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A Critical Analysis of a Thirty-Five Year Judicial Interplay in Riba Case

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Abstract
Pakistan has long been undergoing multiple litigations and judicial rounds of misadventures over thirty-five years in pursuit of elimination of riba from the national economy. The founder of Pakistan, Quaid-i-Azam Muhammad Ali Jinnah had aspired to see the research organization of the State Bank to evolve an indigenous economic model based on Islamic principles instead of relying upon the western system in his address in the inaugural ceremony of State Bank of Pakistan in 1948.[1] Likewise, all the three constitutions also enunciated earliest elimination of riba as a part of principles of policy. This article investigates as to why after all the founder's aspiration and the constitutional enunciations, riba could not be eliminated from the national economy so far. It will be doctrinal research that explores and analyses critically various aspects of the delays and deferments of the judicial proceedings and process in implementation of the judgements of the apex courts of Pakistan.

Key words: riba, judgements, interplay, delay, proceedings, constitution, elimination, court

Introduction

An Ideological Foundation

The founding father of Pakistan had on several occasions reiterated the purpose behind the struggle for a separate homeland for the Muslims of India. The principle of partition had also established that only the Muslim majority provinces of India would be grouped together to form an independent Muslim state. Resultantly, only the Muslim majority provinces were included in Pakistan in 1947 while parting with a large Muslim population in India. The ideological framework for Pakistan's economy was also foretold by the founder in his inaugural address on the foundation ceremony of State Bank on July 1, 1948. He observed that Sate Bank of Pakistan needs to develop such banking principles and practices as consonant with Islamic economic and social norms. He further enunciated that the Western economic system will not serve our objectives of attaining prosperity for our countrymen. He said that we need to decide our destiny in our own perspective.[2]

To pursue the foregoing insightful aspiration of the founder, an 'Objective Resolution' was passed by the first constituent assembly of Pakistan in 1949.[3] The resolution laid down an ideological foundation for the successive constitution. It also stressed upon the need for creating an 'Enabling environment' for the Muslims to practice Islam and the minorities to profess their religions. To achieve the above-set goals of ideological transition into State's economic system, the first constitution of 1956 ensured elimination of riba as early as possible

[1] https://www.sbp.org.pk/departments/IBD.asp [accessed on 13.06.2024]
[2] Ibid
[3] https://www.na.gov.pk/uploads/documents/1434604126_750.pdf [accessed on 13.06.2024]

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in its article 29 (f). The following constitutions of 1962[4] and 1973[5] also provided for an earliest elimination of riba in articles 8 (18) and 38 (f) respectively, as part of principles of policy.

The Executive Actions/ Non-Interest-based Banking (NIB)

However, despite all constitutional assurances for the three decades, no concrete step was taken in this pursuit until the second martial law regime took over the affairs of the country in 1977. The first presidential order[6] passed to the council of Islamic Ideology aimed at preparing a detailed report on elimination of riba from the national economy[7]. The report was submitted in 1980 and in compliance, all the then nationalized banks were required to open a counter for Islamic banking products and operations as a part of five-year plan from 1981 to 1985. Subsequent to completion of the five-year plan, all the banks were mandated to accept all deposit only on the profit and loss sharing basis except as current account and foreign currency account.

Judicial Scrutiny of the Executive Actions

Soon after the lapse of the ten-year bar on Federal Shariat Court's fiscal jurisdiction (FSC),[8] a huge number of petitions flooded in the court, reaching up to one hundred and fifteen together with three Suo-moto actions of the FSC.[9] Under Article 203-D of the Constitution, the petitioners challenged a number of Non-Interest-based Banking (NIB) practices on several grounds such as mark-up, indexation[10], buy-back agreements, hire-purchase agreements, sale of debts and receivables together with a number of fiscal laws and provisions allegedly repugnant to the injunctions of Islam. The court consolidated all the petitions[11] and the Suo-moto actions and framed a questionnaire of fifteen questions for circulation to jurist scholars and experts to obtain their insight and opinions.

