

IQBAL' S THEROY OF IJMA: PERSPECTIVES AND PROSPECTS

Muhammad Altaf Hussein Ahangar

I

Ours is an age of evolution ad revolution. The advances made in all disciplines of knowledge especially in the fields of scientific and technological know-how have dazzled and dazed not only the common man but the inventors and researchers themselves. Consequently many challenges have been thrown upon the different religio-social communities of the world particularly Muslims. One of the confronting problems for the Muslims is regarding the institution which can provide an answer to the Ummah regarding the attending consequences of all these developments. In other words, should we follow the West for providing solution to these problems or Islam provides us the institutions for meeting out the demands resulting form these intellectual and scientific excursions. And in case Islam provides several institutions which one is most viable and relevant during contemporary times. These queries are not made by the Muslims now but were attended by the Muslim intellectuals and philosophers even during the last few centuries. Appreciating the onslaught of these trends, Allama Muhammad Iqbal suggested the following Islamic alternative for dealing with,such contingencies:

The pressure of new world-forces and the political experience of European nations are impressing on the mind of modern Islam the value and possibilities of the idea of *Ijma'*. The growth of republican spirit and the gradual formation of legislative assemblies in Muslim lands constitute a great step in advance.⁴²

With these introductory remarks, 'an endeavour is being made in this paper to deal with the views of Dr. Iqbal regarding *Ijma'*; what form *Ijma'*

⁴² Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*, 138 (Iqbal Academy Pakistan, 2nd Edition, 1989). Hereinafter referred as *Reconstruction*.

can assume according to him in contemporary times; how far his views are acceptable to Pakistan judiciary and how far his views can be defended in the light of views expressed by contemporary *Ulama* and jurists.

II

Ijma', in broader terms, means the consensus of the jurists of a certain period of the Muslim community over a certain legal matter. A contemporary attempt defines it as a legal concept comprising the consensus of the competent scholars of the *Ummah* with regard to legal questions that are not commented upon in the written sources.⁴³ While avoiding the discussion pertaining to definition, Iqbal like the generality of Muslim jurists declares *Ijma'* as the third source of Islamic law but considers it the *most important legal notion in Islam*.⁴⁴ He regrets that this important notion remained practically a mere idea and rarely assumed the form of a permanent institution in any Muslim country.⁴⁵ He attributes the non-transformation of this institution into a permanent legislative institution possibly to the political interests of absolute monarchy especially to that of the Umayyad and the Abbaside Caliphs.⁴⁶ Besides, refuting the theory of some orientalist that *Ijma'* can repeal Qur'an, he contends that *Ijma'* of companions could only extend or limit the application of a Qur'anic rule provided the companions were in possession of a Shariah value (*Hukm*) entitling them to such a limitation or extension.⁴⁷

Generally *Ijma'* of the companions is considered valid and binding with regard to all affairs whether religious or legal. We have even jurists on record who did not accept any other *Ijma'* except the *Ijma'* of the companions. But

⁴³ Abdul Hamid A. Abu Sulayman, "Islamization of Knowledge: A New Approach Toward Reform of Contemporary Knowledge" in the book *Islam: Source and Purpose of Knowledge*, 93-118 at 104 (U.S.A, 1988)

⁴⁴ Reconstruction, 137

⁴⁵ Ibid.

⁴⁶ Id. at 138.

⁴⁷ Id. at 138-139.

Iqbal has unique a opinion about this type of *Ijma* In *Reconstruction*, he informs us:

But supposing the companions have unanimously decided a certain point, the further question is whether later generations are bound by their decision... I think it is necessary in this connection to discriminate between a decision relating to a question of fact and the one relating to a question of law. In the former case as, for instance, when the question arose whether the two small *Surahs* known as *Mu'awwidhatan* formed part of the Qur'an or not, and the Companions unanimously decided that they did, we are bound by their decision, obviously because the companions alone were in a position to know the factor. In the latter case the question is one of interpretation only, and I venture to think, on the authority of Karkhi, that later generations are not bound by the decision of the Companions. Says Karkhi: 'The *Sunnah* of the Companions is binding in matters which cannot be cleared up by *Qiyas*, but .it is not so in matters which can be established by *Qiyas* .⁴⁸

In these lines Iqbal gives his opinion that where there is a consensus of the Companions on a question of act, then such a consensus is unquestionably binding in its entirety on the succeeding generations on the ground that the Companions alone possess the knowledge of those questions and such questions cannot be answered by analogy and individual interpretation. However, where the problem pertains to a question of law, then the *Ijma'* of the Companions is not binding upon future generations for the reason that such questions relate to interpretation which is a right of every competent person⁴⁹ in every age.

