The Conflict between the Actual and Apparent Regulations – Part 1: The Theoretical Foundations of Uṣūl al-Fiqh and the Uṣūlī Resolutions

The discussions pertaining to God's sanctioning of the 'apparent' regulations, albeit indirectly,[1] acquire a central position within the post-Anṣārī uṣūlī tradition.[2] This is because a significant proportion of the regulations derived by the legists fall under the category of the 'apparent' regulations. The problem is whether it is logically possible for God to sanction a type of regulation wherein the possibility of error subsists. Phrased in another way, the uṣūlī theoreticians are seeking to justify the existence of the 'apparent' regulations because of the possibility of error inherent within them. The origins of the discourse are deemed to be certain objections raised by Abū Jaʿfar Ibn Qiba al-Rāzī, an Imāmī theologian who was active during the minor occultation of the Twelfth Imām.[3]

The meta-legal assumptions of both the fallibilist (*mukhaṭṭaʾa*) and infallibilist (*muṣawwiba*) uṣūlī traditions are predicated on the fact that Sharia regulations are value-based.[4] Hence, Sharia regulations are issued with the sole purpose of securing those values. The problem arises at the level of extrapolating regulations from what both traditions deem as 'the Sharia-sanctioned means'. These specific types of evidences, which have been sanctioned as means to derive regulations, yield regulations that cannot be designated definitively as 'the regulations in the mind of God'; that is, such evidences are inherently incapable of conferring certitude upon their

[1] According to Imāmī jurists, the sanctioning of the apparent regulations is 'indirect' because God has sanctioned the utilisation of evidences (*adilla*) yielding 'apparent' regulations.

[2] Shaykh Murtaḍā Anṣārī was the foremost Imāmī jurist and legist during the latter period of his life. He died in 1280/1864.

[3] Ibn Qiba al-Rāzī (d. 319/931) problematised the probative force of speculation (*ẓann*) in general, and the solitary narration (*al-khabar al-wāḥid*) in particular. Although his deliberations pertain to the speculative (*ẓannī*) nature of the solitary narration, they apply to every type of speculative evidence. Thus, scholars have taken his objections seriously. In the domain of uṣūl al-fiqh, such discussions gradually evolved into the issue of 'the reconciliation between the actual (*wāqiʿī*) and apparent (*ẓāhirī*) regulation'. In his book *Farāʾid al-Uṣūl*, Shaykh Anṣārī mentions two of Ibn Qiba's arguments for the impossibility of acting in accordance with the solitary narration: The first states that the permissibility of relying upon the solitary narrations includes the permissibility of relying upon the solitary narrations pertaining to the existence of God. However, since consensus (*ijmāʿ*) does not permit the latter, the former cannot be permitted either. This is because sanctioning the utilisation of the solitary narrations includes sanctioning their utilisation in the formulation of the belief of God's existence, which is prohibited. The second of Ibn Qiba's arguments states that acting on the basis of the speculative solitary narrations is always accompanied by the possibility of error. For instance, the obligation to perform a certain behaviour on the basis of a solitary narration is always accompanied by the possibility of error that the behaviour is not obligatory but permissible in actuality (*wāqiʿ*). *See* Al-Anṣārī, Murtaḍā. 2010. *Farāʾid al-Uṣūl*. Qum: Majmaʿ al-Fikr al-Islāmī. 1: 105-6.

[4] The term 'infallibilists' refers to the Ashʿarī and Muʿtazilī schools of thought. They offer different reasons as to how regulations are value-based. For the former, it is by virtue of God's stipulations that certain behaviours are good and others bad. Whereas for the latter, behaviours are either good or bad on the basis of their innate goodness or badness. *See* Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 405-6 (sections *al-Taṣwīb al-Ashʿarī* and *al-Taṣwīb al-Muʿtazalī*). *And* Al-Ḥillī, Hasan bin Yūsuf (*Al-ʿAllāma*), and Al-Miqdād, Fāḍil (commentary). 2008. *Al-Bāb al-Ḥādī ʿashr*. Qum: Intishārāt Dār al-ʿilm. 47-49.

respective regulations whereby one would have certainty that they are 'the regulations of God'. Such regulations are termed as 'apparent' regulations. Accordingly, there exists the very real possibility of normative inaccuracy and error within every regulation of this type. The consequence of an erroneous 'apparent' regulation is the forfeiting of the desired value-objectives of the regulation in actuality (*wāqiʿī*), or in other words, the loss of the benefits of the regulation as intended by God. It is in light of this that the question at the core of the discourse is asked: Is it even logically possible for God to sanction such 'apparent' regulations?

This issue is dealt with in two papers. This paper, which is the first, presents the problem and solutions offered by the fallibilist tradition. It critiques the tradition's ontological assumptions and epistemic justifications which constitute the basis of the probative force of the 'apparent' regulations and the tradition's legal hermeneutics. Within the fallibilist discourse, reference is made to the infallibilist positions on the status of the 'apparent' regulation. Hence, these are briefly delineated in this paper as well. The second paper builds on the critique of the basic assumptions of the fallibilist and infallibilist traditions presented in this paper. It offers an understanding of the 'actual' and 'apparent' regulations in light of the basic assumptions of 'the existential framework': existential evolutionary growth, the individuality of existent entities, and the principle of no finality. Finally, it introduces and elucidates the framework's novel methodology of extrapolating Sharia regulations.

The deliberations of Bāqir al-Ṣadr, in his work entitled *Durūs fī ʿIlm al-Uṣūl*, form the basis of the presentation in this paper.[5] Ṣadr is not only comprehensive in his presentation of the post-Anṣārī fallibilist position on the matter, but also makes an original contribution to the discourse – his own innovative reconciliatory solution to the problem.

[5] Bāqir al-Ṣadr was a leading twentieth century Imāmī jurist and a champion uṣūlī. He was executed by the state of Iraq in 1400/1980.

The Position of the Fallibilist Uṣūlī Tradition

The word "fallibilism" (*takhṭiʾa* in Arabic), from which the adjective "fallibilist" is derived, is a term used to denote the outlook of the fallibilist tradition towards Sharia regulations: The derived Sharia regulations of the legist must always be deemed as 'fallible' or potentially wrong due to the innate possibility of their non-correspondence to the 'actual' Sharia regulations in the mind of God. In other words, since the possibility of error is part of the essence of all humanly derived regulations, the status of their correspondence to the regulations *as they are* in the mind of God is rendered as perpetually uncertain.[6]

The Fundamental Assumptions of the Fallibilist Tradition

One of the basic fallibilist assumptions is that there are regulations for every event related to human behaviour and interaction.[7] Another is that these regulations apply to all people regardless of whether one is aware of them or not.[8] Of course, the idea of the existence of regulations is itself a fundamental ontological assumption. It is based on the metaphysical notion of *nafs al-amr* (the realm of factuality) in which the status of every instance relating to human behaviour exists in the mind of God.[9] In uṣūlī parlance, this realm is known as *al-wāqiʿ* (lit. "actuality" in English), a term used to refer to the content of God's mind.[10] The uṣūlīs use the adjectival noun *al-wāqiʿī* (the actual) to signify God's intention for humans to adopt a behaviour on the basis of the status of that behaviour in the realm of factuality (His mind).[11]

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[6] Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 369-70 (section *al-Takhṭiʾa wa al-Taṣwīb*).

