The Principle of *"Laws are Subordinate to Benefits & Harms"* in Imāmī Shīʿi Legal Theory and its Implication in Non-Ritualistic Law

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Abstract
Shīʿi jurisprudence is centered on the theological presumption that divine laws are subordinate to benefits and harms (*al-aḥkām tābiʿah lil-maṣāliḥ wa al-mafāsid*). While the theoretical discussions underpinning this principle are not overly disputed, issues arise from the recognition that the derivation of law is not fundamentally concerned with real law (*al-ḥukm al-wāqiʿi*), but rather with apparent law (*al-ḥukm al-ẓāhirī*). How one ascertains the consideration of benefits and harms within apparent law – whose very nature entails the possibility of error – is a challenge to which several Imāmī Shīʿi jurists have dedicated numerous pages. Many have proffered theories for reconciliation between real and apparent law – theories which are contingent on the principle of *al-ishtirāk bayn al-ʿālim wa al-jāhil*. This principle states that real laws are legislated by God for both those who are aware of, as well as ignorant of the law. If this principle is invalidated, then the discussion on reconciling real and apparent law is deemed irrelevant; in such a case, knowledge of a law would become a precondition considered during divine legislation. This conclusion would alter the course of discussion to a more critical discourse concerning the perception of benefits and harms; whether such perceptions constitute knowledge; and how they guide and determine what the law ought to be. If it were possible to establish a probative method to ascertain benefits and harms, it would become the task of a jurist to ensure that laws – at least those of a non-ritualistic nature – always remain subordinate to them.

Keywords
Shīʿi jurisprudence, *al-ḥukm al-wāqiʿī*, *al-ḥukm al-ẓāhirī*, maṣlaḥa, mafsada, *al-ḥaqīqah al-sharʿīyyah*, ashʿarī,

INTRODUCTION

The consensus of Imāmī Shīʿi jurists permits a male guardian to marry off his daughter of under nine when he determines such a marriage to be in her best interest.[1] However, for a Shīʿi living in Iran – a country where numerous Imāmī jurists play a role in the legislative process – not only is the minimum age of marriage for a girl raised from nine to thirteen, but Article 1041 of the Iranian Civil Code prohibits the marriage of an underage girl without explicit approval from the court.[2] Court approval is required to independently affirm that the marriage is, indeed, in the best interest of the child. Despite the fact that the original verdict of the jurists does not contain this condition, the Iranian Expediency Discernment Council has enacted it based on their rigorous understanding of what is in the best interest of their citizens, particularly their children.

The primary responsibility of Iran's Expediency Discernment Council is to ensure verdicts published by jurisconsults, when executed within Iran by their followers, remain subordinate to what is in the best interest of their society. Hence, changes and alterations can and are made to mainstream popular verdicts by the Council whenever necessary. Whether civil law legislated by the Council is akin to religious law, and as such, attributable to God, or whether it is independent of religion altogether, is a subject of ongoing debate. What is important to recognize, however, is the Council's attempt to subordinate laws to benefits and harms, particularly those with direct physical consequences on the Iranian society and its citizens.

The conundrum however, is witnessed when one focuses their attention towards the millions of Imāmī Shīʿa living outside of Iran, who are under no legal or religious obligation to abide by Iranian law but are expected to follow the verdicts of their jurisconsults that were void of any consideration of benefits and harms. This is all the while similar benefits and harms as determined by the Expediency Discernment Council of Iran for their society may also be present outside of Iran. Furthermore, there may also exist benefits and harms exclusive to certain societies which are unheard of within Iran. In either case, as far as the example cited above is concerned, since no precautionary measures exist in the verdicts of followers' jurisconsults, a male guardian outside of Iran would be free to marry off his underage daughter wherever he deems it fit without the intervention of a credible and rigorous third party.

THE PRINCIPLE OF BENEFITS AND HARMS

Within Imāmī Shīʿi legal theory, the divine legislation process is explained via the principle of 'laws are subordinate to benefits and harms' (*al-aḥkām tābiʿah lil-maṣāliḥ wa al-mafāsid*). It is understood that God undertakes the organization of human life and the preservation of societal order through this principle – only legislating a law after taking into consideration its objective benefits (*maṣlaḥa*) or harms (*mafsada*). These benefits and harms are gradational; depending on the degree to which they

[1] Muḥammad Ḥasan al-Najafī, *Jawāhir al-Kalām fī Sharḥ Sharāʿi al-Islām,* 43 vols., (Beirut: Dār Iḥyā al-Turāth al-ʿArabī, 1404), XXIX, 216.
[2] "Qānūn Madanī," Islamic Parliament Research Center of the Islamic Republic of Iran, accessed April 27, 2018, http://rc.majlis.ir/fa/law/show/97937.

exist, the law is translated as an act which is obligatory (*wājib*), prohibited (*ḥarām*), recommended (*mustaḥabb*), discouraged (*makrūh*), or overall indifferent (*mubāḥ*).

Before proceeding further, it is imperative to define and understand what is meant by the terms 'benefit' and 'harm' in this principle, as well as what it means for laws to be subordinate to them. The discussion of the benefits or harms behind a law is synonymous to what is termed the law's 'philosophy' or 'wisdom' (*ḥikmah*). Muḥammad Taqī al-Ḥakīm (d. 2002) considers the definition of wisdom in this context to be the "benefit intended by the Legislator through the legislation of a law".[3] Applied to divine legislation, this suggests that there exist benefits and harms God wishes His creation to respectively attain or avoid; thus, He legislates laws which act as the means through which they are able to do so. A law's wisdom could be linked to a metaphysical outcome, such as attaining a state of servitude towards God; or it could have consequences in the physical realm, such as in the case of murder or adultery.

The principle of benefits and harms in law has been a subject of intense debate amongst certain Islamic factions, particularly Ashāʿrī, Muʿtazalī and Imāmī Shīʿi scholars. The Ashʿarīs have generally rejected this principle, while the Muʿtazalīs and Imāmī Shīʿa have accepted it, albeit with differences in the way they understand and explain it.[4] The Ashʿarī argument against this principle is based on the presumption that God's actions cannot be conditioned to any objectives; thus, it cannot be said that God would legislate a specific law because a certain benefit or harm exists.[5] In their understanding, a being that performs an action in order to achieve an objective, such as God legislating a law to achieve a specific purpose, is necessarily limited, and its actions are made in an effort to acquire perfection. Given that God is not deficient in His existence, such a scenario is an impossibility for God. The Muʿtazalī and Imāmī Shīʿi response to this argument is a rejection of the initial presumption – stating that not only is it possible for God's laws to be conditioned to certain objectives, but it is necessarily the case.[6]

The latter two camps argue that the case of an existent pursuing perfection through his or her actions only exists when the objectives being sought are outside the essence of that existent. In other words, if the objectives being sought are external to the essence of an existent, it implies an absence and therefore a deficiency in the essence of that existent. When discussing God, however, both Muʿtazalī and Imāmī theologians believe that the objectives being discussed are not external to His essence, but rather are one and the same, thus, there is no rational argument prohibiting the view that the laws legislated by God cannot be conditioned to certain objectives. In his seminal work *al-Mīzān*, Ṭabāṭabāī (d. 1981) summarizes the Imāmī position in response to the Ashʿarī belief as follows:

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[3] Muḥammad Taqī al-Ḥakīm, *al-Uṣūl al-ʿĀmah lil-Fiqh al-Muqārin* (Qum: Al-Majmaʿ al-ʿĀlamī li-Ahl al-Bayt, 1997), 296.

[4] Ḥasanalī ʿAlī Akbariyān, *Dar Āmadī bar Falsafeh Aḥkām – Karkard-hā wa Rāh-hāyi Shinākht* (Qum: Pajuheshgah ʿUlūm wa Farhang Islāmī, 1395 SH), 122.

[5] Ibrāhīm bin Mūsa al-Shāṭibī, *al-Muwāfaqāt* (Khobar: Dār Ibn ʿAffān lil-Nashr wa al-Tawzīʿ, 1997), II, 9-11.

[6] ʿAbdul Karīm ʿAbdulilāhīnejād, Muḥammad Ḥasan Rabbānī, and Qurbān Jalāl, "Tabʿīyat Aḥkām Az Maṣāliḥ Wa Mafāsid," *Muṭāliʿāt Maʿrafatī Dar Dānishgāh Islāmī* 20, no. 3 (Tehran: Pajuheshgah Farhang wa Maʿārif-e Islāmī, 2016), 362.

