

## The Conflict between the Actual and Apparent Regulations – Part 2: The Solution of “The Existential Framework”

This is the second of two papers addressing ‘the problem of conflict between the actual and apparent regulations’. The first paper defined the problem of how the existence of the apparent regulation and its corresponding ‘actual’ counterpart necessitates the simultaneous existence of two sets of theoretical criteria in the mind of God. It presented the fundamental assumptions of the fallibilist tradition and analysed their resolutions, and it demonstrated how the infallibilist tradition has also been unable to resolve the problem.

This paper begins by providing a summary of the first paper. It is followed by a critique of the fundamental ontological assumption at the core of both the fallibilist and infallibilist traditions, which is the root of ‘the problem of the conflict between the apparent and actual regulations’: ‘the assumption of “fixed” ontology’. Together with this, arguments and justifications are given for its opposite – ‘the assumption of “dynamic” ontology’, which is the nature of reality espoused by Muslim Philosophers. It then expounds other principles of existence, such as ‘the existential property of growth’, and demonstrates that the nature of Sharia regulations is “dynamic” because of ‘existential flux’; hence, they are in need of constant monitoring to ensure the regulations continue to be ‘optimal’ for the growth of the individual and collectivity.

Accordingly, the regulation is conceived of as a ‘bipartite’ consideration (*i’tibār*), a composite of ‘essence’ and ‘form’. It then delineates the epistemological deliberations and hermeneutical precepts of a new “existential” methodology for the extrapolation of Sharia regulations from its evidences. Examples are given to justify the dynamic nature of regulations and demonstrate the methodology of “the existential framework” in action. Finally, this paper re-evaluates the traditional typology of evidences and the issue of restitution, and it offers a substantive modification to the categories of fiqh, from the perspective of “the existential framework”.

Throughout, the paper demonstrates that it is only in light of this “new” assumption of “dynamic” ontology, and the ensuing epistemological and hermeneutical revisions, that ‘the problem of conflict between the actual and apparent regulations’ is realised as being a non-sequitur.<sup>1</sup>

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<sup>1</sup> Kindly note the following English translations of Arabic terminologies employed in this paper:

- a. The word ‘factuality’, and the expressions ‘the realm of factuality’ and ‘the mind of God’, signify *al-wāqī’* or *nafs al-amr*.
- b. The term ‘actuality’ refers to the sense-perceived reality in a given moment and place.
- c. The expressions ‘the regulation in factuality’, ‘the regulation in the mind of God’, ‘the intent of God’ or ‘the actual’ signify *al-wāqī’*.
- d. The expression *al-ḥukm al-wāqī’* is used exclusively to refer to the linguistic form of the actual regulation (*al-wāqī’* in part c).

### Summary thus far

Sharia regulations are value-based, which means they are formulated in light of the meta-legal considerations of benefit and harm. As such, they are instrumental or ‘means’ to securing those values, which are their ends. By adhering to them, humans fulfil their purpose, which is to accrue benefit and refrain from harm. The problem arises when ‘the Sharia-specified means’ are utilised to derive regulations because such means are unable to guarantee whether the yielded regulations are ‘the regulations in the mind of God’. Regulations of this sort are termed ‘apparent’ regulations due to the real possibility of inaccuracy inherent within them. This possibility of error results in the uncertainty of whether the desired objectives of God have been met because if the apparent regulation does not correspond to the actual regulation in the mind of God, then humans will have forfeited God’s desired objectives. Thus, God’s sanctioning of the apparent regulation, which by definition has this innate possibility of error, is tantamount to the theologically unacceptable scenario of Him potentially sanctioning harm, and hence leading astray.

Therefore, the apparent regulation and its sanctioning gives rise to the following issues: its innate possibility of error, God’s condoning of something having the potential to misguide His creation, and ‘the problem of the simultaneous existence of two sets of theoretical criteria’. The first section of this paper analysed the three solutions of the fallibilist camp. Each sought to justify the sanctioning of ‘the Sharia-specified means’ by trying to resolve ‘the problem of the simultaneous existence of two sets of theoretical criteria’. All three solutions were unsatisfactory. Şadr quite rightly concludes that Naʿīnī’s solution is merely a descriptive clarification of the juristic praxis of the apparent evidences at the level of the formulation of the regulation. It dismissed, and so failed to address, the necessary theoretical conflict entailed by its existence at the level of the mind of God. Regarding Khūʿī’s solution, Şadr admits it logically solves the conflict, however it renders the apparent regulation as being devoid of the values of harm and benefit. Analysis of Şadr’s own solution reveals that it too is merely descriptive in spite of its novelty and brilliance.

Since the possibility of error is part of the nature of the apparent regulation, Şadr is left with no choice but to regard God’s sanctioning of the apparent regulation as utilitarian. God sanctions the ‘Sharia-specified means’ based on the consideration of it yielding the greatest overall benefit and least overall harm; that is, God’s sanctioning of the ‘apparent’ is made in light of the consideration that relatively few instances of the ‘apparent’ will conflict with ‘the actual’ and the vast majority will not. It is evident, therefore, that in spite of Şadr’s attempt to address and solve the conflict, the initial question still remains: Is it logically possible for God to ordain the apparent regulations? Can God *knowingly* sanction a means having the potential to cause harm, albeit the ‘least’ harm, to his creatures and hence wilfully lead them astray?

### Assumption of Fixed Ontology and Epistemic Accuracy in the Fallibilist Discourse

The fallibilist understanding of Sharia regulations is built upon two assumptions: The first is that God intends (*al-irāda*) for humans to adopt behaviours on the basis of His knowledge of the relations of things in terms of their benefits and harms (*al-milāk*). This intention confers the status of ‘actual’ (*wāqīʿī*) upon the knowledge of the relations of things in ‘the realm of factuality’ (*al-wāqīʿi*) or the mind of God. The second assumption is that these intended behaviours were conveyed to the Arabs as regulations (*al-ibrāz*) during the seventh century by revelation and the Sunna of the Prophet Muhammad, and that they are universally applicable in their literal capacity to all times and places.<sup>2</sup> The truth of universal applicability of the scriptural/prophetic regulations to all times and places in the second assumption is dependent upon a presumption about the first, namely, that ‘the realm of factuality’ (*al-wāqīʿi*) is fixed and unchanging. If this assumption of the unchangeability of ‘the realm of factuality’ is sound, then it follows that a literalistic appreciation of the evidences belonging to category 1a will adequately supply the actual regulations, and those belonging to 1b will disclose the actual regulations in an ‘apparent’ capacity.

The first assumption is the origin of the *uṣūlī* dichotomy of the actual and apparent regulations. The assertion of the existence of regulations in the mind of God in the first assumption necessitates that a distinction be made between God’s regulations and human knowledge of God’s regulations. This is because human knowledge of God’s regulation is often not ‘certain’ or ‘definite’; hence it is designated as ‘apparent’ in such cases due to the possibility of it not corresponding with its ‘actual’ counterpart in the mind of God. The second assumption, which is predicated upon the first and the supposition of a fixed state of factuality, is the root of the problem of God’s sanctioning the apparent regulation. This will be made clear in due course. However, if it is assumed, for argument’s sake, that the supposition of a fixed state of factuality is sound, then one has no option other than to accept Ṣadr’s utilitarian-based explanation/justification of the conflict between the actual and apparent regulations together with its theological implications.