⁴⁸ Id. at 139

⁴⁹ Ahmad Hassan. *The Doctrine of Ijma' in Islam*. 241 (Islamabad, 1978)

Before we embark upon analysing the prospects of the above views, we deem it relevant to quote the way Professor Mohammad Hashim Kamali reproduces the above passage:

Iqbal draws a distinction between the two functions of *Ijma'* namely:

Discovering the law and implementing the law. The former function related to the question of facts and the latter relates to - the question of law. "In the former case as, for instance, when the question arose, whether the two small suras known as '*mu'ammazatain*' formed part of the Qur'an or not, and the Companions unanimously decided that they did, we are bound by their decision, obviously because the Companions alone were in a position to know the fact. In the latter case, the question is one of interpretation only, and I venture to think, on the authority of Karkhi, that later generations are not bound by the decision of the companions"⁵⁰

With due respect it is submitted that we fail to locate these two-fold functions of *Ijma'* in Iqbal's Reconstruction. Iqbal nowhere talks about 'discovery' and 'implementation' functions of *Ijma'*. He is simply concerned with the binding relevance of *Ijma'* of the Companions and to this self-posed question he answers that an *Ijma'* of Companions relating to question of law is not binding on future generations. By way of analysis, it is pointed out that if the function of *Ijma'* is to 'discover' the law, then this object can be served not only *vis a vis* question of fact but also question of law. Secondly we fail to accept the view that the function of *Ijma'* is to implement law which can be fulfilled regarding question of law only. *Ijma'* is mainly concerned with the interpretation of existing law according to changed circumstances and also with the formulation of new laws in the light of guidance from the Qur'an and the Sunnah according to the exigencies of time. Implementation of laws does not fall within the ambit of *Ijma'*; it has always been the concern of the executive branch of the state. Perhaps the learned professor has relied for the

⁵⁰ Mohamad Hashim Kamali, Principles of Islamic Jurisprudence. 240 (Selangor, 1989).

above passage upon some secondary source in which the author might have put his own construction upon Iqbal's views.

Regarding the prospects of Iqbal's thesis that *Ijma'* of the Companions relating to question of laws is not binding on the future generations, it is worth mentioning that the observations of 1 contemporary Muslim jurists and writers seem to be implicitly endorsing Iqbal's approach. For example, Taha Jabir al 'Alwani in one of his papers "*Ijtihad*" contends:

Muslim scholars should realize that time constantly travels forward, making it impossible for situations or events to recur in exactly the same way. It just is not possible today to impose proposals and ideas put forward in Madinah by Imam Malik and his contemporaries fourteen hundred years ago. Similarly, it is not possible to ignore or discount the developments and achievements made during all the intervening generations in the field of human sciences. In economics, for instance, how would it be possible to follow the Madman market mentality in reference to contemporary economic issues. To apply the Madman market model to contemporary financial and economic situations would result in poverty and prevent the *Ummah* from meeting the people's basic requirements. It will neither be possible to have any dealings with today's complex world economic systems nor for any Muslim state to build a -strong economy capable of meeting the challenges of the present time. ***Muslims can, no doubt, learn from their predecessors by incorporating the latter's ideas into their own.***⁵¹

Likewise, while justifying on merits the present price control system, Dato Abdul Hamid A. Abu Sulayman states:

While instituting reform, the factors of time and place have to be given adequate consideration with regard to the influence they might have on the interpretation or amendment of each text within the frame work of the principles of Divine guidance.⁵²

⁵¹ Taha Jabir al 'Alwani, *Ijtihad*, 24-25 (IIIT, USA, 1993). [Emphasis Laid].

⁵² *Supra* note 2 at 105.