> It is now clear that the dimensions of good and welfare, even though they exist in Allah's actions and commandments as well as in our actions and laws (since we are intelligent beings), they are different: in relation to our actions and laws, those dimensions lead and affect them– or you may say, they are the compelling causes and reasons for them; but in relation to Allah's actions and commandments, they are intrinsic and inseparable–or you may say, they have beneficial consequences. Since we are rational beings, we do whatever we do and we legislate whatever we legislate in order to seek goodness and success, and to acquire what we do not possess yet. However, the Almighty Allah does whatever He does and commands whatever He commands because He is God. Even though the result of His action is same as the result of our action as far as goodness and welfare is concerned, we are accountable for our actions which are tied to their compelling causes and purposes; but He is not accountable [to anyone] for His actions and they are not tied to compelling causes for acquiring what He might not already possess, rather its goodness and purposes are already integral part of the actions.[7]

Laws are therefore subordinate in the meaning that only after considering a certain benefit or harm does God legislate them. Within Imāmī theology, this goes back to an even more fundamental discussion concerning God's own wisdom, in which it is understood that God, being All-Knowing and Wise, would not do anything without good reason. If God legislates a law as obligatory, prohibitory, or simply permissible without a specific reason, then such an action would be an instance of preponderance without a preponderator (*tarjīḥ bi lā murajjiḥ*) - a rational impossibility.[8] This is considered one of the most significant and compelling arguments for the principle that all laws are subordinate to benefits and harms.[9]

Apart from rational arguments which establish the veracity of the principle, textual evidence from the Qurān or the ḥadīth literature is also used in its defense. One such tradition is recorded in the work *ʿIlal al-Sharāʿi* of Shaykh al-Ṣadūq (d. 991):

> From al-Riḍā (a) in response to a letter sent to him by Muḥammad b. Sinān: I have received your letter in which you mentioned that some people of the Qibla (i.e. some Muslims) think that Allah has not made anything permissible nor prohibited anything for a reason more than to merely seek submission from His servants through it. Whoever says that has gone astray to a great degree and is clearly in loss. If that was the case, then it would have been permissible for Him to make His servants submissive by making permissible that which He had prohibited, and making prohibited that which He had permitted; to the extent that He could make them submissive to abandon prayers, fasting, and all good actions; as well as make them reject Him, His messengers, His books, and deny the impermissibility of fornication, theft, incestuous relationships and anything that resembles these matters; leading to the corruption of management and the annihilation of creation. This is because the cause of permissibility and prohibition is only known to be in its submissive nature. Hence, just like God rejects the opinion of those who hold that position, we too realize that all which Allah has made permissible, there is benefit in it for the servants and their survival and they have a need for it which they will not be free from. Likewise, we find that the servants are not in need of that which is prohibited, and we realize it is a cause of corruption and a source of annihilation and destruction.[10]

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[7] Muḥammad Ḥusayn Ṭabāṭabāī, *Tafsīr al-Mīzān* (Tawheed Institute Australia) 157, http://www.almizan.org.
[8] Rūḥullah Khomeinī, *Anwār al-Hidāyah fī al-Taʿlīqah ʿala al-Kifāyah*, 2 vols. (Tehran: Mu'assasah Tanẓīm wa Nashr Athār Imām Khomeinī 1389 SH), I, 154.
[9] 'Abdul Karīm, Rabbānī, and Jalāl, 369.
[10] Muḥammad bin ʿAlī al-Ṣadūq, *ʿIlal al-Sharāʿi*, 2 vols. (Qum: Maktabah Dāwarī 1427 AH), II, 592.

Some have argued that the indefinite usage of words such as "anything" and "all" in the above tradition signifies that there is no law legislated purely for submissive reasons; rather, every law contains some benefits or harms which are perceivable by humans in their day to day lives.[11] Others have understood the tradition as a condemnation against those who assume every single law is of a submissive nature, when there clearly exists a significant amount of laws whose performance is not due to submissiveness, but rather due to the benefits and harms that accompany it in the material world.[12]

After establishing that laws are indeed subordinate to benefits and harms, a few questions remain. Firstly, does the idea of subordination imply that for every instance where a given law is implemented its considered wisdom is attained? Or does it suggest that, more often than not, the performance of a dictated act leads to the fulfilment of its considered wisdom? For example, if it is presumed that the wisdom behind Ṣalāt's obligatory legislation is due to its ability to prevent immorality – as mentioned in verse 45 of chapter 29 of the Qurān: "Indeed the prayer prevents indecencies and wrongs"[13] – is it to be expected that every instance of a Ṣalāt will necessarily prevent indecency? Or will it be the case that, in most cases, the performance of Ṣalāt will do so? It appears that the former explanation is not what the proponents of this principle abide by.[14] What is understood by the principle of subordination is that when a law that has been legislated by God is enacted and carried out, the majority of the time, its wisdom will be acquired.

To address this point further, the distinction between wisdom and cause (*ʿillah*) must be made. In order to do so, it is necessary to acknowledge that benefits and harms do not constitute the complete cause of a ruling. There can be specific instances where an intended benefit may not exist, yet the law will still need to be implemented.[15] A relevant example which demonstrates this idea is government legislation penalizing those who drive in excess of the speed limit. The presumption is that the law's wisdom, and consequent legislation, necessitates a limit to reduce the risk of accidents and physical harm. However, based on the guidelines of the law, even if a driver were to speed above the prescribed limit without causing an accident or physical harm, they are still legally able to be penalized.

In other words, even though the wisdom behind the original law is not violated, the penalty can still be given -- because the wisdom preventing physical harm is not the complete cause for the law's legislation. There may be many other factors contributing to the enactment of the law which are not its main wisdom; thus, in situations where the wisdom is not particularly violated, or whose benefit is absent, the law still holds.

Using this example, it is possible to better understand the previous question regarding Ṣalāt and indecencies. If one is to consider the wisdom behind Ṣalāt to be prevention against indecency, then it is tempting to presume any instance of indecency amongst those who perform Ṣalāt nullifies its

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[11] Akbariyān, 105.
[12] Abū al-Qāsim ʿAlī-Dūst, "Tabʿīyat ya ʿAdam Tabʿīyat Aḥkām az Maṣāliḥ wa Mafāsid Waqʿī," in *Ḥuqūq Islāmī*, 2, no. 6 (Qum: Pajuheshgah Farhang wa Andīsheh Islāmī, 1384 SH), 28.
[13] ʿAli Qulī Qarāʿī, *The Qur'ān*. (London: ICAS Press, 2005), 561.
[14] Akbariyān, 93.
[15] Muḥammad Taqī al-Ḥakīm, 296, 297.

obligation. This is not the case, however, as was established in the example with the driver. In that situation, the speed limit is relevant for reasons apart from its original wisdom. Similarly, although preventing indecencies could be the main wisdom behind the command for Ṣalāt, it is not the complete cause for the law. There are various reasons why Ṣalāt is obligatory, and thus, violating its wisdom in some instances does not do away with the law altogether.

This distinction between wisdom and cause is important to make and is made use of in Islamic legal deductions heavily. Determining a cause behind a law is more valuable than determining only its wisdom. The former informs one of when the law should be implemented; while the latter informs one of the benefits or harms behind its enactment. While the wisdom behind a law is significant, its knowledge is many times not sufficient to argue for a law's application in those situations where it may be absent.

When viewing this idea in the light of benefits and harms, some scholars have insisted that though the wisdom behind a law does not need to be present in every single instance where the law is implemented, it must exist in most of its instances.[16] A classical case amongst earlier Imāmī jurists where wisdom was cited to argue for a verdict was the prohibition of coitus interruptus from a free woman. In such a case withdrawal during intercourse to prevent pregnancy would even obligate the payment of blood-money. This position was defended based on the opinion that coitus interruptus violated the wisdom behind marriage, as well the understood purpose of sexual intercourse – procreation.[17]

Ritualistic vs. Non-Ritualistic Law

While the proponents of the aforementioned principle claim its universal applicability on every legal edict, this paper will discuss its implications within the context of non-ritualistic (*ghayr ʿibādī*) laws. Shīʿi Imāmī legal theorists have divided law into two categories: non-ritualistic and ritualistic (*ʿibādī*) law.[18] Non-ritualistic law is often referred to in the jargon of dealings (*muʿāmalāt*), or laws whose causes are known (*muʿallal*).[19] Perhaps the most important characteristic of ritualistic law is that its benefits and harms are not necessarily perceivable and though they may be perceived in some instances, this is not a necessary condition and to do so is extremely difficult.[20] On the contrary, when it comes to non-ritualistic laws, it can be argued that benefits and harms to which those laws were subordinate to, are perceivable on most occasions.[21]

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[16] Nāṣir Makārim Shīrāzī, *al-Qawāʿid al-Fiqhiyyah,* 2 vols. (Qum: Madrassah al-Imām ʿAlī bin Abī Ṭālib, 1411 AH) I, 50.

