



EXAMINING THE CONNOTATION OF THE WORD **الحاكم**  
(LAWGIVER AND THE DILEMMA OF MUSLIMS UNDER THE  
**SHARI'AH.**

By

**Abdulrazaak O. Zakariya\***

**Abstract**

*Shari'ah (also known and referred to as Islamic Law) contains rules of all past events, current problems and all possible incidents that may happen in future. Nothing has happened in the past or is happening at present or will happen in the future except that each and every one of those things has a ruling from the Islamic law either directly or indirectly. Every conduct of a man at all time and places are completely and comprehensively taken care of by the Islamic law. Allah (SWT) refers to those who approach or judge their affairs with any other law[s] other than the provisions of Islamic law (the Quran & the Sunnah) as disbelievers (the Kâfirûn), polytheists, wrong-doers (the Zâlimûn) and disobedient (the Fâsiqûn). Hence, the dilemma of Muslims living in non-Islamic state or Muslims' State like Nigeria where the applicable Laws were said to be made and given to themselves. This paper adopts the doctrinal method of research to examine the lawgiver/legislator in Islamic law as it relates to the Muslims therein and several views of Muslim jurists on whether or not the intellect could discern and identify the hukm of Allah regarding the conducts of the Mukallaf (مكلف) based on what is good (hasan) حسن or evil (qabih) قبيح without the intervention of divine revelation. The paper also examines the status of a man-made law as well as the maker, in both Islamic and Non-Islamic States. This paper finds that though a Muslim may find himself in a non-Islamic state, however, that does not leave him at the freelage of perpetrating evil. The study lastly recommends guides for Muslims' conducts in a non-Islamic State.*

**Keywords: Hukm, Islamic Law, Lawgiver, Mukallaf, Hassan and Qabih.**

**1.0. INTRODUCTION**

The fruitful effects of the rules of Islamic law (الاحكام الشرعية) (Tare based on its four



(4) components - *Al-Hukmu* (الحكم), *Al-Hakim* (الحاكم), *Al-Mahkum fihi* (المحكوم فيه), *Al-mahkum alayhi* (المحكوم عليه) - which are all working together for the same operational end result.<sup>1</sup> That is, the determination of one lead to the others in order for them to be fully and finally comprehended together. Hence, it becomes imperative to highlight the four components of the rules of Islamic law before delving into the realm discussion of *Al-Hakim* (الحاكم):

### 1.1. *Al-Hukmu*,<sup>2</sup> (الحكم):

it is a communication from Allah in relation to the acts of the *Mukallaf*<sup>3</sup> (مكلف) through a demand, or option or a declaration. Put differently, in Islamic law, *Hukm* (حكم) refers to a legal ruling or decree issued by a qualified authority, such as a *faqih* (Islamic jurist), derived from the foundational sources of Islamic law: the Qur'an, Sunnah (the practices and sayings of the Prophet Muhammad), *Ijma'* (consensus), and *Qiyas* (analogical reasoning). The term broadly covers both divine rulings and the judgments made by scholars on issues that arise in the lives of Muslims.<sup>4</sup>

*Hukm* is derived from the four main sources:

- i. The *Quran*: The primary source and considered the direct word of God,
- ii. The *Sunnah*: The traditions and practices of Prophet Muhammad (SAW),
- iii. *Ijma'*: Consensus of Islamic scholars on legal issues, and
- iv. *Qiyas*: Analogical reasoning applied to new situations based on the principles of the Qur'an and Sunnah.<sup>5</sup>

*Hukm* in Islamic jurisprudence, is often divided into two main categories:

- i. *Hukm Wadh'i* (حكم وضعي): These are situational rulings that relate to conditions, causes, or legal impediments, often establishing the preconditions for other rulings and
- ii. *Hukm Taklifi* (حكم تكليفي): These are prescriptive rulings that impose a particular legal duty, categorized as: *Wajib* (obligatory), *Mandub* (recommended), *Mubah* (permissible), *Makruh* (discouraged) *Haram* (prohibited).<sup>6</sup>

<sup>1</sup> Az-Zuhayliy Wahabah, '*Usul Al-Fiqh Al-Isalmiy*' (Dar Al-Fikr, Damascus, 2007) Vol. 1, pgs. 43-44. Also, Khalaf Abdulwahab, '*Uloom Usul al-Fiqh*' (Dar al-Hadith, Cairo, 2003) pg. 111

<sup>2</sup> The Islamic law/rule

<sup>3</sup> The Subject obligated to observe the precepts of religion.