From the above details it is apparent that in order to prove that Islam as a living ideology is susceptible to evolution and growth⁵³ we would have to resort to re-interpretation of the corpus of Islamic legacy and eliminate from its components the inconsistency and irrelevancy which might have crept in its legal and other fabrics.⁵⁴ We are not to forget that the current concept of Usul was formulated in an earlier period and in that capacity it responded to the needs of that age. But the developments, changes and the trends in the realities of Muslim life require a reforming in order to determine the amendments that have to be introduced⁵⁵ with regard to the individual and collective life of the Muslims.

III

We have already come to know that Iqbal treats *Ijma'* as a most important legal notion. But that contention does not solve the problem. The question is how Iqbal intends the *Ummah* to take benefit of this institution contemporarily. In other words how *Ijma'* can be constituted at present and who can participate in the discharge of this divinely - ordained obligation. As a realist Iqbal does not allow himself to be hamstrung by the notions and conceptions of past jurists and theologians. Rather he is ahead of his time when he writes:

The transfer of the power of Ijtihad from individual representatives of schools to a Muslim legislative assembly, which in view of the growth of opposing sects, is the only form Ijma' can take in modern times, will secure contributions to legal discussions from laymen who happen to possess a keen sight into affairs. In this way alone we can stir into activity the dormant spirit of

⁵³ Ismail Raji al Faruqi, "Islamization of Knowledge: Problems, Principles and Prospective" in the Book *Islam: Source and Purpose of Knowledge*, 56 (U.S.A, 1988).

⁵⁴ Id., at 30.

⁵⁵ *Supra* note 2 at 105.

life in our legal system, and give it an evolutionary outlook.⁵⁶

These lines suggest that legislation in an Islamic country is no more a job which can be entrusted exclusively to an individual jurist representing a particular school of thought. Such an approach, according to Iqbal, would simply lead to the growth of opposing sects thereby dividing *Ummah* further. In order to add unifying element in *Ijma'* institution, Iqbal considers the legislation through the agency of the legislative assembly as the only possible way-out. He is of the opinion that through the agency of legislative assembly *we can stir into activity the dormant spirit in our legal system and give it an evolutionary outlook*. It implies that the collective deliberations on an issue can result in best formulations and prescriptions for *Ummah*.

The second issue involved in the above observation relates to the membership of the legislative assembly. Should it be represented by the *Ulama* only or even a common man should have some say in the legislative deliberations. In this regard Iqbal expects contributions to legal discussions from *laymen who happen to possess a keen insight* into affairs. Who are these laymen whom Iqbal points out? Do they include illiterate common men? The answer is 'no'. By laymen', we contend that Iqbal means those Muslims who may not be conversant with the intricacies of *Fiqh* but do possess in-depth and profound understanding of other disciplines of life. In order to clarify Iqbal's approach, we venture to reproduce extensively the views expressed by Dato Abdul Hamid A. Abu Sulayman in one of his papers. If not mistaken, we find the close proximity in Dato's views with that of Dr. Iqbal. Dato reiterates:⁵⁷

we must realize, however, that modern knowledge has expanded immensely and has become so complex that it is impossible for a single person to acquire a command of the multiple aspects of even one branch of knowledge. This means that the ability necessary for *Ijtihad* in any one of the various

⁵⁶ Reconstruction, 138

⁵⁷ Supra note 2 at 102. [Emphasis Laid].

branches of knowledge requires specialization in and absolute mastery of that branch. In view of this multifariousness of knowledge, and the multifariousness of the fields of specialization, it is clear that *Ijtihad*, insights, solutions and alternatives, in the domain of social and scientific knowledge cannot be provided by the specialists in legal studies alone. [Both]⁵⁸ the task and the expectation are impossible.

This is most noticeable in the case of legislators who formulate and categorize the laws and regulations covering economics, politics, information, industry and scientific research or transformation. It cannot be assumed that they are the masterminds of the knowledge from which the laws and regulation have been derived. In view of the achievements and progress made in the modern fields of knowledge, we need to bring to bear the expertise of economists, politicians, administrators and others who are well-versed in the various affairs of social life. Such specialists should at the same time have first hand knowledge of the Qur'an and-the *Sunnah*, which give them proper insight into the morals, values and purpose of existence as understood in Islam and validate their activities and contributions.

