

"Legacy of International Law" (The Law of war through ages)

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Introductory:

History of International Law is as old as history of human civilization itself. With the spread of human race, its segmentation into groups, tribes and communities started. These divisions were made on geographical features, linguistic forms and religious notions. Hostile relations amongst them occasionally took the shape of armed clashes. Wars, therefore date back early period of human life. In the 3,500 years, since man started recording his history, only 270 years of peace are observed;¹ and even many of those eras popularly regarded as peaceful, have been suffered with violence. Human history is marked with titanic wars and bloodsheds variously. Wars were spread over the span of years and even forwarded to next generations in inheritance. Rivers were reddened with human blood and towers of human skulls were erected. A civilized country like United States, has merely two decades of peace in the last two centuries.²

Though the nature of war has changed with the change of civilization, it has never disappeared from the pages of human history; and the 2,400 years since Plato's death have proved his prediction that only the dead have seen the end of war. The calamity of war has ever taken the attention of human beings and it has been tried to put it into constraints. An inkling about such principles in war is found in ancient civilizations.

Therefore law of war was the first branch and the foundation of International

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27. Amr bin Al-Aas consulted women even in camps at the time of arbitration between Ali and Uthman for selection of Khalifa.

28. 1973 Constitution, Article 62

29. Abdulrahman Abdulkadir Kurdi, The Islamic State, Mansell Publishing Ltd. London, 1984, P-77f

30. These are qualifications on which there is a Consensus among scholars of Islamic Jurisprudence. See for example

31. Daily Nawa-i-Waqt, Lahore February 3, 1985

32. President's Order 1 of 1980 (Constitution [Amendment] Order 1980)

33. 1971 Constitution, Chapter 3A, Article 203A-203J

34. Dr. Muhammad Amin, Islamization of Laws in Pakistan, Sang-e-Meel Publications, Lahore, 1989, P-207.

35. Justice Javaid Iqbal, The Concept of State in Islam in Muntaz Ahmad (Ed) State politics and Islam, American Trust Publications, Indianapolis, 1986), P-49f

11. 1962 Constitution, Part II, Article 1 and 8.
12. 1962 Constitution, Article 207
13. Ibid, Article 199-206
14. Ibid, Part V, Chapter I, Article 103
15. Ibid, Article 227
16. 1973 Constitution, Article 130 (4)
17. The Provisional Constitution Order, 1981 (Chief Martial Law Administrator's Order 1 of 1981) and President's Order 15 of 1981.
18. The Federal Council (Majlis-e-Shoora) Order 1981 (P.O. No. 158 of 1981)
19. 1973 Constitution, Article 62, 63 and 113 as revised in 1985.
20. Decision of the Federal Shariat Court, dated October 16, 1989 on Shariat Petition No. 13L of 1988.
21. 1962 Constitution, Articles 155 (1) & (2) & 168
22. 1956 Constitution, Article 44
23. 1973 Constitution, Article 51-69
24. Ibid, Article 51 (4) & (5) and Article 106 (4) & (6)
25. Mufti Ghulam Sarwar Qadri, Khilaft-i-Islami, P-188
26. Javaid Ahmad Ghamidi, Meezan, Al-Maurad Publications, Lahore 1994, P-

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 3. Abul Ala Maudidi (Khurshid Ahmad Ed.), The Islamic Law and Constitution, Islamic Publications Lahore, 1980, P-31f.
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4. K.K. Aziz, The making of Pakistan, Karachi, 1967, P-106.
 5. Speeches and Statements of Iqbal, Lahore, 1948, P-3
Some Recent Speeches & Writings of Mr. Jinnah, Lahore, P-89
Debates of Constituent Assemblies of Pakistan, Vol. V, P-3, March 7, 1949.
 6. See table at P-11, to know details at a glance.
 7. See original text of the Resolution in the Constituent Assembly of Pakistan Debates, Vol. V, P-11, March 7, 1949.
 8. See for complete translated text of the Declaration: Maudidi, Islamic Law & Constitution, P-332.
 9. Chapter III, Section 4, 5, 6, & 8 of the BPC Report.
 10. 1956 Constitution, Part XII, Article 198.