Evidently, the fallibilist presumption that actual regulations were communicated to the Arabs of the seventh century is verified by the fact that the Qur’ān conveys them explicitly. Additionally, the fallibilists must be commended for appreciating the fact that ‘the principality of conventional word-meaning intentionality’ (*aṣālat al-ḏuhūr*) underlies all linguistic communication including

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<sup>2</sup> Fallibilists defend this assumption on the basis of their readings of certain ḥadīths, for instance see ḥadīth number 19 in Al-Kulaynī, Muḥammad bin Ya’qūb. 2007. *Uṣūl al-Kāfi*. Beirut: Manshūrāt al-Fajr. 1: 32 (section *Bāb al-Bid’ wa al-Ra’y wa al-Maqāyīs*); and see *ibid.* 35-6 (section *Bāb al-Radd ilā al-Kitāb wa al-Sunna wa anna-hu laysa Shay’ min al-Ḥalāl wa al-Ḥarām wa Jamī’ mā Yaḥtāju al-Nās ilayhi illā wa qad Jā’a fihī Kitāb wa Sunna*). Also see Taha, Mahmoud Mohamed. 1996. *The Second Message of Islam*. New York: Syracuse University Press. 39.

the Legislator's conveyance of actual regulations and the audiences understanding of them. Thus, the epistemic and hermeneutical deliberations regarding 'the principality of conventional word-meaning intentionality' within their legal theory is sound and justified.<sup>3</sup> However, their assumption of the perpetually fixed state of 'the actual' (*al-wāqī'ī*) is highly dubious and counter-intuitive. The stability, or flux, of 'the actual' is contingent upon whether its corresponding component in factuality (*wāqī'*) is constant or in flux. This is because the constitution of 'the actual' qua 'actual' is merely God's intention for a particular component in factuality to be adhered to. Hence, 'the actual' in essence is merely God's intention for the adherence of factual relations. Therefore, if the relations of things in factuality are constant, then the regulations in actuality will be perpetually fixed. On the other hand, if the relations in factuality are subject to change, then the regulations in the mind of God (*wāqī'ī*) will be in a state of flux. Thus, if it can be demonstrated that the realm of factuality (*wāqī'*) is in a state of flux (that is, the relations of things are fluctuating due to the dynamic nature of existence), then the understanding of the actual regulation would be substantively modified. This, in turn, would resolve, or rather dissolve, the conflict between the actual and apparent regulations.

The relations of things are stable and unchangeable *only* if viewed (1) in terms of mathematical constructions and (2) from the perspective of a few laws of logic pertaining to the logical relations between concepts.<sup>4</sup> Otherwise, the unchangeability of the relations of things is not to be found anywhere in 'sense-perceived' existence. Indeed, the nature of existence is to be individuated and dynamic at the level of every existent entity.<sup>5</sup> In the case of regulations, the relations of things are considered in terms of benefit and harm. Unlike mathematical constructions and the laws of logic, 'benefit' and 'harm' are existential features and, as such, are determined through their given existential contexts. Therefore, 'the actual' (*al-wāqī'ī*) (which is God's intention for the adoption of a behaviour based on the relations of things in terms of benefit and harm in factuality) is always contextually bound and ultimately contingent upon the nature of existence.

It is necessary for a legal framework to take such existential features into account so that it generates 'existentially' appropriate regulations. It must appreciate that existence has sequential causal priority (that is, non-spatio-temporal causal priority) over the factual statuses of the relations of things, which in turn have sequential causal priority over 'the actual'. Therefore, since

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<sup>3</sup> For instance, see Al-Muẓaffar, Muḥammad Riḍā. 2004. *Uṣūl al-Fiqh*. Qum: Intishārāt Ismā'īliyyān. 1: 30-171 and 2: 113-131.

<sup>4</sup> This is clearly discerned from Hume and Kant's analyses of judgements (or propositions) and the principle of 'substantial motion' in Islamic Philosophy. See Hume, David. 1993. *An Enquiry Concerning Human Understanding*. Indianapolis/Cambridge: Hackett Publishing Company. 15-20; Kant, Immanuel. 2003. *Critique of Pure Reason*. New York: Dover Publications Inc. 4-12; and Ṭabāṭabā'ī, Muḥammad Husayn. 2008. *Bidāya al-Ḥikma*. Qum: Mu'assisa al-Nahr al-Islāmī. 151-169.

<sup>5</sup> *Ibid.*

the nature of existence is to be entified and dynamic, it necessitates that the natures of the factual statuses of the relations of things and ‘the actual’ be dynamic and relative. This is evinced by the Qur’ānic phenomenon of the abrogation of regulations; that is, the phenomenon of the supersession of one actual regulation by another presupposes the dynamic, relative and existentially contingent nature of ‘the actual’.<sup>6</sup> It would be a misconception to assume that the dynamic and entified nature of existence entails the nullification of the universality of universal normative principles.<sup>7</sup> On the contrary, in the existential framework, universal normative principles are shown to be grounded in certain existential properties.<sup>8</sup> However, the entified and dynamic nature of existence does mean that the formulation of norms on the basis of those principles will be different in differing existential contexts. In fact, it is imperative that norms be formulated differently in different existential contexts in order to safeguard those principles.

Acceptance of a fluctuating factuality restricts the extent to which the literal-conventional<sup>9</sup> interpretations of the norms of the Qur’ān and Prophet qualify as regulations. The fluctuations in factuality since the period of revelation mean that the literal-conventional interpretations of type 1 evidences only qualify as regulations for the contexts of revelation and other such similar contexts. The regulations supplied by the Prophet can only be relevant for contexts similar to those of revelation because the factuality of the relations of things is still the same. Outside of these contexts, factuality has changed, and so the actual regulations in the mind of God will necessarily be different. Here, the ability of the literal-conventional hermeneutic to convey the regulations of the Prophetic period will have no relevance.

Acceptance of a fluctuating factuality also dissolves the need to reconcile the conflict between the actual and apparent regulations. Obviously, as factuality changes, so must the actual regulation. This means that all actual regulations in the mind of God are unknowable, other than those revealed to the Prophet Muhammad, which were existentially contingent upon the contexts of seventh century Arabia. In new existential contexts (that is, contexts different to those of the revelatory period), there are existentially appropriate actual regulations in the mind of God that He has not revealed to humankind. Hence, legislators have no recourse to them. The literal-conventional hermeneutic of the Qur’ān and Sunna only sheds light on the actual regulations of the contexts of the revelatory period. However, this does not mean that they do

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<sup>6</sup> It should be noted that assenting to the truth of this entails the following corollary: The nature of existence itself has been the cause of the plurality of the religious regulative systems that have existed throughout the history of humankind. Within the Abrahamic Faiths, every successive Sharia regulative system supplied new regulations in accordance with their respective existential contexts.

<sup>7</sup> Examples of universal normative principles are ‘the moral imperative of non-deception during transactions’, the harmful nature of certain consumables, or the rights of individuals.

<sup>8</sup> The notion of ‘existential properties’ will be elucidated in due course.

<sup>9</sup> ‘Literal-conventional’ is shorthand for ‘the principiality of conventional word-meaning intentionality’ (*aṣālat al-zuhūr*).

not have a role in the juristic process. On the contrary, they play a fundamental role, as will be elucidated in due course. Thus, in the periods between the different revelations of God and after the revelation to the Prophet Muhammad (and the era of the Ma'şūms), God *intends* for His actual regulations to be unknowable for the sake of human autonomy and growth.

Finally, it must be emphasised that the existential framework – which will be introduced and explicated in the next section – is essentially the insertion of ‘the principiality of the dynamic nature of the relations of things’ (*aşālat al-ḥaraka fī nisab bayna al-ashyā'* or *aşālat al-ḥaraka al-ashyā'īyya*) within the ontology of the uşūl al-fiqh discourse and theory. There will be modifications to the traditional understanding of the categories of the actual and apparent regulations. However, the epistemic and hermeneutic model utilised in the understanding of the evidences carrying regulations will remain unaffected on the whole; indeed, it forms part of the existential hermeneutical method, as will be discussed.<sup>10</sup>

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<sup>10</sup> Having read thus far, the reader may assume that the existential framework is a type of reconciliation between fallibilism and infallibilism as envisaged by Shaykh al-Anṣārī. However, this would not be accurate due to the fact that the ‘fallibilist/infallibilist’ dichotomy is premised on the ontology of a fixed factuality.

## Overview of the Sharia Regulative System within the Existential Framework

A central tenet of the existential framework is the *predetermined* or ‘existential’ unknowability of the actual regulations outside of the revelatory context. This means *all* Sharia evidences, irrespective of which category of the typology of evidences they belong to, are probable means to the actual regulations outside of their contexts. As such, all derived regulations in the existential framework are probable, and hence classify as ‘apparent’.<sup>11</sup> Having understood the thesis of ‘the *existential unknowability* of the actual regulations outside of the revelatory context’, the reader may be inclined to place the existential framework within the infallibilist camp. However, it must be remembered that the ‘fallibilist/infallibilist’ dichotomy is itself premised on the assumption that actual regulations are based on a fixed factuality, whereas the existential framework asserts that factuality is in perpetual flux. Therefore, the existential framework belongs to neither camp. However, it does benefit from both camps’ deliberations of a) the nature of regulations, and b) the justifications for the theoretical criteria of regulations.