<sup>4</sup> M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 296 available online @ [www.google.com/m?q=principle+islamic+jurisprudence+by+m+hkamali&client=ms](http://www.google.com/m?q=principle+islamic+jurisprudence+by+m+hkamali&client=ms) accessed on 1/10/2024

<sup>5</sup> Ibid.

<sup>6</sup> Az-Zuhayliy Wahabah, '*Usul Al-Fiqh Al-Isalmiy*'. Vol. 1. Pg. 44.



The above are generally and usually discussed in *Usul al-Fiqh* by the Muslim jurists under the umbrella of *Al-Ahkam Ash-Shari'yyah* (الاحكام الشرعية). However, the edge of full discussion in this paper is restricted to *Al-Hakim* (الحاكم).

**1.2** *Al-Hakim*<sup>7</sup> (الحاكم) is the original source of Islamic law i.e., the Almighty Allah. This shall be discussed fully here in under separate sub-heading.

**1.3** *Al-Mahkum fihi*<sup>8</sup> (المحكوم فيه) it is the acts on which the *hukm* operates also called *Al-mahkum bihi* (المحكوم به). *Al-Mahkum fihi* (المحكوم فيه) refers to the specific subject matter or action upon which a legal ruling (*hukm*) is applied. It essentially represents the "object" of the law. — the particular act, conduct, or issue about which a legal judgment is made. *Al-Mahkum fihi* concept is crucial because it clarifies what specifically falls under Islamic law's jurisdiction and helps scholars categorize actions according to the five classifications (obligatory, recommended, permissible, discouraged, or forbidden). For example, in the context of obligations, *Al-Mahkum fihi* might be the act of *Salah* (prayer) or *Sawm* (fasting). When a ruling is given (such as the obligation to pray or fast), these acts are the "objects" on which the *hukm*, or legal ruling, operates.

**1.4** *Al-Mahkum alayhi* (المحكوم عليه) is Subjects (legal person with legal capacity) for whose conducts the *hukm* is stipulated.<sup>9</sup> Understanding *al-mahkūm 'alayhi* is crucial for grasping Islamic legal proceedings' structure and ethical considerations, as it underscores principles of justice, accountability, and due process. *Al-mahkūm 'alayhi* (المحكوم عليه) refers to "the party upon whom judgment is passed" or "the defendant." This term is typically used within the context of Islamic judicial proceedings and the administration of justice, particularly in *fiqh* (Islamic jurisprudence).<sup>10</sup>

The above are generally and usually discussed in *Usul al-Fiqh* by the Muslim jurists under the umbrella of *Al-Ahkam Ash-Shari'yyah* (الاحكام الشرعية). However, my edge of full discussion in this paper is restricted to *Al-Hakim* (الحاكم)

## 2.0. THE LAWGIVER (الحاكم)

Literally, Al-Hakim can simply be translated to mean: “the Lawgiver” “the Legislator” “the Decisive” “the Ruler” “the Sovereign” “the Governor” “the Judge” “the Dictator”.<sup>11</sup>

<sup>7</sup> The Lawgiver

<sup>8</sup> The acts of which the hukmu operates

<sup>9</sup> Az-Zuhayliy Wahabah, '*Usul Al-Fiqh Al-Isalmiy*'pg43-44 also, Khan Nyazee I. A., '*Islamic Jurisprudence (Usul al-Fiqh)* (The International Institute of Islamic Thought, Islamabad, 1<sup>st</sup> ed. 2000) pgs. 46-47 and Abu Zahrah M. '*Usul al-Fiqh*,' pg. 25

<sup>10</sup> Az-Zuhayliy Wahabah, '*Usul Al-Fiqh Al-Isalmiy*'pg. 44.

<sup>11</sup> Khan Nyazee I. A., '*Islamic Jurisprudence (Usul al-Fiqh)* pg. 79 and Wehr H., '*Dictionary of Modern Written Arabic*, J. M. Cowan (ed.) (New Delhi, N.D) p.197



Unanimously, all Muslim jurists agreed on the fact that the source of all law in Islam is the Almighty Allah *Subhanahu wa Ta'la*<sup>12</sup> Who made His wills and commands known to *Mukallaf* (مكلف) either directly through the divine revelation, or indirectly by means of inference, deduction and *ijtihad*<sup>13</sup> This is so because Allah (SWT)<sup>14</sup> Himself expressly made it known in the Noble *Quran* that the prerogative of command belongs to Him and only Him with the exclusion of all and even the Prophet Muhammad (SAW)<sup>15</sup> does not share from this prerogative command in His own right.<sup>16</sup> Allah says:<sup>17</sup>

نَبْلَانِ الْحُكْمُ إِلَّا لِلَّهِ يَفْضُلُ الدَّلِيلُ وَأَوْ خَيْرٌ لِّصَّالِحِينَ

