

The Politics of Eliminating *Riba*: Tensions between Secular and Islamic Courts

Imran Ahmed

Summary

*The Constitution of the Islamic Republic of Pakistan contains numerous provisions aimed towards the political, legal and economic system of the country conforming to Islamic norms and injunctions. The difficulty in achieving this goal, however, is that numerous ambiguities exist in the text of the document, including the absence of clear definitions of key and relevant terms. The absence, often, of a decisive and coherent action plan to realise high aspirational Islamic goals further provokes enduring political and legal contestation. These tensions are perhaps most evident in Pakistan’s struggle to establish a just, equitable and moral economic order through the elimination of *riba*. This paper shows how the struggle to eliminate *riba* demonstrates fundamental tensions in the constitutional order concerning the jurisdictional boundaries between the secular and Islamic courts.*

Article 38 of Pakistan’s Constitution details a list of governmental priorities for the promotion of social and economic well-being of the people. It speaks about the importance of preventing the concentration of wealth and means of production and distribution in the hands of a few. It further declares that the state shall provide for all citizens with facilities for work and adequate livelihood with reasonable rest and leisure, social security (by compulsory social insurance or other means), provide all citizens with the basic necessities of life (such as food, clothing, housing, education and medical relief) and reduce income disparity between individuals. Article 38(f), in a brief clause, states that the state shall eliminate *riba* as early as possible. Unlike many of the preceding sub-clauses of the Article, no further details are given concerning the justification for the state’s prerogative to eliminate *riba*. Article 38 is also silent on the impact of *riba* or the method through which it ought to be eliminated – only that it be eliminated as early as possible. Although, Article 38, like much of the early part of the Constitution, is aspirational and serves akin to something like a mission statement where the priorities and prerogatives of the state are stipulated, there are striking features about the clause on *riba* which attract attention. For one thing, besides Article 38(f), the word *riba* is not mentioned anywhere else in the current Constitution. Nor is the word defined in the text of the document which is most notable. The word *riba* appears in the Quran¹ and the basis for its unlawfulness is based both on Quranic verses and scholarly consensus (*ijma*) amongst classical Muslim jurists.² However, the meaning of the term *riba* is decidedly complex and contested in both classical Islamic law and modern interpretations of the *sharia*. “What defines *riba*”, explains Ahmed Affi and Hassan Affi, “is fraught with many challenges.”³ They note that “there are many

¹ See for example verse 275 of the second chapter of the Quran.

² Ahmad ibn Lu’lu’ Ibn al-Naqib (translated by Nuh Ha Mim Keller), *Reliance of the traveller: the classic manual of Islamic sacred law ‘Umdat al-salik* (Amana Publications: Beltsville, rev. ed., 1999), p.384.

³ Ahmed Affi and Hassan Affi, *Contemporary Interpretation of Islamic Law* (United Kingdom: Troubador Publishing, 2014), p.191.

uncertainties surrounding the issue of *riba*, particularly what exactly is and is not forbidden under Sharia law, leading to a myriad of confusion and various intellectual discussions and interpretations of what the Qur'an really means when it talks about *riba*.”⁴ That the Constitution avoids posing a definition for *riba* in this regard may not be surprising, particularly since Muslim jurists of both the classical period and the modern era remain divided on the issue of whether *riba* constitutes usury or simply means interest⁵ or in fact refers to a much broader category of transactions involving gain without due effort.⁶ Despite the difference of opinion on the semantic meaning of the term, what renders *riba* coherence is that it is a decidedly Quranic concept with profound theological connections and implications. In this regard, it is surprising that this provision neither references Islam nor appears in the chapter on Islamic provisions (Part IX of the 1973 Constitution). Moreover, the Constitution does not articulate any Islamic basis for the elimination of *riba* but rather on the broad objective of promoting the social and economic welfare of the people.⁷

The ambiguities around whether the constitutional prescription of eliminating *riba* is an Islamic goal or not raise numerous practical governance questions. For one thing, some consensus is required on what constitutes *riba* in order to eliminate it. How should this consensus be achieved? Should the Council of Islamic Ideology, the constitutional body created to advise the government on Islamic matters, be involved? Who should be responsible to oversee the achievement or implementation of this goal? Is it the responsibility of legislatures? And if so, what connection does this objective relate to Article 227(1) which requires that all legislation must conform to Islamic injunctions?⁸ Or is it a matter for the courts? What role should the Federal Shariat Court (FSC) play? Does *riba* fall within the FSC's jurisdiction to exercise Islamic judicial review? The answers to these questions remain opaque and the subject of heated political contestation.

Most recently, debates on *riba* intertwine with questions around the function and jurisdiction of the FSC. In 2016, a three-member bench of the Supreme Court (SC) of Pakistan headed by Justice Mian Saqib Nisar dismissed a petition filed by Aakif Saeed, the

⁴ Ibid.

⁵ Abdullah Saeed, 'The proponents of Islamic banking argue that interest is *riba* and, as such, is prohibited under Islamic law', *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Netherlands: E.J. Brill, 1996), p. 1.