[7] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 1: 179. The fallibilist assertion that 'regulations exist for every eventuality' is based on the following two premises: firstly, that God's knowledge of what is beneficial or harmful for human beings encompasses every eventuality; and secondly, that He intends for humans to behave in accordance with this knowledge. Therefore, a regulation is a composite of God's knowledge of what is beneficial and harmful, and His desire for humans to behave in accordance with that knowledge. *See Ibid*. 176-7.

[8] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 2: 23-4.

[9] Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 370 (section *al-Takhṭiʾa wa al-Taṣwīb*). In Islamic philosophy, propositions (such as certain moral, legal, logical and philosophical propositions) that do not correspond to anything in the sense-perceived world have correspondence with entities or facts in *nafs al-amr* (factuality). Therefore, *nafs al-amr* refers to other realms of existence. *See* Ṭabāṭabāʾī, Muḥammad Ḥusayn. 2003. *The Elements of Islamic Metaphysics*. London: ICAS Press. 14-5. In the fallibilist tradition, regulations pertaining to every aspect of human life exist in the mind of God; hence, they are ontologically real. The truth of the legist's legal propositions, or regulations, lies in their correspondence to the regulations as they are in *nafs al-amr*, or the mind of God. *See* Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 370 (section *al-Takhṭiʾa wa al-Taṣwīb*).

[10] *Ibid.*

[11] *Ibid*. 536 (section *al-Ḥukm al-Wāqiʿī*).

According to the fallibilists, the process of the divine stipulation of regulations can be conceptualised as being comprised of the following steps: The first pertains to the fact that God's knowledge encompasses all that is beneficial and harmful for human beings in every eventuality; that is, God knows the benefits and harms inherent in all human behaviours. These benefits and harms are known as 'the theoretical criterion of the regulation' (*al-milāk li-l-ḥukm*). The second step is that God intends for humans to behave in accordance with this knowledge. This is known as 'the intention' (*irāda*) for a behaviour. Finally, God may formally express the 'theoretical criterion' and 'intention' for a behaviour through revelation. Such formal issuance of a regulation is termed as 'the consideration and expression of a behaviour as a regulation' (*iʿtibār al-ḥukm wa ibrāzu-hu*).[12] The first and second steps (pertaining to the theoretical criterion and intention respectively) are known as 'the stage of the conceptualisation of the actual regulation' (*marḥalat al-thubūt li ḥukm al-wāqiʿī*). They are collectively termed as 'the spirit of the regulation' (*rūḥ al-ḥukm*) because they constitute the essence of God's regulation; that is, they are 'the reality of the regulation' itself (*ḥaqīqa al-ḥukm*). The final step is known as 'the stage of the establishment of the actual regulation' (*marḥalat al-ithbāt li ḥukm al-wāqiʿī*). Thus, the spirit of the regulation pertains to the mind of God and is referred to as the 'actual' (*wāqiʿī*) or 'the actual regulation' (*al-ḥukm al-wāqiʿī*) in the mind of God. The formal expression of the spirit of the regulation through revelation is also known as 'the actual regulation' (*al-ḥukm al-wāqiʿī*).[13]

In contrast to this, regulations derived as a result of human endeavour can either qualify as 'actual' or 'apparent' regulations (*al-ḥukm al-ẓāhirī*) depending on the types of evidences utilised in the derivation process.[14] According to the fallibilists, it is possible for God to convey His

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[12] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 1: 176.

[13] *Ibid*. 177. A few notes on the usage of terminologies in this paper:

a. The word *wāqiʿ* is more commonly used in the place of *nafs al-amr* in uṣūlī parlance. Henceforth, this paper will utilise the word 'factuality', and the expressions 'the realm of factuality' and 'the mind of God', to signify *al-wāqiʿ* or *nafs al-amr*.
b. The term 'actuality' refers to the sense-perceived reality in a given moment and place.
c. The term *al-wāqiʿī* signifies the status of a thing as it stands in the mind of God together with His intention for humans to behave in accordance with that status. In other words, it refers to both the 'theoretical criterion' and 'intention' together. Henceforth, the expressions 'the regulation in factuality', 'the regulation in the mind of God', 'the intent of God' or 'the actual' will be used to signify this.
d. The expression *al-ḥukm al-wāqiʿī* is used in 2 senses: The first refers to *al-wāqiʿī* (in note c. above). The second and more common usage refers to the linguistic form of the actual regulation, or in other words, it refers to the formal expression of part c. According to the fallibilist tradition, the legist is able to deduce the actual regulation in some instances. In this paper, the expression *al-ḥukm al-wāqiʿī* (the actual regulation) will be used exclusively in the second sense. *See* Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 535-6 (section *al-Ḥukm al-Wāqiʿī*).

[14] *See* Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 2: 25; and Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 533-4 and 535-6 (sections *al-Ḥukm al-Ẓāhirī* and *al-Ḥukm al-Wāqiʿī* respectively).

regulations by formal issuances or other means.[15] The implication here is that if someone has recourse to 'the mind of God' by means other than revelation, then they would be required to adhere to that knowledge due to the 'probative force of knowledge' (*ḥujjīyat al-ʿilm*).[16]

The justification for the fact that actual regulations (*al-ḥukm al-wāqiʿī*) exist for all affairs is supplied by reason and traditions.[17] The fallibilists offer the following rational argument:

1. There is an appropriate human behaviour for every affair.
2. It is possible for humans to derive the most appropriate human behaviour for any given situation via human reason and stipulate them as regulations.
3. Since human reason is fallible, such regulations can never be designated as 'the most appropriate' with certitude. Hence, they are probable or 'apparent' because, at most, they are 'the most appropriate' regulations *in all probability*.
4. This presupposes that there *is* 'the best course of action' for any given situation, or in other words, 'the most appropriate' regulation does exist for every situation.
5. Since God intends for humans to behave on the basis of His knowledge of the benefits and harms of every possible human behaviour, and since His knowledge by definition is certain and devoid of any possibility of error, actual regulations exist in the mind of God for every possible affair.[18]

The assumption that regulations exist and are active, and hence they apply to all people irrespective of whether they have knowledge of them or not, is substantiated by both Sharia texts and reason.[19] Obviously, human knowledge of anything is contingent upon the existence of that thing and not vice versa. Accordingly, a regulation must exist prior to and independently of human knowledge of it, otherwise human knowledge would be both the cause and effect of that regulation simultaneously. This is of course impossible as it entails circular causality in which the knowledge of the regulation must exist and not exist simultaneously.[20] Therefore, regulations exist and are active for all eventualities, and hence they apply to all persons regardless of whether they have knowledge of them or not. Undeniably, a person's adherence to a regulation is

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[15] Iyrwānī, Muḥammad Bāqir. 1995. *Al-Ḥalaqāt al-Thālitha fī uslūbi-hā al-thānī*. Qum: Intishārāt Saʿīd bin Jubayr. 1: 52-3.

[16] Al-Muẓaffar, Muḥammad Riḍā. 2004. *Uṣūl al-Fiqh*. Qum: Intishārāt Ismāʿīliyān. 2: 19-24.

[17] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 1: 179. Refer to footnote 7 for another rational argument.

[18] *Ibid*. 179-80. Note that Ṣadr's presentation of the rational argument is concise and implied.

[19] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 2: 23.