[17] Zayn al-Dīn al-Shahīd al-Thānī, *al-Rawḍāh al-Bahīyyah fī Sharḥ al-Lumʿah al-Dimishqīyyah*, 10 vols. (Qum: Maktabah Dāwarī, 1410 AH), V, 105.

[18] Saʿīd Raḥimīyān, *Rawish Kashf Milāk wa Naqsh Ān Dar Taghyīr Aḥkām*, (Tehran, 1374 SH) 16, 17, http://www.imam-khomeini.ir/fa/c78_114449/_مجموعه_آثار_کنگره_بررسی_مبانی_فقهی_حضرت_امام_خمینی_س_«نقش_زمان_و_مکان_در_اجتهاد»_جلد

[19] Sayyid Muḥammad ʿAlī Ayāzī, *Milākāt Aḥkām wa Shīweh-hāyi Istikshāf Ān* (Qum: Pajuheshgah ʿUlūm wa Farhang Islāmī, 1389 SH), 374.

[20] Raḥimīyān, 15.

[21] Muḥammad Jawād Maghniyyah, *Fiqh al-Imām Jaʿfar al-Ṣādiq,* 6 vols. (Qum: Anṣāriyān, 1379 SH), 156.

Ritualistic law, on the other hand, is defined by some scholars as any law where the dimension concerning one's fate in the hereafter is predominant over the consequences in this world[22] – as is the case in most acts of worship. Hence, any law where both the metaphysical and physical dimensions exist in equal amounts would not necessarily be considered ritualistic.

A more popular and working definition for ritualistic law, however, defines it as any act where the intention of seeking proximity to God is deemed a necessary condition for its validity.[23] This definition reduces ritualistic acts to those actions which would not be considered valid if the performer did not have the specific intention of seeking proximity to God while performing them. Put it simply, the performance of all the motions of a ritualistic act – such as Ṣalāt – would be of no avail in the absence of a clear intention of being performed sincerely for God.

Additionally, ritualistic law is considered that which is established and institutionalized by Islam itself, rather than having already existed in society, while being subsequently approved by Prophet Muḥammad. Ṣalāt and any laws related to it are a prime case of a ritualistic law, for it is an act of worship institutionalized and brought forth by the Prophet specifically for the Muslims. Some ritualistic laws may have existed before the Prophet Muḥammad, such as the annual Ḥajj, having been institutionalized by earlier Prophets. On the contrary, non-ritualistic matters such as transactions and marriages were already being enacted amongst societies at a global level. In such non-ritualistic cases, there was no need for prophetic institutionalization; at most, prophetic approval of certain laws was sufficient, albeit with minor alterations. Of course, there do exist a few cases where a non-ritualistic law was institutionalized by Islam, such as the case of rulings related to purity and cleanliness, but these are undoubtedly exceptions, and not the rule.

As far as the salient features of non-ritualistic law are concerned, such laws are those whose fundamental concern is with worldly matters[24] whose wisdom is generally known by those implementing it, and which do not primarily deal with relationships between God and humans directly. It appears that one of the foremost purposes of non-ritualistic law is to protect and preserve the worldly interests of a society. Most of these laws are based on concepts which are not legally veritative (*al-ḥaqīqah al-sharʿiyyah*), whose meanings God had to establish.[25] For example, the word Ṣalāt may have had a general meaning of 'supplication,' but after the rise of Islam, it developed a legal veritative which signified a very specific form of worship and supplication which is understood to be the case until today. Contrarily, the concepts of marriage (*nikāḥ*) or divorce (*ṭalāq*) which are cases of non-ritualistic law are not words where an initial meaning existed in the Arabic language prior to Islam and another meaning post-Islam.

This idea becomes more apparent when referring to the previously mentioned quality of non-ritualistic laws; most are acts which pre-date Islamic legislation. Societies carried out certain practices to achieve

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[22] Muḥammad bin Makkī al-Shahīd al-Awwal, *al-Qawāʿid wa al-Fawāid fī Fiqh wa al-Uṣūl wa al-ʿArabiyyah*, 2 vols. (Qum: Maktabah al-Mufīd, 1400 AH), I, 34.
[23] Ayāzī, 377.
[24] Al-Shahīd al-Awwal, I, 36.
[25] Ayāzī, 384.

specific goals in the forms they deemed best. It can be argued that this itself demonstrates that the forms in which non-ritualistic acts were performed did not have any transcendental relevance as they were simply the means a common rational people of society developed to attain their goals.

Ritualistic and non-ritualistic laws can further be classified into submissive (*taʿabbudī*) or non-submissive (*ghayr taʿabbudī*) laws. The general idea behind this classification is that ritualistic laws and their performance are submissive in nature. This implies that their wisdom is either not perceivable, or, even if some aspect of their wisdom can be understood, it is not sufficient to claim God legislated them solely due to what was perceived. Ritualistic actions are to be carried out in specific form secondary to divine ordainment. As an example, why one must perform two units in the morning Fajr prayers is for anyone to speculate over, and thus would be considered a ritualistic submissive act. One might speculate that God ordained two units instead of four in order to lessen the early morning burden on His servants; this assumption would not be valid, however, for it would imply that if a society eventually stopped being burdened by the morning prayers, we would be able to change the requirement to four units. Rather, Fajr is simply performed in two units because God commanded it in that manner.

There do, of course, exist some exceptions to this generalization. Certain ritualistic laws, such as Zakāt and Khums, are not considered completely submissive by some scholars.[26] In these cases, the intention of seeking proximity to God is a condition for their performance, but their wisdom is able to be understood concurrently. Submission is a requirement for their performance, but they are not entirely submissive in the sense that their wisdom cannot be fully understood.

When it comes to non-ritualistic law, the general idea is that these laws are of a non-submissive nature; as such their wisdom can be perceived and understood. Since non-ritualistic laws are primarily concerned with organizing human societies and their interactions, their wisdom is more easily discoverable – particularly seeing as these laws were set up by the laity to begin with.[27] As an example, traditionally one of the only areas where gambling is considered permissible is when two or more participants compete on horse racing, camel racing, or archery. The wisdom behind their permissibility is that these acts keep the participants physically and mentally ready for war.[28] Given how much warfare has altered in the modern era, where neither horses and camels are used nor bows and arrows, it would be possible to argue that such a wager could be conducted with weapons and vehicles relevant today given the same wisdom is fulfilled. Interestingly, this line of argument was also alluded to by Āyatullah Khomeinī in one of his letters to one of his students.[29]

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[26] Ayāzī, 381; Ḥaider Ḥobbollah, *Dirāsāt fī Fiqh al-Islāmī al-Muʿāṣir*. 5 vols. (Dār al-Fiqh al-Islāmī al-Muʿāsir, 2011), V, 461.

[27] Raḥimīyān, 16.

[28] Murtaḍa Muṭahharī, *Understanding Islamic Sciences: Philosophy, Theology, Mysticism, Morality, Jurisprudence and Islamic Law* (Qum: Al-Mustafa International Publication and Translation Center, 2014), 179.

[29] Rūḥullah Khomeinī, *Ṣaḥīfah Imām*, 22 vols. (Tehran: Muʾassasah Tanẓīm wa Nashr Athār Imām Khomeinī 1389 SH), XXI, 150.

The Legislative Process

In order to understand the process of legislation as explained by many Imāmī scholars of legal theory, it is imperative to understand certain technical terms and their classifications. Al-Shahīd al-Ṣadr (d. 1980) in his work on legal theory, *al-Ḥalaqāt*, divides the process of divine legislation into three stages. In the first stage – which some have described as the stage of criterion (*milāk*) – God takes into consideration objective benefits and harms. These benefits and harms are deemed gradational. God's will is related to these criteria accordingly, resulting in laws which are obligatory, recommended, dissuasive, prohibited, or simply permissible. Thus, God decides for an act to be obligatory when there is an immense benefit in it, or for a certain act to be prohibited when there is significant harm in it.

