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# Studying the Case of *Riba*: A Synoptic View of the Functioning of Federal *Shariat* Court and the *Shariat* Appellate Bench of Supreme Court

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## Abstract

*Ever since the Shariat Appellate Bench of the Supreme Court pronounced its first judgment in the case of Riba in the year 1999, declaring Riba in all its manifestations repugnant to the injunctions of Shariah, the case of Riba has undergone various misadventures and judicial catastrophe. It started with filing of a Review Petition in the case of Riba, wherein, initially operation of the impugned judgment was suspended, and subsequently it was completely set aside, remanding the case back to Federal Shariat Court (FSC) to decide afresh, while brushing aside a decade long unique intellectual and judicial exercise. This was in clear violation of past precedents that defined the scope of the review proceedings, and against well-established judicial norms. The misadventure continues as the case of Riba is still pending before FSC, even after laps of more than sixteen (16) years. Apparently, the entire constitutional scheme has been laid to rest on the basis of a single rule contained in a subordinate legislation, empowering a Chief Justice to regulate the process of fixation of cases with absolute discretion. This resulted into delay in the process of administration of justice, which led to complete dis-functionality of the two afore-mentioned judicial forums. This work presents a brief sketch of the functioning of the Federal Shariat Court and Shariat Appelate Bench of the Supreme Court of Pakistan while analyzing the Case of Riba.*

## Introduction

Article 38 (f) of the Constitution of the Islamic Republic of Pakistan states that "the State shall eliminate *Riba* as early as possible." The authors of our constitution had penned down this essential obligation of our state way back in the year 1973, "when the people of Pakistan, conscious of their responsibility before Almighty Allah and men"[1], through their representatives in the National Assembly, "unanimously adopted, enacted and gave"[2] to themselves the present Constitution. However, this crucial aspect of promotion of social and economic well-being of the people remained neglected ever since.

The judicial course on *Riba* commenced when several petitions were filed before the Federal Shariat Court (FSC) in the year 1990,

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[1] Preamble of the Constitution of the Islamic Republic of Pakistan, 1973.

[2] *Ibid.*

under Article 203-D of the Constitution of the Islamic Republic of Pakistan whereby the constitutionality of certain provisions of law related to *Riba* were challenged on the ground of repugnance to the injunctions of Islam. Today, in 2018, the matter is still pending before the FSC.

The case of *Riba* has an intricate history of multiple rounds of litigation. It has undergone various misadventures and judicial inertia after the Shariat Appellate Bench of the Supreme Court (SAB) pronounced its first judgment in the year 1999 and declared *Riba* in all its manifestations repugnant to the injunctions of Islam. A deeper analysis reveals that thereafter the entire constitutional scheme has been laid to rest, on the basis of a single rule contained in a subordinate legislation, which provides that a Chief Justice of particular court has absolute discretion (to pick and choose) and has the authority to regulate the process of fixation of cases pending before the court. In other words, this authority also empowers a chief justice not to take up a case pending for adjudication, if he so decides for whatever reasons, without stating the reasons. Apparently, this discretionary power resulted in inexplicable delay in the process of administration of justice, which led to complete dis-functionality of the two afore-mentioned judicial forums. In the given state of affairs, common man, the citizen, is losing all hope and trust as to whether the two judicial forums have the capacity to play an effective role in the process of Islamization of Laws in Pakistan. The situation thus demands major revamping and corrective measures to achieve the objectives, for which these forums were created by the legislature.

This paper will study the case of *Riba* as a test case through evaluating and overviewing the functioning of the two afore-mentioned judicial forums. In this way, this paper will make a fair but critical analysis of the judicial proceedings conducted in the case of *Riba* thus far. To do so, the judicial record of the court proceedings conducted so far will be examined and analyzed. Thus, the main focus during the course of this research will remain on how the process of administration of justice was carried out by the two constitutional judicial forums in the case of *Riba*. The merits of the case of *Riba* will not be the direct subject matter of this paper.