4. Interpretation of texts of Quran and Sunnah in a certain legal matter.³⁵

Thus it would be most appropriate, to mention in operational part of the constitution that legislature of an Islamic state would not adopt any bill repugnant to the teachings of the Quran and Sunnah. It should provide necessary subsequent clauses to ensure the same.

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It is clear from the above analysis that Pakistan's experience of developing an Islamic legislature in a modern Muslim state is worth appreciating. It also illustrates how traditional Islamic view of Ijtehad can be institutionalized in modern statecraft and polity. Opinions would certainly differ on the quality of this experience. Modernists may say it is somewhat fundamentalistic while Islamists may regard it a weak and ineffective effort, but none will deny that it was well worth doing and long overdue. In fact it was the first step to materialize the aspirations of the people who had demanded, struggled for and achieved Pakistan - a state where they should lead their lives according to the tenets of Islam.

It should be noted that during the first twenty years the Council did not work efficiently but in the days of General Zia it worked diligently and became very productive. Many Islamic scholars consider Zia era the period for Islamization in the history of Pakistan although even then its recommendations were not accepted open heartedly.

We feel that a legislature to be an author-itative body in a Muslim state is clearly in accordance with the Islamic teachings. If we suggest it is a consultative body, whose members are nominated by the head of the state/government or its decisions are made subject to the approval of legislature/executive, it would become a weightless and ineffective institution devoid of any effect and prestige. Here the difference should be noted that a legislature in the Western legal philosophy is a sovereign institution. In an Islamic state it is not sovereign but authoritative which means that it is not merely a consultative body but can take decisions on its own, which would be binding on all organs of the state but it cannot 'legislate' independently in the western sense as its decisions cannot be repugnant to Shariah. These have to conform to it. Thus it can be safely said that legislation in Islam is nothing but practicing Ijtehad at the state level which entails the following:

1. To know and identify the implied will of Shariah in such matters where it has not been explicitly mentioned in the sacred texts, especially in the contemporary issues.
2. To derive and infer laws from the sacred legal texts in identical and similar issues.
3. To enact laws for implementation of Islamic injunctions properly, harmoniously and effectively.

TABLE SHOWING PERFORMANCE OF COUNCIL OF ISLAMIC IDEOLOGY
FOR 20 YEARS (1957-77)28

		Average per Annum
Sessions	48	2
Work days	136	7
Laws revised	133	7
inquiries replied	19	1
Draft bills prepared by the Council and implemented by the Government	4	5
Special Reports on Islamization of Society	Nil	Nil
Reports on Islamization of Laws	Nil	Nil
Number of advisers	8-15	

such an institution (The Council of Islamic Ideology in Pakistan) prove our contention:³⁴

TABLE SHOWING PERFORMANCE OF COUNCIL OF ISLAMIC IDEOLOGY DURING 7 YEARS (1977-84)

	Implemen ted	Not implemented
Draft bills prepared by the Council	7	9
Laws reviewed by the Council contained in volumes 1 to 8 of Pakistan Code	-	All
7 Special reports on Islamization of society	-	All
<i>In collaboration with Council</i> Recommendations of special convention on Islamization in August, 1980	5	10
Special Islamization Conference held in January, 1983	4	9

happened the validity of such judicial or administrative decision could be challenged in the superior courts where judges experts in Shariah could nullify such decisions/actions declaring them against the constitution and fundamental law or grund norm of the land, i.e. Shariah.

