

Othman A. Llewellyn

Islamic Jurisprudence and Environmental Planning

JRIE, Vol.1, No.2, Winter 1404/1984.

Rejoinder to the Comments of A. Safi El-Din Awad

I am surprised that my article evoked so heated a response from one of its readers. In rejoinder, I will follow the sequence of his remarks.

1. The purpose of my article is not to belittle non-Muslim legal systems; and the non-Muslim legal specialists to whom I showed the drafts did not take it as an attack. Rather, my purpose is to point out to Muslims in the field of environmental planning some aspects of Islamic legal methodology in the context of their field. This is important because Muslim planners are almost invariably educated within the framework of secular law and values. However, the scope and ultimate aims, the values, principles, and rulings of Islamic law are quite distinctive; and a Muslim planner must be aware of this, if in his work he would be true to his religion.

Nor is my purpose to convince the reader that the Islamic system is the best. Committed Muslims already believe in the *Shari'ah* and others will draw their own conclusions - though they may not be convinced until they see us put it into practice.

However, since Muslims may not be aware what an Islamic approach to environmental planning entails, I wrote my article to address this issue.

2. My brother seems not to have understood what is meant by positivist law in the context of legal theory. *Webster's Third New International Dictionary*, 1971, provides the following definitions:

positivism ... 4: a theory of law that is restricted to the man-made statute law without ethical or ideological content as distinguished from natural law or moral law.

²positivist /'/'/ adj: being a positivist: exhibiting, relating to, or characteristic of any form of positivism < the spiritual barrenness of a conception of reality - *Time's Lit. Supp.*>

For a good, brief comparison of major legal philosophies, including Islamic law, positivist law, natural law, and the sociological and historical schools, one may refer to Anderson, J.N.C., *Islamic Law in the Modern World*, Westport, Connecticut, Greenwood Press, 1975, pp. 1-16.

Natural law, derived from Greek and Roman thought and developed by the Rationalists of the eighteenth century CE, was the predominant legal theory in the West until the last century. This theory holds that law is derived from an instinctive sense of right and wrong inherent in human nature. However, its proponents were unable to produce conclusive evidence to prove its axiomatic values, so the theory of natural law was for the most part discarded as untenable. Of the various theories of law which emerged, positivism became predominant in the West, especially in the United States and Britain. Positivist legal theory holds that law is simply whatever the courts apply, and is not concerned with moral, ethical questions. Positivism has itself come under strong attack in recent years, particularly since the war crimes trials at Nuremberg and those of the My Lai "incident" and other massacres in Vietnam exposed the need for a standard higher than the coercive power of the State. However, the overriding influence of positivism in Western law has not yet been supplanted by any other theory.

It should now be clear that positivist legal theory has nothing to do with Ibn Khaldun's division of the sciences into *tabi iyah* and *wad iyah* or *naqyah*, upon which my brother has based his definition of positive and natural laws.

I have not at any place in my article discussed the "opposite" of Islamic law, nor have I at any place contended that any non-Muslim law or economic system is devoid of ethical or ideological content. My assertion that Islamic law is unequivocally *value-centered*, that it is religion, ethics, and law, all in one, should not be taken to imply that any other system is devoid of values. What I did criticize is *positivist legal theory* for its rejection of the ethical basis of law, as I mentioned the inadequacy of cost-benefit analysis as a means to measure non-material values.

Laws inevitably involve value-judgements; the weakness of positivist legal theory is that it does not recognize this fact. But as for the contention that Roman law and religion and the Bible are the fountainhead of all existing Western laws (and one should add the English common law in the case of Britain and the United States), this is true only in a very broad and rather indirect sense. Almost no laws from the Bible, and not many from the Roman Empire are to be found among the statutes of the West today. The vast majority of Christians and most Jews do not believe that Biblical law should be applied by the courts, and how many followers of Roman religion are still alive? How different is the vital unity of law, religion, and morality in Islam, and the determination of devoted Muslims throughout the world to implement the *shari'ah* in its totality. As a Muslim, I ask a legal expert (*mufiti*) how to perfect my prayer, how to conduct my business transactions ethically, in a manner pleasing to Allah, and how best to treat my wife and child - not as a secular lawyer is consulted to press a lawsuit or find a tax loophole.

The dictum, "you can't legislate morality" is used in the United States to argue that there should be no legal sanctions against adultery, abortion, the sale of alcohol, and the like. This is precisely the kind of separation between law and morality that is in compatible with Islam.

The significance of the words of R.W. Lee which my brother has quoted is that they express a positivistic judgement against Ulpian's identification of law with morality and religion. Lee, like the positivists, separates "justice" into a moral standard, which "is the business not of law but ethics, or, moral philosophy," and a legal standard "determined by the law of our country". Jurisprudence he confines to the latter.