## 1. Constitutional and Historical Background

Whenever we talk of Islamization of laws in Pakistan, the issue of *Riba* becomes of utmost significance. This is because; various

Quranic verses[3] and the sayings of the Holy Prophet (PBUH) categorically declare –in all its forms– to be absolutely prohibited. Not only this, but in another Quranic verse[4] Allah has declared that, those who are indulging in *Riba* are considered to be at war with the Almighty. Therefore, the issue of *Riba* has always remained, and very rightly so, a basic criterion to examine effectiveness of the process of Islamiztion of laws in Pakistan.

The constitutional system of the Islamic Republic of Pakistan, as idealized by the great Iqbal, our ideological father, and envisaged by the founder, the Quaid-e-Azam, Muhammad Ali Jinnah, was to be a truly Islamic republic, where the ultimate sovereignty belongs to Almighty Allah. The Objectives Resolution passed by the very first constituent assembly of Pakistan is a testimony by our founding fathers and leaders for all those who advocate for a secular state. Moreover, after 1985, with the inclusion of Article 2-A in the Constitution, the Objectives Resolution became operative and substantive part of our Constitution[5], there remains no doubt in the fact, that our legal system was meant to be an Islamic system. It was noted by the Supreme Court in the case of Zaheer-ur-Din vs State[6] that, "It is thus clear that the Constitution has adopted the injunctions of Islam as contained in Quran and Sunnah of the Holy Prophet as the real and the effective law. In that view of the matter, the Injunctions of Islam as contained in Holy Quran and Sunnah of the Holy Prophet are now the positive law"[7]. But thanks to the colonial mind-set and some self-styled intellectuals, we all here are still discussing the process of Islamization of Laws in Pakistan and trying to find ways forward to achieve this goal.

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[3] See for instance 2:275, 3:130 and 4:161.

[4] See 2:278-279

[5] The notion that the constitutional amendments introduced in 1980s, were introduced by a martial law administrator and thus, do not reflect the will of the people which could only be exercised through their chosen representatives in the Parliament, has lost its significance, as our Constitution has undergone several major amendments ever since, the last major amendment being the Eighteenth Amendment, by subsequent democratic regimes, whereby the Parliament extensively reviewed the Constitution and brought it to its original form, after it was held in abeyance by the last military ruler, General Pervez Musharraf. In none of these amendments, the insertion of Article 2-A or Chapter 3-A was questioned or any of the above amendments was reversed. Therefore, it could be fairly concluded that the duly elected representatives of the people in the parliament, have on more than one occasion, endorsed the insertion of Article 2-A and Chapter 3-A in the Constitution.

[6] 1993 SCMR 1718.

[7] Page 1774, Supreme Court Monthly Review law journal, 1993.

Before proceeding further, it is pertinent to first give a brief historical background of the two judicial forums, the FSC and the SAB, as to how and when the two forums were created and the scope of their functioning. A constitutional amendment[8] was introduced by General Zia in the year 1980. Chapter 3-A was added in the Constitution, whereby FSC was created. This court was empowered to "examine and decide the question whether or not any law or provision of law is repugnant to injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet"[9]. Article 203-B (c) of the Constitution defines the law for the purpose of determining the jurisdiction of the FSC. Judgment of FSC could be assailed by any aggrieved party before the SAB[10], as a right of appeal has been provided under Article 203-F of the Constitution.

Initially when FSC was created, a restriction on its jurisdiction was imposed. The definition of law as provided in Chapter 3-A of the Constitution, permanently excludes "the Constitution, Muslim personal law, any law relating to the procedure, or any court or tribunal" from the jurisdiction of FSC. In addition to this, "until the expiration of ten[11] years from the commencement of this chapter [3-A w.e.f. May 26, 1980] any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure"[12], was also excluded from the definition of law. The jurisdiction of FSC was, thus, curtailed at least for next ten years, to examine any fiscal law or banking practice on the touchstone of its repugnance to the injunction of Islam. This curtailment on its jurisdiction, however, ended upon expiry of ten years in the year 1990. It was only then, that various petitions were filed before FSC, challenging provisions of law related to *Riba* and financial interest, particularly those, on the basis of which the banking system of the country is based. The FSC itself also took some suo-moto actions to determine the question as to whether the laws recognizing and enforcing the financial interest/*Riba* are in accordance or repugnant to the injunctions of Islam.

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[8] The Constitution (Amendment) Order, 1980 (P.O. No. 1 0f 1980)

[9] Article 203-D (1) of the Constitution of the Islamic Republic of Pakistan.