[20] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 1: 333-4.

contingent upon that person's knowledge of it, however this is a separate issue from its existence and activity.

The Problem of the Simultaneous Existence of Two Sets of Theoretical Criteria

After substantiating these basic assumptions about the nature of regulations, the fallibilist camp endeavour to justify the existence of both the 'actual' and 'apparent' regulations. This is due to a theoretical impasse arising as a result of God's sanctioning the apparent regulation of the legist, namely that two parallel sets of theoretical criteria (of benefit and harm) exist in the mind of God for every behaviour: the theoretical criterion of the 'sanctioned' apparent regulation and the theoretical criterion of its 'actual' counterpart. To elaborate, God's knowledge of the status of a thing in relation to humans (in terms of benefit and harm) constitutes the theoretical criterion behind His intention for humans to adopt a particular behaviour (towards that thing); in addition to this, His sanctioning the apparent regulation of the legist for the same behaviour means He is ordaining the theoretical criteria of benefit and harm in accordance with that apparent regulation as well. Thus, there are two sets of theoretical criteria for one behaviour in the mind of God which results in the following absurd consequences: either the theoretical criterion of one opposes the other or they concur exactly. Both consequences result in the non-attainment of the desired objectives of God.[21]

In cases of opposition between the theoretical criteria, the apparent regulation would be stipulating a behaviour contrary to the behaviour stipulated by its corresponding 'actual' (*al-wāqiʿī*). Thus, adherence to the apparent regulation in such cases would cause either harm or loss of benefit to humans, and hence they would have forfeited the desired objectives of His actual regulations. Moreover, the occurrence of such opposing theoretical criteria in the mind of God is tantamount to absurdity and hence theologically problematic as it demands that a single thing in relation to the human be considered simultaneously beneficial and not beneficial (or harmful and not harmful). In cases of concurrence between the two sets of theoretical criteria, the apparent regulation corresponds to its 'actual' counterpart in the mind of God. However, this is no less problematic because it is tantamount to God ordaining two regulations simultaneously (the 'apparent' and 'actual'), each stipulating the same instruction regarding a particular behaviour, necessitating the impossible: either two simultaneous performances or two simultaneous abstentions of a particular behaviour.[22]

[21] *Ibid*. 1: 178 and 2: 26-7.
[22] *Ibid*. 2: 26-7.

The Apparent Regulation and Its Categories

Prior to delineating the fallibilist resolutions to the problem of the simultaneous existence of two sets of theoretical criteria,[23] a preliminary discussion is necessary on the exact meaning of the apparent regulation and its categories as understood by the fallibilist tradition. A regulation is designated as 'apparent' on the basis of the type of evidences used in its derivation. The fallibilists define an actual regulation as that regulation in whose subject there is no presumption of doubt due to the evidences from which it is derived. In contrast to this, the apparent regulation is one in whose subject there is a possibility of doubt due to the evidences resorted to in its derivation.[24] This doubt is due to the lack of certainty (*ghayr qaṭʿī*) in either (a) the evidences being 'the actual pronouncements of God' (*al-ṣudūr*) or (b) 'the original signification of the evidences' (*al-dalālah*). In other words, apparent regulations are derived from evidences that either do not qualify as 'certain pronouncements' (*qaṭʿ al-ṣudūr*) or do not yield 'certainty regarding the original meaning' (*qaṭʿ al-dalālah*).

The fallibilist typology of evidences has two main categories: 'securing' (*muḥriza*) and 'non-securing' (*ghayr muḥriza*) evidences. The latter are also termed 'the procedural principles' (*al-uṣūl al-ʿamalīyah*), and they are utilised by the legist when the 'securing' evidences are unable to provide regulations.[25] The 'securing' evidences are termed as such due to their ability to provide or secure the actual regulations. They are either 'certitude based' and yield 'certainty of meaning', or they are probable evidences substantiated by the Sharia (*imārāt muʿtabara*). The Sharia has sanctioned the latter even though doubt concerning their issuance (from the maʿṣūm) inheres in their nature, and so they are to be relied upon *as if* they are certain 'securing' evidences.[26] However, this means the category of the 'securing' evidences has to lend itself to further divisions on the basis of whether an evidence's disclosure (*kashf*) and securing (*iḥrāz*) of the regulation in factuality is certain or probable. This is because 'a substantiated evidence' (*imārā muʿtabar*) discloses and secures the regulation in the mind of God *in all probability*, and hence it cannot be considered as epistemically equivalent to the definite disclosure and securing of the regulation by a 'certain' evidence.[27]

[23] Henceforth, the problem will be termed as either 'the problem of the simultaneous existence of two sets of theoretical criteria' or 'the problem of conflict between the actual and apparent regulations'.
[24] *Ibid*. 2: 25.
[25] *Ibid*. 1: 183.
[26] *Ibid*. 2: 32-3.
[27] *Ibid*. 2: 25.

The following typology of evidences was formulated by Mirza Naʾīnī[28] in light of his 'theory of the designation of [evidences as] the means [to the actual regulations]' (*maslak jaʿl al-ṭarīqiyya*):[29]

1- 'Securing' evidences:

   a- 'Certitude based' (*qaṭʿī*) evidences, such as the verses of the Qurʾān and consensus (*ijmāʿ*).[30]
   b- 'Probability based' evidences (*imārāt*), such as the solitary narration.

2- 'Non-securing' evidences or the procedural principles (*al-uṣūl al-ʿamaliyya*):

   a- 'The securing principle' (*al-aṣl al-muḥriz*), such as 'the principle of continuity' (*al-istiṣḥāb*).
   b- 'The assigned principle' (*al-aṣl al-tanzīlī*), such as 'the principle of purity' (*aṣālat al-ṭahāra*).
   c- 'The pure procedural principle' (*al-aṣl al-ʿamalī al-baḥt*), such as 'the principle of exemption' (*aṣālat al-barāʾa*).

Based on the aforementioned definition of the apparent regulation, all evidences yield apparent regulations except those of category 1a. However, the prevalent view is that only the pragmatic outcomes of the 'non-securing' evidences classify as apparent regulations, and regulations derived from the evidences of category 1b classify as actual regulations. The reasoning behind this is that since 'the probability-based evidences' (*imārāt*) have been substantiated by the Sharia, they are to be considered as equivalent to the 'certitude-based' evidences.[31] In contrast to this, Mirza Naʾīnī considers regulations yielded by evidences of all categories apart from 1a as apparent regulations. This is because the evidences of type 1b are not 'certitude based' in themselves, and hence the possibility of conflict between the content of such evidences (of type 1b) and the regulations in factuality (*al-wāqiʿī*) can never be alleviated.[32]

The distinctions in Mirza Naʾīnī's typology of evidences from 1b onwards are based on the fact that the Sharia has ordained evidences in terms of their capacity to either disclose actual

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[28] Mirza Naʾīnī was considered the foremost Imāmī jurist and legist during the latter period of his life. He died in 1355/1936.

[29] *Ibid*. 2: 32-3. Ṣadr uses Mīrza Naʾīnī's division as a benchmark for his response to the problem of conflict between the actual and apparent regulations. Also *see* Iyrwānī, Muḥammad Bāqir. 1995. *Al-Ḥalaqāt al-Thālitha fī uslūbi-hā al-thānī*. Qum: Intishārāt Saʿīd bin Jubayr. 1: 78.