At this point, it is necessary to discuss the philosophical foundations underpinning the derivation process in the existential framework. The keystones of the existential framework are ‘evolutionary motion’ (that is, the motion of a thing from a state of potentiality to a state of actuality) and ‘the individuation of existence at every level of entified existence’. These cause relativity within both the vertical and horizontal axes of existence which, in turn, result in the dynamic and mutable nature of regulations.<sup>12</sup> There are three assumptions here, of which the first two are fundamental:

- a) Every existent entity in this world is individuated, that is, every instance of existence is an individual. As such, there are no universals in existence. Only the numerical one exists in the world beyond human thought.
- b) The nature of all material entities is to be in a state of constant flux. This state is one of growth in the physical, mental and spiritual aspects of every instance of existence.<sup>13</sup> The

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<sup>11</sup> The meaning of the word ‘apparent’ in the existential framework differs from its meaning in the fallibilist tradition. In the latter, ‘the apparent regulation’ signifies its probable correspondence to the ‘actual’ as it would have been revealed or known to the Prophet. Whereas in the existential framework, predetermined ‘existential’ unknowability of ‘the actual’ beyond the contexts of revelation means that there can never be certainty of the correspondence between the human formulations of regulations and those in the mind of God in terms of their linguistic formulations, and hence they are ‘apparent’. It should be noted here that, in the existential framework, correspondence is possible in terms of *milāk* and *irāda*, as will be discussed in the paper.

<sup>12</sup> See Shīrwānī, ‘Alī. 2006. *Taḥrīr al-Asfār li-Mawlā Ṣadr al-Dīn al-Shirāzī*. Qum: Markaz Jahānī ‘Ulūm Islāmī. 2: 85-91; and Ṭabāṭabā‘ī, Muḥammad Husayn. 2008. *Bidāya al-Ḥikma*. Qum: Mu’assisa al-Nahr al-Islāmī. 151-169.

<sup>13</sup> Based on the behaviour of sub-atomic particles in quantum mechanics, Western “materialist” philosophers of mind are beginning to concede to the fact that all atoms have their own “minds” or “consciousnesses”. See Nagel, Thomas. 2012. *Mind and Cosmos: Why the Materialist Neo-Darwinian Conception of Nature is Almost Certainly False*.

growth of an entity is a directed and continuous movement from a state of potentiality to a state of actuality. In humans, 'the mental' refers to the aspect of the mind, consciousness or soul pertaining to the domain of morality and ethics, and 'the spiritual' refers to the aspect of the mind, consciousness or soul pertaining to the domain of the intellect or spirit. 'The vertical axis' refers to the constant flux and growth in these three aspects of the being of every individuated entity.

- c) Human beings exist alongside each other in communities that are in a state of constant flux. 'The horizontal axis' refers to growth in the physical, mental and spiritual aspects of the collective being of every group of people.

Thus, there are two types of relativities:

- a) Relativity in the vertical axis refers to the differences within the physical, mental and spiritual aspects of an individuated entity when it is compared to itself in the past or future. Hence, there is relativity within the three aspects of the being of each individuated entity.
- b) Relativity in the horizontal axis refers to the differences in the physical, mental and spiritual aspects of the collective being of a group of people when compared to other groups. These three aspects of the being of every collectivity<sup>14</sup> are growing at different rates in relation to the aspects of the other collectivities. Thus, there is relativity among different communities in terms of each one's respective progression when compared to others. Since such differences in growth are perceived by virtue of comparing different collectivities with each other at any given point in time, they are said to exist at the horizontal level of existence.

Recall that existence has sequential causal priority (that is, non-spatio-temporal causal priority) over the realm of factuality which in turn has sequential causal priority over regulations. Since 'growth' is a property of existence, it necessitates the fluctuation of the relations of things in factuality and, in turn, the dynamism and mutability of regulations. As 'growth' manifests, there is a corresponding fluctuation in factuality resulting in an actual regulation congruent with that manifested growth-change. Adherence to this new regulation in turn facilitates further optimal existential growth in the individual and collectivity. Accordingly, 'the existential property of growth' is the cause of the fluctuating factual statuses of the relations of things, and hence it is the 'final' cause of every regulation; in other words, it is both the basis and end of the meta-legal values of benefit and harm, or the theoretical criteria in the mind of God.

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USA: Oxford University Press; and Strawson, Galen. "Realistic Monism: Why Physicalism Entails Panpsychism." *Journal of consciousness studies* 13, no. 10-11 (2006): 3-31.

<sup>14</sup> 'Collectivity' refers to every type of body of individuals. Thus, it can refer to the family, community, society, nation or humankind at large.

To summarise thus far, the existential relativity in individuals and communities caused by existential evolutionary motion or ‘the existential property of growth’ necessitates a) the dynamic and mutable nature of regulations, which gives them b) the ability to be congruent with the fluctuating existential state of individuals and communities, so that c) they are able to facilitate further optimal growth of both. Simply put, existential relativity means that regulations will inevitably change in actuality in accordance with differing existential contexts so that optimal growth is maintained.

Therefore, it is necessary for the derived regulations of the legist to be congruent with and facilitate the growth of individuals and communities because the only objective of the Sharia regulations is to assist in the growth process of the individual and collectivity (that is, the family, community, society and humankind). Since existential growth is both ‘formative of’ and ‘purposive in’ regulations, the ‘existential property of growth’ is termed as ‘the *spirit* of the regulation’ (*rūḥ al-ḥukm*). Ṣadr seems to be the first within the fallibilist tradition to employ the expression *rūḥ al-ḥukm* to refer to ‘the theoretical criterion (*al-milāk*) of a particular factual relation’ and ‘God’s intention (*al-irāda*) for that factual relation to be adopted by humans’.<sup>15</sup>

In the existential framework, ‘the theoretical criterion (*al-milāk*) of a particular behaviour’ and ‘the intention (*al-irāda*) for its adoption’ constitute the ‘essence’ or ‘spirit’ of the regulation, or ‘the particular desired growth property of the regulation’ (*al-rūḥ al-khāṣṣ lil-ḥukm*). Whereas the linguistic formulation of a given regulation, which is derived from Sharia texts, is ‘the form of the regulation’ (*ṣūrah al-ḥukm*). The ‘forms’ of the regulations are the extensions (*maṣādīq*) of the desired ‘essences’ of the regulations. The idea of essence (*rūḥ*) is a distinctive feature of the existential framework setting it apart from both fallibilism and infallibilism. For while both the traditional methodologies focus on the accuracy of the ‘form’ of the regulation (*ṣūrah al-ḥukm*) and hence are formalistic (*ṣūrī/ṣuwarī*), the existential framework is ‘essence-based’ (*rūḥī*). It focuses on what ‘the forms’ are conveying in terms of their particular growth properties, and it endeavours to secure those properties in the derivation of subsequent rulings in differing contexts.

The particular desired growth properties of regulations (*al-arwāḥ al-khāṣṣa lil-aḥkām*) are uncovered by analysing the evidences yielding different regulations for the same behaviour in differing contexts; that is, the uncovering of the essence entails the analysis of the different regulative forms (*ṣuwar al-aḥkām*) of the behaviour together with their respective evidences. This discloses the primary facet (*al-jiha al-awwaliyya*) and secondary facet (*al-jiha al-thānawīya*) of the regulations. The former is ‘the particular desired growth property of a regulation’ (*al-rūḥ*

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<sup>15</sup> Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ‘Ilm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 1: 176-7.

*al-khāṣṣa lil-ḥukm*), or its ‘essence’. It is always the main requirement of the regulation, and at times it is the minimum requirement. The secondary facet of a regulation refers to its formal aspects often conveying ‘the best practice’ for a particular context; that is, ‘the best practice’ in accordance with the existential status of the individuals of that community in terms of both the vertical and horizontal axes. For instance, analyses of the evidences and regulative forms of the method of slaughtering livestock for consumption reveal that ‘slaughtering with *basmala*’ is the secondary facet (*al-jiha al-thānawīya*) of the regulation, and ‘the cutting of the jugular vein’ is the primary facet (*al-jiha al-awwaliyya*).<sup>16</sup> The former constitutes best practice in a given context, whereas the latter is the minimum and main requirement, or ‘the essence’ of the regulation.