[10] *Shariat* Appellate Bench of the Supreme Court comprises of three regular judges of the Supreme Court and two *Alim* judges, to be appointed on *ad-hoc* basis by the President.

[11] Substituted by P.O. No. 14 of 1985. Initially, the period was three years, but it was subsequently amended through various enactments. The last one being referred here.

[12] Article 203-B (c) of the Constitution.

## 2. Rounds of Litigation and Judicial Proceedings

The case of *Riba* is presently undergoing second round of the litigation. Until now, four judicial proceedings have been conducted in the case; two before the FSC and two before the SAB. The fourth judicial proceeding is presently pending before the FSC. It is expected that the present proceedings are not going to be concluded any time soon. In fact, an appeal before the SAB would also be filed once the final judgment is announced by the FSC. In the following lines, we are going to analysis the judicial proceedings in chronological order.

### *2.1 "Mahmood-Ur-Rahman Faisal vs. Secretary Ministry of Justice" before FSC[13]*

The first judicial proceeding in the case of *Riba* was initiated before the FSC, when various petitions, invoking original jurisdiction of the court, under Article 203-D of the Constitution, were filed, whereby the banking and insurance system of the country which was based on financial interest/*Riba*, as well as other laws that recognized and enforced financial interest/*Riba*, were challenged on the ground of repugnancy to the injunctions of Islam. These petitions, which were one hundred fifteen (115) in number, along with three (03) *sou-moto* actions of FSC[14], were consolidated and adjudicated upon together, as they involved similar questions of law. This judicial proceeding is commonly referred to with the title of first petition[15], as afore mentioned.

A three member bench heard the case from 7th February, 1991 to 24th October, 1991. In total eighteen (18) hearing sessions were conducted in the case. The subject matter of these petitions was twenty fiscal laws, including few subordinate legislations. In order to decide all the Shariat petitions, the court prepared a questionnaire related to the impugned fiscal laws. This questionnaire was sent to various scholars, economists and bankers, in the country as well as abroad, for their expert opinion. A consolidated statement of the answers received on the questionnaire was prepared and annexed with the judgment.

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[13] Dr. Mahmood-Ur-Rahman Faisal and others versus Secretary, Ministry Of Law, Justice And Parliamentary Affairs, Government Of Pakistan" (reported as PLD 1991 FSC 1)

[14] SSM Nos. 2, 3 & 4 / I of 1991.

[15] Shariat Petition No.30/I of 1990.

Upon conclusion of the aforesaid judicial proceedings, The FSC in November 1991 declared the impugned provisions of law related to *Riba* to be repugnant to the injunction of Islam[16]. Charles Kennedy in one of his articles[17] very comprehensively summarizes the main findings of the court:

> "…
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> - *Riba means any "addition, however slight, over and above the principal," and includes both usury (excessive interest), as well as market-based or government-regulated interest.*
> - *No legal distinction can be made between "productive loans" and "consumption loans. The prohibition against Riba is absolute; there is no difference as to the basis of the purpose or nature of the loan.*
> - *Qur'anic decrees regarding Riba are not allegorical. Rather they constitute part of the clear text (nass) of the Qur'an.*
> - *The prohibition of Riba does not counter the public good. Ijtihad regarding the public good is only relevant when there is no textual precedent (nass) found in the Qur'an.*
> - *The indexation of loans in order to control inflation is prohibited by Islam. The Qur'an considers money a commodity; it must be exchanged in kind, not value.*
> - *Any system of mark-up is repugnant to Islam because it is tantamount to financial interest. …*"

The court while considering the request made by Mr. S. M. Zafar, counsel for the Federation, gave some time to the Federal and all Provincial Governments, to bring the laws in conformity with the injunctions of Islam[18].

## 2.2 *"Dr. M. Aslam Khaki vs. Syed Muhammad Hashim & 2 others" before SAB*[19]

The said judgment of FSC was assailed before the SAB, through various appeals, under Article 203-F of the Constitution. These appeals remained pending for adjudication for more than five (05) years. Once the court decided to take up the matter, it took the court nearly two years to dispose of research and procedural

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

[17] 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.

[18] Please refer to para 383 of the Judgment on page 188: PLD 1991 FSC 1.

