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EDITORIAL ARTICLE

# The *Ribā* Case Pending for three Decades: The Federal Sharī'at Court, Pakistan may Fulfill its Constitutional Responsibility by Outlawing the Interest

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While Islamic banking is being promoted by the State Bank of Pakistan (SBP) working parallel with the conventional banking since 2002, the Constitution of Pakistan requires that interest must be outlawed from the economy as early as possible [Article 38 (f)]. The legal trajectory of interest made its way to the Federal Sharī'at Court (FSC) after the 10-years moratorium on adjudicating fiscal and banking matters ended at the end of May 1990. The FSC and subsequently the Sharī'at Appellate Bench (SAB) of the Supreme Court of Pakistan delivered their landmark judgments in 1991 and 1999 respectively, but the state officials opted to hide behind some constitutional provisions, or the presumed view of some jurists /scholars to plead that the 'interest" was not that *ribā* as prohibited by Qur'ān.

Although, the connotation of *ribā* has long been agreed at the level of Islamic *ummah* to include modern commercial interest in *ribā*, and efforts for evolving 'interest-free' banking and finance system are underway also including Pakistan, but there have been some hindrances in implementation of Islamic injunctions and the Sharī'at Courts' judgments. The *ribā* case being reheard in the FSC since 2013, after it was remanded back by the SAB in 2001 is becoming gradually complicated. The debt trap for Pakistan's economy is becoming increasingly painful requiring to transfer almost all resources for servicing the debt. However, little effort has been made to transform the economy of Pakistan to risk and reward sharing and cooperative bases in the light of Islamic principles. During the hearing of the case in May this year the representatives of the state contended that "the non-justiciable policy decisions regarding implementable possibilities were beyond the jurisdiction of the Sharī'at Court."

We present here a brief account of the arguments of the government and the SBP, and how the same are lacking in rationale. We also discuss the accomplishments so far in terms of evolving an interest free system, and how the problems have become increasingly complex. A possible course of action by the Sharī'at Court has also been suggested in terms of which the 'interest' may be outlawed from the economy without giving the dates on which various law would cease to be effective. The SBP would be asked to go for converting all banks to Islamic bases by removing the dual system as at present. The difficulties confronting in case of financing the public sector and the budgetary deficit would be resolved by combined efforts under the guidance of a "Committee of Economists, Scholars and Professionals" (CESP) created in the State Bank of Pakistan to suggest possible way-out for all types of business and transactions. It will also include simultaneous promulgation of two laws as suggested by the Task Force of the Ministry of Law in 2001. The issues of money creation, monetary management and the rates of money and capital markets will also be regulated under the guidance of the CESP.

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*"O, believers, fear Allah, and give up what is still due to you from ribā if you are true believers." (Q; 2:278) "If you do not do so, then take notice of war from Allah and His Messenger. But, if you repent, you can have your principal. Neither should you commit injustice nor should you be subjected to it." (Q; 2:279)*

The Father of the Nation, Quaid-i-Azam Muhammad Ali Jinnah, mentioned on the historic occasion of the opening of State Bank of Pakistan on July 1, 1948:

- "I shall watch with keenness the work of your Research Organization in evolving banking practices compatible with Islamic ideals of social and economic life.... We must work our destiny in our own way and present to the world an economic system based on true Islamic concept of equality of manhood and social justice." [Janjua, 2004].

The Objectives Resolution passed by the first Constituent Assembly in 1949 resolved that the Assembly would frame a constitution for the sovereign independent State of Pakistan; wherein:

- The State shall exercise its powers and authority through the chosen representatives of the people.
- The principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; and
- The Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'ān and the *Sunnah* [practices of the Holy Prophet]...

Article 38 of the Constitution enjoins:

- "The State shall-(a) secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;... (e) reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan; (f) eliminate *ribā* as early as possible." [emphasis added]

Article: 227 mandates:

- "All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'ān and Sunnah, in this part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions".

## INTRODUCTION

The verses of Holy Qur'ān, the wish and advice of the 'Father of the Nation' and the provisions of the Constitution of Pakistan make it obligatory for the state and its organs to ensure that all laws conform to the tenets of Qur'ān and Sunnah, and that Pakistan's economy is to be transformed to interest free basis. That's the only way to do justice with all, and welfare of the masses at broader scale, as required in the Article 38 (a) and (e), along with application of other tenets of Islam.

The elimination of *ribā* [interest as finally decided by all juristic bodies in the Muslim world like OIC's International *Fiqh* Academy, World Muslim League's *Fiqh* Academy, European *Fiqh* Council, and others at national levels in Islamic countries], has been a part of Pakistan's constitutional heritage since the first Constitution of 1956 declared it as a principle of state policy, and creating the Article 2A making substantive part of the Constitution.

In order to further strengthen the constitutional basis requiring all laws / systems to conform to the Sharī'ah, setting up of the Federal Sharī'at Court (FSC) with jurisdiction to determine whether any law is contrary to the injunctions of Islam and to strike it down if it is so determined, and that of the Sharī'at Appellate Bench (SAB) in the Supreme Court of Pakistan, provided a specific forum for undertaking the task of Islamizing the laws in a gradual and smooth manner. With this step, the confusion regarding involving the mainstream judiciary for deciding about the validity of laws considering the Qur'ān and Sunnah came to end.

