known. Accordingly, traveling would not be a legitimate cause for a king to break his fast and shorten his prayer because hardship is not existent on his part although it is a case, among others, in which the cause is taken to yield its effects despite the non-existence of the rationale. Therefore, we have no choice but to opt for the former. In addition, the rationale can only be

known after the occurrence of cause. So to hold that the existence of the cause is dependent upon the existence of the rationale is to make what is dependent upon the cause its basis of existence, and this is logically circular (Abu Ishaq, 2003).

Some others may be of the view that the cause ceases to exist because to presume the existence of the rationale means that it is non-existent in reality. That makes such a subject matter like that one which is not compatible with its rationale. Therefore, we have either to accept the existence of both or the non-existence of both, and since the acceptance of the existence of both would entail results which are contrary to what has been the subject of consensus, we have no choice but to accept their non-existence. They have also argued that if we consider the cause to remain operative despite the absence of its rationale that would be a contradiction of the *hukm* giver's intention. That is because there must be a rationale of any cause appointed. If a cause lacks a rationale, that is vanity and vanity cannot be a source of *hukm*. Moreover, they have contended that hardship, which is the real rationale in the case of the traveling of a king, does exist. However its kind differs from that of the others. This difference in kind which cannot be subjected to an exact measure is what had caused the *Hukmgiver* to appoint traveling as a general indication of hardship as majority has been appointed as a general indication of reason (Abu Ishaq, 2003).

Sabab can be classified into various categories according to the basis upon which the classification is carried out such as its legitimacy or effects. However, the main and the most important classification is that one which is based upon its nature. According to it, *sabab* is classified into what does not constitute an act of the *mukallaf* and does not fall under his control such as the sun's decline as the cause of the obligation of noon prayer, and that one which constitutes an act of the *mukallaf* and falls under his control such as theft as the cause of hand amputation (Badran, n.d.).

The obligation of offering noon prayer does not ensue from the sun's decline because such a natural phenomenon is capable of giving rise to such a devotional duty. In fact it ensues because Allah (s.w.t.) has made the rise of the devotional duty dependent on the occurrence of the natural phenomenon by virtue of the Qur'anicverse, which reads:

“establish prayers at the sun's decline” (Surat al-Isra', 17: 78).

Thus, it could be asserted that the causality handled here is *Shari'ah* in nature and not logical, (Ahmed Hasan, 1993) and therefore al-Ghazali has described *sabab* as that by existence of which a thing exists and not by its authority (Al-Ghazali, 1993)

Just as the cause by itself plays no role in the ensuing of the effect from it, so does the intention of the *mukallaf*. It might be up to the *mukallaf* to commit or omit a particular act that constitutes a cause, but it is not up to him that a particular effect will or will not ensue from it. That is because such ensuing takes place by virtue of the cause's having been appointed by God and not the intention of the *mukallaf*. For example, the obligatory character of the payment of *mahr* has been assigned by the *Hukmgiver*, although it is an effect that has ensued from the cause of entering into a marriage contract which is permissible in nature (Ahmed Hasan, 1993).

Condition (al-Shart):

Condition *shart* has been defined as: “An evident and constant attribute whose non-existence entails the non-existence of *hukm*, and whose existence does not necessarily entail the existence of *hukm*” (Muhammad, 2000).

The aforementioned definition identifies only one category out of three categories into which *shart* has been classified, viz. *shari'ahshart*. This category defined is meant to signify what has been stipulated by *Shari'ah* such as the stipulation of purity as a condition for the validity of prayers stated in the following Qur'anic verse:

(O you who believe, when you intend to offer prayer, wash your faces and your hands up to the elbow, and rub your heads and feet up to the ankles) (Surah al-Maidah, 5: 6).

Another category is philological *shart*. This second category is meant to signify those conditions stipulated by language such as the stipulation of the wife's entering the husband's house as a condition for divorce. Rational *shart*, as the third category, signifies what has been required by reason (e.g. the requirement of body as a *shart* for life) (Ahmed Hasan, 1993)

It is noteworthy that al-Qarafi has correctly noticed that philological condition should be associated with cause and not condition. That is because its existence entails necessarily the existence of the object just as the existence of the cause necessarily entails the existence of the effect. The wife's entering the husband's house, for example, entails necessarily the occurrence of divorce, and this is exactly the function of cause. Whereas, according to the definition of condition, the occurrence of divorce should not necessarily ensue from the wife's entering the husband's house. Al-Qarafi says:

Most people think that the philological condition is the same as the other kinds of conditions whether rational, *Shari'ah* or habitual, and, consequently, the term (condition) applies to the former in the same sense in which it applies to the latter. However, the rule to which philological condition is subject differs from that rule to which the other kinds of conditions are subject. For the difference between the two rules to be identified, the

essence of cause, condition and impediment has to be identified... Having identified the essence of cause, condition and impediment, philological condition turns out to be cause rather than condition contrary to the other kinds of conditions. These kinds of condition other than philological condition may be rational such as life as a condition for knowledge, *Shari'ah* such as purity as a condition for the validity of prayer, or habitual such as a ladder as a condition for getting onto the roof. The non-existence of these conditions other than philological condition necessitates the non-existence of the object, whereas their existence does not necessitate the existence of the object or its non-existence. The object may exist while the condition is existent as in the case in which the obligation of *zakah* is existent while its condition being the passing of time is also existent. Nevertheless, the obligation of *zakah* may cease to exist despite the existence of the passing of time because of the existence of the impediment of debt. On the other hand, philological conditions, which make the accrual of certain matters dependent upon the occurrence of other matters as in the case of one's saying to his wife: if you enter the house, you will be divorced, entering the house entails the accrual of divorce, and not entering the house entails the non-accrual of divorce unless the accruing divorce has resulted from the occurrence of another cause. (Al-Qarafi, 2000).

The category of *shart* defined above, i.e. the *shari'ahshart*, has been further classified into *shart* which is a compliment of *sabab*, and *shart* which is a compliment of *hukmshar'i* which is a compliment of *sabab* is that one which has been stipulated in the cause. For example, unlawfulness is a *shart* that has been stipulated in murder as the cause of just retaliation (*qisas*). On the other hand, *shart* which is a compliment of *hukm* is that one which has been stipulated in the *hukm*. Inheritance, for instance, is a *hukm* in which the death of the relative during the life of the heir has been stipulated as a *shart*. (Badran, n.d.)