[19] Civil Shariat Appeal No.1 of 1992 titled "Dr. M. Aslam Khaki vs. Syed Muhammad Hashim & 2 others" -along with other connected petitions- (reported as PLD 2000 SC 225).

issues before finally scheduling the hearings. The case was heard in thirty-odd sessions before the full bench of the SAB starting on February 22, 1999, and extending to July 6, 1999. It was a comprehensive and exhaustive exercise—literally hundreds of lawyers and experts participated in the process and ultimately the decision disposed of 55 appeals against the FSC decision, through a detailed and well-reasoned judgment on the issue[20], whereby *Riba* in all its forms and manifestations was declared to be prohibited by the Holy *Qur'an* and the *Sunnah*. The SAB agreed with the FSC on all the six points, mentioned above and upheld its judgment. More importantly, it upheld the FSC's definition of what constitutes *Riba*[21] and applied this definition to all forms of bank interest:

"*…all the prevailing forms of interest, either in the banking transactions or in private transactions do fall within the definition of Riba. Similarly, any interest stipulated in the government borrowings, acquired from domestic or foreign sources, is Riba and clearly prohibited by the Holy Qur'an.*"[22]

The decision was announced on December 23, 1999, and accordingly the SAB dismissed all the appeals filed against the FSC decision. The Federal Government was directed to take necessary steps and bring the economic system of the country, particularly the banking sector, in conformity with the injunctions of Islam, in accordance with the timelines given by the SAB[23]. Apart from the detailed directions to the Government, the court ordered that seven statutes, names whereof were listed in the Order of the Court[24], and a section 9 of the Banking Companies Ordinance, 1962, shall cease to have effect from 31st March, 2000. Moreover, other laws which were declared repugnant to the injunctions of Islam were ordered to cease to have effect from 30th June, 2001[25].

### *2.3 "UBL vs. M/s Farooq Brothers & others" before SAB[26]*

United Bank Limited (UBL) filed a review petition against the judgment of the SAB. The review petition was filed on February

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[20] *ibid*

[21] "*A transaction of money for money of the same denomination where the quality on both sides is not equal, either in a spot transaction or in a transaction based on deferred payment.*"

[22] Please refer to page 303 of PLD 2000 Supreme Court Journal (Part-I)

[23] Please refer to pages 345-347 of PLD 2000 Supreme Court Journal (Part-I)

[24] Please refer to para 10 of the Order of the Court at page 347, ibid.

[25] *Ibid*.

[26] Civil *Shariat* Review Petition No. 1 of 2000 titled "*UBL vs. M/s Farooq Brothers & others*" (reported as PLD 2002 SC 800)

21, 2000. It remained pending adjudication for more than a year. It is important to mention that during the pendency of the review petition, UBL also filed a civil miscellaneous application[27] (first application), wherein it prayed for suspension of operation of the judgment under review. The review petition was fixed for hearing for the first time before the SAB on April 10, 2001. It was next fixed for hearing on 11.06.2001. On the said date, the first application[28] came up for hearing. However, the court declined to give the relief prayed therein on two grounds:

i) "*It is not possible at this stage to adjudicate upon the controversy as the matter will be decided when finally review petition is taken up for decision*"[29].

ii) "*The constitution of the court is also incomplete because of the absence of an Alim Judge*"[30].

It is important to note that on the said date of hearing, the composition of SAB was following:

1) Mr. Justice Sheikh Riaz Ahmad
2) Mr. Justice Munir A. Sheikh
3) Mr. Justice Maulana Muhammad Taqi Usmani

The case was adjourned with date in office. However, it was soon fixed again for hearing, after only three days, on 14.06. 2001. A day before the date of hearing, another CMA[31] (second application) was filed by UBL, wherein it prayed the following:

"*… the Honorable Court may be pleased to:*

*(a) Suspend the operation of the judgment, including provisions of paragraph 11 of Short Order dated 23.12.1999 which is part of the Judgment of this Honorable Court;*

*(b) Pass appropriate interim Orders and in any event, time be extended till at least 31.12.2005 for the purpose of enabling the Federal Government to bring the laws mentioned in the Judgment dated 23.12.1999 in conformity with the Injunctions of Islam, as mentioned in the judgment; and*

(c) *That further until the above date of 31.12.2005, status-quo in relation to the operation of all procedural and operative laws which were the subject matter*

[27] CMA No. 1436 of 2001.
[28] Ibid.
[29] Please refer to Order dated 11.06.2001 passed by SAB in CMA No. 1436/2001 in Shariat Review Petition No.1/2000.
[30] Ibid.
[31] CMA No. 1485 of 2001 in C.Sh.R.P. No. 1 of 2000 in Shariat Appeal No.11 to 19 of 1992.