Imbued with the power to strike down any un-Islamic laws, the FSC and the SAB have the mandate and been reviewing all types of laws ranging from the contracts laws to pay & perks of various state officials and the retirement process of civil servants in the light of Islamic law[1]. Among these, the laws involving *ribā* have been undertrial for over 30 years - from 1991 when the FSC delivered its landmark judgment.

**Failure on the Part of State and Responsible State Organs**

Against the policy requirements as indicated above, there have been failures on part of almost all organs of the state, though the level of failure might be different based on different levels of responsibility. Based on the Qur'ānic injunction and constitutional provisions, the Government of Pakistan [2] should have taken serious steps for adopting the alternatives as suggested in various reports, judgments, and Commissions' reports time to time. The, government represented by the Ministry of Finance, the custodian of the economy of Islamic Republic Pakistan and its resources, the State Bank of Pakistan, the custodian of financial and monetary system of Pakistan, the Parliament as legislative authority of the country, and the judiciary as custodian of the Constitution of Pakistan are responsible for the failure in fulfilling their responsibility assigned by the State "to evolve banking practices compatible with Islamic ideas of social and economic life" right from July 1, 1948 (Quaid-i-Azam speech) to-date when the chief executive of the country is speaking high of making the country a Model of 'Madina State'.

The consistent approach of the government had been to exempt itself from application of any provisions of law aiming at leaving interest-based system. The tragedy to buy time has been on account of:

> a) presumed lack of jurisdiction of the Sharī'ah Court based on some Constitutional provisions; and
> b) viewpoint of some Egypt based jurists of 19th century as has been evident throughout last 30 years since hearing of the *ribā* case in the FSC in 1991, and the passage of the Enforcement of Sharī'ah Act, 1991[3].

The Federal Government and the State Bank of Pakistan pleaded during hearing pertaining to the Sharī'at Petition No.30/L OF 1991 that as the function of eliminating interest was assigned by the Constitution [Article 38 (F) to the State, so the non-justiciable policy decisions regarding implementable possibilities were beyond the jurisdiction of the Sharī'at Court [emphasis added]. The reply referred to the clauses of the Constitution mentioning the word 'interest' and argued that the Court had no jurisdiction to take up the *ribā* case. A six-page reply furnished by the Deputy Attorney General of Pakistan before the FSC said,

> "The Parliament and other institutions including the Council of Islamic Ideology and other relevant institutions are engaged in a collaborative process and may be accorded larger margin to fulfill their obligation of bringing the laws in conformity with injunctions of Islam in a more representative, holistic and effective manner so that sustainable results are achieved and all laws are in conformity

[1] See for example: Pakistan and others vs. Public at Large, PLD 1987 SC 304.

[2] Currently, the biggest debtor in the country, borrowing mainly from the commercial banks, from the public directly and from foreign lenders on the basis of interest.

[3] PLD 1991 Central Statutes 373.

of the mandate of the Constitution as reflected in Article 227."[4]

It is worthwhile to observe that Article 227 mandates that

> "All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'ān and Sunnah, in this part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions".

Further, the Council of Islamic Ideology (CII) has since long decided in its Report (June 1980) that the commercial interest was *ribā* as prohibited according to the tenets of Qur'ān and Sunnah [and also suggested a comprehensive plan for evolving an interest free system as already discussed in this editorial.

In this editorial, we will give a brief account of the both categories of arguments, i.e. the views of some jurists of the past, and constitutional provisions. We will also discuss the accomplishments so far in terms of evolving an interest free system, and indicate the problems created by different organs of the State making the job of transformation of the economy of Pakistan to the sustainable interest free bases increasingly difficult and complex. At the end, the possible course of action by the Sharī'at Court in future is suggested.

**The Connotation of the term '*Ribā*' has long been Decided**

When the present banking system first came in the Muslim world around four centuries ago, there were some discussions on the nature of the banking business and transactions. Confusion had been there in view of writings or alleged perception of the Egyptian jurists like Mufti Muhammad Abduh and Rashid Reza, and later on that of Iqbal Ahmad Khan Suhail (1884-1955), an Advocate, and a politician from India who authored a book in Urdu in 1936[5]. Dr. Fazlur Rahman (1919-1988)[6] and Abdullah Saeed[7] whose book favoring interest was published from New York in 1996 had also been a source and reference for writers in subsequent periods. It's worthwhile to indicate that both Dr. Fazlur Rahman (1964) and Abdullah Saeed (1996) relied directly or indirectly on the book by Iqbal Ahmad Khan Suhail and to some extent on the alleged views of Mufti Abduh and Rashid Reza.

The SBP in its submission to the Court on June 18, 2015 sought to distinguish between different categories of loans and the definition of *ribā* (although all these aspects have already been considered by the FSC (1991). In this submission, reliance by SBP has been made on the review judgment (remanding the case) in Civil Sharī'at Review Petition No. 1 of 2001 by Muhammad Iqbal Zahid and others seeking review of the order dated 14th June 2001 [PLD 2002 SC 800], meaning that no new argument has been given that needed consideration.