Even the Pakistani judiciary could not shun away from endorsing Iqbal's "Legislative Assembly" theory as the best form of *Ijma'*. In *Khurshid Jan*,⁵⁹ Justice Muhammad Yaqub Ali of Lahore High Court did make the following observation:

With due respect to them, the members of our Legislative Assemblies, at present, are not sufficiently

⁵⁸ The original word is "But". We think it should be "both" because that conveys the intended meaning.

⁵⁹ *Khurshid Jan v. Fazal Dad*, PLD 1964 (W.P) Lahore 558.

learned so as to be considered fit for *Ijtihad* or *Qiyas*, the two essential conditions for participating in an *Ijma*. This, however, is not a counsel of despair. A remedy against it has been suggested by Dr. Iqbal and we may add that the pre-requisite for every member of a Legislative Assembly in Pakistan should be a fair amount of knowledge of law-making in Islam. *We do not mean that each one of them should be Faqih or a Mujtahid. But at the same time he should not be wholly unfamiliar with the primary duty of a legislator in an Islamic country.*⁶⁰

IV

Does it mean that *Ulama* have no role within the framework of Iqbal's theory of *Ijma'* and it is only the legislative assembly which may have the ultimate say in judging the Islamicity or otherwise of any proposed legislation? As usual, the answer is not in the affirmative. Iqbal has a definite role for *Ulama* and he does not envisage any legislation to their exclusion. In *Reconstruction* he writes:

One more question may be asked as to the legislative activity of a modern Muslim assembly which must consist,⁶¹ at least for the present, mostly of men possessing no knowledge of the subtleties of Muhammadan Law. Such an assembly may make grave mistakes in their interpretation of law. How can we exclude or at least reduce the possibilities of erroneous interpretations?. The Persian Constitution of 1906 provided a separate ecclesiastical committee of *Ulama* - 'conversant with the affairs of the world' - having power to supervise the legislative activity of the *Mejliss*... But whatever may be the Persian constitutional theory, the arrangement is not free from danger, and may be tried, if

⁶⁰ Id. at 578-579. [Emphasis Laid].

⁶¹ Id. at 579.

at all, only as a temporary measure in Sunni countries.

*The Ulama should form a vital part of a Muslim legislative assembly helping and guiding free discussion on questions relating to law.*⁶²

What one can deduce from the above observation is that the legislative assembly should enact a law in consultation of the Ulama. Dr Iqbal has his own reasons for such a contention. He thinks that most of the members of the legislative assembly *must*⁶³ consist of men possessing no knowledge of the subtleties of Islamic Law. Resultantly such assembly is likely to commit grave mistakes in the interpretation of law. Such an assumption is absolutely right. Even today we see such persons elected to the legislative assembly who are bereft of academic and moral excellence and it is purely their personal influence on the electorates of this constituency which enables them to reach to the corridors of highest law-making institution. So, in order to reduce possibilities of erroneous interpretation Iqbal advocates the temporary adoption in Sunni countries of a device envisaged in Persian Constitution of 1906 whereby *Ulama* should form the *vital part of a Muslim legislative assembly helping and guiding free discussions on questions relating to law*. It means that the role which Iqbal intends to be assigned to the *Ulama* is confined simply to helping and guiding free discussions on questions relating to law. In other words, if a conflict emerges regarding a future enactment, then it will be the will of the legislative assembly which would prevail over the reasoning of *Ulama*. It seems that Iqbal does not favour dominating role of *Ulama* in *Shia* Jurisprudence whereby *Ulama* consider themselves entitled to supervise the whole life of the community. Actually he does not want sovereignty of legislative assembly to be impaired by any other institution. Further, he expects those persons to dominate Muslim legislative assembly in future who happen to possess the) knowledge of the subtleties of Islamic law. We find favour for our argument in Khurshid Jan where the learned judge observed:

Two distinct thoughts are visible in these observations. One that the legislative assemblies of the modern state may assume the role of Ijma' and the other that the

⁶² Reconstruction, 139-140. [Emphasis Laud.

⁶³ Emphasis Laid.

