

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT:

HON.MR.JUSTICE DR.TANZIL-UR-RAHMAN - CHIEF JUSTICE
HON.MR.JUSTICE IBADAT YAR KHAN
HON.MR.JUSTICE DR.FIDA MUHAMMAD KHAN
HON.MR.JUSTICE ABDUL RAZZAQ A. THAHIM
HON.MR.JUSTICE ABAID ULLAH KHAN

SHARIAT PETITION NO.28/I OF 1990.

Dr.Mahmood-ur-Rahman Faisal Petitioner

Versus

1. Secretary, M/o Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad.
2. Secretary, M/o Finance, Government of Pakistan, Islamabad.
3. Attorney General of Pakistan, Supreme Court of Pakistan, Rawalpindi.
4. Chief Secretary, Government of Punjab, Lahore.
5. Chief Secretary, Government of Sind, Karachi.
6. Chief Secretary, Government of NWFP. Peshawar.
7. Chief Secretary, Government of Baluchistan, Quetta.

..... Respondents

For petitioner Petitioner in person

For Federation Hafiz S.A.Rahman, and Mr.Iftikhar Hussain Ch.Standing Counsel for Federation.

For Punjab Mr.Muhammad Nawaz Abbasi, A.A.G., Punjab

For Sind Mr.Abdul Ghafoor Mangi, A.A.G. Sind.

For N.W.F.P. Mr.Shahab-ud-Din, Law Officer, N.W.F.P.

For Baluchistan Raja Muhammad Afsar, Advocate-General, Baluchistan.

Amicus Curiae Syed Sharifuddin Pirzada, Advocate.

Date of Institution 25.6.1990

Dates of hearing 25-3-1991, 20-5-1991, 27-5-1991,

Date of decision 27-5-1991

JUDGMENT:

TANZIL-UR-RAHMAN, CHIEF JUSTICE.- By this Shariat

Petition, section 4 of the Court Fees Act, 1870 was challenged by Dr. Mahmood-ur-Rahman Faisal of Rawalpindi. On conclusion of the hearing, the petition was accepted by our short order dated 27-5-1991, for detailed reasons to be recorded later, which are as under:

2. The petitioner, Dr. Mahmood-ur-Rahman Faisal, in this petition, filed on 25-6-1990, challenged section 4 of the Court Fees Act, 1870. This case was taken up on 13-1-1991 when the petition was admitted to regular hearing by a Full Bench. On 25-3-1991 the petition came up for regular hearing and the petitioner was heard. However, a request was made on behalf of the Federation of Pakistan through its Standing Counsel and the Provinces of Sind, NWFP and Baluchistan for giving them time to file written statements as provided under Rule 12(3) of the Federal Shariat Court (Procedure) Rules, 1981, on the proposition whether imposition of Court Fees as provided under Court Fees Act, 1870 and several Provincial statutes is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (ﷺ). The matter was, therefore, adjourned to 20th May, 1991, with a direction that written statements be filed one week before that date. The matter came up for hearing on the said date and the learned Assistant Advocate General, Punjab, submitted that he has prepared the case on section 4, as it was notified earlier, but there are other provisions relating to the levy, charge and collection of the Court fee in the said Act. He further

submitted that he was not in a position to state the relevant provisions of the Punjab Court Fees Act/Ordinance by virtue whereof the Court Fees are being levied, charged and collected by the Province of Punjab. He, therefore, requested for one week's time to prepare himself on the relevant provisions of law relating to the levy, charge and collection of Court fee in the Punjab. The other Law Officers of the Provinces also made the same request. The case was, therefore, adjourned to 27-5-1991, to examine the Court Fees Act, 1870 and Provincial Statutes covering the subject, as a whole.

3. On 27-5-1991, the Assistant Advocate Generals of Punjab and Sind placed on record the relevant statutes and pointed out the relevant provisions relating to the levy, charge and collection of Court fees in Punjab and Sind. The representative of the Provincial Government, Baluchistan, also supplied the copies of the statutes and pointed out relevant provisions relating to the levy, charge and collection of Court fees. Law Officer of the Government of NWFP also did the same thing. Mr. Iftikhar Hussain Chaudhry, Standing Counsel for the Federation of Pakistan confined to the relevant provisions of Court-Fees Act, 1870 and Schedules thereunder.