It is crucial to indicate that the views of the Mufti Abduh have been construed wrongly. Nomani (2003) has indicated in his extensive research that the views of the Egyptian scholars have not been taken in true sense. The JIBM, in its December 2013 Issue had explored the alleged matter in detail (Ayub, 2013). Here, suffice mentioning that according to Mufti Abduh 'the Postal Fund was not borrowing money from the depositors out of necessity, and, therefore, the prohibition of the payment of interest could not be lifted'. The interest paid was against the use of money, not as a means of exchange; rather, a means to an unfair increase of wealth by *ribā* , he added. Mufti Abduh also proposed the replacement of the savings accounts by the *muḍārabah* contracts to avoid *ribā*.

The impact of banking functions became increasingly clear for exploitation of the masses due to interest and lack of proper transparency and disclosures, leading to transfer of wealth from commodity producing sectors to money and finance sectors, and resultant concentration of wealth to fewer hands. Earning money on money by

[4]Also reported by The Dawn, May 28, 2021 [https://www.dawn.com/news/1626061] Article 227 pertains to the Provisions relating to the Holy Qur'ān and Sunnah. [All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'ān and Sunnah, in this part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.]

[5]Dr. Tahir Mansuri reviewed that book and observed that Suhail's views were personal and not based on any Sharī'ah tenets. (Islamic Studies, IRI, Islamabad; Vol 40, No.1.

[6]Fazlur Rahman; *ribā* and Interest; Islamic Studies (Karachi) 3(1), Mar. 1964:1-43.

[7]Abdullah Saeed is a Maldivian scholar and holds PhD in Islamic Studies from the University of Melbourne, Australia.

way of interest, short selling and speculation proved to be harmful even for the developed economies[8]

It was finally established, therefore, that the interest based conventional system of banking and finance was prohibited due to involvement of *ribā*, *gharar* (absolute uncertainty about the subject matter of a business contract, its price and delivery) and other prohibited practices. The Makkah and Jeddah based Islamic *Fiqh* Councils and Sharī'ah committees in the whole Muslim world issued the pronouncements on prohibition of banks interest, and hence the work for promoting Islamic banking and finance system was formally initiated in 1975 with establishment of Islamic Development Bank, Jeddah and Dubai Islamic Bank in the UAE.

As far as Pakistan is concerned, apart from some conceptual differences, the Sharī'ah scholars believed that in all kinds of money lending transactions (loan or debt created in lieu of a credit transaction) anything recovered in excess of the principal came under the purview of *ribā* and is, therefore, prohibited. Some confusions created by a specific lobby up to 1960 were clarified and accordingly, the Council of Islamic Ideology (CII), and the jurists in general arrived at the definition to include the interest involved in modern banking and finance sectors in the connotation of the world *ribā*.

Another point worthwhile to be mentioned is that FSC is required to adjudge the case based on 'Qur'ān and Sunnah' as per the provisions laid down in the Constitution and not on subsequent legislation of the parliament or on the views of any particular scholar or jurist. As indicated earlier, a consensus has been achieved by the jurists based on the tenets of Qur'ān and Sunnah and views of classical jurists and other authors. As such, the solitary views of earlier jurists or contemporary authors (if any) will not be considered.

A related matter pertains to the seriousness of the Counsels of the state while pleading in favour of interest. In all three hearings, i.e. by FSC in 1991, SAB (1999) and the Review Petition No. 1 of 2001 different Counsels have been citing various verses of Qur'ān, not relevant to the matter, or names of some jurists of recent past without giving proper references for the same. For example, a Counsel pleading the case before the FSC in 1991 referred to the opinions of many scholars including Ibnal-Qayyim, Muhammad Abduh, Rashid Raza, Sanhuri, Daoualibi, Shaikh Draz, Maulana Abul Kalam Azad, Maulana Syed Abdul Aala Maudoodi, Maulana Mufti Muhamamd Shafi and Dr.Wahba Al- Zuhaili. But the then Chief Justice, FSC ruled that the learned Counsel had not sent any text of the above referred scholars. The FSC further said, "Therefore, unless and until the exact writings of the great imams or jurists are laid before us by the counsel, we are unable to place any reliance on any secondary source." It's is pitiable to note, however, that they again referred to the same point a few months ago during rehearing of the case.

The Counsels of the state and the SAB in review judgment in Civil Sharī'at Review Petition No. 1 of 2001, also raised the issue of application of *ribā* rules on non-Muslims. In this regard, both Muslims and non-Muslims living in Islamic state would be the clientele of Islamic banks, and the regulations will be same for the both. "The Judgment that could not be Delivered-in Reference to International Loan Agreements under the Sharī'at Act, 1991"[9] by the IDB Laureate, Justice (R) Dr. Tanzilur Rahman amply discussed this matter and concluded the following:

> "The prohibition also applies to a non-Muslim living in a Muslim territory as its citizen or coming with permission and staying in Muslim territory on a visa or a permit. The prohibition as to *ribā*-based transaction or agreement, in the circumstance, equally applies to Muslim state and its functionaries who act on its behalf. The state functionaries in Pakistan are bound by the principles of policy laid down in the Constitution and the principles and provisions of the Objectives Resolution as made substantive part of the Constitution under Article 2A....". [Para 140; Pp. 133,134].

Lastly, the landmark judgment by the FSC (1991) discussed all related matters also including the matters of indexation and 'consumption verses production loans' and decided that the modern day commercial interest is

[8]For details on impact of these exploitative tools, see the views of Nobel Prize winning economists Piketty (2013) and Stiglitz (2012).