In the second stage, the phase of divine will (*irādah*), God intends for a law to be established. In the third stage, the stage of construction (*iʿtibār*), God formulates and legislates what He had intended.[30] Al-Ṣadr does not consider this third stage to be a necessity in and of itself. In other words, if awareness of God's will in the second phase was attained, it would be necessary to act upon the intended law according to al-Ṣadr - even before its formal legislation. An example which illustrates this idea is that of an ill father on his death-bed. If a father willed for his son to bring him water without constructing his intention into a proposition – and if the son were to become aware of what his father had willed – it would be expected that the son bring his father water without waiting for him to verbalize his request. Failing to act while having known his father's unspoken intention would be viewed detestably by society. In the case of God, who, on a much grander scale, enjoys the complete right of obedience and worship, al-Ṣadr believes such obedience of an intended law is also required if one becomes aware of God's will.

All that has been expounded on thus far regarding the legislative process and the principle of benefits and harms concerns what legal theorists refer to as the realm of permanence (*thubūt*). This is the realm of actuality, and it is claimed that accessible knowledge of it is either nonexistent or speculative at best. There are rare, if any, instances where the laws which exist in the realm of permanence are completely discovered.

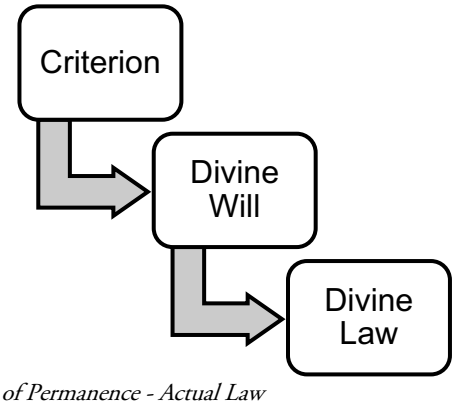

Figure 1 Realm of Permanence - Actual Law

[30] Muḥammad Bāqir al-Ṣadr, *Durūs fī ʿIlm al-Uṣūl (al-juz al-awwal min al-ḥalaqah al-thālitha),* 2 vols. (Qum: Intishārāt Dar al-ʿIlm, 1435 AH), I, 27.

As such, the legal dilemma only really begins within the realm of affirmation (*ithbāt*). In this realm, jurists attempt to determine what the actual law is in any given scenario, but they are only able to arrive at an apparent law (*al-ḥukm al-ẓāhirī*). Different scholars have employed different definitions of apparent law. Within the context of this paper, however, apparent law will be understood as any law whose corroboration with reality is doubtful since the preliminaries to arrive at the law are speculative and doubtful in nature.[31]

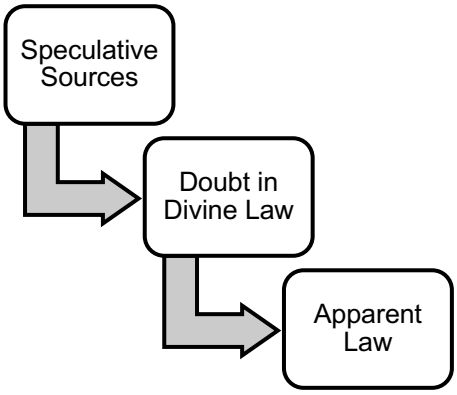

Figure 2 Realm of Affirmation - Apparent Law

The notion of apparent law leads to various discussions within legal theory, not the least of them being understanding God's reasoning for granting probativity to uncertain matters. In such a case, the challenge entails determining how and why God grants probativity to a law, while one is unsure of a) its accordance with reality, and b) whether it is in line with the objective benefits and harms taken into consideration by God during its legislation.

To further complicate matters, many a time, a jurist may arrive at an apparent law whose implementation seems to go against the collective conscious and moral perceptions of a society. Either the society sees no benefit to the law, or it determines it as a source of harm. In the past number of years, several Shīʿi Imāmī ethicists have pointed out prominent examples of apparent law which contradicts societal perceptions of benefits and harms.[32] Major cases include the permissibility for a male guardian to marry off his underage children; the inability of a woman to initiate a divorce even in severe circumstances; the execution of males for apostasy in the absence of intent to spark societal chaos; and the permissibility of deriving sexual pleasure through non-penetrative means with a toddler wife.

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[31] Nāṣir Makārem Shīrāzī, *Anwār al-Uṣūl,* 3 vols. (Qum: Madrassah al-Imām ʿAlī bin Abī Ṭālib, 1428 AH), I, 333; Bāqir al-Ṣadr, I, 27.

[32] Ḥusaynī Sūrkī, *Nemūneh-hāyī az Barrasī Akhlāqī Aḥkām Fiqhī* (1395 SH), accessed April 10, 2018, http://ethicshouse.ir/files/Gozaresh/نمونه_هایی_از_بررسی_اخلاقی_احکام.pdf; Muḥammad Hidāyatī, *Munāsibāt Fiqh wa Akhlāq* (Tehran: Nigāh Muʿāṣir, 1395 SH) 315; Saʿīd Ḍiyāī-far, *Tathīr Akhlāq dar Ijtihād – Guftagu ba Jamʿī az Asātīd Ḥawzeh wa Dānishgah* (Qum: Pajuheshgah ʿUlūm wa Farhang Islāmī, 1388 SH) 162.

These laws are deduced primarily due to an absence of evidence against them, allowing for a procedural principle to be applied for their authorization; or secondarily because speculative traditions exist whose prima-facie signifies their content. In both cases, the understanding is that the verdict given is certainly binding. This approach does not allow a jurist to utilize the principle of benefits and harms and assign it an active role during the derivation process. In fact, some scholars have argued that such deductions have developed a culture and understanding within Imāmī legal theory where humans are completely unaware of what benefits and harms were taken into consideration during divine legislation. This has made much of the wisdom behind different laws unknown, unperceivable, or secretive.[33] Fanaei, another ethicist, further puts it bluntly that though the principle of benefits and harms is accepted by the jurists, it has absolutely no bearing on the derivation process and therefore is tantamount to not accepting it.[34]

Various scholars have striven to address the challenge of how to determine benefits and harms in apparent law in a manner which is similar to the methodology employed in actual law. Over the past two centuries, every major scholar has critiqued the justification put forth by his predecessors. Al-Mīrzā al-Nā'īnī (d. 1936) was critiqued by Sayyid al-Khū'ī (d. 1992), who then went on to be the teacher of al-Sadr. Al-Sadr, in return, went on to critique them both, offering his own solution to this conundrum.[35] While their discussions on reconciliation are prolonged and intricate, a fundamental critique of their attempts renders much of it irrelevant.

Every scholarly pursuit to reconcile actual and apparent law presumes a principle which dictates that actual law is relevant even for those who are ignorant of it (*ishtirāk al-aḥkām bayn al-ʿālim wa al-jāhil*).[36] Deeming this principle to be true forces the conversation within legal theory to begin at a point where it is taken for granted that a) an actual law exists which is subordinate to benefits and harms, b) one is unable to arrive at this law with certainty, and c) such a law remains applicable to an individual despite his or her ignorance towards it. It is here where the reconciliation of apparent law, actual law, and their subordination to benefits and harms becomes an issue.

Critique on the Principle of Ishtirāk al-Aḥkām Bayn al-ʿĀlim wa al-Jāhil

The principle of *Ishtirāk al-Aḥkām Bayn al-ʿĀlim wa al-Jāhil* (henceforth referred to as 'al-ishtirāk') is a premise agreed upon by the vast majority of Shīʿi legal theorists, so much so that al-Mīrzā al-Nā'īnī cites it as a consensus.[37] This premise dictates that all laws legislated by God in the realm of permanence are relevant and applicable for those who are aware of the law as well as those who are unaware of it – even if they have previously exerted effort in determining what the law is. There are some prominent Shīʿi scholars who have rejected this principle, such as al-Muqaddis al-Ardibillī (d. 1585) and some of his students,[38] but such an opinion remains rare.

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[33] Hidāyatī, 342.
[34] Abū al-Qāsim Fanāei, *Akhlāq Dīn Shināsī – Pajuheshī Dar Bāb-e Mabānī Akhlāqī wa Maʿrifat Shināsāneh Fiqh* (Tehran: Nigāh Muʿāṣir, 1394 SH), 487.
[35] Bāqir al-Ṣadr, I, 31-35.
[36] Ibid., 23.
[37] Muḥammad Ḥusayn al-Nā'īnī, *Fawāid al-Uṣūl*, 4 vols. (Qum: Jamāʿah al-Mudarrisīn, 1418 AH), III, 12.
[38] Baytullah Dīvsālārī, "Barrasi Ishtirāk Aḥkām Bayn ʿĀlim wa Jāhil," in *Pajuhesh-hāyi Fiqh wa Ḥuqūq Islāmī,* no. 7 (Babol: Dānishgāh Azād Islāmī, 1386 SH), 69.