We also feel that the decision of ulama was not in right direction when they rejected the scheme of an Ulama Board (suggested in the report of the Second Basic Principles Committee prepared by Khawaja Nazimuddin Government) to be a part of the parliament. Once this scheme was rejected by the Ulama, the basic issue that the legislature of an Islamic country should not adopt a bill contrary to the Islamic teachings, was never considered again by succeeding constitution-makers in Pakistan and the chapter was closed for ever. Instead the Ulama suggested that the authority to check the validity of laws from Islamic view point be vested with the superior courts. Our objection is that why at all a bill, supposedly repugnant to Shariah, be allowed to be adopted first by the legislature of an Islamic state and then its repugnancy checked by the superior courts? Why should not adequate arrangements be made at the very first stage, at the process of adoption of the bill, that such a bill is not adopted by the legislature? Why should it be allowed to reach the second stage when the courts have the authority to nullify it?

We are also of the view that the experiment of creating outside the legislature a consultative body consisting Islamic scholars has proved a failure. The relevant statistics show that such an institution has often an ornamental value and its recommendations are generally ignored. The following tables showing performance of

also shows that Islamists have always preferred Islamization of legislation through the superior courts and not in the legislature by its members. This reflects their dissatisfaction and lack of confidence in politicians and political process prevalent in the country, in religiolegal matters. Keeping this in mind, General Zia-ul-Haq created the Federal Shariah Court and an Appellate Shariah Bench in the Supreme Court of Pakistan through a constitutional amendment.³² These provisions were later made a part of the permanent constitution of 1973 when it was revised and revived in 1985 through 8th constitutional amendment.³³ As the Ulama judges in the above two courts are in minority, their number needs to be so increased that in every bench they are equal in number if not in majority. Limitations imposed on the jurisdiction of the Federal Shariah Court to exclude the constitution, legal procedures and laws relating to personal life (marriage, divorce, inheritance etc) should also be waved.

We feel that the approach of constitution-makers of Pakistan in accepting the sovereignty of Allah Almighty was the most important step in the right direction. Unfortunately, this decision was not made more effective through subsequent necessary clauses in the operative parts of the constitutions. The acceptance of sovereignty of Allah Almighty should have meant not only supremacy of Shariah (the Quran and Sunnah) over the constitution, but over the whole legal and administrative framework including powers of the judiciary and the executive. This important feature was, however, ignored. This would have also led to a very clear statement in the constitution, that Shariah was the supreme law of the land, that no law repugnant to it could be adopted in the legislature and that no action could be taken by the executive in violation of it and if

organized form. Thus it would be most appropriate if these functions are carried out today by the legislature of a Muslim states.

As for the scope of legislation and working of the legislature, it is to be noted that constitution-makers in Pakistan had acknowledged in unambiguous terms in the very beginning (in the 'Objectives Resolution') that sovereignty in an Islamic state was exclusively for Allah Almighty. It was clearly mentioned that authority was a sacred trust entrusted to the people of Pakistan who would exercise the same through their chosen representatives. All constitutions also recommended that the legislature should be an elected authoritative body. The Federal Council (or Majlis-i-Shura) of General Zia-ul-Haq, was considered a provisional and stop-gap arrangement. He had himself confessed the failure of this nominated consultative body. He had admitted that the people wanted democracy³¹ wherein a legislative body, had to be authoritative and not merely a consultative institution.

The constitution-makers were also conscious of the fact that members of the legislature may not be properly qualified to assess matters of religio-legal importance. They found the remedy in creating a consultative body outside the legislature, consisting of Islamic scholars, to help the legislature. Most of the constitution-makers looked satisfied over this arrangement. They did not recommend any check on the legislature itself to guarantee that a bill adopted by it must always be according to the injunctions of Shariah, inspite of the fact that such an arrangement was proposed in the report of the Second Committee of the Basic Principles at the time of framing the first constitutions of Pakistan. The history of Islamization of constitutions in Pakistan

Procedures can be adopted to guarantee smooth working relation-ship between this committee and the parliament. For example when a bill is introduced in the House with an opening debate and then referred to the Committee, the Committee may send its findings to the House. After a full discussion if the House agrees with the findings of the Committee, the bill may be forwarded to the President for his concurrence. If the House does not fully agree with the bill it can return the bill to the Committee, along with its recommendations, for reconsideration. Then the reconsidered draft of the Committee would be considered final and sent to the President for his signatures; or sent to the Senate (if the parliament consists of two houses, the above procedures can be repeated)..