**sovereignty of the legislature should not be impaired by
subjecting it to the authority of an external organ.⁶⁴**

Secondly, what meaning Iqbal gives to the word '*Ulama*'. Does, he mean a person who is well versed in the teachings of the Qur'an and the *Sunnah* and relies unfailingly on the interpretation of early jurists while dealing with a problem. In other words is he the person who is mostly engrossed in the past and does not acquaint himself with the realities of the contemporary multi-dimensional world. In this regard, Iqbal insists on those *Ulama who are conversant with the affairs of the world*. A vivid depiction of qualifications of such *Ulama* can be found in one of the works of Maulana Abul A' la Maududi in which he provides that our law-makers should, *inter alia*, have acquaintance with the problems and conditions of our times – the new problems of life to which an answer is sought and the new conditions in which the principles and injunctions of the *Shari'ah* are to be applied.⁶⁵

From the above views one can arrive at a conclusion that for the time being the Muslim specialists in different disciplines and *Ulama* have, to some extent, role of equivalence in a Muslim legislative assembly. Dato Abdul Hamid A. Abu Sulayman does not seem departing from this approach when he writes:

Such well-equipped specialists can develop the legislative source materials on which legislators can draw to meet the day-to-day requirements of the *Ummah* and vitalize its existence. By so doing we can define the place of '*Ufta*' and of the legislature in the field of knowledge, as well as realistically assess their potential social performance in order to avoid overburden or misguiding either the experts or the solons. *This means that we will continue to call*

⁶⁴ Supra note 18 at 577.

⁶⁵ Sayyid Abul A'la Maududi, *The Islamic Law and Constitution*, 77 (Lahore, 7th edition, 1980). Other qualifications according to learned author, are (i) faith in Sharaah, (ii) proper knowledge of Arabic language,

(iii) Knowledge and insight in the teachings of the Qur'an and the Sunnah,

(iv) acquaintance with contributions of earlier jurists and commendable character and conduct. (Ibid)

*upon orthodox jurists and legislators to provide the insights, originality and answers to new, intricate problems, but only in conjunction with an unflinching determination to keep them abreast of knowledge by preparing cadres of specialists capable of living to the-expectations and requirements of the age.*⁶⁶

The responsibility of these inter-disciplinary specialist cadres should not remain confined to a particular legislative think-tank or authority but should be shared by the academic community, by representatives of interest groups, and by legislative bodi responsible for pronouncements arising from the need and demands of the ' *Ummah*'s social structure. This approach is necessary to enhance the intellectual vitality of the *Ummah* and to reduce any ambiguities or anxieties in its daily practices.⁶⁷

V

Is the literature and law inherited by *Ummah* from Islamic heritage sufficient to guide us for having *Ijma'* pertaining to unending contemporary problems? Many of the contemporary *Ummah* would answer this query affirmatively but Iqbal addresses the problem with the observation:

The only effective remedy for the possibilities of erroneous interpretations is to reform the present system of legal education in Muhammadan countries, to extend its sphere and to combine it with an intelligent study of modern jurisprudence.⁶⁸

From this dictum Iqbal seems to suggest that with the present system of legal education in Muslim countries we cannot face the contemporary world, i.e., we cannot provide solutions to the multi-dimensional complex problems of contemporary items. Accordingly he suggests three-fold steps for proving Shariah as a living institution through the agency of *Ijma'*. Legislators and Ulama are supposed to work for (i) the reformation of

⁶⁶ Emphasis Laid.

⁶⁷ Supra note 2 at 102-103.

⁶⁸ Reconstruction, 140.

present system of legal education, (ii) the extension of the sphere of legal education and (iii) the) combination of Islamic legal education with an intelligent study of modern jurisprudence.

A look in these three steps suggests that there should have been some reason with Iqbal for pleading for the reformation of present system of legal education. Personally we are of the view that it is the rigidity and conservativeness in our legal system towards the solution of our day to day problems that prompted Iqbal to plead for its reformation. When Iqbal talks about the extension of the sphere of legal education, he wants us to come out of the myopic sphere of Islamic family law, penal law and commercial law. His intentions are to make us face the realities of the real world. And this is possible only when we study and teach subjects of contemporary legal relevance, such as, shipping laws, aviation laws, industrial laws, economic laws and so on. Still not satisfied, he impresses upon us the need of combination of Islamic legal education with intelligent study of modern jurisprudence, implying thereby that a comprehensive study of modern legal disciplines and Islamic legal heritage is sine qua non for the purpose of finding solutions to the present-day problems. Here, it would not be a matter of irrelevance to suggest that in Iqbal's approach to legal education we can identify coincidentally the policy adopted by International Institute of Islamic Thought, U.S.A. towards the Islamization of knowledge. The workplan designed by this Institute for knowledge Islamization process lays emphasis, inter alia, on (i) mastery of modern disciplines, (ii) discipline survey, (iii) mastery of Islamic legacy, (iv) establishment of specific relevance of Islam to the disciplines, and (v) critical assessment of modern discipline and Islamic legacy.⁶⁹ One can at ease find in this workplan the materialization of Iqbal's visionary outlook about the future educational pattern of Ummah. There is, however, a differentiating factor; Iqbal's three-step formula relates to the discipline of law whereas the blue-print designed by the IIIT concerns with every discipline of human life. But what can be true of discipline of law is equally applicable to other disciplines and there is a real need to Islamize our knowledge with regard to every discipline of life and talk simply about the discipline of law would not be productive for the Ummah.