[30] It must be noted that 'the level of certainty of an evidence' and 'the import of an evidence' are two different things and must not be conflated. Just because an evidence is a 'certain-pronouncement' does not mean that its appreciation will yield the actual regulation as it is in the mind of God. The issue of 'the interpretation of the text' is other than that of 'the origin of the pronouncement being either certain or probable'.

[31] *See* Al-Muẓaffar, Muḥammad Riḍā. 2004. *Uṣūl al-Fiqh*. Qum: Intishārāt Ismāʿīliyān. 2: 17; and Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 536 (sections *al-Ḥukm al-Wāqiʿī*).

[32] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 2: 32-3.

regulations or provide pragmatic resolutions. He states that if an evidence has the capacity to disclose the actual regulation, then it belongs to 1b, and if it provides the legist or individual with a pragmatic resolution, then it belongs to category 2 (the procedural principles). Within category 2, if the evidence discloses either the status of the subject of a regulation or the regulation itself to the degree of certitude at a pragmatic level, then such an evidence is a 'securing procedural principle'. Here, even though the evidence is 'non-securing' in itself, it is designated as 'securing' because it instructs individuals to assume the actual regulation or the 'actual' status of its subject is "secured" for pragmatic purposes; that is, the former status of the regulation or its subject should be assumed to be certain. Alternatively, if an evidence instructs the individual to assume a particular status vis-à-vis the subject of a regulation in situations of doubt without disclosing the status of the doubted subject in actuality, then it is an 'assigned principle'.[33] Finally, if an evidence (or principle) provides a purely pragmatic resolution to a certain situation, then it is a 'pure procedural principle'.[34]

The Fallibilist Solutions

In addition to his own solution to 'the problem of the conflict between the actual and apparent regulations', Ṣadr presents and critiques the solutions of Mirza Naʾīnī and Abu al-Qāsim al-Khūʾī[35]. This section comprises of Ṣadr's summaries of their solutions followed by his own. It must be noted that both Naʾīnī and Khūʾī have addressed the problem in their own respective works in a thorough, extensive and exhaustive manner, and moreover both allude to and anticipate Ṣadr's solution.[36] Therefore, Ṣadr's own solution is an elaboration of what was already stated by both of his predecessors. However, for the purpose of providing the fallibilist tradition with 'technically sound' solutions, both Naʾīnī and Khūʾī concluded their respective treatments of the problem with the solutions as presented by Ṣadr.

According to Naʾīnī, 'the problem of the conflict between the actual and apparent regulations' arises due to the assumption that the apparent regulation is an independent normative regulation separate from the actual regulation. In other words, 'the substantiated evidences' stipulating the original normative regulations (*aḥkām taklīfiyya*) of God are merely assumed to be parallel regulations (*aḥkām mumāthila*) to the regulations in the mind of God (*aḥkām*

[33] This type of procedural principle does not disclose the statuses of things in factuality, and hence it does not give any sense of what the status of its subject is in factuality. For instance, the principle of purity (*aṣālat al-ṭahāra*) merely posits that the status of a subject should be assumed to be pure (*ṭāhir*).

[34] *See ibid*. 33; and Iyrwānī, Muḥammad Bāqir. 1995. *Al-Ḥalaqāt al-Thālitha fī uslūbi-hā al-thānī*. Qum: Intishārāt Saʿīd bin Jubayr. 1: 78.

[35] Abu al-Qāsim al-Khūʾī was considered the foremost Imāmī jurist and legist during the latter period of his life. He died in 1413/1992.

[36] *See* Al-Naʾīnī, Muḥammad Ḥusayn. 2008. *Ajwad al-Taqrīrāt*. Qum: Muʾassisa Ṣāḥib al-Amr. 3: 109-28; and Al-Khūʾī, Abū al-Qāsim. 1996. *Miṣbāḥ al-Uṣūl*. Qum: Maktaba al-Dāwarī. 2: 88-109.

wāqiʿiyya). Essentially, the problem of the opposition or concurrence of the apparent regulation with its 'actual' counterpart in the mind of God is merely an assumed conflict. The very fact that the Sharia has vested authority upon 'the substantiated evidences' means they have been stipulated (*jaʿl*) and verified (*tanajjuz*) as disclosing the actual regulations to the fullest extent (*kashf tām*). Such elevation of 'the substantiated probable evidences' to the degree of knowledge by the Sharia is itself an implicit affirmation of the identity between the regulations they yield and those in the mind of God. As such, the theoretical criteria of the apparent regulations do not exist simultaneously with those of their 'actual' counterparts in the mind of God, and hence there is no conflict between them.[37]

Although Ṣadr values and adopts Naʾīnī's typology of evidences, he contends that the conflict between the actual and apparent regulations is rooted at the level of the theoretical criteria of the regulations; hence it cannot possibly be resolved by Naʾīnī's descriptive evaluation of the apparent evidence. According to Ṣadr, regardless of how one explains and terms the apparent evidences, one must first justify their existence at the level of the theoretical criteria of the regulations. This is because instances of conflict between the 'actual' and 'apparent' in the mind of God are theoretically possible; that is, the possibility of divinely ordained regulations resulting in harm or the loss of benefit is real, and hence theologically problematic as mentioned above. Thus, for Ṣadr, the fact that God has ordained the 'apparent' regulation in the absence of the 'actual' necessitates there be perfect harmony and consistency at the level of the theoretical criteria, which, according to him, has not been articulated convincingly by the fallibilists.[38]

Abu al-Qāsim al-Khūʾī's solution circumvents 'the problem of the simultaneous existence of two sets of theoretical criteria' in the mind of God. He acknowledged the problem was encountered at the level of the theoretical criteria, and not at the level of the formulation of regulations. His solution proposed that the apparent regulations are devoid of the theoretical criteria of benefit and harm; hence the 'problem of the simultaneous existence of two sets of theoretical criteria' cannot possibly occur. This is because there are no critera in the mind of God for the apparent regulations beyond God's sanctioning the utilisation of the 'apparent' evidences. This means that the apparent regulations are not contingent upon the theoretical criteria of benefit and harm at all. The theoretical criterion informing and accompanying the formulation of an actual regulation is absent in the formulation of the apparent regulation.[39] Khūʾī's solution resolves the issue of

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[37] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 2: 27-8.

[38] *Ibid*. 28.

[39] Elaboration of Khūʾī's solution: Since the assumption of the existence of theoretical criteria of benefit and harm for apparent regulations results in the absurdities entailed in 'the problem of the simultaneous existence of two sets of theoretical criteria', the sanctioning of non-certitude-based evidences and their apparent regulations cannot be based upon the theoretical criteria of benefit and harm. Thus, the theoretical criteria behind God's intention for

the contradiction and concurrence of the two sets of theoretical criteria because the actual and apparent regulations do not share the same theoretical criteria, and hence they cannot conflict with each other.[40] Furthermore, Khūʾī's response adequately accounts for the existence of all the varieties of the apparent regulations in the typology of evidences mentioned above, that is, from category 1b onwards.