In conclusion, the existential framework is characteristically ‘fallibilist’ because (a) it affirms that actual regulations exist in the mind of God for every eventuality, and (b) it is impossible to ascribe the designation of ‘actual’ to any regulations since ‘the actual’ is unknowable outside the periods of the different revelations. This means Sharia evidences reveal the actual regulations of the revelatory contexts only, and outside of those contexts the same evidences have the potential to yield the theoretical criteria (*milāk*) of the regulations, or in other words their particular desired growth properties. As mentioned above, the distance between the regulations in the mind of God and human knowledge of those regulations is unbridgeable outside of the revelatory contexts. Based on (1) the nature of existence, (2) the predetermined ‘existential’ unknowability of ‘the actual’, and (3) the fact that the purpose of each of God’s revelations has been to remind humankind of their existential purpose which is ‘growth’ or the actualisation of their inherent existential potential, it is clear that God’s sole requirement of regulations outside of the revelatory context is for them to be in conformity with ‘the existential property of growth’ (*rūḥ al-ḥukm*). Thus, as long as regulations are formulated in line with *rūḥ al-ḥukm*, God will endorse them because they will be exhibiting the ‘essence’ of every regulation. In the existential framework, the possibility of error between the apparent regulation and what God intends is assessed in terms of the degree to which the ‘apparent’ yields growth.

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<sup>16</sup> The ‘essence’ and ‘forms’ of the historic regulations pertaining to the slaughtering of animals for consumption is discussed more fully below.

## The Existential Property of Growth

Entified existence is in perpetual motion in all aspects of its being, that is, each of its three aspects is in a state of continuous motion from potentiality to actuality. As such, the growth of humankind does not occur merely in the outward or physical aspect of its existence but also in its mental and spiritual aspects. Thus, the existential growth of the human entails movement towards the rational, moral, and spiritual perfection of its mind. The function of the revelations and religions is to facilitate humankind's moral and spiritual actualisation.

At the level of human dealings (*mu'āmalāt*), there has been a gradual and progressive sophistication in human actions and interactions with the 'other', which has culminated in the legal norms and rights existing today including notions such as 'human' and 'animal' rights. Such norms and rights have changed with the passage of time and will continue to do so due to the fluctuating nature of existence in both its horizontal and vertical axes. Regulative forms differ and change vis-à-vis a particular type of human interaction by virtue of differences and fluctuations in time and place, however all share the same particular desired growth property (*al-rūḥ al-khāṣṣa lil-ḥukm*). In other words, the plurality of regulative forms with regard to a particular type of human interaction is the result of the fashioning and re-fashioning of the same 'particular desired growth property' within different existential contexts. The following examples serve as a cursory illustration of this phenomenon and clarify the distinction between notions of 'the forms of the regulation' (*ṣuwar al-ḥukm*) and 'the particular desired growth property of the regulation' (*al-rūḥ al-khāṣṣa lil-ḥukm*):

1. In pre-modern civilisations, women were considered to be incapable of providing accurate public testimonials.<sup>17</sup> The particular desired growth property of the regulations (*al-rūḥ al-khāṣṣa lil-aḥkām*) pertaining to testimonials is 'to ensure the accuracy of testimonials'. In the majority of societies today, this essence is no longer qualified in terms of gender, that is, women are no longer deemed to have lesser capacity than men in providing testimonials.
2. Women did not inherit equally in pre-modern societies due to certain societal attitudes and values shaped by their respective contexts.<sup>18</sup> Today, such attitudes and values have changed significantly due to the emergence of an educated workforce and changes in the demarcations of gender roles. The particular desired growth property of all regulations (*al-rūḥ al-khāṣṣa lil-aḥkām*) pertaining to inheritance is 'to legislate endowment to each category of person in proportion to each category's participation and contribution to

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<sup>17</sup> Ahmed, Leila. 1992. *Women and Gender in Islam: Historical Roots of a Modern Debate*. New Haven & London: Yale University Press. 17 and 27-8.

<sup>18</sup> *Ibid.* 15, 21 and 26-42.

wider society'. So if the contribution of women to both the household and society is on par with men, then the regulation pertaining to inheritance must reflect this by stipulating equal inheritance for both genders.

3. To ensure the survival of the religious teachings of the Qur'ān and the Prophet, it was necessary for the members of the nascent Muslim community to maintain a defined and delimited identity distinguishing them from the other religious communities (such as the Christian, Jewish, Zoroastrian and Sabian communities).<sup>19</sup> This necessity was reflected in the regulations of marriage. In today's pluralistic world in which the Muslim faith and identity are firmly established, the question of whether it is still necessary to prohibit inter-religious marriages is a legitimate one. If 'the preservation of the Muslim religion' – which was the particular desired growth property for such regulations (*al-rūḥ al-khāṣṣa lil-ḥukm*) – is guaranteed as it is today, then the regulation prohibiting inter-religious marriages must be revoked.
4. The sense of human nobility increases gradually with the existential growth of both the individual and collectivity. Appealing to the sense of human nobility often refines the behaviour of a collectivity beyond the normative practices derived on the basis of rights or extrapolated from the sources of regulations. For instance, if it is demonstrated philosophically that the foetus does not have the right to exist, then appealing to 'the sense of human nobility' may deem the act of killing the foetus as below human dignity, and consequently result in the formulation of regulations preventing it. Another example pertains to the legitimacy of breeding animals for human consumption despite it being nutritionally unnecessary for today's urbanised humans. Here, even though the sources of regulations 'apparently' permit the breeding and consuming of poultry, fish and livestock, appealing to 'the sense of human nobility' will accord them rights and prohibit their consumption.
5. The particular desired growth property for the regulation (*al-rūḥ al-khāṣṣa lil-ḥukm*) of cutting the hands of a thief is 'the curtailment of corruption and its means'. Thus, the regulative form can be refashioned in a less draconian manner as long as it secures the particular desired growth property. Today, collectivities with a higher sense of nobility secure 'the curtailment of corruption and its means' by legislating mandatory prison sentences that are effectively compassionate rehabilitation programmes.

The above examples are limited to the area of human dealings (*mu'āmalāt*). However, flux in factuality may necessitate change in regulations pertaining to the domain of the consumables

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<sup>19</sup> Both Shi'ī and Sunnī jurists agree that Sharia regulations have objectives. The latter have defined them as being five in number, the first of which is 'the preservation of the religion'. Naturally, this involves taking measures to safeguard the identity of the religious community entrusted to carry the religious teachings. See Duderija, Adis. 2014. *Maqāṣid al-Sharī'a and Contemporary Reformist Muslim Thought*. New York, Palgrave Macmillan. 3 and 7.

(*al-aṭ'ima wa al-ashriba*). For instance, if the body-mind connection of the human evolves or humankind undergoes genetic mutations impacting the digestion of materials and absorption of nutrients, then that which constitutes the permissible (*ḥalāl*) and prohibited (*ḥarām*) will have to change accordingly.

### **The Nature of the Realm of Factuality (*wāqi'*) within the Existential Framework**

As previously discussed, the term 'factuality' refers to the statuses of the relations of things in the mind of God, which are in a constant state of flux and have *no finality*. In the existential framework, a thing's evolutionary motion (from potentiality to actuality) can be assessed in terms of its 'vertical' progression and 'horizontal' significance. This means that evolutionary motion can be considered along (a) a thing's 'vertical' axis which is the consideration of the motion and change of that thing in isolation of everything else, and (b) a thing's 'horizontal' axis which is the consideration of the motion and change of the collectivity to which that thing belongs when compared to other collectivities. The constant flux of every individuated entity and their respective collectivities cause the statuses of the relations of things to be different at different points on the vertical and horizontal axes. Naturally, this includes 'the statuses of the relations of things in terms of their benefits and harms to humans' (the theoretical criteria of regulations), for by virtue of being an extension of the general category of 'the statuses of the relations of things', it is also subject to variation due to flux in the vertical (the individuated entity) and horizontal axes (the collectivities). Accordingly, 'the status of the relation of a thing in terms of its benefit and harm to humans' is neither stable nor singular. It will vary in accordance with different existential contexts. This means that 'the status of the relation of a thing in terms of its benefit and harm to humans' can have a number of different formulations simultaneously co-existing in different collectivities or multiple formulations within a single collectivity at different times.