It has been disputed whether the non-fulfillment of the condition which is a compliment of *sabab* would make the cause fail to give rise to its effect or not. Some *Usuliyin* have held that since the condition is not fulfilled, the cause would not be able to yield its effect. Some other *Usuliyin* have held that since the cause has taken place, its effect should ensue whether the condition has been fulfilled or not. As an illustration, they have given the example of *zakah*. Its cause is the ownership of *nisab* and its condition is the lapse of a year. On the basis of their opinion, they have allowed the *mukallaf* to give *zaka* even before the completion of the year so long as the *nisab* is owned. Another example is the oath expiation. Its cause is taking the oath and its condition is breaking it. They have also allowed the *mukallaf* to expiate even before the breaking of the oath so long as he has taken it (Muhammad, 2001).

The contention that the cause can yield its effect despite the non-fulfillment of its condition has been justified on another basis, and so have been the examples given by way of illustration. It is not acceptable that a cause can give rise to its effect although what qualifies it to do so is absent. The *mukallaf* is allowed to give *zakah* before the completion of the year because the completion of a year is not a condition for the obligation of *zakah* rather than a condition for the obligatory nature of *zakah*. In other words, the *mukallaf* would be obliged to pay *zakah* so long as he owns the *nisab*. But like *wajibmuwassa'*, it would be binding upon him to pay it on the spot after the completion of the year. Likewise, the breaking of the oath is not a condition for the obligation of expiation rather than a condition for its immediate compulsion (Muhammad, 2001).

On the basis of its maker, condition has been classified into *Shari'ah* condition and positive condition (*jali*). *Shari'ah* condition is what had been stipulated by *Shari'ah* such as the stipulation of two witnesses for the validity of marriage. Positive condition is what had been stipulated by a *mukallaf* such as the stipulation of lodging the wife in a particular place (Ahmad Hasan, 1993).

It is indisputable that contracting parties are not totally free in stipulating any condition they like. For their conditions to be valid, they must be recognized by the *Shari'ah* such as the stipulation of the option of inspection of the goods in a sale contract. If not, it must be recognized by the local custom of the area in which the parties live such as the stipulation made by the purchaser to the effect that the vender will give him a guarantee for the repair of the commodity sold for a certain period of time. If the condition is unprecedented in both the *Shari'ah* and custom, it at least must be compatible with the requirement of the contract (*muqtada al-'aqd*). An example of such a type of condition is the vendor's stipulation that the purchaser will pay the price before the delivery of the goods. If not, it must be of that kind that confirms it such as the vendor's stipulation that the purchaser will provide a pledge or a surety if the payment of the price is to be deferred (Ahmad Hasan, 1993). However, a case might arise in which the condition neither seems to be compatible with the nature of the object nor seems to be incompatible. In such a case, one has to distinguish between whether the object is a matter of rituals or transactions. If it is a matter of rituals, it will be assumed to be incompatible because rituals are based upon restricted permission. Whereas if it is a matter of transactions, it will be assumed to be compatible because transactions are based upon the interests of people and what achieves them (Ahmad Hasan, 1993).

Since condition does not fall under the category of defining rule, it is neither commanded to be performed nor is it abstained from that. In other words, if the cause has taken place and the condition has been fulfilled, the effect of the cause would be given rise to. But the *mukallaf* is not required as such to pursue the fulfillment of the condition. For example, the ownership of the minimum amount of money (*nisab*) is the cause of *zakah*,

while the lapse of a year from the ownership is its condition. If both the cause has taken place and the condition has been fulfilled, the payment of *zakah* would be obligatory. Nevertheless the *mukallaf* is not commanded to pursue the condition of the lapse of a year by not spending (Ahmad Hasan, 1993).

Although the pursuit of the fulfillment of the condition is not obligatory, the pursuit of the non-fulfillment of the condition by the *mukallaf* in order to prevent the establishment of *hukm* is prohibitory. Here arises the question of what is the effect of the *mukallaf's* act, which results in the non-fulfillment of the condition, which entails the non-establishment of *hukm*. To answer such a question, one has to distinguish between the case in which the *mukallaf's* act is considered to be having no effect on the operation of cause and the case in which it is not considered so. In the first case, the cause would remain operative and therefore the *hukm* would get established. For example, the *mukallaf* would be obliged to pay *zakah* even if he gives his money to another by way of donation with the condition that the other will give it back to him later on just to avoid the condition of the lapse of a year. But in the second case, one is faced with three options: the first option is to ignore the act of the *mukallaf* and consider the condition as having been fulfilled so as to let the cause yield its effect as normal; the second option is to rely on the apparent non-existence of the condition despite the ill intention of the *mukallaf* and therefore consider the cause as non-operative in giving rise to its effect; the third one is to distinguish between what is a right of God, a right of man and what involves both. If it is a right of God, the act of the *mukallaf* would be recognized and the *hukm* would not get established. However, if it is a right of man, the *hukm* would get established because the act of the *mukallaf* is ignored. In the case in which both rights merge, the *mujtahid* would have to make his effort to know which one of them is the predominant. If the right of God is the predominant, the act of the *mukallaf* would have an effect in preventing the cause from yielding its effect. But if the right of man is the predominant, the cause would give rise to its effect for the act of the *mukallaf* is considered of no effect at all (Ahmad Hasan, 1993)

Impediment (al-Mani'):

Mani' has been defined as: "That one whose existence entails the non-existence of *sabab* or *hukm*, and whose non-existence does not necessarily entail the existence or non-existence of either of them" (Badran, n.d.)

As it might be inferred from the definition just stated, *mani'*, like *shart*, has been further classified into *mani'al-sabab* (impediment of cause) and *mani' al- hukm* (impediment of *hukm*). *Mani' al-sabab* has been termed so because it prevents *sabab* from causing its effect. Debt, for example, is considered to be *mani'al-sabab* because it disqualifies the ownership of the minimum amount of property (*nisab*) from giving rise to its effect which is *zakah*. *Mani' al-hukm*, on the other hand, has been termed so because it impedes *hukm* from getting established. Fatherhood, for instance, is considered to be *mani'al-hukm* because it prevents just retaliation from being taken on the culprit in case he is the father of the victim (Badran, n.d.).

The Hanafis have classified *mani'* into five types as follows:

First, what impedes the cause from giving rise to its effect such as the sale of carrion. In such a case, the cause, which is the contract of sale does not operate because its subject matter is not valid.

Second, what impedes the completion of the cause on the part of the non-contracting party, for example, the sale of someone's property by an unauthorized person. The validity of this sale contract would be dependent upon the approval of the owner of the property, and until then, no effects would ensue on the part of the owner despite their ensuing on the part of the unauthorized contracting party.