The questions were framed as follows:

1. Whether there is any difference between interest, riba and usury?
2. Whether the prohibited riba is also applicable to the banking interest which is charged on productive and commercial loans
3. What will define debt?
4. Whether sale, which is completely a lawful transaction by the Quranic text, can be applicable to interest-based transaction of banks in character.
5. What is the definition of Rab-al Fadl?
6. What are the reasons behind the prohibition of riba? What are its implications in legal and moral contexts among the different schools of thoughts and scholars?
7. What is the effect of the opinions of the contemporary scholars about a question which has explicit text in the Quran and Sunnah?
8. Whether prohibition of riba is applicable to the non-Muslim, living in an Islamic state.
9. What is the stance of the contemporary scholars over indexation due to currency devaluation?
10. What will define the word Ras-ul-Maal as revealed in the Qur'an?
11. Whether Modaraba, Musharaka etc. are being practiced to give fixed profit by the Islamic banks, if so, what will be the legitimacy of such fixed profit in terms of Shariah?

[4] The constitution of Islamic Republic of Pakistan 1962
[5] The constitution of Islamic Republic of Pakistan 1973
[6] Issued by General Zia-ul-Haqq on 29th September, 1977
[7] Report: Elimination of Riba from the Economy and Islamic Modes of Financing. 1980. Council of Islamic Ideology
[8] Substituted by P.O. No. 14 of 1985.
[9] SSM Nos. 2, 3 & 4 / I of 1991.
[10] Indexation is a compensation from the debtor to the creditor against devaluation of the loaned money
[11] Shariat Petition No.30/I of 1990.

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12. What are the ends/objectives of Islamic banking and financial institutions? Are the ends being met by the practiced Islamic financing modes?
13. Discount on bills. What can be an alternative to this practice from Shariah perspective?
14. Whether shariah warrants preferential treatment extended to current accounts.
15. What will be an alternative approach to the foreign debts in the event, that the interest-bearing banking practices and its cognizant laws are declared inconsistent with the injunctions of Islam?

The responses received in the questionnaire were well deliberated and discussed by the FSC in depth. Leading lawyers and scholars gave their arguments and contentions as well. Following all debates, discussions and contentions the apex court handed down a detailed judgement of 157 pages, in which it declared the foregoing impugned NIB practices together with a list of twenty fiscal laws and provisions as inconsonant to the inunctions of Islam.[12]

The court's findings may be summarised as follows

- Riba is defined as any increase, however little, over and above the principal. It also includes excessive interest/usury, interest backed by government and interest based on market.
- There is no legal difference between the loans for consumption and the loans for production.
- Riba has absolute proscription regardless of the nature and purpose of the loan.
- Prohibition of riba in the Qur'anic is not allegorical. Instead, it originates from clear text of the Holy Qur'an.
- Proscription of Riba does not oppose Maslaha Mursalah or public good. Ijtihad comes into play for the public good once there is no relevant text in the Qur'an.
- Banking practice of Indexation for inflation is not warranted in Islam.
- A mark-up system is tantamount to financial interest hence repugnant to Islam.[13]

The bench of the FSC comprised over Justice Dr. Tanzeel-ur-Rahman, Justice Fida Muhammad and Justice Ubaidullah and held total eighteen hearing sessions from February 7 to October 24, 1991. The judgement was passed on November 14, 1991 with a deadline to the federal and provincial governments for necessary legislations and actions as on June 30, 1992.

The Government's Appeal to the Supreme Court

However, before the lapse of the given deadline, the federal government along with other parties preferred fifty-five appeals against the judgement of the FSC in the Shariat Appellate Bench (SAB), Supreme Court of Pakistan. The appeals remained pending up to more than five years until the SAB took up the matter yet another two years took to dispose of the procedural hitches before fixing the appeal for hearing finally on February 22, 1999. The hearing started before the full bench of the SAB comprising over Justice Khalil-Ur-Rahman, Justice Wajih-Ud-din, Justice Muneer A. Shaikh, Mufti Taqi Usmani and Dr. Mahmood Ahmad Ghazi and concluded on July 6, 1999.The SAB obtained assistance of a number of jurist-scholars and experts of law, economics and finance.[14] The SAB after detailed hearing upheld the Riba-judgement of the Federal Shariat Court and handed down an exhaustive judgement comprising eleven hundred pages. Five hundred and fifty pages were only written by Justice Khalil-Ur-Rahman, whereas two hundred and fifty pages were authored by Mufti Taqi

[12] PLD 1991 FSC 1 titled "Dr. Mahmood-Ur-Rahman Faisal and others versus Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan"