It will be recalled that regulations are merely God's intention (*irāda*) for 'the statuses of the relations of things in terms of their benefits and harms' (*milāk*) to be regulations, which Ṣadr termed as *rūḥ al-ḥukm*. It follows that since these statuses are in flux, their corresponding regulations would need to be conveyed to humans upon any fluctuation, which does not occur outside of the revelatory period. This means that although different actual regulations exist in the mind of God for contexts that differ from those of seventh century Arabia, they are unattainable with certitude because revelation has ceased and the textual resources (or Sharia evidences) from which the majority of the regulations are derived pertain to the seventh century Arabian contexts. Such textual resources are only able to disclose the actual regulations for the revelatory contexts definitively. Thus, in the existential framework, the term *actual regulation*

refers to God's knowledge of the best course of action for human beings in any given circumstance, which is unattainable by humans outside of the revelatory context.

In view of this, the existential framework is similar to infallibilism in that only God has knowledge of what the best course of action is for any given eventuality, whereas humans are tasked with ascertaining that knowledge to the best of their abilities or (in other words) in light of the property of growth. It is also similar to fallibilism in that God withstands human error in the derivation process. Outside of the revelatory period, God bestows authority upon reason (*'aql*), autonomy and discretion to derive regulations for the sake of human 'growth'. This is because the final cause of human existence itself is to evolve and grow through experience as discussed in the preceding sections. In view of this, the existential framework deems the regulations supplied by God through the revelations of the seventh century as an arbitrary – but necessary – intervention laying the groundwork in various capacities for the post-revelatory state of the human experience, one in which reason, autonomy and discretion organise the lives of humans for the sake of 'growth'.

In conclusion, the status of regulations in the mind of God pertaining to contexts differing from the revelatory contexts are rendered as unknowable and inaccessible. This is because Sharia evidences pertain to the contexts of revelation and so disclose the actual regulations of those contexts alone. They were not revealed in other existential contexts, and so they cannot be deemed to have capacity of disclosing the actual regulations for other contexts. However, since they are often the sole means available to the legist in the process of ascertaining the regulations in actuality for other existential contexts, they must be evaluated differently in order to supply regulations outside of their immediate context. It follows then that a face value understanding (*aṣālat al-ḏuhūr*) of the Sharia evidences does not suffice as a means of capturing and appreciating factuality (*wāqi'*) and the intent of God for contexts differing from the revelatory contexts. Therefore, the next section will deal with the epistemic status and function of Sharia evidences, and the hermeneutic method of interpreting them that ensures context-appropriate regulations are generated.

## The Epistemic Model and Hermeneutics of the Existential Framework

In light of ‘the principiality of the dynamic nature of the relations of things’ (*aṣālat al-ḥaraka fī nisab bayna al-ashyā*) or ‘the principiality of the dynamism of factuality and its things’ – *aṣālat ḥaraka al-wāqī’ wa ashya’ihi*), all Sharia evidences are regarded as ‘apparent’ means to the statuses of the relations of things vis-à-vis human behaviour in the mind of God for contexts differing from the contexts of revelation. This means all evidences regardless of whether they pertain to categories 1a or 1b only generate apparent regulations and cannot yield actual regulations (which is contrary to the position of the fallibilists who regard category 1a evidences as having the capacity to yield actual regulations). Thus, evidences of category 1a like those of category 1b are considered as probability-yielding evidences or probable means to ‘the actual’.

The rationale behind this is that in contexts differing from an evidence’s primary context, a distinction exists between the words of an evidence and the Lawgiver’s intention of supplying a regulation by means of using those words. Originally, an evidence belonging to categories 1a or 1b was a communication from the Lawgiver to the audience of a particular context conveying a specific regulation for the people of that context to adhere to. However, in contexts differing from an evidence’s primary context, neither are the people the original addressees of the evidence nor can the status of the relation of a thing regarding human behaviour in factuality be assumed to be the same or knowable. Hence, an evidence cannot be assumed to be either addressing the people of different contexts or conveying the ‘intended’ regulations in the mind of God for contexts differing from its own. This means ‘the principiality of conventional word-meaning intentionality’ (*aṣālat al-zuhūr*), which presupposes that the speaker of a communication is intentionally addressing its audience by the conventional usage of words, only applies to an evidence within its own context and contexts similar to the original context. Accordingly, one is justified in assuming that an evidence is addressing the people of its own context. Moreover, one is also justified in assuming that it is addressing the people of other similar contexts because the status of the relation of a thing vis-à-vis human behaviour in factuality will be the same and will not have changed. Therefore, in accordance with ‘the principiality of conventional word-meaning intentionality’, its words can be assumed to be conveying the Lawgiver’s intention for a regulation in its own context and other similar contexts.

To reiterate for clarity, within the existential context of an evidence (which includes the original context and other contexts in which the status of the relations of things as regards human behaviour is the same as the original context), it can be assumed that an evidence is a communication from the Lawgiver conveying a regulation to the audience or people of that existential context by the intentional and conventional usage of words. In other words, the application of ‘the principiality of conventional word-meaning intentionality’ to evidences within

their own existential contexts is warranted and hence supplies the ‘intended’ regulations embedded within those evidences for their respective contexts. However, since both the Lawgiver’s intention and the status of the relation of a thing to human behaviour in factuality are necessarily different for existential contexts other than an evidence’s own existential context, one is not justified in assuming that an evidence is an ‘intentional’ communication from the Lawgiver conveying a regulation for existential contexts other than its own. Thus, ‘the principality of conventional word-meaning intentionality’ cannot be applied to evidences in existential contexts other than their own.

Therefore, the application of ‘the principality of conventional word-meaning intentionality’ to an evidence outside of its own existential context will not provide the ‘intended’ regulation in the mind God. It will merely generate a context-bound regulative form (*ṣūrah al-ḥukm*) which is a context-based rendering of the essence of that regulation (*al-rūḥ al-khāṣṣa lil-ḥukm*). However, such regulative forms are an indispensable part of the derivation process of context-appropriate and essence-based regulations because they shed light on their respective essences, which as discussed above are the desired objectives (*milāk* and *irāda*) of the regulations. Therefore, insofar as Sharia evidences convey the essences of the regulations allowing for the fashioning of context-appropriate regulative forms, they are considered as probability-yielding evidences or probable-means to the actual regulations in the mind of God.

This means actual regulations (*aḥkām wāqī’iyya*) conveyed in linguistic forms (*ibrāz al-i’tibārāt*) via revelation pertain to the existential contexts of revelation alone. Outside of these contexts, the regulations in the mind of God (*wāqī’ī*) are necessarily different and unknowable. However, the linguistic forms of regulations (*ṣuwar aḥkām*) pertaining to the revelatory contexts do contain the essences of ‘the actuals’ (*al-arwāḥ al-khāṣṣa lil- aḥkām*). These essences are the objectives for which the regulations are desired. They are universal in nature, transcend context and are capable of being secured in the regulative forms of every context. A regulative form (*ṣūrah ḥukm*), therefore, is merely a formulation of the essence in a specific context, whereas the essence of a regulative form (*al-rūḥ al-khāṣṣa li-ḥukm*) is that which a form is trying to accomplish in light of the theoretical criteria of benefit and harm. In seventh century Arabia, the objective of God’s communication of the actual regulations was for the addressees to adhere to them so that individuals and the collectivity actualise the respective essences of those regulative forms. As such, the regulative forms are merely instrumental, for the actualisation of the essence is the objective of God’s communication of the regulative forms.

Although actual regulations exist in the mind of God for every eventuality both in terms of form and essence, humans of the post-revelatory period have no access to the forms of regulations in the mind of God for existential contexts differing from the existential contexts of seventh century

Arabia. Hence, there is an unbridgeable and intentional epistemic distance between the regulative forms derived through human endeavour and the exact formulations in the mind of God. However, since human reason (*'aql*) has been endowed with the ability to know the essences (*al-arwāḥ al-khāṣṣa li-aḥkām*) and formulate regulations securing those essences, the epistemic distance is only a formal one (*ṣūrī*); that is, the epistemic distance lies in the unknowability of the exact syntactical structures of the formulations that would be conveyed by God (*ibrāz al-i'tibārāt*) were He to reveal them.

Thus, on the basis of what has been discussed, the most serious kind of error possible for humankind as regards regulations is its tendency to perpetuate a regulative form (*ṣūrah al-ḥukm*) beyond its context; for that which was 'instrumental' in itself will have been made into an 'objective' or 'end' in itself erroneously, and the essence, which was its actual and real purpose, will have been forgotten altogether.