How far from this is the legal theory of Islam! In the words of Ibn Qayyim al-Jawziyah,

The foundation and basis of the *shari'ah* is wisdom and the welfare of Allah's servants (i.e. created beings) in this life and in the Hereafter. It is entirely justice, entirely mercy, entirely benefit, and entirely wisdom. Hence, any matter which diverges from justice to oppression, from mercy to its opposite, from benefit to harm, or from wisdom to futility, is not part of the *shariah*, though it be introduced therein by way of interpretation. For the *shariah* is Allah's justice among His servants, His mercy among His creatures, His shadow on His earth. (*I, lam al Muwaqqa* in, Fasl Fi Taghyir al-Fatwa wa Ikhtilafiha).

3. Regarding my translations and their implications: One of the subtleties of the word *khalq* is that its meaning here reflects so well the ethic of Islam; for while it emphasizes mankind, it embraces all created beings, omitting none. If my brother will look again at *Lisan al-'Arab*, he will see that the word pertains to "every thing that Allah has created (*Kullu shay' in khalaqahu 'llah*)" and "that which is created" (*al makhlūq*). He probably noticed that, in the case of the hadith regarding the Khawarij, "*hum sharru 'l-khalqi wa 'l-khaliqah*", the dictionary states that *al-khalq* means *annas* or people, and *al-khaliqah* means *al-baha'im* or animals - but even in this case, according to the following sentence, it is also said that the two words are of one meaning, namely "all created beings (*Iami' al-khala'iq*)."

In any case, more important than the dictionary's definition is the usage of the term by the Prophet Muhammad, upon him be blessings and peace. In my article 1 quoted the *hadith* related to Ahmad and at.- Tabarani, "Whoever plants a tree, no human (*adami*) nor any of Allahs creatures (*wa la khalqin min khalqi 'llah*) shall eat from it without its being reckoned as charity from him". In no way can the meaning of *khalq* be construed as restricted to human beings.

The ultimate objective of the *shari'ah*, *masalih. al-khalqi kaffatan*, does include the welfare of all created beings, and is not restricted merely to the welfare of mankind. This is clear from the great number of *ahadith* and *ahkam* which safeguard the welfare of the non-human creation, especially animals. Indeed this is the main idea which I intended to fix in the reader's mind regarding environmental planning in the framework of Islamic law.

Of course, this does not mean that a human planner can actually *provide'* for all the needs of all beings, present and future, and not leave out a single creature. Nor can a planner provide for all the needs of all mankind. He cannot even provide for all his own needs. It is indeed Allah alone in Whose Hand is the destiny of the universe, and Who in His mercy provides for His creation. But does this relieve the Muslim planner from any responsibility for their welfare? By no means! It is precisely the duty of a Muslim to his Lord to act in accordance with His mercy which encompasses all things.

The point is that a Muslim planner must do his utmost toward the welfare of all people and all created beings affected by his acts. When a conflict of interests is unavoidable, I must resort to *tarjih* or prioritizing, as mentioned in my article: The need of society takes precedence over that of an individual, an urgent need takes precedence over a need less acute, the need of a human being takes precedence over that of an animal, the need of the poor takes precedence over the need of the wealthy, and so forth. But my first duty as a planner is to do my honest best to fulfill all interests and harmonize them. I may not willfully *exclude* from consideration the welfare of any person or any created being.

Regarding my translation of the term *huquq al-'ibad*, the purpose of translation is to convey the intended meaning from one language to another, and not necessarily to use the literal equivalent. When writing for a readership that clearly knows the significance of the term, I do normally translate it as "the rights of Allah's servants". But to non-Muslims and people unfamiliar with Islamic legal terminology, "the rights of Allah's servants" may conjure up such ideas as the rights of Muslims or even the rights of Muslim "priests", a gross distortion of the true meaning. Imagine the result, were we to use a still more strictly literal translation, namely "the rights of slaves". In fact, in Islamic jurisprudence, *huquq al-'ibad* include the rights of all human beings and animals as distinguished from *huquq Allah*, the rights of Allah. (For an excellent discussion of these rights and their classification one may refer to *Qawaid al-Ahkam Fi Masalih al-Anam* by 'Izz ad-Din ibn 'Abd as-Salam). However, since many of my readers may not know the legal significance of this term I resorted to the translation, "the rights of Allah's creatures", which conveys its *legal* meaning fairly accurately.

I am at a loss to understand why the commentator should so vigorously deny that Muslim environmental planners have any responsibility regarding the welfare of creatures other than human beings - especially when the Prophet Muhammad, upon him be blessings and peace, clearly stated, "Allah has prescribed the doing of good (*ihsan*) with regard to everything", and when asked whether human beings are rewarded for doing good to animals, he declared, "There is a reward in every living thing (*Fi kulli kabidin ratbatin ajrun*)". And he explicitly mentioned with regard to the treatment of animals the words of the Qur'an, "Then he who has done good an atom's weight shall see it; and he who has done evil an atom's weight shall see it".