Meaning: "The command rests with none but Allah: He declares the Truths, and He is the best judge"<sup>18</sup>

Among the deducible principles from the above quoted verse is that only Allah's laws are acceptable to the Muslims. Thus, no temporal or mundane authority can truly command a binding authority in its own right on a Muslim community's unless and except such principle and law is sanctioned by Allah.<sup>19</sup> Although, other authorities may command obedience but such cannot constitute a binding authority in their own rights.<sup>20</sup> Hence, the purport of *Surah al-Ma'idah*: 44-45 where Allah (SWT) declares as the unbelievers and the wrongdoers respectively those who refuse as binding authority the divine law.

It is pertinent at this juncture to say that the Muslim jurists having agreed unanimously on the fact that Almighty Allah is sole lawgiver however differ on whether the *mukallaf* could know and identify the *Hukm* of the lawgiver regarding his conducts based on what is good (*hasan*) حسن or evil (*qabih*) قبيح without the intervention of divine revelation.<sup>21</sup> Hence, several questions among others arose from the disagreement of the Muslim jurists which are:

- i. Whether the *Mukallaf* can know the *hukm* of the lawgiver by his reasoning faculty without the aid of the Prophets and Scriptures.

<sup>12</sup> The Exalted

<sup>13</sup> Independent judgment in legal or theological question, based on interpretation of Quran and Sunnah.

<sup>14</sup> *Subhanahu wata'la* means: the Exalted

<sup>15</sup> *Salla'llahu alayhi wasalam* meaning: May the peace and blessing of Allah be upon Him

<sup>16</sup> M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 296.

<sup>17</sup> Al An'am; 6:57

<sup>18</sup> Yusuf 'Ali A. '*The Meaning of the Holy Qur'an*' (amana Publications Maryland, USA, New ed., 1998) pg. 308.

<sup>19</sup> Khan Nyazee I. A., '*Islamic Jurisprudence (Usul al-Fiqh)*'. Pg.79 and M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 296.

<sup>20</sup> M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 296

<sup>21</sup> Al-Mawardiyy H. '*Al-Ahkam As-Sultaniyah*' (Dar Al-Hadith, Cairo, 2006) pg. 15-16



- ii. Does human reasoning capable of ascertaining law without the divine guidance based on the principle of what is good (*hasan*) حسن or evil (*qabih*) قبيد?
- iii. Is law made to serve the interest of the *mukallaf*?
- iv. Must the law be identical with the dictates of reason?
- v. Could human reason be harmonious and in concordance with the *hukmu* of Allah?<sup>22</sup>

In an attempt to respond to the above questions by the Muslim jurists, there evolved three different views viz: the *Ash'arites* (الأشاعرة), the *Mu'tazilah*, (المعتزلة) the *Maturidis*, (الماتريدية).<sup>23</sup> An attempt shall be made to examine each of the views seriatim.

### 2.1 The *Ash'arites* (الأشاعرة)

The *Ash'arite*; the followers of *Abu'l-Hasan al-Ash'ari* who died on (d. 324 A.H.) are of the opinion that it totally unwarranted to say human reasoning could discern the *hukm* regarding the conducts of the *mukallaf* based on what is good (*hasan*) حسن or evil (*qabih*) قبيد without the intervention of divine revelation.<sup>24</sup> Since perception depends on perspective, the *Ash'arite* canvassed much argument on the fact that human reasoning is often prevailed over by his selfish desires hence it is not possible for human intellect to discern and identify the *hukm* in relation to the conduct of *mukallaf*.<sup>25</sup> While an act may be evaluated by one person as good, another person may say the opposite; more so, it is often happen that an act may appear good and bad simultaneously in the reasoning of the same person.<sup>26</sup> The *Ash'arites* (also the view of majority of the Muslim jurists) thus maintain that right and wrong are not determined by reference to the nature of things, or our perception thereof, but are determined as such by God. Kamali, illustrates on this with this scenario:

*That honesty is good, but when it is likely to cause the death of an innocent person in the hands of a tyrant, it may be regarded as evil. It is therefore not for the human intellect to determine the values of things, and we cannot say that what the 'aql deems to be*

<sup>22</sup> Az-Zuhayliy Wahabah, '*Usul Al-Fiqh Al-Isalmiy*' pg120 also, Abu Zahrah M. '*Usul al-Fiqh*,' pg. 70; Khalaf Abdulwahab, '*Uloom Usul al-Fiqh*' pg. 112; M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 29.