[13] Charles H. Kennedy. Pakistan's Superior Courts and the Prohibition of Riba in Islamization and the Pakistani Economy, Robert M Hathway and Wilson Lee, ed., Washington DC 2004 pp.101-118

[14] Mufti Taqi Usmani. The Historic Judgement on Interest delivered in the Supreme Court of Pakistan. Idaratul-Maarif Karachi, 194

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Usmani alone. The SAB gave a deadline as of June 30, 2001 for implementation of the judgement which was passed on December 23, 1999.[15]

Judicial Interplay (Review Petition, Applications, Remand Order, New Judgement & Appeal)

Critical Analysis of the Review Petition & Applications

A review petition was filed by the United Bank Limited in the SAB for reconsideration of the 1999-judgement, on February 21, 2000. The review petition remained under pendency for over a year until fixed for the first hearing on April 10, 2001. Second hearing was fixed for June 11, 2001. Interestingly, while the review petition was pending, the UBL filed a Miscellaneous application[16] to suspend the effectivity of the 1999-Riba-judgement of the SAB. Surprisingly, instead of hearing the review petition on its fixed date, the miscellaneous application was taken up by the court for hearing though the court declined to accept the prayer in the application and dismissed on the ground that the suspension of the SAB judgement will depend upon the bench's final decision after hearing the review petition.[17]

The composition of the SAB bench on this application was different as follows:

- Mr. Justice Munir Sheikh
- Mr. Justice Sheikh Riaz Ahmad
- Mr. Justice Muhammad Taqi Usmani

It is also interesting to note that no next date was fixed in the court after hearing the miscellaneous application and an adjournment order passed with date in office. Another interesting point is that shortly after the adjournment, next date was fixed on June 14, 2001. Moreover, just one day before the date fixed for hearing review petition, second application[18] was moved on June 13, by the UBL with the same prayer to suspend the operation of the judgement together with an extension to the deadline from June 2001 to December 31, 2005.

On this occasion, the SAB took up the second application very next date instead of hearing the review petition as was fixed on that date. It is surprising as to how the UBL could ask for extension of the deadline whereas the court had directed the federal government for implementation of the judgement and the UBL was not a party in the appeal, thus having no locus standi for this prayer. The court surprisingly sought the stance of the attorney general[19]regarding extension date despite the fact that the government was not a party in the review petition.

Thus, the SAB not only entertained the second application just one day before the hearing of review petition but also fixed for the very next date, which was the date of hearing the review petition and also provided a partial relief by giving extension of one year more till June 30, 2002. Likewise, the court failed to notice that one of the deadlines had already elapsed on March 30, 2000, whereby numerous fiscal laws and provisions had ceased to have effect, thus the effects of these laws could no longer be extended. Moreover, by extension of the timeline for implementation of the judgement, the SAB suspended the operation of the judgement partially, though the suspension sought in both the applications was for a longer period. Similarly, as the federal government had not filed a petition for review against the SAB

[15] Civil Shariat Appeal No.1 of 1992. Dr. M. Aslam Khaki vs. Syed Muhammad Hashim & 2 others along with other connected petitions (reported as PLD 2000 SC 225).
[16] CMA No. 1436 of 2001
[17] Refer to Order dated 11.06.2001, passed by SAB in CMA No. 1436/2001 in Shariat Review Petition No.1/2000.
[18] CMA No. 1485 of 2001 in C.Sh.R.P. No. 1 of 2000 in Shariat Appeal No.11 to 19 of 1992.
[19] Aziz A. Munshi was the then attorney general of Pakistan

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1999-judgement, the judgement had become final and binding on the government to the extent it related to the government jurisdictions. Hence the conceding of the attorney general of Pakistan for extension of the timeline was a misplaced act.

Remand Order: Observations & Critical Analysis

After disposal of both the applications moved by the UBL, the main review petition was sent to the chief justice for fixing the date of hearing before expiry of the extended deadline. Again, as usual, the petition remained under pendency over a year. Amid the pendency, an Alim judge of the appellate bench of 1999 Mufti Taqi Usmani, was substituted by two new ulama judges namely Dr. Rashid Ahmad and Dr. Khalid Mahmood.