[9]It's crucial to indicate in this context that the Islamic Development Bank's Award for unique contribution for Islamic finance was awarded to late Dr Tanzilur Rahman on the book with the above caption as he was sacked by the Government just before announcing the judgment regarding a petition pertaining to the 'Enforcement of Sharī'ah Act, 1992'.

*ribā* and therefore prohibited as per Qur'ān and Sunnah. This is exactly according to the unanimous view of various *Fiqh* bodies around the world, as indicated in preceding paras.

**The Issue of Jurisdiction of the Federal Sharī'at Court**

Before the provision in the Constitution for establishment of the federal Sharī'at Court, and because of the moratorium on the FSC, defendants of banking suits in the 1980's attempted to seek relief from the ordinary courts. When the Objectives Resolution was made substantive part of the Constitution (Article 2A), the mainstream judiciary was approached to decide regarding the laws involving interest, and the Sindh High Court got the first opportunity to examine such laws.

However, an objection was raised that Article 2A could not be used as a self-triggering device to declare laws un-Islamic[10]. It might be the rationale that the Supreme Court finally ruled in 1992 that Article 2A could not be used as a self-triggering device[11]. The Supreme Court's objective seemed to be preventing a scenario in which all courts in the country were free to test Islamicity of any law by invoking Article 2A. As such, the responsibility shifted to the ideological courts namely the FSC and SAB; and finally after ten-year moratorium on adjudicating fiscal and banking matters ended on 31st May 1990 all aspects relating to laws involving interest were included in the jurisdiction of FSC.

As the Court of Islamic ideology, the mandate of the FSC is to bring country's all laws in line with the tenets of Qur'ān and Sunnah. Accordingly, the FSC in Dr. Mahmood-ur-Rahman Faisal vs. Secretary, Ministry of Law, Government of Pakistan gave its first major ruling on interest in 115 petitions impugning twenty laws.

The Government went into appeal against the Judgment to the SAB of the Supreme Court of Pakistan. The case remained there for almost eight years till decided in December 1999. In the whole process for around 10 years, no one raised the issue of presumed bar on jurisdiction of FSC to take and decide cases against any laws involving interest just because the term 'interest' was written in any other clauses of the Constitution. After the SAB judgment of 1999, the Government first asked for granting an extension of time as the Supreme Court was authorized under Order 33, Rule 3 of the Supreme Court Rules, 1980. Although the Attorney-General asked the Court to delay implementation of the Judgment to end-December 2005, the SAB extended the period of implementation only by one year to 30 June 2002.

The next year, however, the whole case was reversed by a newly constituted Appellate Bench (including two new Sharī'ah scholars ad hoc members Mr. Justice Dr. Allama Khalid Mahmood, Mr. Justice and Dr. Allama Rashid Ahmed Jalandhari, along with other regular Judges [for hearing the Review Petition No. 1 of 2001 seeking review of the SAB' 1999 judgment] (Supreme Court Annual Report, 2002, P. 36). Here, the counsels of the state raised the issue of (presumed) bar on FSC for taking up the case, in addition to citing the alleged view of some Egyptian scholars of the past (as discussed earlier). The the Attorney General for Pakistan, Mr. Makhdoom Ali Khan, who did not even argue before the hearing by the previous SAB, also urged for the review. Mr. Raja Akram, Dr. Syed Riazul Hasan Gilani[12] and Mr. Raza Kazim also pleaded for the review of the judgment of 1999.

The newly constituted SAB [for Review Petition No. 1 of 2001] accepted the contention that 'the banks in Pakistan were working within the framework of banking instruments prescribed by the State Bank, with the approval of Council of Islamic Ideology, as valid Islamic Instruments' (SC Annual Report 2002; P. 37). In this context, the SAB totally ignored the Report of the Council Ideology that required elimination of interest from

[10] It was even observed that Article 2A was an unnecessary and destabilizing constitutional amendment in so much as the FSC could perform the task of Islamizing laws in a gradual and smooth manner [Asif S. Khosa, *"The Ineffective Effect of Article 2-A Constitution of Pakistan",* PLD 1990 Journal, at 50-63]

[11] Hakim Khan vs. Government of Pakistan, PLD 1992 Supreme Court 595.

[12] It's astonishing to note that Dr. Gilani who raised serious objections on the Sharī'ah Court's judgment regarding the connotation of *ribā* was made a member of the first Sharī'ah Board of the State Bank of Pakistan. It reflects the 'seriousness' of the State Bank in developing Islamic banking in the country.
The outcome is visible - only a few in the academia and even Sharī'ah scholars in the country, and the public might be accepting the system as being evolved, as really Islamic. [for specific issues, see Mansuri (2020) and Shahzad et al. (2020).

the economy within a specified time.

More interestingly, the new SAB found no force in the contention that the submissions made in support of the review petition amounted to a plea for rehearing of the case[13]. It was decided, of course, that 'the issues involved in these cases require to be redetermined after thorough and elaborate research and comparative study of the financial systems which are prevalent in the contemporary Muslim countries of the world'[14].

It's astonishing to observe that some of the government counsels pleaded for continuity of the interest-based system based on necessity and *maṣlaḥah* (wellbeing in general). It's is entirely irrational. Abu Zahra, a leading Egyptian jurist argued that reliance of the advocates of interest on the principles of necessity and *maṣlaḥah* as a justification for interest-based system was wrong. He adds that since the Islamic principle of necessity might be applicable to individual cases and not to the society in general, the principle of the public interest cannot be invoked in defense of interest rate for the whole society (Nomani, 2003).