4. In view of the importance of the subject, a letter of request was addressed to Mr. Sharifuddin Pirzada, an eminent Jurist and a former Attorney General of Pakistan to assist the Court. In response to the said request, he appeared in the Court and rendered valuable assistance

to the Court. A letter of request was also sent to Hafiz Abdul Latif Saleemi, Senior Research Officer of the Council of Islamic Ideology to appear and assist the Court. He appeared and also rendered some assistance to the Court.

5. Before dealing with the question of repugnancy of the levy of Court fees in the light of the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (ﷺ) it seems proper to say a foreward about its imposition during British rule in this Sub-continent.

6. The Court fees were levied in this Sub-continent for the first time in 1780 by Viceroy Warren Hastings during East India Company's rule over India. After Warren Hastings was recalled and impeached by the British Parliament, his successor Lord Carnivales took over as Viceroy of India. He abolished the Court Fee as, according to him, a tax on justice was a disgrace to a civilized power. But, after his retirement in 1795, the Court Fee was again imposed. In 1870 the present Court Fees Act was enacted and enforced by the British rulers in the whole of British India. However, the British rulers exempted the Chartered High Courts/ Supreme Court established by them in the three Presidency Towns of India, namely, Calcutta, Madras and Bombay where their British subjects could file suits without paying any Court fee.

7. After the establishment of Pakistan on 14th August, 1947 the laws then in force in Indo-Pak sub-continent were adapted in Pakistan. The Court Fees Act 1870 is one of them, which continues to be in force in Pakistan under Article 268 of the Constitution as the "existing Law."

8. A glance through the Court Fees Act, 1870 reveals that it is

a Central statute relating to the levy of the Court fees; Chapter I is preliminary; Chapter II deals with levy of Court Fees in High Courts on Original side, to be collected in the manner provided in the Act; Chapter III deals with fees in other Courts. Chapter III-A deals with fees leviable on probates, letters of administration and certificates of administration. Chapter IV deals with process fees. Chapter V deals with mode of levying fees and Chapter VI deals with miscellaneous matters. There are three Schedules appended to the said Act. Schedule I prescribes fees on ad-valorem basis whereas Schedule II prescribes fixed rates and fees. Schedule III prescribes forms of valuation.

9. In order to transform Pakistan into a true Islamic State, it was provided under Article 198 of the Constitution of 1956, that all existing laws shall be brought into conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and no law which is repugnant to Islamic Injunctions shall be enacted. It was further provided that within one year of the Constitution day (March 23, 1956), the President shall appoint a Commission to make recommendations suggesting, inter-alia, the measures for bringing the existing laws into conformity with the Injunctions of Islam. On the last day of the expiry of the said one year i.e. on 22nd March, 1957 a Chairman of the Commission was nominated by the then President of Pakistan but nothing could be done or attained by this Commission as no member was nominated. In 1958 Martial Law was proclaimed and the Constitution of 1956 was ^{when} abrogated. In 1962, ^{when} another Constitution was proclaimed by the then President and Chief Martial Law Administrator, Mohammad Ayub Khan, the Islamic provisions were again incorporated

in the said Constitution vide Article 199 to 207. However, by Article 199 instead of Commission an Advisory Council of Islamic Ideology was provided. Originally, the said Advisory Council did not have power to examine the existing laws in the light of the Injunctions of Islam. This function, as a result of country-wide protest, was later on added by the Constitution (First Amendment Act) 1963, whereby the Council, among other things, was entrusted with the function to examine all laws in force immediately before the commencement of the Constitution (First Amendment Act) 1963, with a view to bring them in conformity with the teachings and requirements of Islam, as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (ﷺ). The said Constitution too was abrogated in 1969 when Martial Law was imposed second time in the country. However, the said Advisory Council remained in existence. The said Advisory Council of Islamic Ideology in the year 1971 examined the Court Fees Act 1870 and opined that there was nothing in it which could be said to be repugnant to the Injunctions of Islam.(refer to the First Report of Islamization of Laws 1836-71).