*of the judgment dated 23.12.1999 be continued to be maintained and all the said laws be allowed to continue to be operative.*"[32]

It is interesting to note that directions for implementation of the judgment in accordance with certain timelines were given to the Federal Government. It was the task of the Federal Government to implement the judgment in its letter and spirit, and take certain actions in compliance with the orders of the august court. The Government did not come forward to seek an extension in the timeline, until the petitioner UBL filed the above referred application. Thus, the UBL, being a private entity, did not have a *locus standi* to file the second application, and seek extension of the timelines for implementation of the judgment. Moreover, the relief it sought in the second application was similar to the one it had sought in the first application, and which was refused to be granted by the court.

Considering none of the above mentioned facts, the second application was allowed to be filed on 13.06.2001, and the same was taken up the very next day for hearing before the SAB. The Attorney General for Pakistan[33] put up the appearance, and conceded the relief sought by the petitioner UBL. The court, while ignoring its own previous order, which was passed only three days ago, partially allowed the application, vide Order dated 14.6.2000[34] in the following manner:

"*8. The Learned Attorney General when questioned as to how much time is required replied that the Government wants extension in time till 31st December, 2005. In our view, such prayer cannot be allowed. However, we would only allow time to the Government till 30.6.2001 within which time the Government will take effective steps for the implementation of the judgment and the Court would also be in a position to know as to what substantial steps have been taken so that their bona fides may be judged. In this view of the matter, the time granted in Paragraph 11 of the Judgment of the SAB of the Court dated 23.12.1999 is extended till 30.6.2002.*"

The order dated 14.6.2000 of the SAB substantively provided the relief sought by the UBL in its earlier first application. In doing so, the Court overlooked the following legal points:

i) The grounds mentioned in order dated 11.6.2000, whereby the first application was considered not worthy of any

[32] Abstract from the prayer in CMA. (Copy of the CMA is available to writer)
[33] Mr. Aziz Munshi was the Attorney for Pakistan at that point in time.
[34] Please refer to order dated 14.6.2001 of the SAB in CMA No.1485/2001 in Shariat Review Petition No.1 of 2000.

relief, very much existed at the time of passing the order dated 14.6.2000. However, surprisingly, these grounds did not come in the way of the court in granting the relief prayed for by the petitioner this time.

ii) The principle of *Res Judicata*, which was attracted to the second application, was not applied, rather the court not only entertained the application, fixed it for hearing on the next day, but also gave substantive relief to the petitioner.

iii) The court failed to take judicial notice of the fact that one of the timelines, given by the SAB in the Order of the Court dated 23.12.1999, in para 10 thereof[35], has already expired on 31st March, 2000, and the number of statutes and provisions of law, as listed therein, have already ceased to have effect, by the operation of the above referred judgment, and thus, these laws were no more in field, at the time of passing the order dated 14.6.2000.

iv) The court failed to acknowledge the fact that in extending the timelines given by the SAB, it actually suspended the operation of the entire judgment, without stating any legal grounds to justify the said suspension.

v) In passing the order dated 14.6.2000, the court grossly contradicted its own previous order, which was passed three days ago, on 11.6.2000.

vi) Since the Federation of Pakistan did not prefer to assail the judgment dated 23.12.1999 by way of filing a review petition, the said judgment had already attained finality to the extent of matters pertaining to the Government. Therefore, the stance taken by Attorney General for Pakistan[36] in respect of the relief sought by the petitioner UBL was legally misplaced and misconceived.