**Discussing the Case Currently before the Federal Sharīʿat Court**

Coming to the case presently before the Hon'ble Sharīʿat Court for last about eight years, after the *ribā* case was remanded by the SAB (for Review Petition No. 1 of 2001), the Court is required to re-adjudge whether the modern day interest is included in the term *ribā* as prohibited by the Sharīʿah. Below, we analyses this matter on merit.

The ground reality as at present is that the issue regarding connotation of *ribā* has been decided all over the world and accordingly, efforts are underway to evolve interest free system. Hence, the prior requirement for the Government and SBP for moving forward is that they believe in prohibition in interest and as such submit before the Court while accepting the verdict of the Sharīʿat Court (1991) and the that of the SAB (1999). But the case as pleaded by the Government/SBP speaks of inconsistencies and contradictions which the Hon'ble Court may like to take notice.

The reply also says,

> "The Constitution categorically provides that the sovereignty belongs to the Almighty Allah alone and the State shall exercise its powers and authority through the *chosen representatives* of the people". [Emphasis added].

But there has to be a recourse, if the *'chosen representatives'* do not fulfill their duty, or if they are over-powered by some 'technocrats' imposed from abroad, as a part of geo-political games or to fulfill the global capitalistic agenda. We understand that the Provisions of the institutions like the CII and the FSC is to serve as recourse in this regard.

It is worthwhile to mention that even during the rehearing the case by the FSC, the matter of jurisdiction was decided by the FSC, of course, pending the view of the State Bank of Pakistan. As per Order sheets of the FSC dated 19 March 2019 and 16 April 2019, the then Attorney General Mr. Anwar Mansoor Khan accepted that as per the Constitutional provisions the FSC can hear and decide the matter. The advocates representing all four provincial governments also adopted the view of the Attorney General. The Council assisting the Court Mr. Syed Iqbal Hashmi, Advocate, Supreme Court of Pakistan, and the jurisconsults also submitted that the Constitution of Pakistan conferred jurisdiction to the FSC to hear the case.

The Constitutional provisions behind which the State officials are hiding do not make a serious case for consideration. The Constitutional Provisions referred to in the reply submitted by the Deputy Attorney general

[13] If this is the case, then what does mean the following direction as contained in the review judgment, "it would be in the fitness of things if the matter is remanded to the Federal Sharīʿat Court, which under the Constitution is enjoined upon to give a definite finding on all the issues falling within its jurisdiction"; and that the (earlier judgments of FSC and SAB) are set aside and the cases are remitted to the FSC for determination afresh in the light of the contentions of the parties....

[14] It might have little rationale as far as the definition of the term *ribā* is concerned. It is because, in the whole Muslim world also including Pakistan, it has been finally decided that the present-day interest is haram due to being *ribā* . That is why, efforts to evolve the new interest free system are underway. Hence the issues raised in the review judgment should not have included at least the matter relating to connotation of *ribā* .

are: Articles 29, 30(2), 38(f), 81(c), 121(c), 161, 227 and 260 of the Constitution. While we have already indicated the mandate of Article 227, we indicate the relevance, if any, of the other Provisions as below:

♣ Article 29. (1) requires, "it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority".

♣ Article 38(f) mandates to eliminate *ribā* as early as possible; Articles 81 (a, b, c and d) pertain to the expenditure charged upon Federal Consolidated Fund (remuneration to the President of Pakistan and its Office, Judges of the Supreme Court and the Islamabad High Court and their offices, Chief Election Commissioner and its Office; Chairman and Deputy Chairman of the Senate and their offices; and the Speaker and the Deputy Speaker of the National Assembly, and their Secretariats and offices);

♣ Article 121 (c) pertains to the **debt charges for which the Federal Government is liable, including interest,** sinking fund charges, the repayment or amortization of capital, and other expenditure in connection with the raising of loans, and the service and redemption of debt on the security of the Federal Consolidated Fund; and other sums and expenses required to satisfy any judgement by any court or tribunal. This provision also pertains to debt charges for which the provincial governments are liable.....

♣ Article 161 (on Natural gas and hydro-electric power) is about the operating expenses to include any sums payable as taxes, duties, **interest or return on investment,** and depreciations and element of obsolescence, and over-heads, and provision for reserves.

♣ Article 260 [definitions], also defines pensions to include ——- any sum or sums so payable by way of the return, **with or without interest** thereon or any addition thereto, of subscriptions to a provident fund.

All above provisions may imply that if interest is outlawed, its alternative, as available in Islamic law, of course with different underlying contract would be available. If any law is considered to be excluded from the Court's jurisdiction simply because it includes the term interest, then all other provisions pertaining to pay, remuneration to and expenses of the President, IHC and SC judges, Election Commissioner, Chairman and Deputy Chairman of the Senate, Speaker and Deputy Speaker of National Assembly, etc will also be out of jurisdiction of the FSC, which of course, is not the case, and all such cases have been taken up time to time by the FSC.