<sup>23</sup> Az-Zuhayliy Wahabah, '*Usul Al-Fiqh Al-Isalmiy*' pg119-124 also, Abu Zahrah M. '*Usul al-Fiqh*,' pg. 70-73; Khalaf Abdulwahab, '*Uloom Usul al-Fiqh*' pg. 112-114; M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 297-299.

<sup>24</sup> Khalaf Abdulwahab, '*Uloom Usul al-Fiqh*' pg.112

<sup>25</sup> Ibid. pg. 112, M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 297

<sup>26</sup> Khalaf Abdulwahab, '*Uloom Usul al-Fiqh*' pg.112 and M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 297



*good is necessarily good in the sight of God, or that what it considers evil is also evil in His sight.*<sup>27</sup>

When the lawgiver permits or demands an act, such act is known to be right/good and whoever does same shall be accordingly rewarded, while when He forbids an act, it is certain that the act in question is wrong/evil and the perpetrator shall be accordingly scolded.<sup>28</sup> Stepping from the above and with reference to *Quranic* verse is the view that the *ahl al-fitrah*<sup>29</sup> (أهل الفترة) whom the message from Allah did not reach or delivered to them by means of a clear communication had no obligation on them and shall not be scolded nor rewarded.<sup>30</sup>

لَا وَمَا لَنَا مُعَذِّبُهُمْ ذُنُوبَهُمْ بِمَا نَبَّأَتْ رَسُولًا

Meaning: "...nor would We make Our Wrath visit until We had sent a Messenger (to give warning)"<sup>31</sup>

**2.2 The *Mu'tazilah* (المعتزلة)** the followers of Ibrahim al-Nazzam,<sup>32</sup> some jurists call them the followers of *Wasil bn 'Atau*.<sup>33</sup> Contrary to the view of the *Ash'arites*, the *Mu'tazilah* rather view it in what I can describe as 'Utilitarian perspective'<sup>34</sup> the *Mu'tazilah* is of the view that it is possible for human intellect to discern and identify the *hukm* regarding the conducts of the *mukallaf* based on what is good (*hasan*) حسن or evil (*qabih*) قبيح without the intervention of divine revelation. The *Mu'tazilah* opine that the human intellect (عقل) can identify the good and evil in human conduct with reference to its benefit and harm; if the outcome of an act is benefit/pleasure, then the act is good and if the outcome of an act is harm/pain, then such act is evil hence the issue of reward and/or punishment is determined accordingly on this assertion and it is what human intellect perceive in any of the two ways that the *shar'/hukm* حكم/شرع is in harmonious and in concordance with. They posit further that it is impossible for Allah to command something which is inherently evil or to prohibit something that is intrinsically good hence, *shar'/hukm* حكم/شرع is in harmonious and in concordance with the human intellect.<sup>35</sup> It is on this basis that the *Mu'tazilah*

<sup>27</sup> M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 297

<sup>28</sup> ibid

<sup>29</sup> Those who live after the death of a Prophet and before the arrival of another Prophet.

<sup>30</sup> Khalaf Abdulwahab, '*Uloom Usul al-Fiqh*' pg. 113

<sup>31</sup> *Surah al-Isra* : 15

<sup>32</sup> M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 298

<sup>33</sup> Khalaf Abdulwahab, '*Uloom Usul al-Fiqh*' pg. 113

<sup>34</sup> According to the Jeremy Betham utilitarian point of view is that the purport of a thing is to prevent some evil or procure some good; hence, the ultimate goal of legislation is, to him the greatest happiness of the greatest number. See for detail; Adaramola F. '*Adaramola Jurisprudent*' (Lexis Nexis Butterworths, Durban, 4<sup>th</sup> ed. 2008) pg. 30

<sup>35</sup> Abu Zahrah M. '*Usul al-Fiqh*,' pg. 72 and M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 298



recommends that a person who has received no communication from the Lawgiver can still be considered a *mukallaf* and be held responsible on the basis of reason, and his punishment or reward can be determined accordingly.<sup>36</sup>

It is worthy to note at this juncture that *Al-Shawkani* who is also one of the *Mu'tazilah* in a bid to correct the weakness of the above view of the *Mu'tazilah* divides human conduct into three (3) viz:

- i. Human conduct that could be discerned by intellect as good and with the outcome of pleasure and benefit. (*shar`/hukm* **حکم/شرع** commanding it is not necessary)
- ii. Human conduct that could be discerned and identify by intellect as bad/evil and of harm/pain consequence. *shar`/hukm* **حکم/شرع** prohibiting it is not necessary)
- iii. Certain human conduct that is not amenable to evaluation of human intellect. (good and evil in this case can only be determined by Allah through *shar`/hukm* **حکم/شرع**<sup>37</sup> some of the acts of *ibadah* fall within this last category as human intellect cannot possibly discern and/access the precise value in fasting during the days of *Ramadan*, or offering *salah* etc. except with the divine revelation.<sup>38</sup>