10. In 1972 the interim Constitution of 1972 came into force. After about a year, the Interim Constitution was replaced by the Pakistan Constitution of 1973. The Council of Islamic Ideology (with the deletion of the word 'Advisory') under the Constitution of 1973, was re-constituted in February, 1974, headed by Justice Hamoodur Rahman, the then Chief Justice of Pakistan. The Council did some good work but its

reports do not appear to have been placed and discussed in the National Assembly as required under Article 230(G) of the Constitution of Pakistan, 1973. (See "Reflections on Islam" by Justice Hamoodur Rahman, Lahore pp. 119-20). After about four years, the Constitution of Pakistan was suspended on 5th July 1977 and Martial Law was re-imposed for the third time in the country. The Council of Islamic Ideology, was then re-constituted and headed by Mr. Justice Muhammad Afzal Cheema, a Judge of the Supreme Court, by the Chief Martial Law Administrator, Gen. Muhammad Zia-ul-Haq, who had taken over the reins of power by proclamation of Martial Law on 5th July, 1977. The Court Fees Act, 1870 was, then, considered in depth by the said Council which recommended as follows:

کورٹ فیس کا خاتمہ:

قرآنی آیات، مستند احادیث اور ممتاز آئمہ مجتہدین کی آراء کے مطالعہ سے یہ امر واضح ہو جا تا ہے کہ اسلامی حکومت کا یہ فریضہ ہے کہ وہ نسل، ذات، جنس اور رنگ کی تمیز کئے بغیر تمام باشندوں کو بلا اجرت انصاف کے حصول کی ضمانت دے۔ لہذا کونسل نے تجویز کیا کہ آئینی، دیوانی اور فوجداری مقدمات میں جتنی جلد ممکن ہو سکے کورٹ فیس کی وصولی کے نظام کو ختم کر دیا جائے۔

(اسلامی نظریاتی کونسل کی سالانہ رپورٹ ۱۹۷۷-۷۸ء، ص ۱۲۷)

Translation:

"It is clear from the study of the Quranic verses, authentic ahadith and opinions of the renowned jurists that it is the duty of the Islamic state to provide free justice to all the inhabitants of the state irrespective of caste, sex and colour. The council, therefore, proposes that Court-fee system should be abolished as soon as possible in constitutional, civil and criminal cases."

11. The above said recommendation was partly accepted by the then President and Chief Martial Law Administrator and in 1978 an exemption from payment of Court Fee on suits not exceeding the value of Rs.25,000/- was provided in the Statute.

12. In or about 1984, on further recommendation of the Pakistan Law commission, headed by the Chief Justice of Pakistan, the then President General Muhammad Zia-ul-Haq abolished ad-valorem Court fee on Succession Certificates and Letters of Administration, and ordered a fixed Court Fee of Rs.15/- only, to be paid by the petitioner, irrespective of the value of the estate left by the deceased. Furthermore, in 1981 a fixed Court fee of Rs.15/- only was prescribed on suits under Fatal Accidents Act, 1875 for compensation instead of paying ad-valorem Court fee on the amount claimed in the suit which was really a great hardship for the poor family of the deceased for two-fold reasons: firstly the members of the family were deprived of the future earnings and comforts from the deceased and secondly for claiming damages from the wrong-doer they had to bear heavy litigation expenses by way of Court-fees etc.

13. These were, in fact, direct steps towards enforcing Islamic Social Justice in Pakistan to poor classes of the people, particularly to help the widows and orphan children of the deceased. In 1990, the Sind Assembly, by Sind Finance Act, 1990, enhanced the limit of the earlier exemption from payment Rs.25,000/- to Rs.50,000/- on suits as a further steps towards providing inexpensive justice.

14. In 1980, this Federal Shariat Court was constituted by Presidential Order No.1 of 1980, to examine and decide whether any law or provision of law is repugnant to the Injunctions of Islam, but inter-alia, a bar was imposed to examine fiscal law or a law relating to the levy of fees on taxes and to decide the question whether such law was repugnant to the Injunctions of Islam for a period of 10 years from the commencement of Chapter 3-A incorporated in the Constitution by P.O. Order 1 of 1980. The said period of 10 years having expired on 26th June, 1990 this Court is empowered to examine and decide the question of repugnancy of fiscal law and any law relating to the levy of taxes and fees etc.