Ṣadr accepts that Khūʾī's solution resolves 'the problem of the simultaneous existence of two sets of theoretical criteria' insofar as the apparent and actual regulations cannot conflict with each other. However, he does not agree that God ordains regulations devoid of all substantive value beyond His directive to adhere to them. The Lawgiver does not and cannot arbitrarily stipulate apparent regulations. There has to be value in humans having to comply with them, that is, they have to be issued in light of the theoretical criteria of benefit and harm. Thus, Ṣadr insists that the consistency between the actual and apparent regulations must exist at the level of the theoretical criteria and not at the level of the formulation of regulations.[41] This is because 'the problem of the conflict between the actual and apparent regulations' will always subsist at the level of the formulation of regulations due to the probable nature of the apparent regulation. Therefore, any resolution of the conflict must include the following points: Firstly, it must presuppose the existence of theoretical criteria subsuming both the actual and apparent regulations, and elucidate what they are. Secondly, these theoretical criteria must account for the possibility of disparity between the regulations due to the probable nature of the 'apparent'. Lastly, they must be able to account for the full scope of the apparent regulations derived from categories 1b onwards in the typology of evidences.[42]

Ṣadr's Resolution

Ṣadr's novel idea is his theory of 'the most important theoretical criterion' (*al-ahamm min al-milākāt*). It states that a number of these 'most important theoretical criteria' exist in the mind of God whereby the different types of apparent regulations are sanctioned. 'The most important theoretical criterion' varies in accordance with the different types of apparent regulation. To demonstrate the operation of 'the most important theoretical criterion' whereby the different types of apparent regulations are sanctioned, he presents the conflict between (a) an 'apparent'

humans to adhere to the apparent regulation is merely God's sanctioning of it, that is, God's commandment to rely upon it. As such, the apparent regulations have no theoretical criteria of benefit or harm. Therefore, if an evidence yields an apparent regulation, its sanctioning has nothing to do with whether or not it corresponds to its actual counterpart, rather it is due to God's command to comply with it.

[40] *See ibid*. 28-9; and Al-Khūʾī, Abū al-Qāsim. 1996. *Miṣbāḥ al-Uṣūl*. Qum: Maktaba al-Dāwarī. 2: 109.

[41] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 2: 29.

[42] *Ibid*. 29-31.

permissible and an 'actual' obligation or prohibition, and (b) an 'apparent' obligation or prohibition and an 'actual' permissible.[43] It should be noted that he makes no allusion to the conflict between an 'apparent' obligation and an 'actual' prohibition (and vice versa), which was addressed by his predecessors who in their respective treatments did provide the very solution that he elaborates, and which since has become known as his theory of 'the most important theoretical criterion'.[44]

Ṣadr begins by dividing the broad regulative category of permissibility (*ibāḥa bi maʿna al-aʿāmm*) in terms of whether the 'permissibility' ascribed to a behaviour is based on theoretical criteria or not. Accordingly, its divisions are 'non-value-based permissibility' (*ibāḥa ghayr iqtiḍāʾīyya*) and 'value-based permissibility' (*ibāḥa iqtiḍāʾīyya*). The former refers to the normative designation of 'permissibility' (*ibāḥa*) and indicates that the 'permissibility' of a behaviour is not based on any values or theoretical criteria. The latter division of 'value-based permissibility' subsumes the normative designations of 'recommendation' (*istiḥbāb*) and 'disapproval' (*karāha*), both of which have theoretical criteria; in other words, the 'permissibility' of behaviours with these designations are based on values. This division of the category of 'permissibility in its broad sense' (*ibāḥa bi maʿna al-aʿāmm*) enables Ṣadr to analyse and resolve the conflicts on the basis of theoretical criteria.[45]

Ṣadr's resolution is as follows:[46]

a- The conflict in the apparent regulation as to whether the regulation is a prohibition or permissibility in factuality.

Two types of conflict are subsumed in this conflict: The first is between an 'apparent' prohibition and an *actual* 'non-value-based permissibility'. The second is between an *apparent* 'value-based permissibility' and an 'actual' prohibition.

In the first type of conflict, God endorses the 'apparent' prohibition because the *actual* 'non-value-based permissibility' does not have theoretical criteria that can be compromised. God's concern in all instances of this type of conflict is to ensure that all 'actual' prohibitions are issued and conveyed. This concern is the impetus and criterion whereby He endorses the former – the 'apparent' prohibition. This does not mean that things prohibited in this way become harmful in themselves if they are not so in factuality, rather God endorses the

[43] *Ibid*.
[44] For Naʾīnī and Khūʾī's treatment of the whole issue including the conflict between an 'apparent' obligation and an 'actual' prohibition (and vice versa), *see* Al-Naʾīnī, Muḥammad Ḥusayn. 2008. *Ajwad al-Taqrīrāt*. Qum: Muʾassisa Ṣāḥib al-Amr. 3: 109-28; and Al-Khūʾī, Abū al-Qāsim. 1996. *Miṣbāḥ al-Uṣūl*. Qum: Maktaba al-Dāwarī. 2: 88-109.
[45] *Ibid*. 1: 177-8 and 2: 30-1.
[46] *Ibid*. 2: 30-1.

'apparent' prohibitions only to ensure that the 'actual' prohibitions are abstained from. Hence, God's directive to comply with all 'apparent' prohibitions is based on 'the most important theoretical criterion of "ensuring that all 'actual' prohibitions are issued and conveyed"'. In this way, God maximises the probability that all 'actual' prohibitions are issued and conveyed because the domain of the 'apparent' prohibition is broader than the domain of the 'actual' prohibition thereby ensuring that all 'actual' prohibitions are issued and conveyed *in all probability*.

In the second type of conflict, God endorses the *apparent* 'value-based permissibility' because it has the theoretical criterion of 'the ease of discretion' (*muṭlaq al-ʿinān*). God's concern in all instances of this type of conflict is to ensure that all *actual* 'value-based permissibilities' are issued and conveyed, and their criterion of 'the ease of discretion' conserved. Thus, God endorses the *apparent* 'value-based permissibilities' in order to ensure that the *actual* 'value-based permissibilities' are issued and conveyed, even if a particular regulation is an 'actual' prohibition. Therefore, God's directive to comply with all the *apparent* 'value-based permissibilities' is based on 'the most important theoretical criterion of "ensuring all *actual* 'value-based permissibilities' are issued and conveyed, and their criteria of 'the ease of discretion' conserved"'. In this way, God maximises the probability that all *actual* 'value-based permissibilities' are secured because the domain of the *apparent* 'value-based permissibilities' is broader than the domain *actual* 'value-based permissibilities' thereby ensuring that all *actual* 'value-based permissibilities' are issued and conveyed *in all probability*.

b- The conflict in the apparent regulation as to whether the regulation is an obligation or a permissibility in factuality.

Two types of conflict are subsumed in this category of conflict: The first is between an 'apparent' obligation and an *actual* 'non-value-based permissibility'. The second is between an *apparent* 'value-based permissibility' and an 'actual' obligation.

The reasoning here is no different to Ṣadr's resolution in part (a) above. Thus, in order to avoid repetition, the conclusions are as follows: In all instances of the first type of conflict, God endorses the 'apparent' obligations. This maximises the probability that all 'actual' obligations are issued and conveyed. God's basis for this is 'the most important theoretical criterion of "ensuring that all 'actual' obligations are issued and conveyed"'. In all instances of the second type of conflict, God endorses the *apparent* 'value-based permissibilities'. This maximises the probability that all 'actual' value-based permissibilities are issued and conveyed, and their criteria of 'the ease of discretion' are conserved. God's basis for this is

> 'the most important theoretical criterion of "ensuring all 'actual' value-based permissibilities are issued and conveyed, and their criteria of 'the ease of discretion' are conserved in His mind"'.