Most non-Shīʿi scholars have not accepted this principle; instead, they adhere to an idea known as al-taṣwīb. This concept states that a jurist's verdict will always be in accordance with reality – i.e., if in a specific instance, a jurist engages in speculation and arrives at a law, then that law is understood to be equivalent to God's legislation. Critics of al-taṣwīb, namely the Imāmī theologians, are proponents of a view known as al-takhṭi'ah. These critics argue that a jurist's views are not infallible and instead, God may allow laws to gain probative force, even when the speculative sources which formed them are not in accordance with reality.

There are four main arguments put forth in the defense of the principle of al-ishtirāk: consensus, a rational argument citing circular reasoning, the absolute nature (*iṭlāq*) of the legal traditions, and the existence of traditions which demand precaution even from those who are unaware of the law. The first argument, that of consensus, is often used in support of this principle (as mentioned earlier in relation to al-Nā'īnī). The idea is that the principle must be upheld due to the nearly unanimous support proffered to it by Shīʿi legal theorists. This reasoning breaks down, however, when one realizes that the principle of al-ishtirāk is not a submissive legal edict, but rather a principle which relies heavily on rational discourse. Āyatullah Borojerdī (d. 1961) critiques the use of consensus in this matter as follows:

> It has become popular amongst the jurists and legal theorists that the invalidity of the jurist's infallibility (al-taṣwīb) is consensual, but this popularity should most definitely not delude you. Rather, it is upon you to refer to the history of the dispute between the view proposing the fallibility of the jurist (al-takhṭi'ah) and al-taṣwīb so that it becomes clear for you that this is a rational issue, not a legally submissive matter in which one can resort to consensus as evidence. The consensus being referred to is the consensus of the Imāmī theologians qua theologians, not a consensus of the jurists and scholars of ḥadīth which is what is probative and binding within the realm of jurisprudence.[39]

Therefore, even if there happens to be a consensus on the principle of al-ishtirāk, this consensus is of the scholars as far as they are deemed to be theologians, not jurists.

The second popular defense for this principle is based on a rational argument. This argument claims that the existence of laws that are only conditioned for one who has knowledge of them is a notion which results in circular reasoning.[40] To illustrate, one may examine the legislation which deems Ṣalāt as obligatory. The proposition that God would restrict its obligation to those who are aware of its obligation is one which results in circular reasoning. This is because it would necessitate that the existence of the law is dependent on one's knowledge of the law, whereas one's knowledge of the law could only exist if there was already a law to begin with.

Al-Ṣadr contests this reasoning, claiming it is an instance of linguistic fallacy where the usage of the word 'law' is not made clear. In this case, 'law' can either be referring to the presence of a divine edict in the realm of permanence, or to the active and applicable dimension of a commandment which

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[39] Ḥusayn-ʿAlī Montaẓarī, *Nihāyah al-Uṣūl,* (Tehran: Manshūrāt al-Tafakkur, 1415 AH), 150.
[40] Muḥammad Riḍā al-Muẓaffar, *Uṣūl al-Fiqh*, 2 vols. (Beirut: Mu'assasah al-Aʿlamī lil-Maṭbūʿāt, 1990), II, 30.

necessitates action. There appears to be no rational impossibility between God's legislation of a law, and His subsequent restriction of its application to those with knowledge of its existence. These two dimensions – a law's existence and its applicability – are independent from one another. The applicability of a law follows its existence, but the existence of a law does not rationally necessitate its applicability. What does appear to be a rational impossibility, however, is for the knowledge of a law being currently applicable to be made a condition for its very applicability. In other words, circular reasoning only results by stating that a law is applicable once one knows it is applicable. On the contrary, if God designates it as a condition that one must know a law exists before it becomes applicable a circular argument is no longer present.[41] This then leaves the possibility open for the applicability of a law to be conditioned to the knowledge of the existence of a law.

Further support for the critique of the rational argument citing circular reasoning can be found in traditions whose prima facie clearly signifies that laws are legislated only for those who are aware of them. One such instance relates to the rulings for praying full or shortened prayers while traveling. In a tradition reported on the authority of Imām Abū Ja'far al-Bāqir, the Imam was asked by two of his companions whether someone who performs four units of prayers instead of two while on a journey must repeat his or her prayers. The Imām replied:

> If the verses (from the Qurān) regarding shortening the prayers had been recited for them and explained and yet they performed four units, then they are to repeat them. However, if they were not recited for them and they did not know about them, then there is no requirement upon them to repeat them.[42]

This and similar traditions clearly convey the point that the rule for repeating prayers that were not shortened while traveling, and thus performed incorrectly, is only applicable for those who are unaware of the law. As the existence of these traditions and their clarity of meaning is widely known, proponents of the rational argument were forced to explain away their meanings in various ways.[43]

The third, and perhaps the most compelling argument defending the principle of al-ishtirāk is the absolute nature of the legal traditions.[44] This argument asserts that when an infallible relays a law without explicitly stating to whom it applies, then it is understood to be applicable to both those who are aware and unaware of it. In legal theory, the probative force of the absolute nature of any evidence is a widely accepted premise; disagreements only occur when determining whether an evidence is absolute or whether it is restricted by another evidence.

Though the argument which establishes the probative force for the absolute nature of an evidence may be theoretically sound, determining whether it can be applied on any given evidence depends on whether or not the speaker is in maqām al-bayān.[45] Maqām al-bayān is a communicative state where, if no restrictions or conditions are mentioned by the speaker – and no evidence exists elsewhere to

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[41] Bāqir al-Ṣadr, I, 334.
[42] Muḥammad bin ʿAlī al-Ṣadūq, *Man Lā Yaḥḍuruhū al-Faqīh,* 4 vols. (Qum: Muʿassasah al-Nashr al-Islāmī, 1413 AH), I, 434.
[43] Al-Muẓaffar, II, 32.
[44] Bāqir al-Ṣadr, I, 24; Dīvsālārī, 67.
[45] Al-Muẓaffar, I, 162.

suggest otherwise – the speaker is to be presumed to be in a state where they are taking into consideration all instances and that their speech will be applicable in every conceivable scenario. One such example can be seen in verse 275 of the second chapter of the Qurān in which God states: "Allah has allowed trade and forbidden usury".[46] This verse prohibits usury without mentioning any restrictions; if it can be proven that God has delivered this prohibition in maqām al-bayān, that He was indeed taking into consideration every possible instance where this law could be applied, it can be argued that every conceivable scenario in which usury is involved is to be considered prohibited.

As far as the premise of al-ishtirāk is concerned, the presumption that the infallible Prophet or one of the Imāms is in this specific communicative state is taken for granted. One of the major challenges of citing the absolute nature of evidence to prove the principle of al-ishtirāk is to convincingly demonstrate that the speaker is in this state. Proving such a matter is extremely difficult, if not nearly impossible; to date, no discussion has been found which addresses this crucial aspect of the premise.

It may be argued that there exists an understanding and practice amongst the common people (*sīrah al-ʿuqalā*) to assume a speaker is in this communicative state unless specified otherwise. This presumption is probative because the practice of the common people is taken to be legally probative.[47] Proponents of this view would argue that if, for example, John asks Alex to respect Mark, then it is reasonable for Alex to assume that John expects everyone who may come into contact with Mark (even those unaware of his request) to respect him." While the reasoning behind this argument can be taken as a possibility, there does not exist any evidence to prove that such a practice of assumed communicative states truly exists.[48]

On the contrary, it can be argued that the practice of the common people is not to assume that individuals are speaking to all conceivable scenarios as is done in maqām al-bayān, but rather to understand them as speaking to specific situations. Applying this to the previous example, if John asks Alex to respect Mark, Alex may assume that this dictate is directed specifically at him, rather than at all those who are unaware of John's request: those who have met Mark, not met Mark, who are from the same city, or from another city – or may come across him in any other conceivable scenario.

The fourth and final argument defending the principle of al-ishtirak is made through narrated traditions themselves. One category of traditions seems to suggest that everyone is expected to ask, learn, and determine what the laws of God are. If this is the case, then it would imply these laws are applicable to everyone, and those unaware of them must seek to determine them. Some have claimed that the existence of such traditions has reached a degree of certainty and therefore, the concept of al-ishtirāk can be accepted as an established principle. Others are a bit more critical, however, arguing that these reports are solitary and thus more speculative in nature.[49]

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[46] Qarāʿī, 65.
[47] ʿAbd al-Aʿlā al-Sabzwārī, *Tahdhīb al-Uṣūl*, 2 vols., (Qum: Muʾassasah al-Manār, 1996), II, 17.
[48] Ḥaider Ḥobbollah, "al-Shakṣīyyah al-Marjaʿīyyah lil-Nabī Bayn al-Rasūlīyyah al-Tablīghīyyah wa al-Dhātīyyah al-Basharīyyah," in *al-Ijtihād wa al-Tajdīd*, 45 (Beirut: Muʾassasah Delta li-Ṭabāʿah wa al-Nashr, 2018), 11.
[49] Al-Nāʾīnī, III, 12.