### 2.3 The *Maturidis*, (الماتريدية)

The followers of *Mansuur al-Maturidiy* the view of the *Maturidis*<sup>39</sup> is more or less in between the two views earlier discussed; as they agree that it is possible for human intellect to discern and identify the *hukm* regarding the conducts of the *mukallaf* based on what is good (*hasan*) **حسن** or evil (*qabih*) **قبيح** but this is however subject to the intervention of divine revelation. Nonetheless, this does not necessarily mean that the law of God in regard to such conduct is always identical with the dictates of (*عقل* **عقل**) for human intellect is liable to error. However, the *Maturidis*, differs from the *Mu'tazilah* in that they hold that no reward or punishment can be granted on the basis of (*عقل* **عقل**) alone until and unless such is made known by means of a clear communication (*an-Nas*).<sup>40</sup> Hence, human intellect regarding the conduct of the *mukallaf* must be in tandem and concordance with the *shar`/hukm* **حکم/شرع**.<sup>41</sup>

<sup>36</sup> Ibid.

<sup>37</sup> Abu Zahrah M. '*Usul al-Fiqh*,' pg. 70-71 and M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 298

<sup>38</sup> Ibid.

<sup>39</sup> Khalaf Abdulwahab, '*Uloom Usul al-Fiqh*' pg. 114

<sup>40</sup> Abu Zahrah M. '*Usul al-Fiqh*,' pg. 72-73

<sup>41</sup> Abu Zahrah M. '*Usul al-Fiqh*,' pg. 72-73 and Khalaf Abdulwahab, '*Uloom Usul al-Fiqh*' pg. 114



### 3.0 *Can Prophet Muhammad (SAW) be regarded as The Lawgiver (الحاكم)?*

3.1 Prophet Muhammad (SAW) is the Arab Prophet through whom the Quran was revealed and the religion of Islam established and completed.<sup>42</sup> He is the last Prophet sent by the Almighty Allah to the mankind and beyond. Predominantly, rules (hukm) revealed to Prophet Muhammad (SAW) in the Noble Quran were general and not in details.<sup>43</sup> It is a fundamental that the hukm of Allah (SWT) in an act He commanded must be properly understood<sup>44</sup> and comprehended by the subject before such hukm is required to be carried out by the subject; the subject is not expected to carry out any command for which he does not understand, hence, it become imperative that someone specifically explained and illustrate the general rules in general terms of the Quran.<sup>45</sup> Owing to the foregoing, Allah (SWT) ordered Prophet Muhammad (SAW) to give details and/or practice the hukm in the Quran. Allah Says: '...and we have sent down into thee (also) the message that thou mayest explain clearly to men what is sent for them and that they may give thought.' The Prophet (SAW) thus diligently dedicated all His life to the execution of this Allah's order unflinchingly till He was still.<sup>46</sup>

This acts of giving details explanation and/or practicing the hukm حكم of Allah in the Quran by the Prophet (SAW) to the subjects makes the Prophet a "Legislator". A good illustration of this is the command of Allah for offering Salat prayer which come in the Quran in general term as "establish regular salat (prayer)" the way and manner the salat would be carried out is not explained in the Quran. It was through the detail explanations and practice of the Prophet (SAW) that the man understood this particular command of Allah.<sup>47</sup> Hence, without much ado, the Prophet (SAW) can be properly regarded as a "Legislator" (Shari') however, the Prophet cannot be regarded as the Lawgiver in His own right because, to the Muslims, only Allah has the rightful monopoly of the

<sup>42</sup> Hornby A. S., 'Oxford Advanced Learner's Dictionary of Current English' (Oxford University Press, Eight ed. 2010) pg. 970

<sup>43</sup> For example: Allah commands the mankind to offer Salat in the Quran but does not render the details of how to pray it, what time, how many rakat and how many time a day except for practice of the Prophet (SAW)

<sup>44</sup> Az-Zuhayliy Wahabah, 'Usul Al-Fiqh Al-Isalmiy' pgs. 136-137

<sup>45</sup> Zubair A., 'The major Sources of Islamic Law' (Al-Madinah Heritage Publications, Lagos, 2005) pg. 1

<sup>46</sup> Allah says: "Nor does He (the Prophet [Sala'llahu alayhi wasalam]) say (ought) of (His own) desire." Q53:3

<sup>47</sup> In the process of explaining and practicalising this, the Prophet [Sala'llahu alayhi wasalam] says: "establish your salat in the way and manner I establish mine" see SahihBukhari for detail.