Thus, the reconstituted Shariat Appellate Bench (SAB) comprised now the following judges:

- Chief Justice Shaikh Riaz Ahmad
- Justice Khalid Mahmood
- Justice Qazi Mohammad Farooq
- Justice Munir A. Sheikh
- Justice Rashid Ahmad

Finally, being the last month of the extended deadline, the hearing started on June 6, 2002 by the new SAB in which only one judge of the previous SAB was sitting namely, Justice Munir A. Shaikh. The newly constituted SAB disposed of the review petition within nineteen days and pronounced its judgement on June 24, 2002, just six days before the lapse of the extended deadline. The previous judgements of the SAB and FSC were set aside and the case was remanded to Federal Shariat Court for redetermination of the issues afresh. It is noteworthy that as a matter of principle, the scope in review petition remains limited to only review the errors, if found on the surface of the judgement and not to entertain arguments, debates and discussions on the points already settled in the earlier judgement under the appeal.

However, in this review proceedings the advocates were allowed to raise questions and advance arguments upon the facts and points which were well settled and recorded in the judgement under appeal. More interestingly, the new SAB placed reliance mainly upon the arguments, presented by advocate Mr. Riaz Gilani who was a counsel, representing the federal government despite the fact that the federal government has not preferred this review petition against the judgement of the previous SAB of 1999. Hence, he had no locus standi to represent the federal government, as the review petition was filed by United Bank Limited. Moreover, Mr. Gilani repeated the previous arguments in the current review proceedings in the pretext that he had not got answers[20] to his questions he raised in the appeal. However, his questions were duly addressed by Justice Taqi Usmani in his additional note[21] of the judgement under the appeal, despite the fact that Mr. Gilani was seeking adjournment instead of concluding his arguments and subsequently did not appear before the court in the appeal proceedings. Similarly, he relied upon different opinions of the scholars and interpretation of legal jargons instead of giving concrete contentions against the judgement.

Statutory Guidelines for Administration of Justice

The Constitution of Pakistan, 1973, provides that "the State shall ensure inexpensive and expeditious justice".[22] Similarly, a code of conduct has been set by the Supreme Judicial

[20] Refer to para 9 of the judgment at page 810 (reported as PLD 2002 SC 800).
[21] PLD Supreme Court 2000. Page. 665-759.
[22] Article 37 (d), the Constitution 1973

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Council[23] for Judges of the superior judiciary, i.e., Supreme Court and the High Courts in 2009, which mandates a judge to be diligent and expeditious in disposal of the cases and to relieve the suffering of the litigations."[24]

New Judgement of the Federal Shariat Court & Appeal

It is an irony that despite the foregoing clear guidelines, ever since the remand order of the new SAB to FSC in June 2002, the case remained pending for more than ten years until a leading figure of Tanzeem-i-Islami namely Mr. Khalid Mahmood Abbasi, filed an application in the Federal Shariat Court on August 4, 2012 to take up one hundred and seventeen petitions, pending long.[25] Finally after further one year of the application, the hearing started in 2013, which took another ten years from the date of the application, to finally conclude this case and pronounce the judgement on April 28, 2022.[26]

The court made redetermination of the points which were settled in original petitions and appeals for the sake of compliance with the new SAB remand order, 2002. The judgement maintained the previous judgements of the FSC and the SAB while declaring numerous statutes and provisions as repugnant to the Islamic injunctions. The FSC also gave a five-year[27] timeline to the federal government for transformation to riba-free economy. Again, as usual an appeal has been filed against the judgment in the Shariat Appellate Bench of the Supreme Court of Pakistan and the 1991-riba case is sub Judice thus far, over three decades.

Observations, Suggestions & Conclusion

As regards this latest judgement of the FSC, passed on April 28, 2022, it is commendable judicial endeavor towards elimination of riba from the national economy. However, it may be observed that the court mentioned three barter transactions and prohibited them as part of the interest. Although there is another kind of barter transaction, i.e. an exchange of two different currencies with a deferred delivery of one currency. This barter transaction also forms riba thus requires to be prohibited by the FSC as well. This will in turn prohibit currency forwards contracts and currency Futures, which are very much in vogue in money markets. AAOIFI's standard on Salam and parallel Salam has also prohibited the above-mentioned kind of transaction.[28] Similarly, AAOIFI's Shariah standard no. 8 on Murabaha[29] does not allow deferred Murabaha in currency as well."