However, a second category of traditions exists which speaks of observing caution when encountering situations where one is unaware of one's exact legal responsibility. One tradition, transmitted on the authority of Imām Abū Jaʿfar al-Bāqir, says, "Halting at an obscure matter is better than being intruded upon by destruction".[50] Another tradition, reported on the authority of Imām Abū ʿAbdillah al-Ṣādiq, narrates, "The most pious of people is one who halts at an obscure matter".[51] These traditions and those similar to them tend to convey the necessity – or at the very least, preference - of avoiding matters where one's responsibility is not clear. Based on this, one might argue that if laws were only relevant for those who are aware of them, there would be no need for the Imāms to advise caution in matters of doubt and uncertainty.

When taking a closer look, however, it becomes clear that advising precaution in a specific matter does not necessarily imply the existence of a legislated law. The aforementioned reports could very well be cautioning against objective harms or benefits of a certain scenario. While there may be no legal obligation on someone who is unaware of the laws for that specific scenario, this advise may be urging the intellect to be cautious of potential harm. For example, a law may exist which demands all pedestrians of legal age to stop at a red traffic light. This law is subordinate to certain benefits that exist when one follows them, such as avoiding the risk of an accident or death. While a penalty will only apply to those of legal age who break the law, the inherent benefit (and avoided harm) is still applicable to those under the legal age. In other words, precaution may be demanded or encouraged even when there is no applicable law for an individual, as they are still able to be impacted by the benefits and harms of a certain situation.

Traditions which speak about taking precaution can be understood in a similar fashion. In a situation where one is unsure of his or her religious legal responsibility, a simple risk analysis may suggest that it is better to err on the side of caution. Such an act may prevent one from falling into potential harm. Heeding such counsel does not, however, necessitate the existence of a law which is also applicable on an individual who is ignorant of the correct step to take in a specific scenario.

Thus far, it has been demonstrated that the evidence used in the defense of principle of al-ishtirāk is insufficient. However, these critiques simply make it possible for laws to be legislated while conditioning them to knowledge and do not necessarily prove that it is indeed the case. The preceding critiques have solely allowed for the possibility of laws being legislated while conditioned to knowledge. In order to prove that this is truly the case, however, it is necessary to discuss the principle of capability. Most Imāmī legal theorists adhere to the idea that God legislates laws only for those who are capable (*qādir*) of performing them. An individual's capacity to perform a law is taken into account during divine legislation, and is considered one of the greatest conditions for responsibility.

The concept of capacity, and textual evidence supporting its role in conditioning laws, can be found in the Holy Quran. In verse 286 of chapter 2, God says: "Allah does not task any soul beyond its capacity".[52] When applying this statement to divine legislation, it becomes clear that laws can only be

[50] Muḥammad bin Yaʿqūb al-Kulaynī, *al-Kāfī*, 8 vols. (Tehran: Dār al-Kutub al-Islāmiyyah, 1407 AH) I, 50.
[51] Muḥammad bin ʿAlī al-Ṣadūq, *al-Khiṣāl*, 2 vols. (Qum: Jamāʿah al-Mudarrisīn, 1403 AH), I, 16.
[52] Qarāʿī, 68.

enacted for those individuals who are capable of performing them. God, as proven through His own words, would not legislate a law for an individual who does not have the capacity to carry it out.[53]

Additionally, a rational argument may be made in support of the idea that God conditions laws to capability. Proponents of this view state that the wisdom behind God legislating laws lies in His expectation for humans to fulfil them and carry out their responsibilities. If He were to legislate laws for those who were incapable of fulfilling them, this would not only be unwise, but would also be done in vain.[54] Because it would be impossible for an incapable person to fulfil God's law, it would be pointless for that law to be legislated for them.

In a similar vein, while arguing for the detestability of God punishing someone to whom a law was not conveyed and hence was incapable of fulfilling it, al-Nā'īnī explicitly states:

> The mere existence of a law in actuality, while it has not reached the one who is responsible of carrying it out, is not enough for there to be accountability and for (God to have) the right of punishment. This is because the existence of a law, like the absence of it, is unable to motivate and push the will of a servant if the law itself has not reached him and become a matter of knowledge for them.[55]

Though al-Nā'īnī's discussion relates to the idea of divine punishment, it is also applicable to the arena of divine legislation. By his reasoning, until and unless a person has knowledge of the law, there is nothing motivating an individual to move towards it to carry it out. In other words, lacking knowledge of a law – i.e., being ignorant of it or unaware of its existence – is akin to being incapable of fulfilling its commands. Hence according to al-Nā'īnī, it would be detestable for God to punish someone who is ignorant of the law. This rational premise does not suggest such legislation for an incapable person to be a metaphysical impossibility; rather, it uses theological knowledge of God, the All-Wise who does not act in vain, to argue that God would not perform such an action.

Through this one can conclude that God would only legislate laws for those who come to know of them. Legislating a law and making it applicable and relevant even on those who are ignorant of it would have no benefit as an ignorant person will never have any reason or motivation to carry out such a law. Given that the legislation of law by God is so humans can fulfil them, doing so for an ignorant person is a vain act which goes against God's wisdom.

The major challenge posed by reconciliation lays in how the benefits accounted for during divine legislation remain considered when a jurist arrives at an apparent law. After demonstrating the weakness of the principle of al-ishtirāk between one who knows and one who does not know, the least that can be deduced is that God legislates laws for those who attain knowledge regarding them. Those who have exerted effort and are still not able to attain certainty regarding a law are exempt from its application. Such individuals will have to resort to one of many general legal injunctions such as

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[53] Al-Sayyid Abū al-Qāsim Khū'ī, *Fiqh al-Aʿdhār al-Sharʿīyyah wa al-Maṣa'il al-Ṭibbiyyah min Ṣirāṭ al-Najāh*, (Qum: Dār al-Ṣiddiqah al-Shahīdah, 2006), 7.

[54] Al-Sayyid ʿAbd al-Ṣāḥib al-Ḥakīm, *Muntaqa al-Uṣūl*, 7 vols. (Qum: Maktab Āyatullah al-Sayyid Muḥammad al-Ḥusaynī al-Rūḥānī, 1413 AH), II, 369.

[55] Al-Nā'īnī, III, 365.

exemption (*barā'ah*), precaution (*iḥtiyāṭ*) and continuity (*istiṣḥāb*). Essentially, if a jurist does not achieve certainty regarding a law, there is no law legislated for them to begin with; thus, the concern regarding reconciling an actual law with an apparent law ceases to exist.

Critique of a Proposed Solution

As has been made evident, the discussion on benefits and harms in legal theory is a complicated technical endeavour in which various premises and presuppositions must be investigated and reconsidered. Thus far, it has been established that God only legislates laws for those who come to know of them. The remaining inquiry which must be addressed is how it is possible to achieve certainty with respect to such laws – if it is possible at all.

A popular solution offered to this query states that true certainty cannot be achieved; therefore, arriving at speculation suffices. In a paper published with Durham University, Ali-Reza Bhojani establishes the authority of unqualified speculation -- an argument referred to by some legal theorists as dalīl al-insidād.[56] Bhojani uses this concept as a precedent to argue for the preference of moral rational perceptions of benefits and harms to a speculative degree over the apparent meanings of traditions that contradict those perceptions. This paper will offer a brief critique on Bhojani's resort to dalil al-insidād. Subsequently, it will propose a solution which will not only eliminate the need to resort to speculation, but will rather allow one to claim with certainty what the law ought to be in cases of non-ritualistic law.

In order to undermine the dependency on rational speculation, it should be known that the initial first premise underlying dalīl al-insidād is the non-specific knowledge (*al-ʿilm al-ijmālī*) that God legislates extensive religious responsibilities. This premise is understood to be rooted in the notion of comprehensiveness of religion (*shumūliyyah al-dīn)* or the maximalist religious worldview (*dīn ḥadd aktharī*). The maximalist worldview presumes God legislates laws that are subordinate to benefits and harms for each instance in an individual's life. While this remains a predominant view within Muslim scholarship, several scholars in the past two centuries have questioned its validity, heavily critiquing any evidence brought forth in its justification.[57] These critics instead offer a minimalist approach to religion, albeit with significantly different interpretations. What is common amongst them, however, is that there does not exist concrete evidence to suggest God has legislated an actual law for every single instance of human life.