lawgiver as earlier discussed and that of the Prophet's (SAW) to so do comes as order and command from Allah to him.<sup>48</sup> Allah says: 'Nor does He (the Prophet [SAW]) say (ought) of (His own) desire.'<sup>49</sup>

### 3.2. The Applicable Laws by the Authority in an Islamic State

No doubt that social and political institution in an Islamic State would be patterned after the provisions *Shari'ah*, hence the law that has a general application and sanction of law in an Islamic State is the *Shari'ah*.<sup>50</sup> The *Shari'ah* regards certain acts under different circumstances to be mandatory (*fard*) omission by any Muslims with legal capacity (*Ahliyyah*) shall be entitled his to the punishment of the Lawgiver. Some other acts are recommended (*mandub*), while some others are permissible (*halal* or *ja'iz*), reprehensible (*makruh*), and lastly, some other stipulated acts are forbidden (*haram*).<sup>51</sup> This does not preclude the authority and/or overseers of such state from enacting some rules and regulations which a Muslim must obey and which will also have the enforcement of law in the society.<sup>52</sup> Nonetheless, the laws or rules made by such authority in the interest of the subject must have their sources from the provisions of Islamic law, and must be in tandem with the general provisions of Islamic Law. If any provisions of such rules and regulations so made by such authority runs contrary to the provisions of Islamic law, such provision[s] shall be null and void to the extent of its inconsistency with the law of Allah.<sup>53</sup> More so, those laws must be termed as the law of Allah.<sup>54</sup>

There are laid down rules and regulations for extracting law(s) in the interest of the subject from the *Quran* and *Sunnah* which any *Mujtahid*<sup>55</sup> must strictly adhere to and such rules so extracted are also part of the law of Allah since they have their source from it and cannot stand on their own.<sup>56</sup>

---

<sup>48</sup> *Fatir*: 24

<sup>49</sup> *Surah An-Najm*: 3

<sup>50</sup> This because, the ruler and the ruled are muslims who have their affairs in line with the tenets of Islamic principle.

<sup>51</sup> Az-Zuhayliy Wahabah, '*Usul Al-Fiqh Al-Isalmiy*' pg.

<sup>52</sup> Allah say: "O ye who believe! Obey Allah, and obey the Messenger, and those charged with authority among you" Q.5:59

<sup>53</sup> Al-Maidah: 44, 45 & 47

<sup>54</sup> Khan Nyazee I. A., '*Islamic Jurisprudence (Usul al-Fiqh)*'. Pg. 83

<sup>55</sup> Qualified person to give independent judgment in legal or theological question, based on interpretation.

<sup>56</sup> See the illustration in Reinhart K. A. '*Islamic Law as Islamic Ethics*' (Journal of Religious Ethics, Vol.II, No. 2, 1983) pg 191-192



### 3.2 The Applicable Laws in a Non-Islamic State and the Muslims.<sup>57</sup>

The predominant laws in the non-Islamic state are man-made, mostly of which the makers are not Muslims, are mixture of Muslims and non-Muslims or are Muslims but have no consideration for Islamic law.<sup>58</sup> For example, the preamble of the Constitution of the Federal Republic of Nigeria 1999, (as amended) provides thus: “*We the People* of the Federal Republic of Nigeria: Having firmly and solemnly resolved: To live in unity and harmony as one indivisible and indissoluble Sovereign Nation ... Do hereby make and give to ourselves the following Constitution: -<sup>59</sup>“Though the state usually adopts no religion for itself<sup>60</sup> but provides for right to freedom of religion of individuals. For example, America Constitution provides viz:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>61</sup>

More so, the constitution of the state provides for a legal framework within which any such activity will have to operate in the state. Islamic law, on the contrary, is of divine origin. Law is a creation of God, intervening in the form of a communication (*Khitab*) concerning human actions, and relating to acts, words, and even thoughts of capable persons (*Ahliyyah*).

### 3.3. The Muslims in a Non-Islamic State.

It must be said at this juncture that accepting and acknowledging the validity of the provisions of the man-made constitution by a Muslim does not necessarily

---

<sup>57</sup> It does not matter even if the overwhelming majority are Muslims in as much as the rulers are non-Muslims or the rulers are Muslims but do not accept *Shariah* as the governing law.