Hence, pleading that as the word 'interest' has been used in the Constitution in any other Provisions of the Constitution, hence it's beyond the jurisdiction of Court is irrational. The Sharī'at Court is required to adjudge the laws adjudicated in the judgement of 1991, meaning that the other laws as portrayed by the Counsels of the state and the State Bank need not be adjudged.

♣ The only tricky clause of the Constitution (referred to by the representatives of the state before the Court) is Article 30 which pertains to 'Responsibility with respect to Principles of Policy'.

Article 30 (1) provides that the responsibility of deciding whether any action of an organ or authority of the state, or of a person performing functions on behalf of an organ or authority of the state, is in accordance with the Principles of Policy is that of the organ or authority of the state, or of the person, concerned. Article 30 (2) provides that the validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organs or authoritiies of the State or any person on such ground.

The above two provisions are irrational, and against any criteria of ethics, management and good governance that a person, official or an authority is required to judge or ascertain its own functions or performance; and that no action, whatsoever, could be taken against such official or authority. The above clause is against the substance and spirt of any law, in our case, the Article 2A and Constitutional provision for establishing the FSC and the SAB of the Supreme Court of Pakistan, and hence seems to be ultra vires. The Court may like to declare Article 30 invalid due to lacking any lawful basis; and the Parliament might be directed to discuss it afresh thoroughly to bring it in line with the valid laws and provisions of law.

**Steps Practically Taken by the State and the SBP**

The SBP also pleaded that since a lot of work has been done over the last 30 years for promoting Islamic banking in the country, there might be no need of 'judicial interference' in the process that is underway. It is contended

in this regard that the move towards Islamic banking as indicated by the State Bank is dichotomic-when they are not accepting interest as *ribā* , so prohibited; then why they are working for evolving Islamic banking that certainly, as per SBP directives and Sharī'ah Governance Framework (SGF), must be interest free. The reality is opposite to it-they have accepted the commandment of Allah and His Prophet (PBUH) that all gains to money and liquidity in the form of interest or rent are prohibited.

The work on transformation of the economy to interest free bases started from late 1970s, and there is a long list of accomplishments. The Government of Pakistan expressed commitment time to time to transform the system from interest based to interest free bases and to introduce Islamic banking in the country. The mainl problems facing the nation and the economy are lack of continuity (ad hocism), and that of implementation will due to feeble resolve. Below, we give a brief account of what the Government and the State Bank of Pakistan have, in addition to the Constitutional provisions, accomplished over the last 40 years[15]

- ♣ The Panel of Bankers and Economists and six (6) Working Groups in the SBP with their detailed working and Report of the Panel (1979-80).
- ♣ Report of the Council of Islamic Ideology (CII) on Elimination of interest from the economy, June 1980.

The reports of the Panel of Bankers and Economists, and that of the CII provided workable alternatives for almost all categories of banking and finance in local currency also including the central bank's monetary management functions (Janjua, 2004).

- ♣ Hanfi Commission Report (1992) [Constituted as per Enforcement of Sharī'at Act, 1991].
- ♣ Raja Zafarul Haq Commission Report (1997) [This report covered all areas including private domestic transactions, government finance, foreign transactions as well as reforms in banking law. It added that Islamic finance, being asset-based, was perfectly suited for any activity enabling the creation or acquisition of assets and goods and warned that selective application of Islamic finance would be creating distortions in the economy.
- ♣ The Commission for Transformation of the Financial System (CTFS) established in SBP as per Directive of the SAB Judgment (1999). The CTFS set-up a Committee on Development of Financial Instruments and Standardized Documents to suggest amendments in contracts and operations of the banks and financial instruments conforming to Sharī'ah. The Committee provided useful documentation required for all major modes of business in Islamic framework.
- ♣ Task Force (headed by Mr. Javed Ahmed Noel) in the Finance Ministry to plan for transforming government debt to an interest-free system (2000).
- ♣ Task Force (headed by Dr. Mahmood Ahmad Ghazi) in the Ministry of Law for suggesting the main law for the prohibition of *ribā* and ancillary laws on foreclosure and fair trade and business practices (2000).

While the CTFS proposed one comprehensive seminal law namely, 'Islamization of Financial Transactions Ordinance' the Task Force of Ministry of Law proposed two separate draft ordinances namely 'Prohibition of *ribā* Ordinance' and the 'Financial Transactions Ordinance'. However, it corresponded to the proposal by the CTFS that in case of two separate laws, the same may be promulgated simultaneously to avoid any gap or dislocation.

The CTFS had detailed discussion with Dr. Ghiath Shabsigh, the IMF's lead expert on Islamic banking and finance, on the practical aspects of transforming the system. Issues discussed included:

i) viability of the new system;
ii) effects on Resource Mobilization;
iii) tools for Monetary Management; and
iv) Supervisory and Regulatory Needs of the new system.

Dr. Ghiath Shabsigh believed that there was no a priori reason to believe that Islamic system of finance

[15]For details of all such measures, see Janjua (2004); (Chapters on Islamisation of Economy) and (Chapter on Islamisation of Economy).

*per se* would generate adverse effects on savings and resource mobilization. He also made presentation to the CTFS on how the tools for monetary management could be developed within the interest free framework. They however, emphasized the need to review and revamp the supervisory and monetary mechanism to provide adequate supervision and regulation of the new system [main point of the report of IMF experts can be seen in the History of the State Bank of Pakistan, by Janjua (2004).