⁶⁹ Supra note 12 at 54-63. See also supra note 2 at 103-106.

VI

One more question which attends our mind pertains to location and analysis of the practical significance of Iqbal's theory regarding Ijma'. We mean whether Iqbal's views simply reflect the philosophical dimension and relevance of the Ijma' institution or practically it has impressed the legal institutions of Muslim nations. An approach of Pakistani judiciary to Iqbal's thinking can provide best answer to this self-posed query. In Khurshid Jan,⁷⁰ justice Muhammad Yaqub Ali found Iqbal's views about Ijma' constitutionally incorporated in the provisions of Article 198(3) of the 1956 Constitution and Articles 199-203 of 1962 Constitutions of Pakistan. Article 198(3) of 1956 Constitution authorised the President of Pakistan to appoint a commission:

a) to make recommendations:-

i) as to the measures for bringing the existing law into conformity with the injunctions of Islam, and

ii) as to the stages by which such measures should be brought into effect; and

b) to compile in a suitable form, for the guidance of the

National and Provincial Assemblies such injunctions of

Islam as can be given legislative effect.

Likewise the enumerated articles of 1962- Constitution empowered the President or the Governor of Province to refer to the Advisory Council of Islamic Ideology for advice on any question that arises as to whether a proposed law disregards or violates, or is otherwise not in accordance with, the above principles. In selecting a person for appointment to the Council, the President was to have regard to the person's understanding and appreciation of Islam and of the economic, political, legal and administrative problems of Pakistan. The functions of the Council were:

⁷⁰ Supra note 18.

(a) to make recommendations to the Central Government and the Provincial Governments as to means of enabling and encouraging the Muslims of Pakistan to order their lives in all respects in accordance with the principles and concepts of Islam, as set out in the Holy Qur'an and the Sunnah; and

(b) to advise the National Assembly, a Provincial Assembly, the President or a Governor on any question referred to the Council under Article 6, that is to say, a question as to whether a proposed law disregards or violates, or is otherwise not in accordance with the principles of law-making.

Besides, the Constitution required the President to establish an Islamic Research Institute which shall undertake Islamic research and instruction in Islam for the purpose of assisting in the reconstruction of Muslim society on the truly Islamic basis.⁷¹

The Post-Kbushid Jan era, however, witnessed more strides towards the realization of Iqbal's thinking about Ijma'. The Constitution of Islamic Republic of Pakistan 1973 provides for the establishment of Federal Shariah Court⁷² entrusted with the task of examining and deciding the question whether or not any law or provision of law is repugnant to the injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet (SAAS). Once it finds any law or provision of law repugnant to the injunctions of the Holy Qur'an and the Sunnah, such law or provision shall cease to have effect on the day on which the decision of the court takes effect.⁷³ The role and approach of Federal Shariat Court was discussed in Muhammad Riaz.⁷⁴ Aftab Hussain J., observed:

The principle under which the repugnance of a particular law to the injunctions of Islam has to be

⁷¹ Id. at 577-578.

⁷² Art. 203 C.

⁷³ Art. 203 D.