Third, what impedes the operation of *hukm* from getting started. The option of condition stipulated for a particular period of time by the vendor is a good example. The ownership of the commodity remains with the vendor throughout the stipulated time despite the conclusion of the sale contract. However, upon the termination of the option, the ownership of the commodity gets transferred to the purchaser from the date of concluding the contract.

Fourth, what impedes *hukm* from being completed. A good example is the option of inspection in a sale contract. If someone buys a commodity without inspecting it but subject to the condition of inspection, the right of ownership gets transferred to him upon the conclusion of the contract. However that ownership is not fully established whereby upon inspecting it he has the right to dissolve the contract without an agreement or even a judicial decision.

Fifth, what impedes the binding nature of the *hukm* such as the condition of defect. Although the purchaser has the full right to dispose of the commodity after the conclusion of the contract and the receipt of the commodity, the condition of defect entitles him to dissolve the contract. However, it has to be through an agreement or a judicial decision because the *hukm* has both got established and been completed (Ahmad Hasan, 1993).

Regularity (al-'Azimah) and Dispensation (al-Rukhsah):

Hukmshar'i has been classified into regularity (*'azimah*) and dispensation (*rukhsah*). *'Azimah* is the normal and general commands of the *Shari'ah* that have been commanded by Allah without considering a specific individual or situation (Abd al-Wahhab, 1995). On the other hand, *rukhsah* is what has been commanded

because of hardship as an exception to a general norm and it is limited to the need involved in that exception (Muhammad, 2001).

Al-Shatibi has considered *rukhsah* to be falling under the category of permission. To support his opinion, he has advanced the following arguments:

First, several Qur'anic verses grant *rukhsahs* to the *mukallafin* in the form of permissions. For example, Allah says:

(But if one is forced by necessity without willful disobedience nor transgressing due limits, then there is no sin on him)(Surah al-Baqarah, 2: 173).

He also says:

(But as for him who is forced by severe hunger, with no inclination to sin, then surely Allah is Opt-forgiving, Most Merciful).(Surah al-Maidah, 5: 3

Another verse reads:

(And when you travel in the land, there is no sin on you if you shorten the prayers)(Surah al-Nisa, 4: 101).

Second, the effect of *rukhsah* is to give the *mukallaf* the option of either acting upon the '*azimah* or the *rukhsah*, and this is exactly the effect of permission.

Moreover, to say that *rukhsah* is a command in the sense that it is either obligatory or recommended makes *rukhsah* cease to exist in the first place. That is because the essence of *rukhsah* is to allow the *mukallaf* to choose between commission and omission. Whereas obligation does not have that element and recommendation does not have it too in the sense that the *mukallaf* is urged to perform the act and not given the option to choose as such. So, to say that a particular obligation or recommendation is a *rukhsah* is contradictory, because it brings together what is optional and what is not (Muhammad, 2001)

Al-Shatibi has anticipated that it would be objected to his first argument that the expressions that there will not be inconvenience or blame put upon the *mukallaf* are used in some other Qur'anic verses in which the act concerned is obligatory or recommended. An example is the Qur'anic verse in which Allah says:

(Verily! *Al-Safa* and *al-Marwah*, are among the signs appointed by Allah. So, it is not a sin on him who performs *Haj* or '*Umrah* of the house to perform the going between them)(Surah al-Baqarah, 2: 158).

In this verse the expression that there will be no blame put upon the *mukallaf* is used although going between *safa* and *marwah* is obligatory. Another example is the Qur'anic verse in which Allah says: "But whosoever hastens to leave in two days, there is no sin on him"(Surah al-Baqarah, 2: 203). Despite the expression concerned, hastening in two days is recommended (Muhammad, 2001)

He has also anticipated that it would be objected to his second argument that the prophet (s.a.w.) says: "Allah likes His *rukhsahs* to be acted upon just as He likes His '*azimahs* to be acted upon" (Al-Amir, 1996). In addition, some jurists have talked about obligatory *rukhsahs* such as the obligation to eat carrion in case the *mukallaf* fears that he would die if he does not (Muhammad, 2001).

As for the first objection, the expressions concerned, in principle, convey the meaning of permission in case there is no other indication that suggests otherwise. But if such an indication exists, another meaning like obligation might be conveyed. This meaning is deemed to be derived from the indication related to the text. The obligation of moving between *safa* and *marwah*, for example, is not derived from the expression concerned rather than from it being described as being of Allah's rituals or from another proof(Muhammad, 2001).

As for the second objection, it is contradictory, as mentioned earlier, to hold that a *rukhsah*, which is permissible, can be at the same time obligatory or recommended. The obligation involved in the case of one who fears death to eat, for instance, is due to being an original '*azimah* and not an exceptional *rukhsah*. This obligation is clearly stated in the Qur'anicverse, which reads:

"And kill not yourselves" (Surah al-Nisa', 4: 29).

But it is referred to as a *rukhsah* to convey the meaning of lifting the hardship from upon the *mukallaf*. In another case, however, the *rukhsah* of uttering the word of unbelief under compulsion is referred to as a *rukhsah* to convey the meaning of permission because facing death in the way of Allah is a commendable thing which the *mukallaf* cannot be prohibited from doing. Yet it is a *rukhsah*, that is to say, it is permissible for him to utter such a word (Muhammad, 2001).

Consequently, it has been contended that the classification of *rukhsah* into *rukhsah* with which the proof of '*azimah* continues to yield its effect in the object of *rukhsah* and that one with which the proof of '*azimah* ceases to do so is implausible. The difference between the two is that '*azimah* in the first kind is preferred to be performed even if it would result in the *mukallaf's* loss of his life. An example of this kind is to refuse to utter the word of infidelity under compulsion. On the other hand, the '*azimah* in the second kind is preferred to be performed unless it would be harmful to the *mukallaf* to do so. An example of this kind is to fast Ramadan for the sick and the traveler. In fact, the *hukm* of '*azimah* continues to coexist with the *rukhsah*. However, it is like *rukhsah* is neither obligatory nor prohibitory. What designates the status of both is the contrast between the interests or evils that would ensue from the commission or omission of either of them. If the evil that would ensue from the abandonment of the *rukhsah* is not contrasted with a preponderant interest ensuing from acting upon the '*azimah*, then the *mukallaf* would be committing a sin if he abandons it. On the contrary, if the evil

ensuing from the abandonment of the *rukhsah* is ruled out by a preponderant interest ensuing from acting upon the '*azimah*', then the *mukallaf* would be rewarded if he abandons it (Muhammad, 2001).