Accordingly, evidences of categories 1a and 1b yield linguistic regulative forms (*ṣuwar al-aḥkām*) that are context-specific through the hermeneutic of 'the conventional meanings of words', which is itself based on and justified by 'the principiality of conventional word-meaning intentionality' (*aṣālat al-zuhūr*). Each linguistic form is a composite of form (*ṣūrah*) and essence (*rūḥ khāṣṣa*), the ultimate import of which is always 'the fundamental existential property of growth' (*rūḥ al-ḥukm*). The method of extracting the particular desired growth property (*al-rūḥ al-khāṣṣa*) of a regulation entails the analysis of all relevant authenticated evidences of categories 1a and 1b alongside each other. This is in contrast to the fallibilist method in which there is an epistemic hierarchy between the categories of evidences: evidences of category 1a are thought to be epistemically privileged over those of 1b which in turn have priority over the rest.<sup>20</sup> Since the essence of a regulation (*al-rūḥ al-khāṣṣa li-ḥukm*) may be expressed through a variety of forms, valid but conflicting evidences of categories 1a and 1b yielding different regulations with respect to the same behaviour (which is a common occurrence during the derivation process of regulations, and an instance of normative incongruence and theoretical perplexity for fallibilists)<sup>21</sup> are to be treated as different formulations of the same essence in differing contexts within the era of revelation and legislation itself. Thus, all such 'apparently' contradictory regulative forms are valid in the existential framework, for each yields 'existential growth' in its respective context. Neither conflict nor contradiction exist between such regulative forms because all convey the same essence in differing contexts. Naturally, when one regulative form is active in a particular space and time, others are rendered as 'inactive' because they are not optimal in facilitating 'existential growth' for that particular space and time.

<sup>20</sup> Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi 'Ilm al-Uṣūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takhaṣṣuṣiyya li-I-Shahīd Al-Ṣadr. 2: 25 and 32-3.

<sup>21</sup> Ṣanqūr 'Alī, Muḥammad. 2001. *Al-Mu'jam al-Uṣūlī*. Qum: Dar al-Mujtaba. 417-30. (section *Al-Ta'arūf*).

Since flux in factuality inevitably renders all historic regulative forms as obsolete because of their inability to facilitate the desired growth in different contexts, they require modification. Hence, a hermeneutical method that goes beyond the meaning of an evidence on the basis of 'the conventional meanings of words' is necessary. Of course, the 'conventional' meanings of evidences pertaining to the same behaviour is an essential first step in the hermeneutics of capturing the essence of the regulation (*al-rūḥ al-khāṣṣa lil-ḥukm*). However, this must be followed by contrasting the meanings of the evidences and their respective contexts with each other, because such comparison provides an understanding as to how a particular regulative form facilitated the attainment of 'a particular desired growth property' (*rūḥ khāṣṣa*) within its own context. Once the essence (*al-rūḥ al-khāṣṣa*) has been deduced from the various regulative forms and their contexts, the legislator can then formulate context-appropriate regulative forms (*ṣuwar al- ḥukm*), the adherence of which results in the realisation of 'the desired growth property' (*al-rūḥ al-khāṣṣa*) in the individual and collectivity.

In conclusion, the hermeneutics of the existential framework is concerned with ascertaining the desired value of a regulation within its own context, and hence places greater importance on the essence (*al-rūḥ al-khāṣṣa*) as opposed to the form (*ṣūrah*) of the regulation. This does not mean that a historic regulative form loses all worth. On the contrary, it aids in the disclosure (*kashf*) of the essence for which it was formulated, especially when contrasted with other forms formulated in light of that particular essence. The formal (*ṣūwarī*) particularities of historic regulations yield invaluable insights regarding the method of attaining the desired growth property (*al-rūḥ al-khāṣṣa*) and its subsequent refashioning into a context-appropriate regulative form.

## The Typology of Evidences within the Existential Framework

All category 1 evidences are probable means to the essences of regulations (*al-arwāḥ al-khāṣṣa lil-aḥkām*) as discussed above. Category 2 evidences are either (i) procedural means of ascertaining the status of essence-based (and context-appropriate) regulative forms or their subjects in situations of ‘doubt’, or (ii) procedural means of ensuring that the existential property of growth (*rūḥ al-ḥukm*) is secured vis-à-vis ‘new’ human behaviours not alluded to in category 1 evidences.

Sharia evidences are defined as follows in light of the notions of (i) ‘the essences of the regulations’ (*al-arwāḥ al-khāṣṣa lil-aḥkām*), (ii) ‘existential probabilities’ (*al-iḥtimālāt al-wujūdiyya*) and (iii) Ṣadr’s understanding of ‘the most important theoretical criterion’:

- 1- Securing evidences (*al-adillah al-muḥriza*):
  - a- These evidences give an appreciation of ‘the essences’ and are the hermeneutical lenses through which category 1b evidences pertaining to the same issue are to be interpreted. This is because evidences of this category are ‘certain’ as regards their being the Lawgiver’s pronouncements, whereas category 1b evidences are ‘probable’.
  - b- These evidences assume the function of those of category 1a in the absence of category 1a evidences with respect to a particular behaviour.
- 2- Non-securing evidences (*al-adillah ghayr al-muḥriza*):
  - a- Securing principles, such as ‘the principiality of continuity’ (*aṣālat al-istiṣḥāb*) and ‘the precept of successful completion’ (*qā’idat al-farāgh*), are formulated on the basis of existential probabilities, and textual and rational considerations. They provide assurance in situations of doubt regarding the status of regulations, their subjects and regulative statuses.
  - b- Assigned principles, such as ‘the principiality of purity’, are formulated on the basis of existential probabilities, textual and rational considerations, and Ṣadr’s ‘most important theoretical criterion of the ease of discretion’. Their objective is to engender individual and collective growth in situations of doubt.
  - c- Pure procedural principles, such as ‘the principiality of exemption’ (*aṣālat al-barā’a*), are formulated on the basis of rational and textual considerations, and ‘the most important theoretical criterion of the ease of discretion’. Their objective is also to facilitate growth of the individual and collectivity.

To illustrate the method of extrapolating the essence of regulations relating to a particular behaviour, the Sharia regulative forms pertaining to the issue of the consumption of meat, which dates back to the seventh century, will be used as an example. Several verses of the Qur’ān, classifying as category 1a evidences, declare the impermissibility of consuming the meat of (i)

animals found to be dead prior to slaughter, and (ii) animals sacrificed for other than God. Other category 1a evidences allude to ‘slaughter’ as a means of purifying animals close to death and instruct on the manner of hunting. Additionally, category 1b evidences assert: (i) the necessity of slaughtering the animal in the direction of the Ka’ba by a Muslim, (ii) beginning with the recitation of the name of God (*basmala*), (iii) ensuring the whole head is not severed during the slaughter, and (iv) methods of slaughter (appropriate for the existential context of the seventh century) with the view to minimising the level of suffering experienced by the animal, its family and community. Finally, category 1b evidences also stipulate that should these conditions be omitted due to ignorance or even forgetfulness of the regulation, the meat is nevertheless lawful to consume.<sup>22</sup>

When all the evidences are evaluated alongside each other, it is clear that ‘the particular desired growth property’ of these regulations is ‘to prevent harm caused by consuming the flesh of animals that have died (prior to slaughtering) or been sacrificed for other than God’. In other words, the minimum requirement of these historic regulations is ‘to avert harm by ascertaining that the animal has not been sacrificed for other than God and ensuring that it died as a result of slaughter’. This essence, also termed as ‘the primary facet’ (*al-jihah al-awwaliyyah*) of the regulations, constitutes instructions that are universal or acontextual, and hence are unfluctuating and cannot be compromised. In contrast to this, the secondary facets (*al-jihah al-thānawiyah*) of the regulations are those instructions that are contextual, fluctuating and compromisable. Hence, meat consumption was lawful in spite of ignorance or forgetfulness of ‘the secondary facets’ of the regulations. The function of ‘the secondary facets’ is to facilitate the essence of wholesome growth (*rūḥ al-ḥukm*) which often lies beyond ‘the primary facet’ or the minimum and main requirements.