However, State Bank of Pakistan has allowed Islamic banks, vide IBD Circular Letter No. 02 of 2014, to transact currency Salam which negates the standards set by Islamic Fiqh Academy and AOIFI. Therefore, the prohibition of exchange of different currencies with deferred delivery needs to be mentioned in the judgement as one among the prohibited categories of barter transactions. Likewise, the FSC in its latest judgement has not ruled upon the issue of indexation for inflation. Though the SAB in its remand order of 2002 had explicitly directed the FSC to redetermine this issue yet the FSC has resorted to the fact that there is no existing law which deals with indexation hence the court did not touch upon this issue.

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[23] The Supreme Judicial Council framed under Article 128 (4) of the 1962 Constitution as amended up to date under Article 209 (8) of the Constitution of Islamic Republic of Pakistan 1973.

[24] Article X of the Code of Conduct for the Judges of the Supreme Court of Pakistan and the High Courts, Published onhttps://www.supremecourt.gov.pk/downloads_judgements/all_downloads/supreme_judicial_council/CODE_OF_CONDUCT_FOR_JUDGES.pdf [accessed on 13.06.2024]

[25] Imran Ahsan Khan, (2018), The concept of Riba and Islamic banking in Pakistan, Daniyal Publisher, Lahore:21.

[26] PLD-2023 FSC-47

[27] From April 28 2022 to December 31, 2027

[28] Art. 3/2/4 Shariah Standard no. 10

[29] Art. 2/2/6 Shariah Standard no. 8 Murabaha

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Similarly, the court confined itself to only those fiscal statutes and provisions which were challenged in the petition of 1990, and did not touch upon other statutes which are also repugnant to the injunctions of Islam such as Public Debt Act, 1944, which allows public borrowings on the basis of interest, Securities Act 2015, which permits sale and purchase of interest-bearing instruments such as debentures and preference shares as well as Futures Act 2016, which permits gambling and speculative transactions. Similarly, the FSC should have examined all the practiced modes of Islamic banking and finance in Pakistan. As certain Islamic financing modes have not been approved by a consensus of Shariah scholars and are under debate among them for a long time. These financing modes include commodity Murabaha, special Musharaka pools, running Musharaka, banca takaful and currency Salam. Therefore, the court should have passed its judgement about the shariah validity of these modes in vogue. In short, it can be said that the destination of elimination of riba from the national economy is still far ahead to reach as the matter is yet not resolved and pending in appeal under the Appellate Bench of the Supreme Court of Pakistan since 2022 for an indefinite time period.

Bibliography

- Civil Shariat Appeal No.1. 1992. titled "Dr. M. Aslam Khaki vs. Syed Muhammad Hashim & 2 others" -along with other connected petitions. (reported as PLD 2000 SC 225).
- CMA No. 1436. 2001.
- CMA No. 1436. 2001. Shariat Review Petition No.1. 2000.
- CMA No. 1485. 2001. C.Sh.R.P. No. 1. 2000. Shariat Appeal No.11 to 19. 1992.
- https://www.na.gov.pk/uploads/documents/1434604126_750.pdf
- https://www.sbp.org.pk/departments/IBD.asp
- Kennedy. C.H., Hathway R.M., & Lee W. Pakistan's Superior Courts and the Prohibition of Riba in Islamization and the Pakistani Economy. ed. Washington DC. pp.101-118.
- Khan I. A. (2018). The concept of Riba and Islamic banking in Pakistan. Daniyal Publisher. Lahore:21.
- PLD. 1991. FSC 1. Titled: Dr. Mahmood-Ur-Rahman Faisal and others versus Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan.
- PLD. 2002. SC. 800. (para 9 of the judgment at page 810).
- PLD. 2023. FSC. 47.
- Report on Elimination of Riba from the Economy and Islamic Modes of Financing. 1980. Council of Islamic Ideology.
- Shariat Petition No.30/I. 1990.
- SSM Nos. 2, 3 & 4 / I. 1991.
- The Constitution (Amendment) Order. 1980. (P.O. No. 1 0f 1980)
- The Constitution of Islamic Republic of Pakistan. 1962.

Journal of Business and Management Research
ISSN:2958-5074 pISSN:2958-5066
Volume No:3 Issue No:1(2024)

- The Constitution of Islamic Republic of Pakistan. 1973.
- Usmani. M.T. 2000. PLD Supreme Court. Note on pages 665-759.
- Usmani. M.T. The Historic Judgement on Interest delivered in the Supreme Court of Pakistan. Idaratul-Maarif Karachi. 194.