The Classification of (Rukhsah):

Usuliyyin have not been unanimous on the classification of *rukhsah* whereby they have got divided into *jumhur* and Hanafis. On one hand, *jumhur* have classified it into four categories: first, the permission of committing a prohibitory act in the case of need or necessity. An example of that is the utterance of the word of unbelief in the state of compulsion. Another example is to damage someone's property under duress. Second, the permission of omitting an obligation if it involves a hardship, such as the permission of breaking fast in Ramadan for the sick and the traveler. Third, the rigorous and burdensome obligations that have been given to the nations of the prophets that had been before the advent of Islam and have been lifted from upon the nation of the prophet Muhammad (s.a.w.). Fourth, such contracts as *salam* and *istisna'*, that have been exceptionally validated despite their lack of some of the validity conditions because of the people's need for them and their interest in them (Badran, n.d.).

On the other hand, the Hanafis have classified *rukhsah* into two categories: real dispensation (*rukhsah Haqiqiyyah*) and figurative dispensation (*rukhsah majaziyyah*). Real dispensation has been further subdivided into two types. The first type is that one upon which the *mukallaf* is allowed to act despite the existence of the prohibitive cause and its effect. An example is the permission to utter the word of unbelief under duress. Another is the permission to damage the property of another for the same reason. With respect to this type, the prohibition of unbelief and the destruction of the others' property persist. Nevertheless it does not apply to the *mukallaf* who is in a state of compulsion because this state is considered an excuse for him. In other words, his act is prohibitory, but he will not be blamed for it. The second type is that one, which the *mukallaf*, is allowed to act upon despite the existence of the prohibitive cause but not its effect. The permission for a traveler to omit fasting during the month of Ramadan while he is on a journey is a good example. According to this type, the dispensation is granted not by way of an excuse from the effect of the prohibitive cause but because the effect of such a cause is absent (Ahmed Hasan, 1993).

Like the real one, figurative dispensation has been further subdivided into two types: The first type is that one upon which the *mukallaf* may act not because of the absence of the prohibitive cause, but because, despite its existence, it is not operative on the part of the *mukallaf*. For instance, the permission to eat carrion or drink wine by someone, who is dying of hunger or thirst to save his life. The second type, however, comprises those burdensome and rigorous commands that have been given to the past nations prior to the advent of Muhammad (s.a.w.). Such commands are what had been mentioned in the Qur'anic verse which reads:

(Our Lord, lay not upon us burdens like those Thou laid upon those before us)(Surah al-Baqarah, 2: 286).

Killing oneself in repentance and cutting the impure part of one's garment are examples of those burdens from which the nation of our prophet (s.a.w.) has been released (Ahmed Hasan, 1993).

Some *Usuliyyin*, including Abu Yusuf and al-Shafi'i in one of his two opinions, however, see no difference between the dispensation granted to a person who is dying of hunger or thirst to eat carrion or drink wine, and the dispensation granted to a person who is compelled to utter the word of unbelief. Meaning to say that the [prohibitive proof and its command are existent in the figurative kind as they are existent in the real one. They based their opinion upon the following Qur'anic verse:

(But if one is forced by necessity without willful disobedience nor transgressing due limits, then there is no sin on him. Truly, Allah is opt-forgiving, Most Merciful)(Surah al-Baqarah, 2: 173).

another verse which has been quoted by them is:

(But as for him who is forced by severe hunger, with no inclination to sin, the surely Allah is Opt-forgiving, Most Merciful).(Surah al-Maidah, 5: 3).

According to these verses, the description of Allah (s.w.t.) as forgiving and Merciful indicates that the prohibition of eating a prohibited thing persists. Nevertheless the *mukallaf* would not be blamed because the state of necessity is considered as an excuse. In other words, the prohibitive cause and its command exist, yet the prohibitive act is tolerated (Ahmed Hasan, 1993).

In response to this argument, the majority of Hanafis have contended that these Qur'anic verses apply to that one who is in state of necessity without reaching up the level of the apprehension of death. In such a state, the *mukallaf* still has a degree of freedom to commit the prohibited act. But in the state in which one fears death, eating the prohibited thing would transform into an obligation whereby he would be a sinner if he does not eat until he dies. To support their point of view, they have quoted the following Qur'anic verse:

While he has explained to you in detail what is forbidden to you, except under compulsion of necessity(Surah al-An'am, 6: 119).

According to this verse, the command of prohibition ceases to exist when one is compelled by necessity (Ahmed Hasan, 1993).

Regularity Versus Dispensation:

No doubt that the *mukallaf* has to act upon the dispensation if acting upon the regularity would harm him either in religion, life or health. But if none of these would ensue if he acts upon it, is it better for him to act upon it or the dispensation? In response to this question, jurists have got divided into two groups. The first group has held that it is better for the *mukallaf* to act upon the regularity for the following reasons:

First, there is no doubt that the principle of dispensation is established in the *Shari'ah* just as the principle of regularity is. However, the cause of dispensation is doubtful. That is to say, whether the cause qualifies to operate as a cause that justifies the breaking of the regularity is uncertain. In such a case, when a certain thing conflicts with a doubtful one, the certain thing prevails. Therefore, regularity will prevail over dispensation.

Second, regularity is a general principle while dispensation is a specific one. Because of its generality, breaking the regularity results in the disturbance of the whole system whereas breaking the dispensation does not result in such an effect. When a regularity and dispensation conflict, then, regularity should prevail because the harm suffered in case the regularity is broken is less than that one suffered in case the dispensation is broken.

Third, they have relied on some Qur'anic verses in which the *mukallafin* are urged to stick to the regularity despite the existence of the dispensation. An example of these verses is:

(Those unto whom the people said, Verily, the people have gathered against you, therefore, fear them)(Surah Ala 'Imran, 3-173).

Another example is:

(When they came upon you from above you and from below you, and when the eyes grew wild and the hearts reached to the throats)(Surah al-Ahzab, 33: 10).

Fourth, the hardship and inconvenience suffered when acting upon the regularity are of the objectives of the lawgiver intended in imposing the regularity.

Fifth, the constant acting upon the dispensation results in the weakening of the resolve of the *mukallaf* to the extent to which it would be hard for him in general to act upon regularity (Muhammad, 2001).

On the contrary, the second group has held that it is better for the *mukallaf* to act upon the dispensation because of the following reasons:

First, although the cause of dispensation is uncertain, the certain evidence has indicated that with respect to the *Shari'ah* rules, uncertainty is as operative as certainty.