**What the above Implies?**

All statements, steps and measures as discussed above imply explicitly that the state institutions, necessarily including the Government and the State Bank of Pakistan, considered the present-day commercial interest '*ribā*' as prohibited under the tenets of Qur'ān and Sunnah. Accordingly, former Governor State Bank of Pakistan, late A. G. N. Kazi observed in his speech,

> "Prohibition of interest is ordained in Islam by verses in the Holy Qur'ān as well as the saying of the Holy Prophet (peace be upon him). The Arabic word used is "*ribā* ", and there is near unanimity among all schools of thought in Islam that the term *ribā* stands for interest in all forms" (Janjua, 2004, p. 657).

Further, the SBP announced a new program of introducing Islamic banking working parallel with the conventional banking system as from January 2002. It also introduced one of the most comprehensive 'Sharī'ah Governance Framework, 2015' (SGF 2015) in the world seeking to ensure that Islamic banking business in the country is free from interest and other prohibited elements. The SGF (2015) provides for the extended roles of the banks' BODs, Sharī'ah Boards (SB), etc. to ensure that business and operations of Islamic banking institutions (IBIs) are Sharī'ah compliant.

This also is to ensure that IBIs keep in view the distinctive features of Islamic banking and finance so that people in general and stakeholders may find clear differences between Islamic and conventional systems of financial intermediation. SBP has recently expressed commitment in its third strategic plans (2021-2025) to promote Islamic banking to increase its market share up to 30 percent of overall banking industry by 2025. The Plan is said to have an *"extensive focus on improving public perception of Islamic banking as a distinct and viable system capable of catering to financial services needs of various segments of the society. It would capitalize on potential of Islamic finance for achieving the shared vision of a vibrant and sustainable Islamic banking sector in Pakistan"* (SBP, April 2021)[16]. The Vision and Mission of the Plan pertain to evolving Islamic banking system leading to equitable and inclusive economic system.

As such, any different move, observations, statements, or 'prayer' before the Sharī'at Courts by any of the State functionaries that 'interest might not be *ribā* ' are negation of their own stance.

**Interest Rates, Debt-to GDP ratio and Debt Trap**

The interest related problem facing Pakistan economy started aggravating since late 1990s when rate on ad hoc Treasury Bills was linked to the money market rate for the commercial banks (instead of 0.5% earlier). It's ironic to indicate here that the advanced countries like USA, or the institutions like IMF tend to impose on poor economies what they themselves do not apply to themselves or the developed economies. In USA, the rate charged by the FED to the State institutions has been near to zero, while the developing countries that are caught in debt trap are pressurized to keep the rates high to increasingly discourage the real production and business activities. The investors go for higher and risk-free returns in the form of interest. Besides, the privatization of almost all commercial banks in the country resulted in increasing earnings for the banks at the cost of the nation that had to pay as high rate as 15% (in 2019 when the SBP's base rate increased to peak despite the vagaries of COVID 19). They earned huge risk-free returns and did not pass-on due share to the depositors. Same was the case of Islamic banks that give even lower profits to depositors than their conventional counterparts.

While even the Western institutions, economists and finance experts are talking high about the strengths of Islamic finance system with regard to sustainability, CSR and 'Value Based Intermediation' (VBI), we in Pakistan are involved in trivial discussion whether the 'interest' falls under the definition of *ribā* as prohibited

[16]State Bank of Pakistan, Strategic Plan for Islamic Banking Industry 2021-25, p. 6.

by Qur'ān and Sunnah. It might simply be termed as self-deception. It may be because of the hidden trap in decision making at almost all institutional levels in the country (Hammond *et al.,* 1988).

Another serious problem arising from this move is that banks, both conventional and Islamic, concentrate on public and the corporate sectors ignoring the micro businesses, SMEs, small farmers, and other commodity producing sectors. As at end of Sep. 2020, the financing provided by the banking industry in the country as a whole and that by Islamic banking institutions (IBIs) to the corporate sector was around 72% of their total financing portfolio. SME financing by them was 4.7 and 3.1% respectively, while agriculture got only 4.0% and 0.7% respectively (SBP, Islamic Banking Bulletins, 2020).

Particularly since 2012 the debt servicing burden increased sharply due to rise in SBP's and money market rates[17]. As per the estimated budget for 2021-22, Rs. 3,060 billion are to be paid as interest, while only Rs. 479 billion on running of the Government (also includes corruption, if there is, as the issue being raised in the media), and Rs. 480 billion on pensions [the only category of welfare function, if it could be termed so, and which the 'technocrats' are suggesting discontinuing in future to syphon out all possible resources toward interest payments]. Neither the regulator (SBP), nor the government bothers to halt this transfer of wealth from the poor and middle classes to the rich, and to abroad. Huge amount of profit is remitted abroad due to foreign ownership of the banks. Even worse, public sector borrowing has been shifted by the present government from the central bank to the commercial banks [the move termed as *'re-profiling exercise'* by the SBP)[18], thus increasing the debt burden on the public more sharply for benefit of the banks and the richer groups.