⁶ A possible reason for the need for scriptural reinterpretation in the contemporary age is to accommodate the imperatives of the modern banking system. "The fact of the matter is that the traditional interpretation of *riba*," Abdullah Saeed explains, "faces insurmountable obstacles in today's financial and economic environment as it does not appear to be either totally implementable or morally justifiable." Ibid, p. 2.

⁷ It must be noted that while the contents of Article 38 do not explicitly state any overt connections to Islamic principles, its goals fall in line with the objectives enunciated in classical Islamic law of an Islamic economic order. As Mawil Izzi Dien explains: "Qur'anic economic philosophy propounds the redistribution of wealth in society rather than allowing it to be concentrated in the hands of the few. This aims to achieve better public welfare." Mawil Izzi Dien, *Islamic law: from historical foundations to contemporary practice* (University of Notre Dame Press: Notre Dame, 2004), p. 63.

⁸ Article 227(1) states that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions. (In the application of this clause to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by the sect).

head of the Tanzeem-e-Islami and the son of late religious scholar Dr Israr Ahmed, seeking elimination of *riba* from the financial system of the country.⁹ The Tanzeem-e-Islami has long campaigned for the eradication of *riba* and has often thrown its weight behind legislation which has sought to further this agenda.¹⁰ The SC in this instance argued that the matter lay within the purview of the FSC and that the FSC was in fact looking into the matter.¹¹ Article 203D (1) of the Constitution establishes the FSC as the body responsible for aligning laws to Islamic legal norms and principles. Article 203B (c) ensures that the jurisdiction of the court is limited and that key areas of law remain outside its purview. Article 203B (c) states that the Constitution itself, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of ten years from the commencement of Chapter 3A of the Constitution, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure all remain outside of the jurisdiction of the FSC.

The 10-year exclusion of fiscal laws from the FSC's jurisdiction is most relevant. When the FSC was established by General Zia ul Haq in 1980, its functions and jurisdiction were the subject of continual tinkering.¹² The FSC was set up to hear sharia-related petitions from citizens and provincial and federal governments. A number of petitions were then lodged before the FSC to examine provisions for laws which permitted the payment of interest – but these were all dismissed on the basis that they were 'fiscal laws' and that fiscal laws were outside of the Court's jurisdiction.¹³ This exclusion of fiscal laws from the FSC's jurisdiction was set to initially last three years, but Zia went ahead and further extended the time span first to four years, then five years and then to 10 years. "Therefore", Charles Kennedy writes, "the FSC was effectively banned from consideration of all laws relevant to *riba* until 1990."¹⁴

⁹ Web Desk, 'SC dismisses petition seeking Riba free system', *SAMAA* (19 April 2016), <https://www.samaa.tv/economy/2016/04/sc-dismisses-petition-seeking-riba-free-system/>. Accessed on 15 February 2021.

¹⁰ 'Eradication of Riba bill lauded', *The News* (4 May 2019), <https://www.thenews.com.pk/print/466772-eradication-of-riba-bill-lauded>. Accessed on 16 February 2021, Ayub Baig Mirza, 'Tanzeem-e-Islami strongly and unequivocally supports 'The Eradication of Riba Act, 2019'', *Tanzeem Press Release* (3 May 2019), https://tanzeem.org/press_release/03-may-2019-tanzeem-e-islami-strongly-and-unequivocally-supports-the-eradication-of-riba-act-2019/. Accessed on 14 February 2021.

¹¹ Zeeshan Haider, 'Eliminating riba', *The News* (4 April 2016), <https://www.thenews.com.pk/magazine/instep-today/110043-Eliminating-riba>. Accessed on 16 February 2021.

¹² "Between 1980 and 1985," Charles Kennedy notes, "provisions relating to the operation of the FSC were modified 28 times, through the mechanism of 12 separate presidential ordinances, and were incorporated into the constitution in 14 subsections covering 11 pages of text." Charles H Kennedy, 'Islamization and Legal Reform in Pakistan, 1979-1989', *Pacific Affairs*, Vol.63, no.1 (1990), pp.64.

¹³ While much of the scholarly literature on Islamisation in Pakistan has focused on the criminal laws introduced during the Zia ul Haq era, it has been argued by some scholars that the driving force behind Islamisation in Pakistan has been a judge led initiative. Martin Lau for instance writes: "the role of judges in the Islamisation of the legal system has been largely obscured by the more visible manifestations of Islamisation, namely the promulgation of the infamous Hudood Ordinances and other isolated pieces of Islamic legislation, such as, for instance, the Enforcement of Shariah Act 1991." He believes that "the Islamisation of laws in Pakistan has been primarily a judge-led process, which was initiated to enhance the power of the judiciary and to expand the scope of constitutionally guaranteed fundamental rights." Martin Lau, *The role of Islam in the legal system of Pakistan* (Brill/Nijhoff, 2006), p.1.

¹⁴ Charles H Kennedy, 'Judicial Activism and Islamization After Zia: Towards the Prohibition of Riba', in Charles H Kennedy (ed.), *Pakistan: 1992* (Boulder: Westview Press, 1993), pp.57-74.