⁷⁴ Muhammad Riaz v. Federal Govt. PLD 1980 F.S.C.I. (Federal Shariat Court).

judged is limited to the consideration of the question whether the laws sought to be challenged before this court are in conformity with the injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of Prophet (peace be upon Him). It would, therefore, be clear that the language of the Constitution does not warrant any attempts at harmonizing the laws with any particular Jurisprudence (Fiqh) or Jurisprudence of any particular school of thought or sect. On the other hand it appears that reference to any particular doctrinal approach (Fiqh) has been eliminated deliberately so as to enable the Courts to test the validity of a law only on the criteria of commandments laid down in the Holy Qur'an or the Sunnah of the Prophet (peace be upon Him)⁷⁵

Continuing his observation, the learned judge further contends:

Looked in this context it would be clear that though doctrinal approach (Fiqh) of different schools of thought may have a persuasive value which it undoubtedly has and in many cases full assistance may be obtained from it in the interpretation of the texts of the Holy Qur'an or traditions, yet this Court cannot blindly follow the doctrines (fiqh) of a particular sect. If the intention of the Constitution had been to apply a sectarian doctrine to matters of public law (as distinguished from personal law) all the difficulty would have been obviated by replacing the present public law by Fatawa Alamgiri. But clearly this is not the object of the Constitution to which it appears abhorrent to demolish the existing legal structure in order to raise a new structure of public law. The constitutional intent is only to repair the existing structure by eliminating from it what is repugnant to the divine law comprised in the Holy Qur'an and the Sunnah of the Prophet (peace be upon

⁷⁵ Id. at 14.

Him) and amending the law to make it conform to the said divine law.⁷⁶

Zakaullah Lodi, the other Judge of the Federal Shariat Court, held:

We are required to construe the injunction of the Holy Qur'an and the Sunnah in the light of such conditions as were prevalent at particular juncture of time in the society in which Islam was practised first in its true spirit and not to try to apply -it by rigidly adhering to the grammatical meanings of a particular verse and by divorcing the impact and bearing of the general scheme and spirit of the Qur'an as well as the goal in view of the Holy Prophet (peace be upon Him). The greatest of exponents of Islamic laws always adopted this course in their own times and provided a guideline for us. Such other questions as the examination of the historical background of our people, their temperament and the, place and position that they occupy in the present day civilization are other considerations which shall have to be kept in mind.⁷⁷

Late President Zia, after putting 1973 Constitution in abeyance, allowed many of its articles to operate without any amendment and got some articles amended vide Chief Martial Law Administrator's order No. 1 of 1981. Article 228 provided for the Constitution of Council of Islamic Ideology within ninety days of commencing of the Order consisting of not less than eight and more than twenty members amongst persons having knowledge of the principles and philosophy of Islam as enunciated in the Holy Qur'an and the Sunnah, or understanding of thee economic, political, legal or administrative problems of Pakistan.⁷⁸ Allowing a member the tenure of three years⁷⁹ and Council having at least a woman member,⁸⁰ the function of the Council

⁷⁶ Ibid.

⁷⁷ Id. at 46.

⁷⁸ Art. 228 (2).

⁷⁹ Art. 228 (5).

include (i) making of recommendations to Parliament and the Provincial Assemblies as to the ways and means of enabling to encourage the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Qur'an and the Suunnah; (ii) to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the injunctions of Islam; (iii) to make recommendations as to the measures for bringing existing laws into conformity with the injunctions of Islam and the stages by which such measures should be brought into effect; and (iv) to compile in a suitable form, for the guidance of the Parliament and the Provincial Assemblies, such injunctions of Islam as can be given legislative, effect.⁸¹

All these details have been given with the object of familiarising the readers that Pakistan has theoretically (and to some extent practically) gone ahead of Iqbals' conception of Ijma. Iqbal had envisioned uni-tier device for framing of laws by Ijma', i.e., Ulama constituting a vital part of Muslim legislative assembly helping and guiding free discussion on questions relating to law.⁸²

But the Pakistani Judiciary has come out with four-tier device for legal formulations by Ijma'. These are: (1) Legislative Assemblies; (2) Federal Shariat Court; (3) Council of Islamic Ideology and (4) Islamic Research Institute. Treating the establishment of Islamic Council and Islamic Research Institute conforming with Ijma' institution, Muhammad Yaqub Ali, J., observed in Khurshid Jan:⁸³

⁸⁰ Art. 228 (3) (d). The inclusion of a woman member in the Council of Islamic Ideology bears witness to the fact that only Muslim males cannot have understanding of the principles and philosophy of Islam enunciated in the Qur'an and the Sunnah. It implies that Muslim women can equally participate in the legislative process of a Muslim nation.