Second, being a general principle does not make regularity prevail over dispensation all the time, for it would mean that regularity should prevail even in the cases in which dispensation is obligatory. In addition, being a specific principle does not put dispensation at loggerheads with regularity rather than it makes it stand on its own feet. That is because dispensation might be seen as a specification of a general or a limitation of an absolute, and the specification of a certain rule by an uncertain rule is acceptable. Moreover, the exceptional nature of dispensation is not detrimental to the normal nature of regularity, for it has been agreed upon that the existence of some exceptions to the general rule does not render it void.

Third, the Qur'anic verses, which indicate that the *Shari'ah* has been revealed to lift hardship and inconvenience from upon the *mukallafin* have reached the degree of certainty. In addition, acting upon dispensation involves the consideration of the right of man as well as the right of God. Whereas acting upon regularity involves the consideration of the right of God alone. Therefore, dispensation is preferred to regularity.

Fourth, the purpose aimed at through the grant of dispensation is lifting the hardship and inconvenience from upon the *mukallafin*. So, acting upon dispensation is itself an objective of the *Hukmgiver*. Whereas holding otherwise is of the extreme strictness that has been prohibited in Qur'an and Sunnah.

Fifth, acting all the time upon the regularity causes the *mukallafin* to feel bored and weakens their resolve in regard to the observance of the regularities. Not only this, it might cause them to even doubt the several proofs which indicate that *Shari'ah* has been revealed to lift hardship and inconvenience from upon them (Muhammad, 2001).

In addition to the *Usuliyin's* disagreement on which one of *rukhsah* and '*azimah* should prevail, they have disagreed on whether both should fall under the category of *hukmtaklifi* or *hukmwad'i*. Some of the *Usuliyin* have classified *rukhsah* and '*azimah* as types of *hukmtaklifi*. They have argued that '*azimah* bears the meaning of command and *rukhsah* bears the meaning of option, and these two are the two main subdivisions of *hukmtaklifi*. Some other *Usuliyin*, however, have classified them as a type of *hukmwad'i*, viz. cause. They have argued that *rukhsah* represents the appointment of a specific attribute as the cause of resorting to the exceptional command while the absence of such an attribute is the cause of sticking to the general norm (Wahbah, 2005).

Validity (al-sihhah) and Invalidity (al-Butlan):

If the command of the *Shari'ah* has been complied with in performing a certain act in the sense that its cause has taken place, its constituents have been present, its conditions have been fulfilled, and its impediments are absent, the act is valid (*sahih*), that is to say, the act is capable of giving rise to its effects in this world and in the hereafter. On the contrary, if the command of the *Shari'ah* has not been complied with in performing the act, it is considered to be invalid (*batil*), that is to say, incapable of giving rise to its effects in this world and in the

hereafter. Based on that, validity (*sihhah*) has two meanings; one is the accruing of the effects of a particular act in this world, and the other is the accruing of the effects of a particular act in the hereafter. Conversely, invalidity has two meanings; one is the non-accruing of the effects of a particular act in this world, and the other is the non-accruing of the effects of a particular act in the hereafter. With respect to the effects that ensue in this world, their nature depends upon the nature of the act characterized by *sihhah* or *butlan* whether it is a ritual or transaction. If it is a ritual, its effects consist in the extinguishing of the compensatory performance and the exoneration of the *mukallaf* from his religious responsibility. Whereas, if it is a transaction, its effects differ from one to another according to the nature of that transaction such as the transfer of ownership. With respect to those that ensue in the hereafter, they always consist in the reward given to the *mukallaf* by Allah (s.w.t.) (Wahbah, 2005).

Since reward, which is the effect resulting from an act in the hereafter, falls entirely and exclusively within the domain of Allah (s.w.t), its accruing or non-accruing from an act was not the concern of Muslim scholars and will not be our concern here. On the other hand, the accruing or non-accruing of the worldly effects of an act, which was the Muslim scholars' concern and will be our concern here, have been discussed under two categories of acts, namely, rituals and transactions.

Usuliyin have differed from jurists as to the nature of the *sihhah* of a ritual. Whereas *Usuliyin* have considered a ritual to be *sahih* as long as it has complied with the command of the *Shari'ah*, the jurists have considered it to be *sahih* only if its performance has extinguished the compensatory performance. For example, a person who offered prayer presuming that he was in a state of purity and later on he realized that he was not, his prayer would be *sahih* according to *Usuliyin* and *batil* according to jurists (Ahmad Hasan, 1993).

Instead of getting divided into *Usuliyin* and jurists in regard to the nature of the *sihhah* of transactions, Muslim scholars have divided into *Jumhur* and Hanafis. For Hanafis, a valid transaction is what is legitimate by its nature and attributes. On the other hand, an invalid transaction is what is not legitimate by its nature nor by its attributes. In between, a transaction, which is legitimate by its nature and not by its attributes is called irregular (*fasid*) (Ahmad Hasan, 1993). By the nature of a transaction Hanafis mean its essential elements and conditions such as the legitimacy of the transaction and its subject matter. Whereas by the attributes they mean the external qualities to the transaction that have been required by the *Shari'ah* such as the knowledge of the price (Abdal-Wahhab, 1995; Ahmad Hasan, 1993). The effects of an irregular transaction fall in between the effects of a valid transaction and those of an invalid one. If an invalid transaction, contrary to a valid one, does not give rise to any effect, an irregular transaction gives rise to some of its effects to the exclusion of others if its obligations have been discharged. A sale for an unknown price, for example, makes the purchaser entitled to the ownership of the commodity to the exclusion of the usufruct if the commodity has been possessed by the purchaser (Badran, n.d.). This intermediate state of contracts has the potentiality of turning into validity if the defect pertaining to the attributes is rectified (Muhammad, 2000). According to *Jumhur*, however, the intermediate state of *fasad* between *sihhah* and *butlan* is not recognized for *butlan* and *fasad* are synonymous and both signify what is not *sahih*.

Classification of (al-Sihhah and al-Butlan):

Discussing *sihhah* and *butlan* under *hukmwad'i* does not mean that we are convinced of the view of some scholars who have regarded *sihhah* and *butlan* as *hukmwad'i* contending that they refer to a relation that exists between *sihhah* and an act on one hand and *butlan* and another act on the other. Not being convinced of the view just mentioned does not mean that we are convinced of the opposite one adopted by some other scholars who have held that *sihhah* and *butlan* are subdivisions of *hukmtaklifi*, for the *sihhah* of a sale contract, for instance, means the obligation of the vendor to deliver the goods to the purchaser and the permission of the utilization of the goods by the latter. Conversely, the *butlan* of the contract means the prohibition of the utilization of the goods. Objectively, then, we are talking about obligation, prohibition and permission, which are but subdivisions of *hukmtaklifi* (Ahmad Hasan).