As the main Shariat Review Petition was not fixed on 14.6.2000, the court also ordered that "the file shall be sent to the Honorable Chief Justice, so that the Review Petition be fixed and decided well before the extended date"[37]. The matter remained pending for another year. Meanwhile, the only Alim judge of the SAB, namely, Mr. Justice Maulana Muhammad Taqi Usmani, who was among the four judges who passed the judgment dated 23.12.1999, was replaced by two new *Alim* Judges, namely, Dr. Allama Khalid Mahmood and Dr. Rashid Jallandhari. The review petition was finally fixed for hearing on 6th June, 2002 before a newly constituted SAB, which included Mr. Justice Munir A.

[35] Please refer to page 345 of PLD Supreme Court Journal, 2000.
[36] Mr. Aziz Munshi was the Attorney for Pakistan at that point in time.
[37] Please refer to footnote 34 above.

Sheikh, who was the only member of the SAB which passed the judgment under review. All other members were new on the SAB.

The court after conducting six hearing sessions accepted the review petitions, vide judgment dated 24th June, 2002[38], set aside the judgment dated 23.12.1999, and remanded the matter back to FSC, to be decided afresh. Going through the judgment, it gives the impression, that the court was hearing the first appeal against the judgment of FSC. This is because it allowed itself as well the parties to touch the merits of the case and raise arguments, which were already considered and adjudicated upon by the SAB in its earlier decision. The limited scope of review proceedings[39], as set out by the august Supreme Court, in a number of past precedents[40], was not taken into consideration. It is unfortunate to note that most of the grounds, on which the court based its decision to set aside the earlier judgment and remand the matter back, are comprehensively addressed and dealt with by the SAB in its decision dated 23.12.1999.

The court, while reaching the conclusion, mainly relied on the arguments advanced by Mr. Riaz Gilani, Sr. ASC, representing the Federal Government and its various ministries and divisions.[41] Going through the contentions of Mr. Gilani, as reproduced in the judgment, it seems that he was ignorant of the fact that he is representing the Federation, which as per the record, preferred not to assail the judgment dated 23.12.1999. It is also an interesting fact that Mr. Gilani did appear before the SAB, at the time when SAB was seized with the appeals. His arguments before the SAB are reproduced at pages No.388-391[42]. However, he did not conclude his arguments and sought adjournment. Later, he did not appear before the Court despite Court's order. Mr. Gilani's arguments were duly addressed by one of the members of SAB (Mr. Justice Maulana Muhammad Taqi Usmani) in his additional note[43]. It was unbecoming of a professional lawyer to repeat the same arguments before the Court and claim that he never got an

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[38] Civil *Shariat* Review Petition No. 1 of 2000 titled "*UBL vs. M/s Farooq Brothers & others*" (reported as PLD 2002 SC 800)

[39] In review proceedings, the courts only look into "any error floating on the face of the judgment under review".

[40] See for instance 1981 SCMR 518, PLD 1979 SC 941 & 1984 SCMR 1033.

[41] Please refer to paras 8, 9, 10 & 11 of the judgment reported as PLD 2002 SC 800 (Pages No. 809-812).

[42] Please refer to PLD 2000 SC 225.

[43] See Mr. Justice Maulana Muhammad Taqi Usmani note on pages 665-759 in PLD Supreme Court 2000.

answer[44] in the judgment under review, especially when he was representing the Federation which never assailed the judgment dated 23.12.1999. Moreover, Mr. Gilani failed to substantiate his contentions, while quoting opinions of different scholars or interpreting various terminologies of *Shariah*. The court also proceeded to accept the same on their face value without going deeper into the contentions, raised before it.

### 2.4 *"M/s Farooq Brothers vs UBL"* [45] *pending adjudication before FSC*

As stated above, the SAB remanded back the case of *Riba* to FSC to be decided afresh. Ever since the order of remand was announced in June 2002, the matter is pending adjudication before the FSC. Since the matter is sub judice, it may not be appropriate to make a comment on it. Nonetheless, we can highlight some facts related to the proceedings conducted thus far in the case, which are ascertained through the judicial record, available to us. But before doing so, it seems relevant to highlight certain guidelines as to how the process of administration of justice is to be carried out by the court as well as the judges.