<sup>58</sup> It must be said that most constitutions of non-Islamic states were either as the result of an agreement among a group of non-Muslims about how to distribute a political rights and power within a non-Muslim polity or imported/adopted from form a state by another on the basis of colonization with little or some fine-tune

<sup>59</sup> See Preamble of the Constitution of the Federal Republic of Nigeria, 1999, (as Amended); see a similar provision in the Preamble of the United States Constitution which provides viz: “*We the People* of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” available online @ [www.constitutionus.com](http://www.constitutionus.com) accessed on 6/1/2018;

<sup>60</sup> See Section 42 of the Constitution of the Federal Republic of Nigeria, 1999, (as Amended)

<sup>61</sup> See the First Amendment under Article 1 of the United States Constitution; see also similar provision in Section 38 of the Constitution of the Federal Republic of Nigeria, 1999, (as Amended);



constitute an affront to Allah's monopoly as rights and obligations Giver in as much as his adherence is Islamic law.<sup>62</sup> This is because Muslims are enjoyed to recognize and honour agreements and treaties entered into even by non-Muslims.<sup>63</sup> However, the acceptance and/or recognition of the man-made laws here do not mean the acceptance as a matter of conscience and belief. To the Muslims, The authority of the law rests on human conscience and not on public authority. The foundation on which it rests is belief in God. The recognition of God is a mental act, and the manifestation of faith (*Shahada*) is a material act accomplished by words in the form of avowal (*Ikrar*). A better approach by a Muslim to the man-made laws is to exploit the opportunities afford them by these laws to promote their interest religiously.<sup>64</sup> Muslims are enjoyed to strictly follow the will of Allah (SWT), obey the Prophet Muhammad and the Authorities,<sup>65</sup> in as much as the obedience of the authority is not at the detriment of their belief. In Nigeria, Muslims are allowed to apply Islamic law in the affairs relating to Islamic Personal Status.<sup>66</sup> Hence, a Muslim living in a non-Islamic/secular state country is obliged to obey its law by not going against such laws but must also regulate his affairs with the command of Allah and his Prophet.<sup>67</sup> The communication from Allah (SWT) expresses His authorization or prohibition that certain acts be accomplished and determines the consequences of such acts in case the command or the prohibition is violated. Allah says in continuation of the verse earlier referred to: '...if you differ over a matter then refer it to Allah and His Messenger if you believe in Allah and the Last Day'<sup>68</sup>

Salman al-Oadah; a contemporary Muslim scholar has this to say when answering the question to what extent should a Muslim obeys a non-Muslim government:

The Muslims living in a non-Muslim country, even if they originally entered that country by means of forged documents, are considered to be living in their adopted country under a covenant. They must,

<sup>62</sup> Jackson S. A., '*Muslims, Islamic Law and Public Policy in the United States*', pgs. 22-23 available online @[www.ispi-usa.org/policy/policy4.html](http://www.ispi-usa.org/policy/policy4.html), accessed on 1/10/2024

<sup>63</sup> This was why the Prophet [*Sala'llahu alayhi wasalam*] honoured and recognized the Treaty of *Hudaybiyyah* made by Quraysh despite the provisions stipulated (that Muslims who leave Mecca to join the Prophet [*Sala'llahu alayhi wasalam*] at *Madinah* must be sent back to *Mecca*) therein were not all in favour of the Muslims *Ummah*.

<sup>64</sup> Jackson S. A., '*Muslims, Islamic Law and Public Policy in the United States*', pgs. 26

<sup>65</sup> An-Nisa: 59

<sup>66</sup> See Sections 262 and 277 of the 1999 Constitution of the Federal Republic of Nigeria (as Amended)

<sup>67</sup> Like keeping all the commandments of Allah and staying away from all the forbidden.

<sup>68</sup> An-Nisa: 59



therefore, comply with the law of their country of residence without, at the same time, disobeying Islamic Law.<sup>69</sup>

Abdallah ibn Bayyah, also said in his fatwa regarding the extent to which Muslims need follow the dictates of *Shari'ah* in a non-Muslim country:

A Muslim is not obliged to establish Shari'a law in civil, financial or political matters, or anything related to the prevailing social order in a non-Muslim country. The reason is that these laws are beyond individual's capacity, and God does not burden a soul beyond its capacity. A Muslim, however, is obliged to abide by the Sharia rules specific to him such as the rituals, food, drinks, clothing, and that which relates to matters of marriage and divorce, inheritance and matters of personal status<sup>70</sup>