When the 10-year term for the exclusion expired, the FSC received some 115 petitions to examine some 20 laws which purportedly contradicted Islam.¹⁵ These petitions mostly based their arguments on verses 275-278 of the second chapter of the Quran.¹⁶ The cause against *riba* found a sympathetic ear with the Chief Justice of the FSC, Tanzil-ur-Rahman, who had also previously served as the chairman of the Council of Islamic Ideology and authored reports on *riba* in 1980 and 1983.¹⁷ The landmark 564-page judgement in the case *Mahmood-ur-rahman Faisal v. Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government Of Pakistan, Islamabad*, relied heavily on these reports and their findings. The judgment declared that “the literal meaning of *riba* is, ‘increase’. In Shari’ah it means ‘an addition, however slight, over and above the principal’, and thus includes both usury and interest.”¹⁸ Moreover, the FSC reasoned that “*Riba* forbidden in the Qur’an and Sunnah includes interest due on the loans taken or given for commercial and productive purposes by Banks or other financial institutions as well as interest on consumptional loans.”¹⁹

This ruling continues to be the subject of much contestation. While an appeal against the verdict was heard before the Shariat Appellate Bench (SAB) of the Supreme Court, the SAB however upheld the original FSC verdict in 1991 and allowed the government two years to reform banking laws and statutes in order to eliminate *riba*.²⁰ When the government and some banks filed a review petition before a Supreme Court bench headed by Chief Justice Sheikh Riaz, the bench returned the issue back to the FSC in 2002 for a “hearing afresh”.²¹ The bench explained: “Since the Federal Shariat Court did not give a definite finding on all the issues involved the determination whereof was essential to the resolution of the controversy involved in these cases, it would be in the fitness of things if the matter is remanded to the Federal Shariat Court which under the Constitution is enjoined upon to give a definite finding on all the issues falling within its jurisdiction.”²² The review petition was also grounded on the basis that the implementation of the anti-*riba* judgment would risk the economy of the country.²³

In December 2020, similar issues presented before both the FSC and the SC when a three-judge bench of the FSC led by Chief Justice Muhammad Noor Meskanzai took up constitutional petitions filed to examine whether the banking system in Pakistan conforms

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ *Mahmood-ur-rahman Faisal v. Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad*, (PLD 1992 FSC 1). The text of the judgement can be found at <https://cite.pakcaselaw.com/pld-federal-shariat-court/1992/1/>.

¹⁹ Ibid.

²⁰ M M Khan and M I Bhatti, *Developments in Islamic Banking. Palgrave Macmillan Studies in Banking and Financial Institutions* (Palgrave Macmillan: London, 2008), p.159.

²¹ ‘SC dismisses petition seeking Riba free system’, *SAMAA* (19 April 2016), (<https://www.samaa.tv/economy/2016/04/sc-dismisses-petition-seeking-riba-free-system/>). Accessed on 15 February 2021.; ‘History of Islamic Banking in Pakistan’, State Bank of Pakistan, <https://dnb.sbp.org.pk/IB/abt-his.asp>.

²² *United Bank Ltd. v. Messrs Farooq Brothers*, (PLD 2002 SC 800). The text of the judgement can be found at <https://cite.pakcaselaw.com/pld-supreme-court/2002/800/>.

²³ ‘Judgment reserved in Riba case’, *Dawn* (23 June 2002), <https://www.dawn.com/news/44409/judgment-reserved-in-riba-case>. Accessed 25 February 2021.

to Islamic injunctions.²⁴ The State Bank of Pakistan (SBP) requested the FSC to defer its hearing of these petitions arguing that the enforcement of Article 38 of the Constitution was a matter for the legislative and executive arms of government – and not the judicial apparatus of the state.²⁵ The counsel for the SBP further added that the mandate of eliminating *riba* in Article 38, whilst important, did not in fact specify a timeframe.²⁶ While the FSC rejected the request, in February 2021, the federal government challenged the FSC arguing that the Court did not have jurisdiction to hear the case regarding interest.²⁷ The attorney general contended that the Supreme Court was the appropriate avenue to settle the issue since the case against interest was a matter of constitutional interpretation.²⁸ While the hearing has been adjourned, it can be seen that the issue of *riba* continues to raise questions and contestation concerning jurisdictional boundaries between the FSC and the SC in Pakistan.

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Dr Imran Ahmed is an Honorary Associate at the University of New England, New South Wales, Australia, and a consultant with the Institute of South Asian Studies (ISAS), an autonomous research institute at the National University of Singapore (NUS). He can be contacted at iahmed5@une.edu.au. The author bears full responsibility for the facts cited and opinions expressed in this paper.

²⁴ ‘Shariat Court rejects SBP request to defer Riba case’, *The Express Tribune* (8 December 2020), <https://tribune.com.pk/story/2275067/shariat-court-rejects-sbp-request-to-defer-riba-case>. Accessed 25 February 2021.

²⁵ Ibid.

²⁶ Ibid.

²⁷ ‘Govt challenges FSC jurisdiction over interest case’, *The Express Tribune* (4 February 2021), <https://tribune.com.pk/story/2282547/govt-challenges-fsc-jurisdiction-over-interest-case>. Accessed 24 February 2021.

²⁸ Ibid.