The Constitution categorically states that "the State shall ensure inexpensive and expeditious justice"[46]. Besides, the Code of Conduct for Judges of the Supreme Court and High Courts, framed by the Supreme Judicial Council[47], requires a judge to "take all steps to decide cases within the shortest time, controlling effectively efforts made to prevent early disposal of cases and make every endeavor to minimize suffering of litigants by deciding cases expeditiously through proper written judgments"[48]. It further states, "A Judge who is unmindful or

[44] Please refer to para 9 of the judgment at page 810 (reported as PLD 2002 SC 800).

[45] Shariat Petition No. 30/L of 1991 –along with all other 117 cases– which were remanded by Hon. Supreme Court vide its judgment dated 24.6.2002 in Shariat Review Petition No.1 of 2000 (reported as PLD 2002 SC 800).

[46] Article 37 (d) of the Constitution.

[47] Framed by the Supreme Judicial Council 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.

[48] Article-X of the CODE OF CONDUCT TO BE OBSERVED BY THE JUDGES OF THE SUPREME COURT OF PAKISTAN AND OF THE HIGH COURTS OF PAKISTAN. (as published on http://www.supremecourt.gov.pk/web/page.asp?id=435 [last visited on 15.1.2019])

indifferent towards this aspect of his duty is not faithful to his work, which is a grave fault."[49]

This is such an unprecedented case in the world, in which even after lapse of sixteen years of pendency, after being remanded back to be decided afresh by SAB, the question of maintainability is still open to be decided. In every proceedings, before any judicial forum, the question of maintainability is the first question to be raised and decided. However, in the proceedings under discussion, in first six hearings, the question of maintainability was not even raised. Rather, the court proceeded to prepare a questionnaire, appoint jurist consults (experts of *Shariah*, economics, banking and finance) and directed its researchers to prepare research memos on points related to merits of the case. It was only on seventh date of hearing[50], when a counsel representing the State Bank of Pakistan raised objections on the jurisdiction of FSC to adjudicate upon the case of *Riba*. Ever since, neither the said counsel has been able to conclude his submissions on the point of maintainability, nor the court has given its findings on the said point.

There could be no denial of the fact that the nature of proceedings are such as require a deep intellectual debate and exercise on the subject. The court is performing such a unique jurisdiction, which is seldom found in any other Muslim country, that is to say, examining constitutionality and legality of laws on the touchstone of the injunctions of Islam. Keeping this in view, instead of taking into consideration and relying on fundamentals which have been subject to *Ijma'*[51] among the vast majority of scholars (who are experts on the subject) of all the ages for last fourteen hundred years, the court seems to be trying to reinvent the wheel. Since the subject matter of the case requires great expertise and in-depth understanding of the matters involved therein, such an approach does not seem to lead anywhere and will be of little help.

A brief scrutiny of the order sheet maintained in the case reveals that proceedings on the point of maintainability as well as on merits of the case have been conducted and progressed simultaneously side by side. This is because, the jurist consults appointed by the Court have already submitted their answers to

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[49] *Ibid*.

[50] Please refer to Orders dated 16.6.2015, passed by FSC in *Shariat* Petition No. 30/L of 1991.

[51] *Consensus of great Muslim jurists*.

questionnaires prepared by the Court on the merits of the case. Similarly, some of them have also briefly addressed the court. Thus, at this juncture, the propriety would demand the court to proceed in deciding the case on its merits, as it has been pending since long, and while doing so, it may also address the objections raised on the jurisdiction of the court.

After examining and analyzing the judicial record of the proceedings conducted by the FSC in the remanded case of *Riba*, following facts and legal points are worth mentioning[52]:

i) Not a single hearing was conducted in the case, after it was remanded back to FSC, for next (11) years. That is until June 2013, the case was not taken up for hearing even once.
ii) Until now, only twenty-four (24) hearing sessions have been conducted by the FSC. Except on four hearings, each time whenever, the case is postponed, it is adjourned with date in office, without fixing next specific date of hearing.
iii) Despite repeated requests by the parties, the court has never decided through an express judicial order, to conduct day-to-day hearing in the case. Only on two occasions, it so happened that the hearing sessions were conducted for two consecutive dates[53]. Even the Attorney General for Pakistan, on one occasion, requested the court to hear the case on day-to-day basis. Upon his request, only once, the case was adjourned to next day.[54]
iv) In none of the hearing sessions conducted so far, a counsel representing a party or jurist consult appointed by the court, who started addressing the court and making arguments, has fully concluded his arguments or submissions before the court. It is an interesting coincidence that every time a counsel or jurist consult, who starts making his submissions, "after arguing at some length"[55] seeks adjournment, and the court without any hesitation or showing any displeasure, accepts such request and the case gets "adjourned with date in office"
v) There lacks continuity in the proceedings. After few hearings, a new direction is set for adjudication of the case. For instance, on the first hearing, the court decided to appoint jurist consults to assist the court. Accordingly, the researcher of the