Finding neither of the foregoing views convincing, Ibn al-hajib is among the scholars who have regarded *sihhah* and *butlan* as kinds of *hukm 'aqli* (rational judgment), for they describe the state in which the essential elements of the act characterized by *sihhah* or *butlan* are present and its conditions are fulfilled or not. That is to say, the state in which compliance with the command of the *Shari'ah* has taken place or not (Ahmad Hasan, 1993; Ahmad 1997).

Analysis of the classification of Hukm Shar'i:

In an unsuccessful attempt to rationalize *sabab*, al-Ghazali says:

Know that since it has become difficult for people to be acquainted with the communication of Allah (s) in all situations especially after the revelation's having ceased, Allah (s) has disclosed his communication through certain perceptible things which have been made by Him a foundation of his injunctions, and has made these injunctions dependent upon these things just as the effects are dependent upon their perceptible causes (Al-Ghazali, 1993).

This rationalization carries the implication that the *mukallaf* realizes that he is commanded to offer the noon prayer, for example, when the sun declines. This implication is not acceptable and not wanted even by al-Ghazali himself, for the *mukallaf* offers the noon prayer at the sun's decline because he knows antecedently that he ought to do so. In other words, the *mukallaf* offers the noon prayer at the sun's decline because he is commanded to do so. Similarly, when we say that murder is the cause of retaliation, we do not mean that the *mukallaf* (those who are responsible for the administration of justice) realize the obligation of taking retaliation upon the culprit when the latter commits his delict, for the punishment is inflicted upon the criminal in accordance with the command of the lawgiver which has been issued before the occurrence of the crime. In view of our criticism of al-Ghazali's rationalization, and taking into account that the causality in question is *Shari'ah* and not logical, what al-Ghazali wanted to say is that the obligation of offering noon prayer is dependent on the sun's decline, and the obligation of the infliction of retaliation is dependent on murder. In causal terms, the sun's decline has been appointed by the lawgiver as the cause of offering noon prayer as murder has been appointed as the cause of the infliction of retaliation.

As far as we think, the causality that has been misleadingly rationalized by al-Ghazali, and we shall call it the minor causality, is inherently flawed, for it rests characteristically upon the wrongly-devised classification of *hukmwad'i* whose defects will be highlighted later on. Instead of the flawed minor causality, we recommend another type of causality, which we shall call the major causality. This recommended major causality operates within the concept of *hukmshar'i*.

The term '*hukm*', according to Ibn al-Humam and al-Taftazani, applies to the communication of the *Hukmgiver*, its effect, and the effect of the effect of the communication (Tahir,2001) If we confine our attention to the effect of the communication and its effect, we would see that the effect of the communication, which is always an act that may be obligatory, recommended, prohibited, reprehensible or permissible, can be considered to be the cause giving rise to the effect which, in turn, is an act that may be characterized by one of the five subdivisions of *hukmtaklifi*. As an illustration, murder is a prohibited act whose commission entails the effect of retaliation which itself is an obligatory act. Likewise, entering into a sale contract is a permissible act, which entails the effect of the delivery of the goods by the vendor, which is obligatory, and the utilization of the goods by the purchaser, which is permissible. Causality in our sense, then, is that one which ties two independent *hukmtaklifi*: one is the cause being the effect of the communication of the lawgiver, and the other is the effect being the effect of the effect of the communication.

In the major causality's sense, the statement that murder, for instance, is the cause of retaliation is considered casual. Whereas, the same statement in the minor causality's sense is considered mistaken. In the first sense, the statement is considered casual because murder refers to the act of intentional homicide committed by a person who is adult, sane and not the father of the victim. In other words, the major cause denotes the situation in which the cause has taken place, the conditions are fulfilled and the impediments are absent. In the second sense, however, the statement is considered mistaken because murder refers to the act of homicide alone although this act is not capable of yielding its effects unless the conditions have been fulfilled and the impediments are absent. To put it differently, it is logically unacceptable to impute retaliation as an effect to the act of homicide as a cause despite the fact that it causes nothing independently of the fulfillment of the conditions and the absence of the impediments. Having said this, what causes the effect and deserves to be called cause is the situation indicated by the major cause. The falsity of the minor cause will be further proven when we eliminate the false distinction between *sabab* and *shart*, and identify the nature of *mani'*.

It is often held that the arrival of time is the cause of the obligation of prayer, and taking ablution is a condition for the validity of prayer. The first is a cause because its existence entails the existence of the obligation of prayer and its non-existence entails the non-existence of the obligation of prayer. On the other hand, the second is a condition because its non-existence, like *sabab*, entails the non-existence of the validity of prayer, whereas its existence does not necessarily entail the obligation of prayer, for a *mukallaf* may be in a state of purity without having the obligation to offer prayer (Sa'd al-din, 2004). The similarity between these two examples, which is, in turn, indicative of the similarity between the two kinds of *hukm* is obscured by the wrong description of the second case. In the first case, the existence of the arrival of time is said to entail the existence of the obligation of prayer, whereas in the second case, the existence of having taken ablution is said not to entail the existence of the obligation of prayer. What they ought to have said in regard to having taken ablution is that its existence does not entail the validity of prayer and not the obligation of prayer as its non-existence entails the non-existence of the validity of prayer and not the obligation of prayer. Had they substituted the validity of prayer for the obligation of prayer, they would have found no distinction between the arrival of time and taking ablution, for the existence of having taken ablution necessitates the existence of the validity of prayer as the existence of the arrival of time necessitates the existence of the obligation of prayer.

In fact, the cause of the obligation of offering prayer is its being commanded by the *hukm* giver and not the arrival of time. The arrival of time is a condition for its validity just as purity is. In other words, offering prayer is an obligation. For the performance of such an obligation to be valid, it must be carried out after the arrival of time and having taken ablution.

It has been said earlier that the major cause signifies the situation in which the cause has occurred, the conditions have been fulfilled, and the impediments are absent. This statement is no longer accurate because the fulfillment of conditions implies the absence of impediments. That is because, conversely, the existence of impediments necessitates the absence of conditions. For example, menstruation is considered an impediment to prayer because it actually indicates the absence of purity. Likewise, fatherhood is an impediment to retaliation because it indicates the absence of the condition that the murderer must not be the father of the victim.