In light of this therefore, today’s practices of (i) stunning cattle (as long as it does not lead to death), (ii) slaughtering by machinery in directions other than the Ka’ba, (iii) the commencement of slaughter without reciting the name of God, and (iv) slaughter performed by non-Muslims, all comply with ‘the essence’ or ‘the particular desired growth property’ of the historic regulations pertaining to the consumption of meat, which is ‘the aversion of harm caused by consuming the flesh of animals that have died (prior to slaughtering) or been sacrificed for other than God’.<sup>23</sup>

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<sup>22</sup> See for instance Iyrwānī, Bāqir. 2001. *Durūs Tamhīdiya fī al-Fiqh al-Istidlālī ‘alā al-Madḥab al-Ja’farī*. Qum: Mu’assisa al-Fiqh li al-Ṭibā’ wa al-Nashr. 143-59.

<sup>23</sup> For a more in-depth discussion, see author’s forthcoming article on *ḥalāl* meat.

## Sharia Regulations and Theoretical Justifications: An Existential Perspective

Based on ‘the principiality of the dynamism of factuality and its things’ (*aṣālat ḥaraka al-wāqī’ wa ashya’ihī*), unknowable ‘actual’ regulative formulations exist in the mind of God for existential contexts differing from those of the revelatory era. Although ‘fallibility’ is part of the nature of the formulations of the existential hermeneutical method (like those of the other two schools), its wholesale ascription to ‘the unknowability of the actual regulations’ is not only misleading but renders it (fallibility) as merely a theoretical problem needing to be solved. The fact that all proposed solutions are inadequate, not least because of their theological implications, indicates that the source of the fallibility of the apparent regulation is more nuanced than merely positing the inherent possibility of its non-correspondence to its ‘actual’ counterpart on the basis of the ‘unknowability’ of latter. In fact, the fallibility of the apparent, and indeed of human knowledge in general, is based on the nature of existence itself, and hence is substantially more significant than it being a mere theoretical conundrum in need of a solution.

The unknowability of the actual regulations in the mind of God means that the knowledge of the correspondence between human formulations of the essence and their ‘actual’ counterparts is ‘existentially impossible’. In other words, the impossibility of such knowledge is the outcome of the creative will of God. Based on the ‘purposive’ and ‘benevolent’ nature of the creative will of God, this means that such knowledge is not only unnecessary for the growth of the individual and collectivity, but on the contrary this ‘existential unknowability’ is essential for the growth of the individual and collectivity. The corollaries to be inferred from this are that (a) ‘existential unknowability’ presupposes that humans are endowed with the capacity to formulate regulations ensuring ‘optimal growth’, and (b) the actualisation of this capacity is itself contingent upon ‘existential unknowability’.

In the fallibilist discourse, the issue of the conflict between human formulations and their ‘existentially unknowable’ counterparts in the mind of God is merely an irresolvable theoretical issue with absolutely no significance for the individual and collectivity in practice.<sup>24</sup> However, in the existential framework, ‘existential unknowability’ of the actual regulations is an outcome of God’s creative will, and as such it is essential for the existential growth of the individual and collectivity in all three aspects of their being. In view of this, the source of the fallibility of human regulative formulations is not to be defined in terms of the inherent possibility of their non-correspondence with the actual regulations. This is because the latter are destined to be ‘existentially unknowable’, implying that humans are not meant to define the truth of their apparent formulations in terms of their correspondence with ‘the actual’. In other words, the

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<sup>24</sup> See for instance Al-Ṣadr, Muḥammad Bāqir. 2005. *Durūs fi ‘Ilm al-Usūl*. Qum: Markaz al-Abḥāth wa al-Darāsāt al-Takḥaṣṣuṣiyya li-l-Shahīd Al-Ṣadr. 2: 25-38.

criterion by which humans are to assess the degree of accuracy and error of their regulative formulations is other than their correspondence to ‘the actual’.

In light of this, the source of the *fallibility* of all human, or ‘apparent’, regulative formulations according to the existential framework stems from ‘the principiality of the dynamism of factuality and its things’ (*aṣālat ḥaraka al-wāqi’ wa ashyā’ihi*). This is because ‘flux in factuality’ renders human appreciation of the statuses of the relations of things vis-à-vis human behaviour at any given moment as being potentially wrong, and so they have the possibility of either being detrimental or ‘less optimal’ in facilitating growth. Based on this, the legislator is obliged to be vigilant regarding the appropriateness of regulative formulations to their respective existential contexts because the very nature of existential contexts is to be in a state of perpetual flux.

The existential framework justifies the existence, or God’s ordaining, of the apparent regulation in light of the existential property of growth. Since the only objective for the issuance of actual regulations is ‘to facilitate optimal growth in the individual and collectivity’, and since humans are endowed with the capacity to formulate regulations ‘facilitating optimal growth’, it follows that the existence, or ordaining, of essence-based apparent regulations are justified so long as they ‘facilitate optimal growth’. Insofar as the apparent regulation is deemed to be ‘the most optimal regulative form’ (in terms of facilitating growth) out of all possible or conceivable regulative forms, then the legislator is justified in presuming it to be yielding the same objective as ‘the actual’. Hence, it assumes the rank of ‘the actual’, conferring infallibility upon both the legislator and adherent, and remains valid so long as it provides ‘optimal’ growth. Once it ceases to facilitate optimal growth, it must be replaced by the regulative form deduced to be ‘the most optimal in assisting growth’ out of all possible or conceivable regulative forms.

Therefore, the hitherto *insoluble* ‘problem of the simultaneous existence of two sets of theoretical criteria’ is dissolved within the existential framework on the basis of ‘the principiality of the dynamism of factuality and its things’ (*aṣālat ḥaraka al-wāqi’ wa ashyā’ihi*) and its corollary fact of ‘the existential unknowability’ of actual regulations pertaining to existential contexts differing from those of the revelatory era. In view of this, God expects human minds to derive ‘the most optimal regulative forms’ in light of their respective essences for any given existential context, for that is essentially what the actual regulations in His mind are – *the most optimal regulative forms*.

Finally, it is necessary to delineate ‘the remedial measures’ as per the existential framework to be employed in cases of conflict between regulative formulations so that missed benefits can be reaped. Obviously, the discussion of remedial measures in the context of cases of disparity between the actual and apparent regulation is a non-sequitur because actual regulations in the

mind of God are 'existentially unknowable' and inaccessible to humans. In other words, it is impossible for humans to ever have knowledge of such disparity, and so the issue of compensation of missed benefits as a result of such conflict is moot. However, the knowledge of the disparity between different 'apparent' regulative forms with respect to the same behaviour is possible; in fact, such disparities will inevitably be experienced by humans during the course of their lives. Thus, the issue of compensating for the lack of attainment of a regulation's objective is only conceivable when it is ascertained that another apparent regulation is 'more optimal' in yielding growth. In such cases, adherence to the previous 'less optimal' regulation results in the loss of benefit, and hence reparation may be available and necessary whereby one is able to accrue the missed benefits and secure growth.

Prior to outlining the remedial measures, it is necessary to discuss a distinctive feature of the Sharia regulatory system that sets it apart from non-Sharia regulatory systems, and to demarcate the genres of regulations within the Sharia regulatory system wherein conflict between the 'most optimal' and 'less optimal' are possible. This will assist in delineating the sort and extent of reparation required in cases of conflict within the differing categories of regulations.

In addition to securing physical/moral benefits and removing physical/moral harms, the adherence and non-adherence in relation to Sharia regulations (that is, regulations understood to be 'the commands of God') have spiritual benefits and harms respectively. For instance, if smoking were illegal and punishable within a non-Sharia system due to its harmful effects, then the smoker would incur harm by smoking and be liable for punishment, and a non-smoker would be averting harm and not be liable. In contrast to this, if smoking was prohibited in a Sharia regulatory system, adherence to the regulation with the understanding that it is 'the regulation of God' would have the additional benefit of procuring spiritual reward, and its non-compliance would have the additional harm of causing spiritual regression.

All three legal schools – fallibilism, infallibilism and the existential framework – consider 'obedience' and 'disobedience' with respect to the regulations of God as fundamental. There is no question as to any of them consciously endorsing disobedience of His regulations and intentionally sinning. In fact, all three propose methods to discover His intentions. Insofar as they are sincere, all three are obeying God and worthy of reward even if they are mistaken. That being said, it is incumbent upon each school to examine every case in which the spiritual value gained by adhering to a particular regulative form is less than the value provided by another regulative form, even if the latter is a formulation of an 'other' school. This is because the possibility of the obligation of restitution accompanies every case in which there is a conflict between the 'most optimal' and 'less optimal' regulative forms. Therefore, the area of compensation comprises instances of adherence to an apparent regulation resulting in the omission of benefit and

incurring of harm when compared to the adherence of another ‘apparent’ regulative form yielding greater growth.