⁸¹ Art. 230 (1) (a-d).

⁸² Reconstruction, 139-140.

⁸³ Supra note 18.

... The masses are to follow the learned in exposition of laws on the basis of Qur'anic verse "obey God and obey the Prophet and those amongst you who are in authority". According to the four Sunni Schools, the words "man is authority" referred to men, who are learned in the laws so as to be considered fit for Ijtihad or Qiyas and not to Rulers or Governors since they themselves are required to conform to the rules of Shariat and to act upon the advice of the learned according to the Qur'anic Text: "that if you yourself do not know them question those who do". The Constitutional provisions for the establishment of . Advisory Council of Islamic Ideology and Islamic Research Institute, in our opinion, seek to conform to this rule.⁸⁴

As is evident, the judicial approach in Pakistan highlights several devices for resorting to the law-making through Ijma' but this in no way affects the utility and relevance of Iqbal's device of 'legislative assembly' as constituting the only possible form of Ijma'. Any rule and finding put forward by Council of Islamic ideology and Islamic Research Institute cannot become law unless given recognition by a legislative assembly. Likewise, where the legislative assembly is convinced that the Federal Shariat Court has departed from the true spirit of an Islamic principle while construing a law, it can nullify that very interpretation by a legislative provision to that effect. So we can safely arrive at a conclusion that contemporarily the legislative assembly of Pakistan is the supreme body of law-making and the role of the Council of Islamic Ideology, Islamic Research Institute and even Federal Shariat Court is to help and guide this legislative assembly in the formulations of rules, regulations and laws for the governance of the contemporary Pakistani Muslim society in accordance with the urgencies and demands of the time.⁸⁵

VII

From the preceding discussion we have come to know that Iqbal considered *lima'* as the most important legal notion in Islam. And in order to provide legal solutions to the multi-dimensional confronting problems, he

⁸⁴ Id. at 578.

⁸⁵ For further details, see M. Altaf Hussain Ahangar, "Classical Sources of Islamic Law: Judicial Responses in Pakistan", *XII Islamic Comparative Law Review*, 101-113 (New Delhi, 1992).

held the opinion that the legislative assembly of a Muslim state is the possible form the Ijma' can assume in contemporary times. He expects the guidance and help of Ulama to the members of legislative assembly during the law enactment process. The 'legislative assembly' device for law formulations has already received endorsement from Pakistan Judiciary. However, the Pakistani Judiciary has recognised (1) Federal Sha'riat Court; (2) Council of Islamic Ideology, and (3) Islamic Research Institute as other institutions through which laws can be enacted in a Muslim County. Personally we are of the opinion that the four-fold devices recognised by Pakistan Judiciary for enactment of Laws through the process of Ijma' does not in any way affect Iqbal's 'legislative assembly' theory whereby the legislative assembly is the only possible form of Ijma. The fact remains that deliberations, findings and formulations by any institution does not become law automatically unless and until legislative assembly approves and ratifies these in the form of legislation. The emergence of International Institute of Islamic thought on the world-scene does make us realize that Iqbal's theory of Ijma' holds positive and bright future. A comparison of Iqbal's thesis with that of policy and objects of IIT makes one realize! about the closeness and at some places the similarity between the, Iqbal's philosophical adventure and IIT'S practical workplan. An indirect concise account of IIT'S mission outlined by Taha Jabir al 'Alwani in one of his papers mentions:

... It advocates the revival of Muslim Thought along the Prophet's original methodology and calls for a fresh look at Islam's basic sources in the light of modern changes and for adjustment in Islamic thought accordingly. The exponents of this school consider Ijtihad a reflection of the contemporary intellectual and, psychological state of the Ummah. For then whatever the right pre requisites for Ijtihad exist, then it becomes incumbent upon the Ulama to practise Ijtihad and respond to the needs of the time. They, also contend that fiqh is but one area in need for Ijtihad in order to deal with the affairs of the Ummah. The school propounds what could be called macro-fiqh which deals with the totality of the concerns of the Ummah - as opposed to micro-fiqh which deal with specific issues - and is therefore subject to local conditions and influences.⁸⁶

⁸⁶ Supra note 10 at 21-22.