15. To examine the Court Fees Act, 1870 as to whether the said law or any provision thereof is repugnant to the Injunctions of Islam, I would, in the first instance, quote few verses from the Holy Qur'an relating to justice. For the first of such verses, I quote verse 25 of Surah Al-Hadeed, which reads as under:-

١- "لقد ارسلنا رسلنا بالبينات وانزلنا معهم الكتاب والميزان ليقوم
الناس بالقسط (الحديد ٥٧ : ٢٥)

(We sent aforetime our apostles with Clear Signs and sent down with them The Book and the Balance (Of Right and Wrong), that men may stand forth in justice).

٢- "فلذلك فادع واستقم كما امرت ولا تتبع اهواءهم وقل آمنت بما انزل
الله من كتاب وامرت لاعدل بينكم الله ربنا وربكم لنا اعمالنا ولكم
اعمالكم لا حجة بيننا وبينكم الله يجمع بيننا واليه المصير،

(الشورى ٤٢ : ١٥)

(Now then, for that (reason), call (them to the faith) and stand steadfast as thou art commanded, nor follow, thou their vain desires but say: "I believe in the Book which Allah has sent down; and I am commanded to judge justly between you. Allah is our Lord and your Lord. For us (Is the responsibility for) Our deeds, and for you, for your deeds. There is no contention between us and you. Allah will bring us together, and to Him is (Our)final goal').

٣- "يا ايها الذين آمنوا كونوا قوامين بالقسط شهداء لله ولوعلى انفسكم والوالدين والاقربين ان يكن غنيا او فقيرا فالله اولى بهما فلا تتبعوا الهوى ان تعدلوا وان تلوا او تعرضوا فان الله كان بما تعملون خبيرا" (النساء ٤ : ١٣٥)

(O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourself, or your parents, or your kin, and whether it be (against) rich or poor for Allah can best protect both. Follow not the lusts (Of your hearts), lest ye swerve, and if ye distort (justice), or decline to do justice, verily Allah is well-acquainted with all that ye do).

٤- "يا ايها الذين آمنوا كونوا قوامين لله شهداء بالقسط ولا يجرمنكم شنان قوم على الا تعدلوا اعدلوا هو اقرب للتقوى واتقوا الله ان الله خبير بما تعملون" (المائدة ٥ : ٩)

(O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make swerve to wrong and depart from justice. Be just; that is next to piety: and fear Allah, for Allah is well-acquainted with all that ye do).

٥- "ان الله يأمركم ان تؤدوا الامانات الى اهلها واذا حكمتم بين الناس ان تحكموا بالعدل ان الله نعم اعظمكم به ان الله كان سميعا بصيرا" (النساء ٤ : ٥٨)

(Allah doth command you to render back your Trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice; verily how excellent is the teaching which He giveth you! for Allah is He Who heareth And seeth all things).

٦- "وَضَرَبَ اللَّهُ مَثَلًا رَجُلَيْنِ أَحَدُهُمَا أَبْكَمُ لَا يَقْدِرُ عَلَى شَيْءٍ وَهُوَ كَلٌّ عَلَى مَوْلَاهُ أَيْنَمَا يُوَجِّههُ لَا يَأْتِ خَيْرًا هَلْ يَسْتَوِي هُوَ وَمَنْ يَأْمُرُ بِالْعَدْلِ وَهُوَ عَلَى صِرَاطٍ مُسْتَقِيمٍ" (النحل ١٦ : ٧٦)

(Allah sets forth (another) parable of two men; one of them Dumb, no power of any sort; a wearisome burden is he to his master; whichever way he directs him, He brings no good; Is such a man equal with one who commands justice, and is on a Straight Way?)

٧- "وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلَحُوا بَيْنَهُمَا فَإِنْ بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَى فَقَاتِلُوا الَّتِي تَبْغِي حَتَّى تَفِيءَ إِلَى أَمْرِ اللَّهِ فَإِنْ فَاتَتْ فَأَصْلَحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ" (الحجرات ٤٩ : ١٠)

(If two parties among the Believers fall into a quarrel, make ye peace between them; but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies, then make peace between them with justice, and be fair; for Allah loves those who are fair (and just).)