Sharia regulations cover the entirety of human life. In light of the traditional fiqhī discourse, they can be categorised into regulations pertaining to (1) devotions (*‘ibādāt*), (2) consumables (*al-aṭ‘ima wa al-ashriba*) and (3) human dealings (*mu‘āmalāt*).<sup>25</sup> (1) Devotional regulations prescribe behaviours that have spiritual values. As a whole, the governing feature of their essence is ‘the intentionality of devotion’, and hence it is the fundamental element in all the various forms of devotional behaviours. In other words, the forms of devotion are secondary to the essence of ‘the intentionality of devotion’. (2) Regulations pertaining to consumables are concerned with the benefits and harms of foods and liquids vis-à-vis the body and consequently the collectivity. As such, the forms of the regulations are less contextual and more significant in terms of securing the essence. (3) Regulations pertaining to human dealings are concerned with societal well-being and rights, and as such the regulative forms fluctuate in accordance with the growth of society.

In view of this and certain Sharia texts, the conflict between the ‘most optimal’ and ‘less optimal’ apparent regulative forms regarding the same devotional behaviour requires no remedial measure beyond adhering to the ‘most optimal’ form.<sup>26</sup> This is because the essence of devotional behaviours (*al-rūḥ al-‘ibādāt*), which is ‘the intentionality of devotion’ (*al-rūḥ al-khāṣṣa lil-‘ibāda*), is assumed to have been attained by adhering to the devotional act prescribed by the previous regulative form. The repetition of devotional acts for the sake of mere praxis inevitably nullifies their essence. It displaces the essence from one that is spiritual to one that is formal and merely ritualistic, resulting in the forfeiting of the desired objective (*al-rūḥ al-‘ibādāt*).

As for consumables, adherence to the regulative forms ensures that their desired essences are attained with satisfaction. Furthermore, there is no scope for reparation in cases of conflict between regulative forms of this category.

In the category of regulative forms pertaining to human dealings, there is real scope for compensation due to the fact that they relate to rights, health and societal benefits, all of which are in a constant state of flux. Thus, there is a real possibility of misjudging ‘the most optimal’ regulative form. For instance, a regulation in the domain of divorce settlements may state that the wife is only entitled to receive her dowry. Subsequently, if it is understood by the legist that

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<sup>25</sup> ‘Human dealings’ broadly subsume all regulations pertaining to sale, lease, testimonials, compensation, liabilities and capital punishments.

<sup>26</sup> See the ḥadīth of the blessed Prophet stating that the performance of the rituals (*manāsik*) of ḥajj were accepted despite the companions faltering with their sequences in: Ibn Bābawayh al-Qummī, Abū Ja‘far Muḥammad bin ‘Alī. 2006. *Man Lā Yahḍuru-hu al-Faqīh*. Beirut: Mu‘assisa al-A‘lamī li al-Maṭbū‘āt. 379 (section *Taqdīm al-Manāsik wa Ta’khīru-hā*).

the essence of the regulation is ‘to provide sufficient security for a woman in her present context’ (*al-rūḥ al-khāṣṣa lil-ḥukm*) and hence the regulation of dowry was merely a means to secure that essence in a particular context, then the wife would be entitled to compensation if the dowry was insufficient in providing her needs. Similarly, if certain forms of sale are mistakenly considered as illicit and as a result the seller incurs a loss due to being prevented from selling them or is punished for selling them, then compensation would be required. In theory, compensation is necessary with regard to this category of regulations for every instance in which there is an erroneous appreciation of a regulation, regardless whether the error occurred at the level of generic jurisprudential deduction of the regulative form or at the level of adjudication by the courts.

### **Summary of the Categories of Regulations in the Existential Framework**

This section introduces the categories of Sharia regulations in the existential framework. They are: (1) the regulations pertaining to devotional acts (*‘ibādāt*), (2) the regulations pertaining to consumables (*al-aṭ‘ima wa al-ashriba*), (3) the regulations pertaining to human dealings (*mu‘āmalāt*) and (4) the regulations pertaining to decency (*ḥayā*).

The regulations pertaining to devotions (*‘ibādāt*) instituted by the blessed Prophet endure so long as humans are terrestrially bound. Since the essences of the various devotional practices of the existential context of the Prophet can be ascertained by analysis of the Sharia evidences belonging to categories 1a and 1b, their forms can be tweaked in order to facilitate ‘optimal’ growth in other existential contexts. For instance, according to the “existential” hermeneutic, the notion of ‘day’, which is central to the devotional practices of prayer (*ṣalāt*) and fasting (*ṣawm*), signifies ‘a conventional day’ for existential contexts in the northern hemisphere; thus, the notion of ‘the conventional day’ would demarcate the duration of the fast and require that the timings of the five daily prayers be equally distributed throughout it in such existential contexts.<sup>27</sup>

The essence of regulations pertaining to human dealings (*mu‘āmalāt*) is ‘fair-play’. This is because the Sharia formulations of the blessed Prophet were not original or novel (*ta’sīsī*), rather they sought to regulate the existing interactions of the people within a fairer framework. However, since the notion of ‘fairness’ is existentially contingent, its regulative determinations will always be in a state of flux. For instance, the notion of ‘fair-play’ dictated that the inheritance of a woman be half that of her male sibling in the existential context of the blessed Prophet, whereas today in majority of the regions of the world, it would demand the inheritance be the same.<sup>28</sup>

<sup>27</sup> For the importance of ‘the night’ to the fast, see Qur’ān 2:187.

<sup>28</sup> For half of the share of inheritance to the daughter, see Qur’ān 4:11.

As for the regulations pertaining to the consumables (*al-aṭ'ima wa al-ashriba*), they would persist so long as human nature is the same. However, the consumption of animals may be deemed as problematic with the growth of human nobility and the acceptance of animal rights by the collectivity, or if its essence, which is 'to provide high nutritional benefit to the human body', is able to be equally or better satisfied by other foods so that the consumption of animals is no longer justified.

Finally, the regulations pertaining to decency (*ḥayā'*) include marital and sexual norms. For instance, the children of the Prophet Adam married each other; however, restrictions were instituted as nobility increased and physical detriments manifested.<sup>29</sup> Such norms are in a perpetual state of flux. In the future, increase in nobility and/or physical detriments may dictate that cousin marriages be deemed 'indecent' and/or prohibited respectively.

In conclusion, the existential framework views all four categories of Sharia regulations as being grounded in existence. This means the essences of regulations can be derived either from categories 1a and 1b in the typology of Sharia evidences or by deriving existential properties beyond these categories and extrapolating regulations from them directly.

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<sup>29</sup> Ibn Kathīr, Ismā'īl bin 'Umar. 1999. *Tafsīr al-Qur'ān al-Āzīm*. Riyādh: Dār al-Ṭība wa al-Tawzī'. 3: 82-3.

### Conclusion

Although the ingenuity of the fallibilist attempts to justify the existence of the apparent regulation within *uṣūlī* discourse is commendable, they fall short of resolving the conflict and have untenable implications on the nature of God. In fact, it becomes evident upon analysis of the discourse that the fallibilist tradition is *incapable* of resolving ‘the problem of the simultaneous existence of two sets of theoretical criteria’. This *irresolvability* is due to its fundamental ontological assumption of a “static” realm of factuality. In contrast to this, the existential framework, by virtue of its basic ontological assumption of ‘flux in factuality’, does not suffer from such a theoretical impasse and hence is able to dissolve the issue by demonstrating the problem to be a non-sequitur.

The logical consequence of assenting to the ontological assumption of ‘flux in factuality’ is the necessity to revise the traditions’ epistemological presuppositions and substantively modify its hermeneutical methodology on the basis of the nature of existence. The result is an “existential framework” for the extrapolation of Sharia regulations from its evidences. This paper not only deals with ‘the conflict between the apparent and actual regulations’, but in the process introduces the ontological and epistemological premises of “the existential framework” and its hermeneutical methodology.