Having assimilated cause to condition and identified impediment with the absence of condition, what follows from this is that the major cause simply denotes the situation in which the conditions for the act, constituting the effect of the communication, to give rise to its effects have been fulfilled. Based on that, it is thought that the classification of condition into one which is a compliment of *sabab* and another, which is a compliment of *hukm* is inaccurate. Condition is always a compliment of *sabab*, but the intended *sabab* here is the major *sabab* and not the minor one. Condition, which is a compliment of *hukm*, however, if closely examined, turns out to be a compliment of *sabab* as well. For example, the distribution of the deceased's estate according to the law of inheritance is an obligation, one of whose conditions is the death of the relative during the life of the heir. Similarly, for entering into a sale contract, a permissible act, to give rise to its effects one of whose is the purchaser's ability to utilize the commodity, the vendor must be able to deliver the subject matter of that utilization to its new owner.

Since the ensuing of the effects from their cause is dependent upon the fulfillment of the latter's conditions, the opinion that the cause can give rise to its effects without the fulfillment of its conditions held by some of the Hanafis is mistaken.

In an easier and more direct way than the analytical one followed above, the existence of the declaratory rule can be denied. If we look at some of the communications that have established such a rule, we would find their simple literal meaning establishing a defining rule rather than a declaratory one. For instance, the Qur'anic verse which reads:

(Perform prayer at the sun's decline)(Surah al-Isra', 17: 78).

It is in fact a commandment obligating the offer of prayer at the sun's decline and not an appointment of the sun's decline as a cause of prayer. Likewise, the prophetic tradition that reads: "A murderer will not inherit" (Abu Isa, 2000) is a commandment forbidding inheritance to murderers and not a declaration of murder as an impediment to inheritance. Accordingly, the subject matter of the first communication is obligation and not cause while the subject matter of the second communication is prohibition and not impediment. Hence, the nucleus of the communication of the lawgiver is always an act of the *mukallaf*, i.e. a defining *rule*. However, this act might be related to or dependent upon another thing that has been mistaken for it.

Major causality, as it has been ultimately portrayed, establishes one relationship between two things, the first one is *hukmtaklifi* constituting the effect of the communication of the lawgiver, and the other is also *hukmtaklifi* constituting the effect of the effect of the communication. The first *hukm* is the cause synthesizing the conventional cause, condition and impediment, and the other *hukm* is the effect of the cause. Major causality, then, dictates that the sole kind of *hukmshar'i* is *hukmtaklifi* under which *hukmwad'i* is subsumed and upon which is parasitic.

If we evaluate the conflicting opinions about the nature of *sihha* and *butlan* in view of our understanding of the major causality, we would realize that the opinions other than Ibn al-Hajib's opinion are mistaken. No doubt that a valid contract of sale necessitates that it is permissible for the purchaser to utilize the goods. But this does not mean that validity is *hukmtaklifi* for validity does not refer to permission, which is *hukmtaklifi*, rather than to the existence of the state in which such a *hukmtaklifi* accrues from such a contract as an end result of compliance with the *Shari'ah*. Conversely, invalidity refers to the absence of that state. On the other hand, there is no doubt that the permission of the utilization of the goods by the purchaser is the effect of a valid contract. But this does not mean that validity is *hukmwad'i*; for the relationship does not exist between the permission and the validity rather than between the permission as an effect and the contract as a cause capable of giving rise to such an effect because it has been functioned in accordance with the *Shari'ah*. Therefore, validity and invalidity are factual terms indicating the existence or non-existence of the relationship and not a party to it.

Despite the criticism leveled at the above-mentioned opinions, we admit that the tricky character of *sihha* might lead to such misconceptions. But we suppose that the tricky character of *sihha* could have been eliminated had the scholars looked at *butlan* as an independent notion and not only the negative side of *sihha*. If we revert to the same example, an invalid contract does not allow the purchaser to utilize the goods because the utilization as a *hukmtaklifi* does not result from an invalid contract and not because the invalidity of a contract connotes the prohibition of utilization as if the prohibition is imputed to the invalidity. In short, *butlan* is a factual term indicating the absence of *hukm* and does not constitute *hukm* itself.

Just as *sihha* and *butlan* are thought to be neither *hukmtaklifi* nor *hukmwad'i*, so are *rukhsah* and *'azimah*. The way in which these terms are defined proves this opinion to be true. To say that *rukhsah* is an exceptional permission that is granted to the *mukallaf* contrary to an obligatory or prohibitory norm connotes if not denotes that *rukhsah*, as held by al-Shatibi, is not but permission. But what signifies that permission is being an

exception to a norm. So, *rukhsah* is a term that is meant to denote the exceptional character of the act rather than the essential character as such. To put it differently, it is not meant to indicate that such an act is permissible rather than to indicate that its permissibility is granted on account of exceptional considerations that have to be born in mind while assigning it that character. Correspondingly, '*azimah* is meant to indicate that the obligatory or prohibitory character of an act is assigned to it on a normal basis as opposed to *rukhsah*. Therefore, it is said to be the original commands of the *Shari'ah*.

The trueness of this opinion is also proven by the way in which they are classified as *hukmtaklifi* or *hukmwad'i*. On one hand, to hold that '*azimah* is *hukmtaklifi* because it bears the meaning of command denotes that it derives its meaning from being an indication of the normal character of an act which is characterized by way of obligation or prohibition. Similarly, to hold that *rukhsah* is *hukmtaklifi* because it bears the meaning of option denotes that it derives its meaning from being an indication of the exceptional character of an act which is characterized by permissibility. Ultimately, both terms seem to derive their meaning from being opposite of each other by virtue of being an indication of the normal or exceptional character of an act which is already characterized by one of the five types of *hukmtaklifi* and do not have meaning on their own. On the other, to say that the specific attribute appointed by the *hukm* giver is the cause of resorting to *rukhsah* while the lack of such an attribute is the cause of sticking to '*azimah* makes them *hukmtaklifi* by virtue of being either a command or option which is an effect of an exceptional cause or a normal one. Not only this, it ties their being *hukmwad'i* to being an effect of a cause and not being the cause itself, and this is of course inaccurate.