٨- "وَمَنْ كَلَّمَكَ رِيكَ صَدَقًا وَعَدَلًا لَا يَبْدُلُ لِكَلِمَاتِهِ وَهُوَ السَّمِيعُ الْعَلِيمُ" (الانعام ٦ : ١١٥)

(The Word of thy Lord doth find its fulfilment in truth and in justice; none can change His words: for He is the one Who Heareth and knoweth all).

٩- "سَمَاعُونَ لِلْكَذِبِ أَكْلُونَ لَسَعْتَ فَإِنْ جَاءُوكَ فَاحْكُم بَيْنَهُمْ أَوْ أَعْرِضْ عَنْهُمْ وَإِنْ تَعْرِضْ عَنْهُمْ فَلَنْ يَضُرُّوكَ شَيْئًا وَإِنْ حَكَمْتَ بَيْنَهُمْ بِالْقِسْطِ إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ" (المائدة ٥ : ٤٥)

(They are foud of) listening to falsehood, of devouring anything

forbidden. If they do come to thee, either judge between them, or

decline to interfere. If thou decline, they cannot hurt thee in the least. If thou judge, judge in equity between them; for Allah loveth those who judge in equity).

۱۰۔ اَشْهَدُ اَللهُ اَنَّهُ لَا اِلَهَ اِلَّا هُوَ وَالْمَلَائِكَةُ وَاُولُو الْعِلْمِ قَائِمًا بِالْقِسْطِ

لَا اِلَهَ اِلَّا هُوَ الْعَزِيزُ الْحَكِيمُ (العمران ۳ : ۱۸)

(There is no god but He: that is the witness of Allah, His angels, and those endued with knowledge standing firm on justice. There is no god but He, the Exalted in Power, the wise).

۱۱۔ وَلَا تَقْرَبُوا مَالَ الْيَتِيمِ اِلَّا بِالَّتِي هِيَ اَحْسَنُ حَتَّىٰ يَبْلُغَ اَشُدَّهُ وَاَوْفُوا الْكَيْلَ

وَالْمِيزَانَ بِالْقِسْطِ لَا تَكْلَفْ نَفْسًا اِلَّا وُسْعَهَا وَاِذَا قُلْتُمْ فَاعْدِلُوا وَلَوْ كَانَ ذَا قُرْبَىٰ وَبَعْدَ

اَللهِ اَوْفُوا ذَلِكُمْ وَاصُمْ بِهِ لَعَلَّكُمْ تَذَكَّرُونَ (الانعام ۶ : ۱۵۲)

(And come not nigh to the orphans' property except to improve it, until he attain the age of full strength; give measure and weight with (full justice; no burden do We place on any soul, but that which it can bear; whenever ye speak, speak justly even if a near relative is concerned and fulfil the Covenant of Allah: Thus doth He command you, that ye may remember).

۱۲۔ "قُلْ اَمْرٌ رَّبِّى بِالْقِسْطِ وَاَقِمْ وُجُوْهُكُمْ عِنْدَ كُلِّ مَسْجِدٍ وَادْعُوهُ مُخْلِصِينَ لَهُ

الدِّينَ كَمَا بَدَأَكُمْ تَعُودُونَ (الاعراف ۷ : ۲۹)

(Say: "My Lord hath commanded justice; and that ye set your whole selves (to Him) at every time and place of prayer, and call upon Him, making your devotion sincere as in His sight: such as He created you in the beginning, so shall ye return).

۱۳۔ "وَيَا قَوْمِ اَوْفُوا الْكَيْلَ وَالْمِيزَانَ بِالْقِسْطِ وَلَا تَبْخَسُوا النَّاسَ اَشْيَاءَهُمْ وَلَا

تَعْثَوْا فِى الْاَرْضِ مُفْسِدِينَ (هود ۱۱ : ۸۵)

(And O my people! Give just measure and weight, nor withhold from

the people the things that are their due: Commit not evil in the land with intent to do mischief).