Of the arguments which are presented in favor of the comprehensiveness of religion, perhaps the most popular is a rational premise which states that the intellect cannot conceive of an instance where a law would not be legislated. The intellect logically restricts all events of life to five possibilities. God either

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[56] Ali-Riḍā Bhojani, "Moral Rationalism and Independent rationality as a source of Sharīʿa in Shīʿi uṣūl al-fiqh; In search of an ʿAdliyya reading of Sharīʿa," (PhD diss., Durham University, Durham 2013), 218, accessed April 2, 2018 http://etheses.dur.ac.uk/8449/.

[57] Ḥaider Ḥobbollah, *Shumūl al-Sharīʿah – Buḥūth fī Madayāt al-Marjaʿīyyah al-Qānūniyyah Bayn al-ʿAql wa al-Waḥī* (Beirut: Dār Rawāfid, 2018); Abdulkarim Soroush, *The Expansion of Prophetic Experience: Essays on Historicity, Contingency and Plurality in Religion,* trans. N. Mobasser (Leiden: Brill, 2009), 94; Abū al-Qāsim ʿAlī-Dūst, *Fiqh wa ʿUrf* (Tehran: Sāzmān Intishārāt Pajuheshgah Farhang wa Andīsheh Islāmī, 1394 SH), 346.

legislates a law that is obligatory, prohibited, recommended or detested; if none of these are legislated, then by default there will simply be a law indicating mere permissibility.[58]

However, as pointed out by Ḥobbollah, this argument falls prey to a fallacy similar to the one indicated by al-Sadr in relation to the rational argument and circular reasoning cited earlier. In this case, the fallacy is in the idea that one cannot conceive of an instance where a law is not legislated; such an argument conflates God's knowledge of what a law ought to be, with what God intends to express.[59] There is no rational impossibility in conceptualizing scenarios where God has knowledge of laws that ought to exist, yet He decides not to legislate them and even more so, express them. In fact, as history will show and Islamic scholars will affirm, many laws (across the lives of many Prophets) were gradually expressed over time rather than legislated and expressed by God simultaneously. As there is no rational barrier in conceptualizing a scenario where no law is legislated, it is evident that not all situations call for a law or fall into the proposed legal categories of the intellect.

Some have resorted to the finality of the message of the Prophet Muḥammad as a counter-argument for establishing comprehensiveness of religion; this does not, however, prove their case, as there is no clear necessitation between a Prophet being the final messenger and his message legislating a law for every instance of human life.[60] In fact, it is very plausible for God to have left it to the followers of the last Prophet to engage in intellectual study while taking into consideration the general goals prescribed by the religion to discover or legislate these laws themselves. There is no rational barrier that impedes the possible intent for humans to progress and acquire their own perfection, materially and spiritually, through this route.

The remainder of the evidence for the comprehensiveness of religion and its laws resorts to textual evidence found in the Qurān and the traditions. Scholarly analysis conducted on the subject, however shows that many of these traditions either do not stand academic scrutiny of authenticity, and if they do, much of their content is open to interpretation.[61] Furthermore, there exist a number of traditions which indicate the complete opposite, making a case for a minimalistic view of religion. In order to understand traditions which seem to imply comprehensiveness of religion, one must also consider those traditions which appear to indicate otherwise. While expounding upon and critiquing every textual piece of evidence is beyond the scope of this paper, it is here where the critics of the comprehensiveness of law attempt to lay their framework.

The comprehensiveness of religion is one of the first premises for establishing dalīl al-insidād. Given that this premise is flawed, it stands to reason that the remainder of the argument will not hold true. Bhojani however, argues for its validity, and then puts forth the claim that moral speculative perceptions are probative and can be relied upon to derive law. What he appears to overlook is that scholars who themselves advocated for dalīl al-insidād – most prominently al-Mīrzā al-Qummī(d. 1815) – excluded rational speculation from the probative force of unqualified speculation. This was done by referring to the numerous traditions pointing to the prohibition of making use of rational

[58] Ḥobbollah, *Shumūl al-Sharīʿah*, 56.
[59] Ibid., 57-58.
[60] Ibid., 53.
[61] Ḥobbollah, *Shumūl al-Sharīʿah*, 113, 249; ʿAlī-Dūst, *Fiqh wa ʿUrf*, 346.

conjecture (*qiyās*) in matters of law. Using a rationally perceived moral perception to deduce law would be an instance of speculative conjecture which proponents would argue has been condemned and does not hold probativity. Any argument resorting to a rationally speculative premise can be demonstrated as follows.

Inductively one may come to the realization – whether to a degree of certainty or speculation – that within Islamic textual sources a certain number of acts whose harms and injustice can be rationally perceived, such as murder or theft, have been prohibited. While these textual sources may be solitary and speculative, their probative force can be established through dalīl al-insidād. In a different instance, where a religious textual source indicates the permissibility of a certain act, such as marriage to an underage child, one may speculatively perceive it to be harmful and unjust viz-a-viz the intellect. In this case, one may be tempted to utilize speculative rational perception as follows:

> *Premise 1:* This law is rationally – and speculatively – perceived as unjust
> *Premise 2:* All laws rationally perceived as unjust have been legislated as prohibited by God
> *Conclusion:* This law has been legislated as prohibited by God

The source of the first premise is presumed to be solely the intellect at the degree of speculation, not certainty. The second premise is rooted in induction, but it is believed that it will lead to a high degree of assurance, if not psychological certainty, which is what is being presumed is relevant in legal theory.[62] Nevertheless, as the conclusion follows the lower of the two premises, it remains speculative. This is an instance of rational conjecture which has been outlawed. This is due to the fact that the cause of prohibition for many laws whose detestability is perceived initially through induction may not have been explicitly mentioned in the text. It is for this reason that, after engaging in a discussion on rational conjecture and reaching a unique understanding, al-Qummī writes:

> As a result, that in which the intellect is not independent in perceiving the wisdom and benefits to a degree of certainty, it is not allowed to make a judgement stating that the benefits and wisdom in these acts are matters that the apparent delusions have perceived.[63]

To solidify this conclusion, he adds:

> Rational conjecture which has been prohibited in the traditions is a prohibition of legislation, innovation, and independently making judgements based on what the weak imagination and silly delusions understand, because those who carry out rational conjecture give a verdict by simply looking at the cause as they have understood it to be, which is why we only act based on a cause that has been explicitly mentioned in a text or has been pointed out elsewhere.[64]

As can be seen, relying on dalīl al-insidād to establish the probative force of moral speculative perceptions of benefits and harms is not an idea which works even in accordance with proponents of the view.

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[62] ʿAlī Riḍā Amīnī, Muḥammad Riḍā Niyākī, "Mafhūm wa Māhiyat Iṭmināan Dar ʿIlm Uṣūl," in *Muṭāliʿāt Fiqh wa Ḥuqūq-i Islāmī*, 5, no. 8 (Semnan: Intishārāt Dānishgāh Semnan, 1392 SH), 13.
[63] Al-Mīrzā al-Qummī, *al-Qawānīn al-Muḥkamāh fī al-Uṣūl,* 4 vols. (Qum: Iḥyā al-Kutub al-Islāmiyyah, 1430 AH), IV, 297.
[64] Ibid.

In the criticism laid out against dalīl al-insidād, it has been argued that there is no convincing evidence for a maximalist religious worldview. One of the major implications of a minimalist religious worldview is that laws do not enjoy absoluteness as far as time and place are concerned unless proven otherwise. This is primarily true for non-ritualistic laws whose forms are rooted in the practice of the common people, and in which there is nothing inherent preventing their forms to be altered as long as the wisdom behind them continues to be fulfilled.

Proposed Solution

When presenting a solution to the usage of the principle of benefits and harms in the derivation of law, it is of utmost importance to appreciate the highly assistive sources that comprise the Islamic textual heritage. It contains enough substance, particularly when accompanied by rational pursuits, for jurists to arrive at psychological certainty with respect to the general goals, wisdom and purposes of different non-ritualistic acts.[65] This becomes more apparent when studying traditions or verses concerning non-ritualistic laws, as they explicitly mention or implicitly allude to their underlying wisdom. If a jurist is able to achieve certainty regarding the benefits and harms of a situation, he or she is able to lay the foundation for a legislative process which corroborates external reality.