Although Ṣadr does not address the conflict between an 'apparent' obligation and an 'actual' prohibition (and vice versa), based on his presentation of the above conflicts and his predecessors' anticipated solutions to them, the following would be his response: God endorses the 'apparent' regulation on the basis of 'the most important theoretical criterion of "ensuring all the actual regulations are issued and conveyed, and their theoretical criteria in His mind are conserved"'. In this way, God maximises the probability that all actual regulations are secured because the domain of the apparent regulations is broader than the domain of the actual regulations thereby ensuring that all actual regulations are issued and conveyed *in all probability*.

Ṣadr is justifiably unsatisfied with the 'technical' solutions offered by his predecessors because they negate (in respect of Naʾīnī's) and evade (in respect of Khūʾī's) the fact that the sanctioning of the apparent regulation necessitates the sanctioning of its innate possibility of error and the conflict between the theoretical criteria. Simply put, the 'technical' solutions are unsatisfactory because they negate and evade the fact that the possibility of error is the very nature of the apparent regulation, and hence acting in accordance with it always entails the real possibility that (a) the behaviour is wrong and (b) the responsible individual (*mukallaf*) is forfeiting the theoretical criteria in the mind of God. In summary, his solution is as follows:

1- God's sanctioning of the apparent regulations means that humans are compelled to act in accordance with all instances of the probable apparent regulations.
2- The domain of the probable apparent regulations is larger than the domain of the actual regulations, which means that the former subsumes all instances of the latter *in all probability*.
3- Therefore, God's sanctioning of the apparent regulations ensures that the actual regulations are issued, conveyed and adhered to by humans *in all probability*.

In this way, humans maximise the probability of acting in accordance with the stipulations of the actual regulations and minimise the possibility of forfeiting the theoretical criteria in the mind of God. Therefore, God authorises the apparent regulations on the basis of 'the most important theoretical criterion of "ensuring all the actual regulations are issued and conveyed, and their theoretical criteria in His mind are conserved"'.[47]

[47] *Ibid*. 31.

In light of his theory, Ṣadr provides substantive definitions of the categories of 'apparent' evidences in the typology of evidences. He introduces the notions of 'the strength of probability' (*quwwat al-iḥtimāl*) and 'the strength of the probable' (*quwwat al-muḥtamal*). The former refers to the 'probability' of an evidence 'disclosing' and 'securing' the regulation as it is in the mind of God. The latter refers to 'probable' things or norms, that is, it refers to things or norms when their statuses are doubted or unknown; subsequently, their statuses are supplied by the application of the 'procedural' evidences. Ṣadr states that if an evidence is sanctioned on the basis of its 'strength of probability' (*quwwat al-iḥtimāl*) to 'secure' the actual regulation, then it belongs to the category 1b – 'the substantiated securing evidences' (*al-imāra*). This is because of the high probability that the evidence 'discloses' its 'actual' counterpart. On the other hand, if an evidence merely yields the status of 'probable' things (*al-muḥtamal*), it belongs to category 2 – the 'non-securing' evidences or procedural principles. Within category 2, if an evidence assumes the status of a 'probable' thing (*al-muḥtamal*) for pragmatic purposes, then it classifies as a 'pure procedural principle'; however, if an evidence presumes the status of a 'probable' thing (*al-muḥtamal*) based on the strength of probability (*quwwat al-iḥtimāl*) that it has 'secured' the thing's status in actuality, then it classifies as either 'a securing principle' or 'an assigned principle'.[48]

Analyses of Ṣadr's Resolution

Ṣadr's solution to the problem of God sanctioning the 'apparent' evidences is based on the assumption that the domain of the apparent regulations is broader than, and subsumes, the domain of the actual regulations. He acknowledges that within the domain of the apparent regulations stipulating either prohibitions or obligations, the probability exists that some benign behaviours may be either prohibited or made obligatory; that is, some benign behaviours, which are neither beneficial nor harmful in themselves, may be deemed as beneficial and harmful. However, God's concern in ordaining these apparent regulations is merely to ensure that the majority of the 'actual' prohibitions and obligations are conserved. Similarly, he acknowledges that within the domain of the apparent regulations stipulating permissibilities, the probability exists that some behaviours designated as 'permissible' may be prohibited and obligatory in factuality; in other words, the probability of the loss of benefit and acquisition of harm is real and exists. However, God's concern in ordaining these apparent regulations is merely to ensure that the majority of the 'actual' permissibilities are conserved. Evidently, this solution results in the following theological incongruities:

1- God is content with humans forfeiting a few 'actual' prohibited and obligatory behaviours in order to secure the majority of *actual* 'permissible' regulations.

[48] *Ibid*. 34-5.

2- God is content with humans performing a few benign behaviours as though they were obligatory or prohibited in order to secure the majority of *actual* 'obligatory' or 'prohibited' regulations.

There is a third theological incongruity based on the conflict between an 'apparent' obligation and an 'actual' prohibition (and vice versa). Although Ṣadr did not address this conflict, according to his theory he would have to conclude that God sanctions the 'apparent' obligation on the basis of 'the most important theoretical criterion of "ensuring that all 'actual' obligations are issued and conveyed"'. Such a consideration in the mind of God has the following theological implication: that God is content with humans performing a few 'prohibited' behaviours as though they were obligatory in order to secure the majority of *actual* 'obligatory' regulations.

Clearly, Ṣadr's solution – like the other fallibilist solutions – does not eradicate the potential for one vested with responsibility to incur harm or loss of benefit as a result of adhering to the apparent regulation, and hence 'the problem of the conflict between the actual and apparent regulations' continues to subsist. This inability to solve the problem is the result of not identifying the roots of the problem: certain fundamental ontological assumptions of the fallibilist framework upon which the 'actual' and 'apparent' dichotomy is based. The non-identification of these assumptions as the origins of the problem renders the conflict as irreconcilable. Hence, Ṣadr's solution was never going to be able to resolve the conflict. Moreover, his solution suffers from the two theological incongruities mentioned above: firstly, that God is indifferent to the potential loss of benefit and acquisition of harm entailed in sanctioning all 'apparent' permissibilities; and secondly, that God is unconcerned with the potential designation of benign behaviours as 'obligatory' and 'prohibited' resulting from His sanctioning all 'apparent' obligations and prohibitions.