١٤- "واقموا الوزن بالقسط ولا تخسروا الميزان" (الرحمان ٥٥ : ٩)

(So establish weight with justice and fall not short in the balance).

١٥- "والى مدين اخاهم شعيبا قال يا قوم اعبدوا الله ما لكم من اله غيره قد جاءكم

بينه من ربكم فافوا الكيل والميزان ولا تبخسوا الناس اشياءهم ولا تفسدوا فى الارض

بعد اصلاحها ذ لكم خير لكم ان كنتم مؤمنين" (الاعراف ٧ : ٨٥)

(To the Madyan people we sent Shuaib, one of their own brethren: he said: "O my people! worship Allah; ye have no other god but Him. Now hadth come unto you a clear (sign) from your Lord! Give just measure and weight, nor with old from the people the things that are their due; and do not mischief on the earth after it has been set in order: that will be best for you, if ye have Faith).

١٦- "والى مدين اخاهم شعيبا قال يا قوم اعبدوا الله ما لكم من اله غيره ولا تنقصوا

الكيال والميزان انى اراكم بخيروانى اخاف عليكم عذاب يوم محيط" (هود ١١ : ٨٤)

(To the Madyan people (We sent) Shuaib, one of their own brethren: he said: "O my people! worship Allah: Ye have no other god but Him. And give not short measure or weight: I see you in prosperity, but I fear for you the Penalty of a Day that will compass (you) all round).

١٧- "الله الذى انزل الكتاب بالحق والميزان وما يدريك لعل الساعة

قريب" (الشورى ٤٢ : ١٧)

(It is Allah Who has sent down the Book in truth, And the Balance (By which to weigh conduct). And what will make thee realise that kperhaps the Hour is close at hand?).

١٨- "والسما رفعها و وضع الميزان ، الا تطفوا فى الميزان" (الرحمان ٥٥ : ٧-٨)

(And the Firmament has He raised high, and He has set up the balance (of Justice), In order that ye may not transgress (due) balance.

١٩ - " ان الله يامر بالعدل والاحسان وايتاي ذى القربى وينهى عن الفحشاء والمنكر والبغى يعظكم لعلكم تذكرون " (النحل ١٦ : ٩٠)

Allah Commands Justice, the doing of good and Liberality to kith and Kin, and he farbid all showful deeds and injustice and Rebellion. he instructs you that ye may receive admonition. (Abdullah Yusuf Ali).

٢٠ - " الذين ان مكاهم فى الارض اقاموا الصلوة و اتوا الزكوة وامروا بالمعروف و نهوا عن المنكر والله عاقبة الامور " (الحج ٢٢ : ٤١)

(They are) those who, If We establish them In the land, establish Regular prayer and give Regular charity, enjoin The right and forbid wrong: With Allah rests the end (And decision) of (all) affairs."

The Qur'an (verse 41 of Surah Al-Hajj) ordains that those who come in power on earth enjoin the right and forbid wrong. This enjoiment upon people in power, infact, laying upon them, as a mandate: to order or direct with authority, (Chambers Twentieth Century Dictionary), is absolute in terms and is not tagged with charging any fee or return for commanding good and forbidding wrong (to be done). While explaining this verse Mawlana Mawdudi has explained that the commandment of justice implies to make such arrangements as may enable every one to get one's due right without stint.....

To interpret the meaning, intent and purpose of the above verses it may be stated that .-

In verse 15 of Surah Al-Shoora the words of Allah Almighty

وامرت لاعدل بينكم (The Holy Prophet says) "I am commanded to judge justly between you." This commandment is absolute in terms. It is a duty to be performed. So justice is a prophetic mission and the Prophet had to fulfil the commandment of Allah without encumbering the people with any fee like Court fee or justice fee. An Islamic State which appoints judges to impart justice among the people is, in fact, fulfilling the Prophetic mission of sending prophet, the mission of revealing Book (الكتاب) and the Balance (الميزان) (Scale of Justice is directed to be fulfilled free. Justice cannot be denied merely because the court-fee has not been paid.