Another point concerning the scope of the legislature is that: Should its authority be limited to enacting new laws or should it include other matters as well? We feel that the stage where the West has reached now in a period of two centuries after a great deal of trial and error, Muslims had reached that stage 1400 years before. It is abundantly clear that at the time of Khilafat-e-Rashidah members of Shura were the basic electorate for electing the new Khalifa. They were also at the forefront of those who would check the working of Khalifa and his government for any misuse of the authority. A regular division of the state organs in judiciary, executive and legislature did not exist at that time but developed with the passage of time. The fact neverthe-less remains that the three main functions of today's legislature i.e.

- a) formation of Government;
- b) Enactment of laws; and
- c) Control over the Executive

were being carried out by the Shura at the time of Khilafat-e-Rashida in the light of the Quran and Sunnah, although in a less

Islamic scholars at the top of their lists. If this system is not followed and persons having such qualifications are not elected in general elections in sufficient number then these elected members of the legislature can elect certain number of Islamic scholars from the whole country who would become members of the legislature. If required, a similar arrangement can also be suggested for the Senate. We feel it is neither possible in the prevailing circumstances nor required in the Islamic perspective that every member of the legislature should have the qualifications of a 'Mujtahid'.²⁹ What really required is that a few such members should be available in the legislative body. This purpose can be achieved today by electing such members directly or indirectly, as suggested, and than an authoritative and competent legislative committee is constituted in the legislature with such members.

The qualifications of the members of this committee should also be clearly specified in the constitution or election laws. These qualification are summarized below:³⁰

1. Expert knowledge of the Quran and Sunnah
2. Command over Arabic Language.
3. Expert knowledge of the Fiqh and Its Usool (Islamic Law and Jurisprudence).
4. Knowledge of prevailing social, economical, legal and political conditions of the society especially of current legal structure.
5. High standards of morality and integrity

We are not recommending a system similar to that operative in Iran which gives supremacy to a body of Ulama over the legislature. We are rather recommending a body elected by the members of legislature themselves, which should be authoritative within the House due to its special nature.

they decide their matters with mutual consultation" (Quran 42:38).

As for qualifications of members of the legislature, all previous constitutions have given western style qualifications like age, citizenship, non conviction in criminal offences etc. However, General Zia-ul-Haq introduced Islamic qualifications for candidates of parliament which were included in the 1973 constitution when it was revived in 1985. Now the 1973 Constitution expressly states Islamic qualifications for candidates for parliamentary elections.²⁸ But, even this Constitution does not make it obligatory for the members of the Majlis-i-Shura (the parliament) to have even a fair knowledge of Shariah to legislate according to Islamic injunctions.

If we consider this in the Islamic perspective we note that at the time of Khilafat-i-Rashida the Khalifa did consult all members of the Shura in day to day matters. However, in matters which required special knowledge of Shariah and professional legal expertise, he used to consult only those members who had the required expertise. Thus by inference the members of legislature today, should generally have the knowledge of Shariah, but there must be some among them who have special and deeper knowledge of Shariah so that they give their expert opinion in matters relating to Islamic law. Evidently decisions of the experts should either be binding on the legislature or at least should be given special consideration and weightage.

How can the existence of such members be guaranteed in a legislature in a modern Muslim state? The answer is manifold. One possible method is that elections are held under the proportionate representation system and political parties are asked to keep such

Women are not only allowed to cast their votes but are also allowed to contest general elections. In addition to that they have their special quota in National Assembly (20 seats) and Provincial Assemblies (5% of the House) by virtue of a special clause in the Constitution.²⁴ They are elected by the members of the respective assemblies. The special clause in respect of women representation has now lapsed as it was valid for ten years after the third general elections and now its renewal needs a constitutional amendment which does not seem possible in the present political situation because no political party, or a coalition, has two third majority in the parliament to adopt a constitutional amendment.