In USA, the debt to GDP ratio is around 132% (2021), while in Pakistan it was around 87.2% at the end-June 2020. But, debt payments as percent of GDP are only 0.5 in USA, against around 5% of GDP in Pakistan. Despite the visible decrease in foreign rates (LIBOR) due to COVID pandemic (SBP, 2nd Quarter report, 2021, P. 62), the SBP increased the domestic market rates to a record high level. According to SBP publication, debt servicing payments were 53% of the total current expenditure of the government in 2020-21, 6-times higher than the development expenditure. The SBP report (pp. 62-63) also tells that while revenue expenses on defense, pensions and running of the government reduced over the year, interest payments [indicated in the Report as 'mark-up payments'] increased by 15.1% [of course, much less than the 46.1 percent growth recorded during the same period last year].

**Resolving the Issue confronting the Hon'ble Sharī'at Court**

Based on the above arguments it is prayed the Hon'ble Sharī'at Court may certify the prohibition of 'interest' as per the injunctions of Qur'ān and Sunnah, the and earlier Judgments (1991 and 1999) and outlaw all laws that have involvement of interest in any form.

The Court may also advise the State Bank of Pakistan to convert all banking operations to Islamic bases by removing the dual system as at present. It is because, Islamic banking in its true perspective might not be possible in dual system as the banks, their top management and the (corporate) clients, and even the SBP as regulator, compare all transaction and rates with that of the conventional markets. For this, the findings of earlier Commissions and Reports (as indicated in the SBP History, Volumes 3 and 4) may be explored by a Committee of Economists, Scholars and Professionals (CESP) to be created in the State Bank of Pakistan to suggest possible way-out for all types of business and transactions. It would also include simultaneous promulgation of two laws as suggested by the Task Force of the Ministry of Law as indicated in the text above.

The hon'ble Court may also like to suggest suitable amendment, if deemed necessary, in the General Clauses Act, 1897 (X of 1897) as per the recommendation of the Pakistan Law Commission in early 1990s. This amendment was suggested for filling up gaps, voids, vacuum occurred in a law or a provision of law declared repugnant to Sharī'ah by the Court. The job of suggesting timing for replacement of interest-based laws and

[17]See Table at the link: https://www.finance.gov.pk/survey/chapter_20/09_Public_Debt.pdf

[18]SBP report, in this regard, says: "Under the debt re-profiling exercise carried out in June 2019, around 70 percent of the SBP debt was converted into floating-rate PIBs and about 23 percent into fixed-rate PIBs". "The first coupon payment of these PIBs had fallen due in December 2019 and had pushed up the quarterly payments to Rs 443 billion (nearly 3 times the payments in the preceding quarter)" the SBP 2nd Quarter FY-21 Report, p. 63.

provisions will also be conducted under the supervision of the CESP may be under the guidance of the **Sharī'at** Court.

The main challenge is in respect of the public sector borrowing or 'financing the budgetary deficit'. A related challenge is framing monetary policy and deciding about the creation of money and credit by the banking system. This also would be responsibility of the CESP. The SBP, in consultation with the CESP, can announce the mark-up rate and expected profit rate for Islamic financial institutions involved in goods trading and for the government securities. In such functions, the CECP will be allowing time bound waiver by doing *ijtihād* to transform the system keeping in view the ground realities in the economy[19].

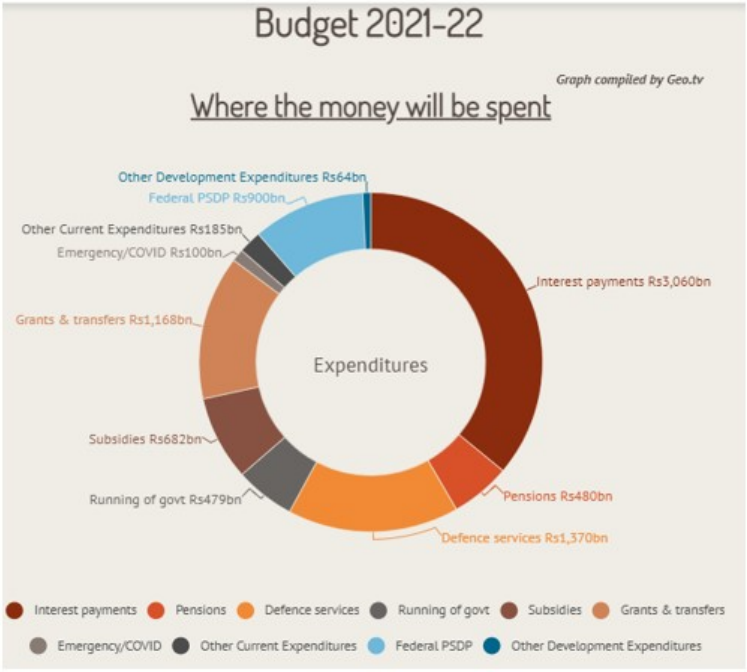


**FIGURE 1.** Budget of Pakistan 2021-2022

Accordingly, while the institution of modern interest will be outlawed being *ribā* , a space would be available to the Government and the State Bank to transform the system to Sharī'ah compliant bases in line with the reports of the CII and that of various Commissions and Task Forces without risk of chaos in the economy. It will also help in reforming the Islamic banking system in vouge in the country that, so far, has not been able to attain credibility as a divine system due to many lacunae.

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[19]Even currently, the SAC of the State Bank and the Sharī'ah board of Islamic banks are giving some special favour may be to facilitate the evolving system. Its best example is practically charging fixed rate to corporate bodies in *mushārakah* based financing (Running *mushārakah* ).

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