16. The words كونا قوامين بالقسط in verse 135 of Surah Al-Nisa again commands the believers يا ايها الذين آمنوا to stand out firmly for justice. It does not at all imply with the condition of receiving any payment for justice. In the said verse (135 of Surah Al-Nisa), Justice has been stated as Allah's attribute, and to stand firm for justice is to be a witness to Allah, even if it is detrimental to our own interests, as we conceive them, say, for example, there may be loss of revenue to the Government.

17. Let it be noted that Islamic justice is something higher than the formal justice of Roman Law or any other human Law. Both Plato and Aristotle define Justice as the virtue which gives everyone his due. From this point of view Justice becomes the master virtue, and includes most other virtues. In Islam, justice is related to the

concept of Tawhid (توحيد) and Tawhid is the foundation of justice.

Justice is a value recognized by all religions. Some people may be inclined to favour the rich, because they expect something from them.

Some people may be inclined to favour the poor because they are generally helpless. Partiality in either case is wrong. Allah commands us: Be just, without fear or favour, Both the rich and the poor are to be treated alike under Allah's protection as far as their legitimate rights are concerned. To do justice and act righteously in neutral atmosphere is meritorious enough, but the real test comes when you have to do justice to people who hate you or to whom you have an aversion. But no less is required of you by the higher Moral law.

18. In verse 9 of Surah Al-Maidah, again, the Believers are addressed and again the same words كُونُوا قَوَّامِينَ بِالْقِسْطِ are reiterated with more emphasis. Justice to be done for the sake of Allah and not for the sake of money, fee or compensation or reward.

19. In verse 45 of Surah Al-Maidah, devouring anything forbidden: both in a literal and in a figurative sense. In the figurative sense, it may be the taking of usury or bribe, or taking of undue advantage of people's weak position or their own fiduciary powers to add to their own wealth by way of levy of any fee or charge.

20. In verse 9 of Surah Al-Hujrat the Almighty Allah says if the two parties among the Believers go into a quarrel ye (State) make

peace between them. It nowhere implies that for making peace fee is to be charged.

21. In verse 115 of Surah Al-An'am, the 'عدل' (justice)

is one of the attribute of Allah the Almighty Himself.

22. In verse 45 of Surah Al-Maidah, the Holy Prophet has been

commanded to judge in equity between them, for Allah loves those

who judge in equity. Surely, the Balance of equity will be disturbed

if anyone stands for justice for consideration either received by the

judge himself for purpose of doing justice or the State imposes it on

the litigious public to meet the expenses incurred for rendering

justice to the people.

23. In verse 18 of Surah Al-Imran, the Angels, the Allah

Almighty all stand firm on justice.

24. In verse 29 of Surah Al-A'raf, the opening words

قل امر ربي بالقسط is a direct commandment to the Holy

Prophet. In fact, the Holy Prophet himself says that "Say my

Lord has commanded justice and that ye set your wholeselves

(to Him) at every time and place of prayer. There is no

fee to be charged for rendering Ibadah either for himself or for

another. It has been stated by all the 'Mufassirin', (مفسرين)

Interpreters of the Holy Qur'an, Interpreters of the Hadith

'Muhaddithin', (محمد ثين) and the Jurists that justice is an

Ibadah (عبادة). I may quote herein-below Imam Shamsuddin

al-Sarakhsi (d.482 A.H.) who stated in his book Al-Mabsūt vol:XVI,

that justice is the best form of worship. In his own words:-

ان القضاء بالحق من اقوى الفرائض بعد الايمان بالله

تعالى وهو من اشرف العبادات

(Al-Sarakhsi, Shamsuddin, Al-Mabsūt Cairo, 1324 A.H. vol.XVI p.59).

25. In verse 85 of Surah Al-Hood, the Holy Qur'an commands:

اوفوا المكيال والميزان بالقسط ولا تبخسوا الناس

اشيائهم ولا تعثوا فى الارض مفسدين

that is, O' my people! give just measure and weight, nor withhold

from the people the things that are their due: Commit not evil

in the land with intent to mischief." This implies that justice

is to be imparted in full; the dispute is to be settled in full

without charging anything called as court-fee or call it by any

other name.

26. In verse 9 of Surah Al-Rahman the commandment is

more explicit "واقموا الوزن بالقسط ولا تخسروا الميزان" establish

weight with justice and fall not short in the Balance."