The term *rukhsah* continues to apply to the act characterized by it so long as the *mukallaf* has the option either to act upon it or upon '*azimah*. But when that option ceases to exist whereby the *mukallaf* is obliged to act upon it, the term *rukhsah* ceases to be applicable unless in the casual sense. The majority of scholars are of the view that if someone is dying of hunger, for instance, he is obliged to eat carrion to save his life. Saving one's life in this case is an obligation, that is '*azimah*, and not a *rukhsah*. Consequently, talking of obligatory *rukhsahs*, as held by al-Shatibi, (Abu Ishaq, 2003) is mistaken. Talking of recommended *rukhsahs*, however, is not mistaken contrary to what has been held by al-Shatibi (Abu Ishaq, 2003). The *Usuliyyin* have agreed on the *mukallaf's* freedom to act upon either *rukhsah* or '*azimah* when he is not obliged to act upon the former. Nevertheless they have disagreed upon which one of them is preferred to act upon. The *Usuliyyin's* disagreement implies that the permissible character of *rukhsah* does not preclude the recommended character or its *opposite*, namely reprehension. So, if *rukhsah* is preferred to be acted upon, that means that it is recommended and its opposite is of course reprehensible. On the contrary, if '*azimah* is preferred, that means that it is recommended and its opposite is of course reprehensible. The combination of the permissible and recommended or reprehensible characters of an act proves the soundness of Ibn Hazm's assertion that permissibility involves the three categories of option, recommendation and reprehension (Ahmad, 1997).

Conclusion:

This paper has started with encountering seven categories into which *hukmwad'i* has been classified. Validity and invalidity have turned out to be neither *hukmtaklifi* nor even *hukmwad'i*. They have, instead, turned out to be *hukm'aqli* (rational judgment). Validity does not indicate obligation or permission. It indicates the situation in which command or option ensues. Correspondingly, invalidity does not indicate prohibition. It indicates the situation in which obligation or permission has not ensued whereby the act supposed to have been characterized as obligatory or permissible has become prohibitory. Just as validity and invalidity have turned out to be rational judgments, so have regularity and dispensation. Regularity, in fact, is not meant to signify the essential character of the act being a command whether an obligation or permission. Regularity, instead, is meant to signify the normal nature of the obligatory or prohibitory character of the act. Correspondingly, dispensation is not meant to signify the permissible character of a particular act. Dispensation, instead, is meant to signify the exceptional nature of the permissible character of such an act.

Having characterized the aforementioned four categories of *hukmwad'i* as rational judgments, *hukmwad'i* has thus got reduced to the three categories on which Muslim scholars have agreed, namely, cause, condition and impediment. With respect to cause, a distinction has been made between minor cause and major cause. Minor cause is the classical cause discussed in Islamic jurisprudence. This cause has been assimilated to condition whose presence has been identified with the absence of impediment whereby the assertion that the conditions have been fulfilled implies necessarily that the cause has taken place, the conditions are present and the impediments are absent. The conditions to which minor causes have been assimilated and whose presence has been identified with the absence of impediments are the conditions whose fulfillment creates the situation in which command or option ensues indicated by the rational judgment of validity. These conditions are those of the major cause being a command or option the commission of which according to the conditions fulfilled gives rise to another or other commands or options. These commands or options whether those committed or those ensuing from those committed are the subdivisions of *hukmtaklifi*. Hence, the conditions to which *hukmwad'i* has been reduced are meant to facilitate the ensuing of one or more of the subdivisions of *hukmtaklifi* in case

another subdivision of *hukmtaklifi* is committed. *hukmtaklifi*, eventually, has turned out to be the sole kind of which *hukmshar'i* consists and of which *hukmwad'* has turned out to be an integral part.

REFERENCES

- Abd al-Wahhab Khallaf, *'Ilm Usul al-fiqh Wa Khulasat al-tashri al-islami*, Dar al-fikr al-'arabi, 1995, at 119; Ahmad Hasan, *Principles of Islamic Jurisprudence*, Kazi Publications, 1993, at 206.
- Abu 'Isa Muhammad Ibn 'Isa Ibn Sawrah Al-Tirmidhi, *Al-jami' Al-sahih*, Vol3, Kitab al-faraid, Bab Ma Ja'a Fi Ibtal Mirath al-qatil, Dar al-kutub al-'ilmiyyah, 2000, at 71-72.
- Abu Ishaq Ibrahim Ibn Musa al-Shatibi, *Al-Muwafaqat Fi Usul al-Shari'ah*, 3rd ed, vol 1, Dar al-kutub al-'ilmiyyah, 2003, at 230.
- Ahmad al-Husari, *Al-Hukm al-Shar'i Wa masadiruh*, 3rd edition, Dar al-jil, 1997, at 172-173.
- Ahmad Hasan, *Principles of Islamic Jurisprudence*, Kazi Publications, 1993. at 180
- Al- Ghazali, Abu Hamid Muhammad ibn Muhammad ibn Muhammad, *Al-mustasfa fi 'ilm al-Usul*, Dar al-kutub al-'ilmiyyah, 1993, at 74.
- Al-Amir 'Alauddin 'Ali ibn balban al-farisi, *Al-ihsan Bi tartibsahih ibn Hibban*, 2nd edition, Dar al-Kutub al-'Ilmiyyah, 1996, at 284.
- Al-Qarafi, Shihab al-Din Ahmad ibn Idris, *Kitab al-Furuq: Anwar al-Buruq Fi Anwa' al-Furuq*, vol. 1, Daar al-Salam, 2001, at 152-53.
- Al-Qur'an, Surah Ala 'Imran, 3-173
- Al-Qur'an, Surah al-Ahzab, 33: 10.
- Al-Qur'an, Surah al-an'am, 6: 119.
- Al-Qur'an, Surah al-Baqarah, 2: 158.
- Al-Qur'an, Surah al-Baqarah, 2: 173.
- Al-Qur'an, Surah al-Baqarah, 2: 173.
- Al-Qur'an, Surah al-Baqarah, 2: 203.
- Al-Qur'an, Surah al-Baqarah, 2: 286
- Al-Qur'an, Surah al-Isra', 17: 78.
- Al-Quran, Surah al-Maidah, 5: 3.
- Al-Quran, Surah al-Maidah 5: 6
- Al-Qur'an, Surah al-Nisa, 4: 101.
- Al-Qur'an, Surah al-Nisa', 4: 29
- Badran Abu al-'aynayn Badran, *Usul al-fiqh al-islami*, Muassasah Shabab al-jami'ah, n.d at 285.
- Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 2nd edition, Iimiah Publishers, 2000 at 337.
- Mohammed Tahir Haji Mohammad, "Rights and Duties in *Shari'ah* and Common Law" (PhD Thesis, International Islamic University Malaysia, 2001), 31-32.
- Muhammad al-Khudari, *Usul al-fiqh*, Dar al-Hadith, 2001, at 55-56.
- Sa'd al-Din Mus'ad Hilali, *Al-Maharat al-Usuliyah Wa Atharuha Fi al-nudj Wa al-Tajdid al-Fiqhi*, Majlis al-nashr al-'ilmi, 2004, at 289.
- Wahbah al-Zuhayli, *Usul al-fiqh al-Islami*, 3rd edition. Dar al-fikr, 2005, Vol. 1, at 113.