The manner in which a jurist may attain knowledge of the wisdom behind an act or institution differs from one subject matter to another. For the purposes of this paper, various approaches will be discussed using the example mentioned in the introduction – the law which permits a father to marry off his underage daughter as he sees fit. As this law is subject to jurisprudential discussion and dispute,[66] for the objectives of this argument it will be assumed that a father has such a right over his daughter to begin with. In this example, the general consensus of classical and contemporary traditional jurists does not reflect the laws legislated by the Iranian Expediency Discernment Council; the former have drawn up their argument based on traditions which permit a male guardian to marry off his underage daughter sans third-party involvement.

The aforementioned ruling is understood to be an apparent law whose probative force has been established as per religious traditions; it is postulated as being universally applicable across time and space. Its practical application is then left in the hands of its followers. In Iran, an expediency discernment council ensures such rulings are not abused; elsewhere, no such mechanism exists. In non-Islamic countries, it may be illegal to conduct such a marriage based on national civil code; whether such laws are religiously binding or hold value for the followers of an Islamic jurisconsult is a subject of discussion outside the scope of this paper.

The argument being made via the cited example is not an attempt to arrive at a conclusion regarding what the law ought to be; such a task is much too extensive, as it will be illustrated shortly. Instead,

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[65] Abū al-Qāsim ʿAlī-Dūst, *Fiqh wa Maṣlaḥat,* (Tehran: Sāzmān Intishārāt Pajuheshgah Farhang wa Andīsheh Islāmī, 1390 SH), 479.

[66] Vinay Khetia, "The Guardians of the Islamic Marriage Contract and the Search for Agency in Twelver Shiʿa jurisprudence," in Shah, Z (ed) *Iftā' and Fatwa in the Muslim World and the West* (Herndon: International Institute of Islamic Thought, 2014), 148.

the preliminaries necessary for arriving at such legislation will be outlined. To begin with, it must be acknowledged that marriage is a case of a non-ritualistic law. More specifically, it is a case of contractual law which impacts the involved individuals, their families, and society at large. Marriage enjoys the previously mentioned qualities of non-ritualistic law – its conception predates the teachings of Prophet Muhammad, and it does not require the intention of attaining nearness to God to be considered valid. In order to achieve certainty regarding the general wisdom behind marriage – as well as to determine whether certain benefits and harms are present in the current example – three approaches will be utilized. First, a referral to the practice of common people will be made; second, an inductive approach to religious texts will employed; and third, those sciences specifically developed for the study of humans and society will be consulted.

The first approach, involving a brief examination of the institution of marriage, reveals that it has long been a practice of the common people -- existing prior to the advent of Prophet Muhammad. Practices of the common people are defined as understandings which remain universally consistent amongst people of all religions, ethnicities, geographies, and times.[67] Reasons behind the inception of such practices may vary. In the case of marriage in particular, motivations may range from the human need to fulfil sexual desires, to attain love, to seek companionship and intimacy, or to procreate and establish a family. To ensure that such objectives are attained, it is understood that the two individuals involved must be compatible. The dynamics and variables which dictate compatibility may differ from one place to another, yet its necessity is generally understood.

The second step involves an inductive study of the numerous Qurānic verses and religious traditions on the subject of marriage, sifting for common themes which may indicate the causes and wisdom behind its practice. An exhaustive reading of such traditions reconfirms many of the notions underlying the practice of the common people – such as procreation and fulfilling sexual desires.[68] When viewed independently, the specific content of some of these reports may be speculative and not probative; collectively, however, they portray marriage as a sacred practice whose institution should not be taken lightly. One tradition goes as far as signifying the importance of a marriage based in love, cautioning that young children simply given into marriage may fail to later develop loving relationships.[69] The examination of these texts reveals certain benefits and goals of marriage – benefits and goals to which the union of marriage is subordinate.

The third step incorporates the consideration of sciences specifically developed to study humans and society. As mentioned earlier, an important quality of non-ritualistic law is the predominance of the worldly dimension over the metaphysical. Such a law does not entail a submissive act whose benefits and harms are imperceptible. In the case of an underage child, particularly a female, it is the responsibility of a jurist to determine whether such a union remains subordinate to the wisdom behind marriage in the current age. In order to determine whether this is the case in majority of cases, it would require the knowledge of how human biology, physiology, psychology, and social structures have changed over the centuries and across geographies. Additionally, the jurist must be able to understand

[67] Muḥammad Taqī Akbarnijād, "Ḥujjiyyat-i Dhāti Banā-hāyi ʿUqalāī wa Taʾthīr Ān Dar Fiqh wa Uṣūl," in *Kāwishī Nou Dar Fiqh*, 17, no. 64 (Qum: Daftar Tablīghāt Islāmī Ḥawzeh ʿIlmiyyeh, 1389 SH), 119.
[68] Al-Kulaynī, IV, 333, 339, 347, 353.
[69] Ibid., 398.

the implication of such changes on current societal heuristics and child development. An understanding of child abuse and maltreatment is a necessity for evaluating the soundness of underage marriage. Prior to any legislation, the benefits and harms – or lack thereof – which accompany such relationships must be thoroughly investigated.

It has been famously argued by Iranian philosopher Muḥammad Shabistarī that jurists are at the mercy of disciplines outside the scope of their expertise, as such knowledge directly impacts their rulings.[70] This idea becomes increasingly evident when delving into the third approach. Many of the propositions which must be understood to a degree of certainty have nothing to do with legal theory or jurisprudence per se. Rather, they concern fields of study such as the natural sciences, psychology, or sociology.

Once a jurist reliably acquires an understanding of the relevant disciplines, he or she is able to determine whether a law's ratification will primarily result in benefit or harm. In the scenario at hand, once the benefits and harms of an underage marriage are weighed, a jurist becomes well within his or her right as a lawmaker to issue a verdict permitting or prohibiting its enactment. As societal studies vary across geographies, the benefits and harms determined by a jurist in one location do not stand as an absolute ruling for all followers of the original law. Accordingly, such expectations must not be thrust upon jurisconsults in one part of the world by followers in another.

An analysis of the practices of common people, an inductive approach to textual evidence, and rational conclusions obtained from the study of sciences outside of law – must all be taken into consideration before mandating non-ritualistic law. If, after working through these approaches, a jurist is unable to gather enough proof to determine the wisdom behind an act with certainty, and the external sciences do not provide conclusive evidence regarding the benefits and harms of a practice, a jurist is left with no choice but to revert to an appropriate probative legal injunction and avoid legislating a law without the appropriate knowledge.

Conclusion

The principle which dictates the subordination of law to benefits and harms distinguishes Imāmī Shīʿi legal theory from other Islamic schools of legal thought. A major issue which accompanies this principle is its relation to the derivation of apparent law, particularly that which is non-ritualistic and whose wisdom is able to be perceived. Many scholars have attempted to reconcile the benefits and harms perceived in apparent law versus those considered in divine legislation by presuming that all laws are applicable both to those who are aware and unaware of them. Such an argument has been proven to be flawed. Instead, it has been demonstrated that laws can only be legislated for those who come to know of them with certainty. This conclusion renders the discussion on reconciliation between real and apparent laws and their associated benefits and harms to be irrelevant.

This paper has proven that knowledge is a condition for the applicability of a law; as a result, an individual must make every effort to attain it. This proves a daunting task if one adheres to a

[70] Muḥammad Mujtahid Shabistarī, *Hermeneutic, Kitab wa Sunnat* (Tehran: Ṭarḥ Nau, 1381 SH), 46-47.

maximalist reading of religion and considers religious law to be exhaustive. As has been discussed, however, such a reading is lacking, for no conclusive evidence exists to indicate that God has legislated specific laws for every instance of human life. Rather, evidence exists to suggest otherwise. It appears that God has left it to humanity to employ textual evidence and rationality to discover the wisdom behind certain institutions – and, as the nature of law necessitates, to then legislate for specific contexts. This understanding solidifies the relevance of the principle of laws being subordinate to benefits and harms in every instance in which non-ritualistic law is deduced by jurists.

This conclusion will necessitate the heavy use of the principle in question -- al-aḥkām tābiʿah lil-maṣāliḥ wa al-mafāsid -- in the legislative process. Despite this, many situations will remain where determining the benefits and harms of a situation will fall outside the scope of legal theory and jurisprudence. Further analysis is crucial for understanding how the present system of ijtihād and derivation of law can change or expand in order to accommodate such research. A delineation of what the deduction process would look like in such cases is much-needed. While such an endeavour is outside the scope of this paper, it is a project which is worthy of further research and analysis.