[52] These facts and legal points are ascertained from the Order Sheet of the court in Shariat Petition No. 30/L of 1991.
[53] Please refer to Orders dated 30.1.2017 and 13.2.2017, passed by FSC in Shariat Petition No. 30/L of 1991.
[54] Please refer to Order dated 30.1.2017, ibid.
[55] A phrase commonly used in the orders passed by FSC in Shariat Petition No. 30/L of 1991.

court was directed to prepare a list of jurist consults who will assist the court. A detailed questionnaire in this behalf was also prepared. On the next hearing, two of the jurist consults attended the court and submitted the answers to the questionnaire. They were only 'partially heard', as the court decided that "rest of their arguments will be heard afterward"[56]. In subsequent hearings, none of them was heard by the court.

vi) After conducting 16 hearing sessions in the case, the bench was dissolved upon the retirement of the Chief Justice. The case hearing was started afresh after appointment of some new judges on the bench.[57]

vii) Even after conducting twenty four sessions of hearing in the case, the question of maintainability is yet to be decided. On the next date of hearing, which date is in office, the court is going to hear the counsel for State Bank of Pakistan on the point of maintainability.

viii) Even after lapse of more than 15 years, the court, while passing the orders, never showed any concern on the delay being caused to the case of *Riba*, nor did it take any administrative steps to expedite the process of delivering its long-awaited verdict.

The above-mentioned facts and points reflect the state of affairs in which the proceedings in the case of *Riba* are being conducted. It is interesting to note that in the exercise of the powers conferred by Article 203-J of the Constitution, the FSC has made the rules[58] for carrying out its constitutional purposes. As per these rules, the Chief Justice has absolute authority and discretion to "constitute benches and cause a roster of sittings of such benches"[59].

Intentions cannot be challenged, but the way these proceedings are being conducted, does not reflect the commitment to serve the cause for which FSC is established. It is a far cry from commitment and dedication, which is more essential a qualification for bringing the laws in conformity with the injunctions of Islam than the competence to understand and interpret laws in light of injunctions of Islam. Unfortunately, the honorable FCS in this case has not provided much evidence to trust in either.

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[56] Please refer to Order dated 21.10.2013, ibid.
[57] Please refer to Order dated 23.4.2018, ibid.
[58] The Federal Shariat Court (Procedure) Rules, 1981.
[59] Please refer to Rule 4 *Ibid*.

## Conclusion

Keeping in view the past and present state of affairs in the case of Riba, as briefly discussed and highlighted in this paper, it can be safely concluded that the two constitutional judicial forums are lagging behind in achieving the purpose for which they were created.

The irregularities and illegalities highlighted in the interim order as well the final review judgment passed by the SAB in Shariat Review Petition No. 1 0f 2000 are of such a grave nature, that make them liable to be revisited and set a side, being legally a wrong decision.

As it was rightly stated by Lord Acton[60], "absolute power corrupts absolutely". The root cause lies with the discretion that has been provided, through a subordinate legislation, to the Chief Justice of each court to decide about fixation of cases and forming of benches. This power and discretion is absolute, since he is not obliged to state any reason for his decision in this regard.

New legislation should be introduced, with the aim to achieve following objectives:

i. An automated mechanism of fixation of cases for hearing, without any interference or exercise of discretion.
ii. Strict timelines for disposal of cases, keeping in view the nature of case, along with mechanism of evaluation of judicial work done by a judge on annual basis.
iii. Detailed qualification and strict criteria for appointment of judges in FSC, keeping in view the constitutional function the court performs.
iv. Separate rules for the functioning of SAB, addressing the issue of its regular sittings, regulating the process of fixation of cases, and review proceedings.

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[60] A British historian of the late nineteenth and early twentieth centuries.