Ṣadr's 'solution' assumes the rationale behind God's sanctioning of the 'apparent' evidences is utilitarian: God's main concern is to ensure the maximum number of actual regulations are issued, conveyed and adhered to so that the majority of theoretical criteria in His mind are not forfeited; the only way for God to achieve this is by ordaining the apparent regulations and sanctioning the procedural principles. Ṣadr also considers this utilitarian approach (of ensuring the greatest number of actual regulations are secured) as a justification for the probative force (*ḥujjiyya*) of the 'apparent' evidences themselves.[49] It should be noted that in practice, the innate possibility of error in the apparent regulation does not pose a problem for fallibilists until it is known that an apparent regulation was indeed in conflict with its 'actual' counterpart.[50] In such

[49] *Ibid*. 33-7.
[50] Al-Muẓaffar, Muḥammad Riḍā. 2004. *Uṣūl al-Fiqh*. Qum: Intishārāt Ismāʿīliyān. 1: 223-5.

cases, some regulations will have to be re-enacted in order to attain the previous benefits and desired objectives of the regulations as per the fallibilist hermeneutic of impending benefit.[51]

Whilst one can appreciate Ṣadr's ingenuity in justifying the existence of the apparent regulation within the existing ontological paradigm of the fallibilists, his probability-based utilitarian understanding does not resolve the conflict. Therefore, his 'solution' is at best a 'justificatory' description. It merely explains God's sanctioning of the apparent regulation as a utilitarian calculation in the mind of God, which is theologically problematic as discussed above. The reason for Ṣadr's lack of success in resolving the conflict is because he failed to question the fundamental ontological assumptions of fallibilist framework. Hence the question that his 'solution' attempts to address still remains: Is it logically possible for God to sanction the 'apparent' regulation?

The Position of the Infallibilist Uṣūlī Tradition

The infallibilist tradition (*muṣawwiba*) has an alternative reading of the apparent regulation that arguably avoids 'the problem of the simultaneous existence of two sets of theoretical criteria'. The fallibilists conduct a cursory survey of the infallibilist theories in order to substantiate their own position and endorse a limited scope of infallibilism for certain categories of the 'apparent' evidences. They reference two types of infallibilism: the Ashʿarī form of infallibilism (*al-taṣwīb al-ashʿarī*) and the Muʿtazilī form of infallibilism (*al-taṣwīb al-muʿtazilī*).[52] The former is deemed as 'hard' infallibilism and the latter as 'soft'. The dichotomy of 'hard' (Ashʿarī) and 'soft' (Muʿtazilī) infallibilism is accurate insofar as it depicts the two poles of the spectrum of interpretations concerning the status of the apparent regulations within Sunnī uṣūl al-fiqh.

The term 'infallibilism' refers to the assertion of the complete accuracy and legitimacy of the apparent regulation. The Ashʿarī position deems both the accuracy and legitimacy of the 'apparent' as absolute. For the Muʿtazilī, its accuracy and legitimacy are contingent upon God sanctioning it as His *de facto* 'actual' regulation. Effectively, both versions of infallibilism consider all apparent regulations as legitimate and accurate. Hence, they consider every juristic verdict as valid provided legists have been through the rigour of the derivation process (*ijtihād*) and have evidences (*adilla*) for their respective verdicts.[53]

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[51] *Ibid*.

[52] Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 369-72 (section *al-Takhṭiʾa wa al-Taṣwīb*).

[53] Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 369-72 and 405-7 (sections *Al-Takhṭiʾa wa al-Taṣwīb*, *Al-Taṣwīb al-Ashʿarī* and *Al-Taṣwīb al-Muʿtazilī*).

The differences between the two infallibilisms lie in their respective ontological assumptions. According to the Ashʿarī, actual regulations do not exist, and hence the whole issue of their disclosure by evidences is moot.[54] The Muʿtazilī share the fallibilist assumption that actual regulations exist in the mind of God for every eventuality in accordance with the theoretical criteria of benefit and harm.[55] However, actual regulations pertaining to eventualities outside of the revelatory period subsist in the mind of God as simple declarations (*inshāʾī*) that are not active (*ghayr fiʿlī*). Actual regulations can only be deemed to be 'active' when knowledge of their content is ascertained,[56] otherwise they are assumed to be in a dormant 'declarative' state.[57] This inactivity of the actual regulations results in the existence of apparent regulations, for if the former were known by humans and hence 'active', the need for the existence of the latter would be eliminated. Thus, the defining feature of 'inactive' actual regulations is that humans do not definitively know and hence cannot verify (*ghayr tanajjuz*) their contents.[58] In light of this, should the apparent regulation conflict with the content of its 'inactive' *actual* counterpart, then no option remains other than for God to sanction the theoretical criteria of benefit and harm in accordance with the content of the apparent regulation.[59]

The fallibilists refute Ashʿarī infallibilism by referencing Sharia texts from which the existence of divine regulations for every affair can be inferred.[60] They also point out the nonsensicality in the Ashʿarī claim of the existence of apparent regulations for every affair in light of their other claim of the non-existence of regulations in the mind of God; that is, it is nonsensical for the Ashʿarī to claim that God desires humans to adhere to 'probable' apparent regulations when regulations do not exist in the His mind for Him to desire in the first place.[61]

The fallibilists reject the Muʿtazilī claim that the activity (*fiʿliyya*) of regulations in the mind of God is contingent upon the knowledge of their respective contents. For the fallibilists, the 'activity' of a regulation is a necessary concomitant of its 'existence'. When a regulation exists, it is active, and vice versa. Just as the existence of a thing is not contingent upon the knowledge of that thing, similarly the activity of a thing is not contingent upon the knowledge of that thing; that is, the existence and activity of a thing are independent and causally prior to the knowledge of them. Therefore, just as knowledge cannot be the cause of the existence of a regulation because knowledge presupposes existence, similarly knowledge cannot be the cause of the activity of a

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[54] Al-Khūʾī, Abū al-Qāsim. 1996. *Miṣbāḥ al-Uṣūl*. Qum: Maktaba al-Dāwarī. 2: 95.
[55] *Ibid*.
[56] By revelation, for instance.
[57] Ṣanqūr ʿAlī, Muḥammad. 2001. *Al-Muʿjam al-Uṣūlī*. Qum: Dar al-Mujtaba. 406 (section *Al-Taṣwīb al-Muʿtazilī*).
[58] *Ibid*.
[59] *Ibid*.
[60] *See* footnotes 7 and 17; and Al-Naʾīnī, Muḥammad Ḥusayn. 2008. *Ajwad al-Taqrīrāt*. Qum: Muʾassisa Ṣāḥib al-Amr. 3: 116-7.
[61] Al-Khūʾī, Abū al-Qāsim. 1996. *Miṣbāḥ al-Uṣūl*. Qum: Maktaba al-Dāwarī. 2: 95.

regulation because knowledge of the content of a regulation and its applicability to all people presupposes the existence of its content and applicability to all people. Thus, the necessary concomitant of the fact that actual regulations exist for every eventuality, which the Muʿtazilī assent to, is that they are *active* regardless of whether humans have knowledge of them or not. They pertain to all equally, both to those who are aware of them as well as those who are not. Of course, the force and implementation of a regulation is contingent upon its knowledge, and so ignorance of the actual regulations absolves humans of having to adhere to them. However, this does not negate the fact that they exist and are active upon one and all, thereby obligating humans to ascertain them.[62]

Therefore, the Muʿtazilī's implied assertion of the non-existence of conflict between the apparent and actual regulations is wrong because it is predicated upon the erroneous assumption that actual regulations can exist and be inactive simultaneously. This means Muʿtazilī infallibilism is not free of 'the problem of the simultaneous existence of two sets of theoretical criteria'. Additionally, two other claims of the Muʿtazilī are also problematic. The first is the validity of all apparent regulations derived by legists including those contradicting one another.[63] This claim is based on the supposition that God sanctions the theoretical criteria of benefit and harm in accordance with every derived apparent regulation. However, this entails God sanctioning contradictory or contrary regulations for the same behaviour, which is tantamount to absurdity in the mind of God, and hence theologically untenable. The second claim is the non-necessity of re-discharging duties performed on the basis of a former apparent regulation despite it being erroneous in light of a newer apparent regulation superseding it. Such dispensation is inferred from the first claim stating that all 'apparent' derivations of the legist, including those contradicting one another, are considered by God as His *de facto* actual regulations. Hence, duties performed on the basis of a superseded regulation must be deemed by God to be valid. However, as in the first claim above, this has absurd and untenable implications on the nature of the mind of God.