#### 4.0. CONCLUSION

The Lawgiver has left to man freedom of conduct, but encourage the observance of the right ways which would earn him a reward (*thawab*) in the future life. It is easily deducible from a bird's-eye view that what is regarded as good (*hasan*) or evil (*qabih*) in the contemporary world is subjective. More so, perspective cum perception in which human evaluate what is good (*hasan*) or evil (*qabih*) could be affected by environmental influence and succession of ages of a particular man/set of people. This can be illustrated through the Europe earlier view of disgust to pre-marital relations between men and women and the promiscuity that is openly displayed nowadays. Not only that, it is not far off when bill of homosexuality had it way in the American Parliament.<sup>71</sup> The Western Capitalist societies view and interpret “(*hasan*) حسن or evil (*qabih*) قبيح” in concordance with principle of secularism –religion should be separated from life- so that people would be free to decide what is to be law rationally. Human excessive desires of pleasure often make it difficult if not impossible to unanimously agree on an act vis-à-vis good or bad. More so, the limitation cum myopic nature of human intellect also makes it impossible to fathom some acts let alone knowing the good or bad in it except with the intervention of divine revelation as human

<sup>69</sup> Available online @ [www.en.islamtoday.net/node/604](http://www.en.islamtoday.net/node/604) accessed on 4/1/2014

<sup>70</sup> Available online in Arabic language @ [www.binbayyah.net/portal/sites/default/files/the%2520diffrent%2520bettween%2520alदारorah%2520and%2520alajah.pdf](http://www.binbayyah.net/portal/sites/default/files/the%2520diffrent%2520bettween%2520alदारorah%2520and%2520alajah.pdf) English Translation quoted by in Mohamad Abdalla, 'Islamic Australia? What place is there for sacred law in a secular land?' available online @ [www.abc.net.au/religion/articles/2013/05/10/3756163.htm](http://www.abc.net.au/religion/articles/2013/05/10/3756163.htm) accssed on 4/1/2014

<sup>71</sup> Abu Ismael, 'Who is al-Hakim (The Legislator)?' available online @ [www.hizb-australia.org/culture/usul-fiqh/item/454-who-is-al-hakim-the-legislator](http://www.hizb-australia.org/culture/usul-fiqh/item/454-who-is-al-hakim-the-legislator) accessed on 3/1/2024. I must add at this juncture that the menace of the same sex marriage has spread its tentacle across the world; Nigeria inclusive see for detail: accessed on 5/1/2024



intellect cannot evaluate the reward attached to fasting in first day of *Ramadan* as different from fasting in the last day of *Ramadan*. This explanation goes for other acts of *ibadah* like *salat*, *hajj* and the like.<sup>72</sup>

Hence, the law given by the Lawgiver must have an overriding power over a human intellect/reasoning to the extent that if any intellect is inconsistent with the command of the Lawgiver that intellect shall be null and void to the extent of its inconsistency. This however does not preclude the *Mujahid* from making pronouncement which must have its root from the *Quran* and *Sunnah* on new issues which are not directly covered by the existing rules. The *Mujahid* also must strictly abide by the laid down guide to do such, hence the laws/rules made by the *Mujahid* become part of the law of Allah. In the same token, Muslims living under a non-Islamic government should know that Islam can never be separated from social, political, or economic life, since religion provides moral guidance for every action that a person takes. Thus, at the same time a man may be dissuaded from disobeying by the threat of a penalty which can be inflicted in this world and one to be inflicted in the future life. The primary act of faith is to strive to implement God's will in both private and public life. They must equally know that they will be responsible for ensuring that their affairs are consistent with the dictate and provision of *hukm* of Allah Who is the Lawgiver for every spare of human life. This attribute of the legislative system of Islam results in some important consequences: Islamic law applies to the Muslim as such, whether he resides in an Islamic country (*Daru-l-Islam*) or not. Muslim's conscience continues to be bound by Islamic law even though he is a member of a social community which is not governed by Islamic law. In case of a violation under this principle the Muslim becomes a wrong-doer as stipulated in Al-Maidah:45. On the other hand, Islamic law does not apply to a non-Muslim who does not believe in the unity of God. He is not bound by the law since he does not recognize the Islamic legislator's authority; consequently, he cannot claim the law's protection. There is, however, a distinction in this regard between a non-Muslim who resides abroad and is a citizen of a country having no peace treaty with the Muslim country (*harbi*) and a non-Muslim (*zimmi*) who resides in the Muslim territory and thus enjoys Islam's protection. A man in the latter category lives under what is called *ahdu-l-zimma*, i.e., the pact of peace. He is not bound by Islamic law insofar as his religious beliefs are concerned; he can drink alcohol without being liable to punishment. The *Zimmi*, however, must pay a certain tax to the Islamic Government where he lives for rights of protection and other things he enjoys therein, this would continually guarantee his rights under the pact of peace. Nonetheless, Muslims should recognize the existence of the man-made law in the state thus exploiting the opportunities afford them in the interest of their faith.

---

<sup>72</sup> M. H. Kamali, '*Principles of Islamic Jurisprudence*' pg. 298