In the matter of qualifications for the voters all constitutions mention western style routine qualifications like age, citizenship, mental soundness etc. No special moral or religious qualifications have been introduced although some Islamic scholars recommend that members of legislature should be elected only by pious male Muslims (who atleast offer prayers regularly and pay poor-due).²⁵ A few of them recommend that women should have their separate assembly or Shura elected only by women to deal with the issues concerning women folks.²⁶ A separate House for women could be a genuine substitute but to give right of vote to women is not unIslamic in our opinion. If Amr bin Al Aas could consult women fourteen hundred years ago at the time of selection between Ali and Othaman²⁷ why women should not be consulted today for election of members of legislature or head of state/government? Every citizen, male or female, rich or poor, pious or an ordinary Muslim has a concern with the state and the government and should be consulted in political matters. This is according to the divine guidance "And

Part-III

After this brief account of legislatures in Pakistan, we may now proceed to examine how far these legislatures have responded to the issues which we had formulated in part I of this study.

So far nature of the legislature is concerned, all Pakistani constitutions maintain that members of legislature would be elected directly on adult franchise basis, except the 1962 Constitution enforced by General Muhammad Ayub Khan which introduced a system in which members of the Basic Democracy, that is elected representatives of the people at the primary level, were to elect members of the National Assembly and the President.²¹ Also, all constitutions recommended one house parliament. But there was a great problem to tackle in one house parliament as East Pakistan (now Bangla Desh), with 53% of the country's population had only one province while West Pakistan (Now Pakistan) with 47% of the country's population had four provinces. In order to give equal representation to all provinces of the country in the National Assembly the four provinces of West Pakistan were merged in One Unit and the principle of equal representation of East Pakistan and West Pakistan was adopted.²² After the separation of East Pakistan from the Federation, a new constitution (1973 Constitution) was promulgated which recommended a parliament consisting of two houses - the National Assembly and the Senate. Under this constitution members of the National Assembly are directly elected by the people on separate electorate basis while members of the Senate are elected by members of the provincial assemblies for their respective provinces in accordance with the system of proportionate representation by means of a single transferable vote.²³

The following table would give an overview of legislatures in Pakistan, in choronological order:

LEGISLATIVE BODIES IN PAKISTAN

Sr.No.	Nature and title of Legislative Body	Ruler/Ruling Party	Duration	Constitution
1.	Constituent Assembly	Muslim League	1947-1954	Pakistan Provisional Constitution Order 1947
2.	Constituent Assembly/National Assembly	Muslim League	1955-1958	Pakistan Provisional Constitution Order 1947/1956 Constitution
3.	National Assembly	Gen. Ayub Khan/Council Muslim League	1962-1969	1962 Constitution
4.	Parliament	Z.A. Bhutto P.P.P.	1972-1977	Interim Constitution of 1972/ 1973 Constitution
5.	Federal Council (<i>Majlis-e-Shura</i>)	Gen. Zia-ul-Haq	1982-1985	Provisional Constitution of 1981
6.	Parliament (<i>Majlis-e-Shura</i>)	M.Khan Junejo Pakistan Muslim League	1985-1988	1973 Constitution
7.	Parliament (<i>Majlis-e-Shura</i>)	Benazir Bhutto P.P.P.	1988-1990	1973 Constitution
8.	-do-	Nawaz Sharif Pakistan Muslim League	1990-1993	-do-
9.	do-	Benazir Bhutto P.P.P.	1993	-do-

