

Othman A. Llewellyn

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1. Many articles written by some Muslim economists about what Islam can do for the welfare of mankind here and not in the Hereafter - start with belittling all non-Muslim systems in a few lines, and then indulge in building castles in the air under the banner of Islam, thus hoping to convince the reader that its system is the best. Surely, such a style cannot be relished by a person with an analytic mind or a deep dislike to day-dreaming, even if it can win the hearts of many.

One is sorry to say that Mr. Llewellyn's article is one of them.

2. The writer says in his introduction: "It must be emphasized that Islamic law is value-centred. Unlike positive law, which denies ethical or ideological content to legislation and which remains an overriding influence in Western legal system-expressed in statements such as 'you can not legislate morality' - Islamic law is unequivocally value-centred. Ethics and laws are not strictly differentiated in Islam, and all rulings of the *Shari'ah* concerning social transaction aim at realizing certain divinely-ordained value goals".

First, it sounds proper English if we say "Positive Law" or "Positivistic Law" instead of "Positivist Law", because the adjective is "positivistic" and not "positivist", which is a noun.

Second, the opposite of "Islamic Law" is "Non-Islamic Law", not "Positive Law", because all divinely-revealed laws are called "Positive", while all other laws are referred to as "Natural".

Ibn Khaldun called natural sciences *tabi'iyya* and positive sciences *wad'iyya*. The natural sciences which he also called philosophic (*falsaffyya*) are defined as "those that man can know by the nature of his thought, and through his human perception can arrive at their subject matter, problems, ways of demonstration, and the manner of teaching them - until his reflection and investigation leads him to distinguish truth from falsehood in them." In contrast, the positive sciences which are also referred to as transmitted (*naqliyya*) are all based on revelation. Reason has no role to play in them except in relating their subsidiary problems and the fundamental, i.e. [in the case of Islam], the application of the fundamental commands revealed in the Qur'an and Tradition to particular instances."¹

Third, there is no acceptable reason to accuse any non-Muslim law or economic system of lacking ethical or ideological content, because all social sciences are based on hidden value-judgements which reflect the traditions, ethics and ideals of the men who formulated them. Western jurisprudence is not an exception to this rule as can be easily seen in the following words written by one of its scholars:

"Ulpian's definition² [of jurisprudence] is too comprehensive, for it seems to merge into a single formula, law, morality and religion. This may be attributed partly to the historical connection of Roman Law with Roman religion, partly to the ambiguity of the word 'jus' which includes both morality and law".³

The significance of these words becomes obvious when we realize that Roman Law and the Bible formed jointly the fountainhead of all existing Western Laws. If both sources have moral and religious content, it is logical to conclude that modern laws also contain such elements. The inclusion of morality in Roman Law is vindicated by the quotation; and as for the Bible, there is no doubt about its moral content.

The dictum: "you can not legislate morality" does not mean that morality is alien to Western legal systems, as interpreted by Llewellyn. Indeed, the job of a legal system is to protect - with the aid of government - the values which society has evolved in social, religious, political, and economic spheres of life. This means that these values, as goals, cannot be incorporated in the means which lead to them, i.e. laws. The following quotation from the same authority may help the reader to see what we are driving at:

"To the lawyer of today the words - 'just' - Justice' - suggest rather the quality of an act estimated with reference to some standard of conduct. This may be (a) a moral standard, or (b) a legal standard.

(a) When we apply moral standard we find it outside the limits of any given system, e.g., if one ventured to say that an act of Parliament or a decision of the House of Lords was 'unjust'. Our standard here is external to the law. It is one by which a rule of law may be criticized and perhaps condemned. To fix this is the business not of law, but of ethics, or, moral philosophy.

(b) When we apply a legal standard we mean by 'justice', right or wrong as determined by the law of our country. In this sense we speak of the 'administration of justice'. Jurisprudence is the science of justice in the legal sense of the word."⁴

In other words, social values are independent of laws, but the converse is not true, because laws have to be compatible with the values cherished by the society if they were to stay. And, in this sense, morality cannot be legislated. In the meantime, since it is impossible to sever this relationship which exists between laws and social values, we can say that all legal systems contain ethical or ideological elements.

Hence, there is no wonder if legal systems differ from one another because of differences in national values. And for this reason, we kept saying, for quite a long time, that we should not expect different Muslim nations to have one and the same legal or economic system, even if they exert the same effort to comply with the Qur'an and Tradition. But, because all Muslims resort to the same legal resources, we expect their legal systems to have a great deal in common.⁵

Likewise, Western legal systems resemble one another; but differ greatly from Islamic ones, because each group has its own origin.

3. The literal translation of many terms and expressions from Arabic into English has led Llewellyn to adopt really queer ideas, and demand from planners to carry out - through the state - a task which cannot be undertaken by anyone except Allah. There is no point in trying to cite all the paragraphs in which he repeated these ideas. The following instance will do. He said:

“The ultimate purpose of the Shari'ah is thus the universal common good, the welfare of the entire creation (*masalih, al-khalqi kaffatan*). This means that all of the measurable effects of an action both immediate and ultimate, on all beings must be weighed by the planner, designer or administrator, to maximize benefit and minimize harm to the totality Not a single creature, present or future, may be excluded from consideration in deciding a course of action, and the maximum possible net benefit to the totality must be striven for.” [Llewellyn, p. 28].

Llewellyn made (*al-khalq*) equivalent to creation (i.e. all created things), while it actually means people (*annas*).⁶ Hence, the correct translation of (*masalih, al-khalaqi kaffatan*) is the welfare of all people (mankind), and not the entire creation which amounts to the whole universe! Who can plan, design or administrate all beings, provided that he should not leave out a single creature, present or future, from consideration in deciding a course of action? The answer is too obvious for any child: ALLAH.

We are absolutely sure that Llewellyn has never intended to say so, but he kept saying so throughout his article, as if he wanted to fix this idea in the reader's mind. He even went to the extent of rendering the word (*al-`ibad*) as (Allah's Creatures)⁷ instead of (Allah's servants) in order to be consistent with himself from the beginning up to the end.

Notes

- (1) Mahdi, pp. 73, 74.
- (2) Ulpian [assassinated in A.D. 228] defined jurisprudence as "the knowledge of things divine and human; the science of the just and the unjust", quoted in Lee, p. 33.
- (3) Lee, p. 34.
- (4) *Ibid*, p. 34.
- (5) Awad, pp. 12, 13.
- (6) See the meaning of `al-khalq' in *Lisdn al-'Arab*, under (*khalqa*).
- (7) See 4th line from Sec. 2, p. 30 of JRIE, 1:2.

References

- Awad, Ahmed Safi El Din**, *Ma'alim Addastour al-Islami*, Khartoum, 1967.
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