Within the fallibilist tradition, Anṣārī advocated a form of infallibilism that he termed 'the beneficiality of the means' (*al-maṣlaḥa al-sulūkiyya*). He stated that the mere juristic pursuit of an evidence resulting in an apparent regulation compensates for the loss of benefit in instances when the 'apparent' does not correspond to the 'actual'.[64] This implies that such apparent regulations would have separate theoretical criteria in instances when they conflict with the

[62] Al-Naʾīnī, Muḥammad Ḥusayn. 2008. *Ajwad al-Taqrīrāt*. Qum: Muʾassisa Ṣāḥib al-Amr. 3: 126-128.
[63] Kamali, Mohammad Hashim. 2003. *Principles of Islamic Jurisprudence*. Cambridge: The Islamic Texts Society. 487-9.
[64] *See* Al-Khūʾī, Abū al-Qāsim. 1996. *Miṣbāḥ al-Uṣūl*. Qum: Maktaba al-Dāwarī. 2: 96-7; and Al-Naʾīnī, Muḥammad Ḥusayn. 2008. *Ajwad al-Taqrīrāt*. Qum: Muʾassisa Ṣāḥib al-Amr. 3: 123.

'actual'. Of course, this leads to 'the problem of the simultaneous existence of two sets of theoretical criteria', which is unacceptable for fallibilists. Nevertheless, Anṣārī's deliberations prompted Ākhūnd Khurāsānī[65] to realise that infallibilism is presupposed in the sanctioning and operation of the evidences of category 2. The infallibilism of category 2 evidences is acceptable to fallibilists because it does not compromise the tradition's core assumption of the existence and activity of actual regulations for all eventualities. Thus, they justify the infallibilism of category 2 evidences by their own methods and in accordance with their own standards.[66]

The following example demonstrates what is meant by the 'infallibilism' of the fallibilists: Within category 2b, the principiality of purity (*aṣālat al-ṭaḥāra*)[67] bestows the 'exemptive' property of 'infallibilism' to situations of doubt regarding the status of the purity of a subject of a regulation. For instance, the outcome of applying this principle to the prerequisite condition of 'having pure garments' (a condition for Sharia regulations prescribing prayer) is that the designation of 'pure garments' would be broadened to include garments suspected of being impure; consequently, garments with unknown statuses of purity would be deemed as pure. Here, the 'infallibilism' – resulting from the application of the principle of purity – refers to the fact that prayers are valid in factuality irrespective of the actual status of the doubtful garments. Thus, one is exempted from repetition if it is understood afterwards that the status of the garment was actually impure.[68]

In contrast to this, the status of the purity of unknown garments cannot be derived from evidences of category 1 because they merely generate regulations with the requisite condition that garments be pure. They are incapable of generating extensions of pure garments for pragmatic purposes on the basis of probabilities. Hypothetically, if the category of procedural principles did not exist and it became known that the garments worn during prayers were impure in actuality, then the respective regulations (of category 1 evidences) would not have been discharged, and the prayers would have to be repeated.[69]

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[65] Ākhūnd Khurāsānī was considered the foremost Imāmī jurist and legist during the latter period of his life. He died in 1329/1911.

[66] Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ʿIlm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 2: 37-8.

[67] *Aṣālat al-ṭaḥāra* states that all things are to be considered pure until and unless they are known to be impure. The principle of purity is able to generate real extensions for subjects of regulations by the juristic process of 'authoritative modification' (*al-ḥukūma*). For instance, in regulations whose executions are contingent upon pure garments, the principle of purity modifies the designation of 'pure garments' by broadening it to include garments with unknown statuses of purity in actuality.

[68] *Ibid*.

[69] *Ibid*.

Conclusion

Attempts to justify the existence of the apparent regulation within uṣūlī discourse are responses to a theoretical conundrum dating back to the fourth century. The probabilistic nature of the apparent regulation means there is a possibility that it is wrong or does not correspond to its 'actual' counterpart in the mind of God. The issue is defined as 'the problem of the simultaneous existence of two sets of theoretical criteria of benefit and harm in the mind of God' – one set for the apparent regulation and the other for its 'actual' counterpart. Apart from the obvious implications on praxis, it also has untenable repercussions on the nature of God.

The collective endeavours of the fallibilist theoreticians culminated in the idea that God sanctions the apparent regulation on utilitarian grounds, that is, it's sanctioning ensures the maximum number of actual regulations are issued and conveyed. Although propounded by both Naʾīnī and Khūʾī, they opted to offer 'technically-sound' solutions to the problem instead: Naʾīnī's solution is his theory of "the designation of evidences as means to the actual regulation". It tries to demonstrate that the apparent regulation is not an independent regulation as such. Khūʾī's solution is that the theoretical criterion for the entire corpus of apparent regulations is merely God's sanctioning the usage of apparent evidences from which apparent regulations are extrapolated.

Unsatisfied with both of these responses, Ṣadr critiqued these solutions and then developed and expounded the utilitarian basis for the sanctioning of the apparent regulation alluded to by his predecessors. His theory – 'the most important theoretical criterion' – states that the theoretical criteria for the various types of apparent regulations are ordained by God on the basis of probabilistic and utilitarian considerations. Thus, the ordaining of the various types of apparent regulations is a means of ensuring that the majority of the 'unknowable' and 'inaccessible' actual regulations are not forfeited.

Based on a *prima facie* reading of both strands of the infallibilist tradition – the Ashʿarī and Muʿtazilī, it may seem that neither encounter 'the problem of the conflict between the actual and apparent regulations'. However, the fallibilist critique demonstrates that the basic infallibilist assumptions upon which such a *prima facie* reading is predicated collapse under closer scrutiny: Ashʿarī infallibilism assumes there are no actual regulations in the mind of God, which the fallibilists argue is non-sensical and contrary to textual evidences. Muʿtazilī infallibilism assumes the existence of 'inactive' *actual* regulations for eventualities not addressed during the revelatory era, which the fallibilists demonstrate is erroneous. Hence, both strands of the infallibilist tradition have not escaped 'the problem of the simultaneous existence of two sets of theoretical criteria'.

Despite Ṣadr's attempt to justify the existence of the apparent regulation within the existing ontological paradigm of the fallibilists, his probability-based utilitarian understanding does not resolve the conflict. This is because it has serious theological implications incongruent with the nature of God. Therefore, his 'solution' is at best a 'explanatory' description. Hence the question that his 'solution' attempts to address still remains: Is it logically possible for God to sanction the 'apparent' regulation?

The second paper deals with 'the problem of the simultaneous existence of two sets of theoretical criteria' from the existential perspective. It questions the fundamental ontological assumptions of fallibilist framework that have resulted in this theoretical impasse. In so doing, it offers different ontological assumptions that not only resolve 'the problem' but mark the advent of a paradigm shift within the uṣūlī tradition.