members of the Council of Islamic Ideology as ex-officio members of the Council.¹⁸ But even then he faced resistance from other members in the adoption of Islamic laws. He did not prescribe any qualifications for membership of the Council, from Islamic view point nor did he apply any Islamic standard in their selection. The same thing happened when non party elections were held in 1985 and Junejo government took over as an elected government. However, at the time of the revival of the revised 1973 Constitution in 1985 he introduced certain Islamic qualifications for members of the legislature,¹⁹ which required a candidate for legislature's membership to have adequate knowledge of Islamic teachings. He was also required to be free from major sins, practising obligatory duties prescribed by Islam. It was also stipulated that he should be of good character and not commonly known as one who violated Islamic injunctions. Furthermore he was supposed to be sagacious, righteous, non profligate, honest and ameen (honest). Now these qualifications are part of the 1973 Constitution but detailed regulations required to implement these constitutional provisions were not framed with the result that these provisions could not be applied properly when elections were held in November, 1988. Deficiencies of the regulatory laws were challenged in the Federal Shariah Court in 1989 which gave some favourable decisions.²⁰ The Government, filed an appeal in the Supreme Court but the decisions were upheld. Since no Government sincerely wishes to implement these constitutional provisions, no effective measures were taken by the successor governments of Benazir Bhutto and Mian Nawaz Sharif to implement these provisions. Nor was any interest shown to make the Council of Islamic ideology effective by giving a consideration to its reports in the legislature.

establishment of a 'Council for Islamic Ideology'. The word 'Advisory' was dropped from the title of the Council and the role of the Council was made a bit more effective which is apparent from the fact that the Council had to submit a provisional report annually and a final report within seven years. It was held essential to discuss the reports in the federal and provincial legislatures within six months of their receipt and to enact laws within two years of receipt of the final report.¹⁶ However, the role of the Council remained consultative in nature, and the legislature and the government neither accepted any change in the existing laws nor enacted any new law on the recommendations of the Council (except that just before its removal from office, the Bhutto government promulgated some Islamic laws to cool down the public which was highly enraged over Bhutto's anti-Islamic policies). As regards qualifications of the members of the legislature, this constitution was no better than its predecessors.

The 1973 Constitution was suspended by General Zia-ul-Haq captured power and imposed Martial Law on July 5, 1977. He created in 1981 a Federal Council (Majlis-e-Shura) members of which were nominated by him. Its role was consultative.¹⁷ It could discuss and consider issues and make recommendations to the President to enact new laws or modify the existing ones. However, it could not enact new laws at its own.

Although General Zia was known for his religious leanings the fact merits notice that out of his first list of 288 nominees for the Federal Council only 15 were Ulama and Islamic scholars. The rest came from the same old families of landlords, industrialists and retired bureaucrats. When he faced difficulties in getting Islam-oriented laws adopted by the Federal Council, he designated

first session of the assembly. This constitution not only recommended the establishment of an Islamic Research Institute to undertake research and instructions in Islam for the reconstruction of the Muslim society on truly Islamic basis¹² but also recommended setting up of an 'Advisory Council for Islamic Ideology'. The proposed Council was to examine all laws in force to bring them into conformity with the teachings and requirements of Islam laid down in the Holy Quran and the Sunnah and to advise whether or not a proposed law was repugnant to the teachings and requirements of Islam. Thus the role of the Council was consultative.¹³ The Government did not pay any heed to its recommendations. So much so that amendments suggested by the Council in the 'Family Laws Ordinance, 1961' which was being condemned unanimously by all religious groups in the country, were not approved. For the qualifications for membership of the legislature, this Constitution made a routine reference to citizenship, age, non-holding of an office of profit, non conviction in an offence, etc. on the pattern of 1956 Constitution. It did not include any specific Islamic qualification.¹⁴

Ayub regime was overthrown by General Yehya Khan when in consequence of failure of its policies, masses came out on the streets to oust the Government. After a long series of political agitations in which East Pakistan was separated from the Federation of Pakistan, Mr. Zulfiqar Ali Bhutto took over the Government. Mr. Bhutto first made an interim constitution. Then the regular constitution of 1973 was framed and passed by the National Assembly. It was made effective from August 14, 1974. This constitution declared that no law repugnant to Islamic injunctions shall be enacted and all existing laws shall be brought in conformity with the injunctions of Islam.¹⁵ It also provided for