27. In verse 85 of Surah Hood after commanding to establish

weight with justice it has been stated that do not play mischief.

This implies that if you charge anything for justice and thereby reduce the claimant's rightful due, because he bears expenses for seeking justice, it will amount to doing mischief on earth.

28. In verse 84 of Surah Hood after commanding the giving of full measure of weight, there is warning for those who do so, and those who do not abide, for them is the penalty on the Day that will compass them all round.

29. In verse 7 and 8 of Surah Al-Rahman it has been stated in clear terms that He raised the High and He has set up the Balance (justice), in order that ye may not transgress Balance (due). Justice is a heavenly virtue. As Abdullah Yusuf Ali says that "Balance" is to be taken both literally and figuratively, a man should be honest and straight in every daily matter, such as weighing out things which he is selling; and he should be straight, just and honest in all the highest dealings not only with other people, but with himself and his obedience to God's Law. Not many do either the one or the other, when they have an opportunity of deceit. Justice is the central virtue, and the avoidance of both excess and loss in conduct keeps the human world balanced just as the heavenly world is kept balanced by mathematical order.

30. The Holy Prophet himself performed the duty of a judge and he used to sit in the mosque where every one was allowed to come and present his claim before him for adjudication without paying any fee etc. The same practice was followed by the Khulafa al-Rashidin after the Holy Prophet. Allama Shibli Nu'mani, while discussing the court system in the period of Hazrat Umar writes:

"مقدمات کے رجوع کرنے میں کوئی صرف برداشت کرنا نہیں پڑتا تھا"

that is, no financial burden had to be borne (by the parties) with respect to their cases (in the courts). (Shibli Nu'mani, Al-Farooq, printed Maktabah Rahmaniyyah, Lahore, p.225).

31. Al-Mawardi, while discussing the salaries of judges, writes, "Remuneration (salary) for the Qada (dispensation of Justice) is permissible from Bait-al-Mal as Allah Almighty has permitted payment of the salaries of the staff of the Zakat Department from the Zakat fund, and Hazrat Umar appointed Shuraih as judge on a salary of 100 dirhams per month and Zaid bin Thabit also received salary as a Judge." He further writes, "Similarly the salaries of the staff of a judge will also be paid from Bait al-Mal like his clerk, watchman, assistant etc. so that none of them demands something from any party to the case. Imam Shafi'i said that a qazi, in addition to his salary, will also be paid for the paper etc. which he requires for recording the arguments, judgments, filing and registration of the cases because all these are required in the larger interest of the public and payment for the public interest is

liable to be made from bait al-Māl." (Mawardi, Abul Hassan, Ali Ibn Muhammad, Adab Al-Qadi, Baghdad, vol-II, pp.295-297). The relevant

Arabic text reads as under:-

(رزق القضاة)

٣١٥٨- مسألة : قال الشافعي : وينبغي للامام ان يجعل مع

رزق القاضي شيئا لقراطيته ولا يكلفه الطالب فان لم يفعل .

٣١٦١- والقضاة ما يجوز اخذ الرزق عليه من بيت المال لان الله

تعالى جعل للعاملين على الصدقات سهما فيها وقد استقصى عمر شريحا

وجعل له في كل شهر مائة درهم رزقا فلما افضت الخلافة

الى علي جعل رزقه في كل شهر خمسمائة

٣١٦٦- وكذلك ارزاق اعوانه من كاتب ، وحاجب ، و نائب ، وقاسم ،

وسجان ، حتى لا يستجمل واحد منهم خصما .

٣١٦٧- قال الشافعي : ويجعل مع رزق القاضي شيئا لقراطيته لانه

لا يستغنى عن اثبات الحجج والمحاكمات ، وكتب المحاضر والسجلات ، وهى من

عموم المصالح فكان سهم المصالح من بيت المال احق بتحملها .

32. Reference may also be made to two classical works of fiqh.

It is stated in المغنى والشرح الكبير as under:-

وينبغي ان يجعل من بيت المال شيء برسم الكاغد الذى يكتب فيه

المحاضر والسجلات لانه من المصالح فانه يحفظ به الوثائق ويذكر الحاكم

حكمه والشاهد شهادته ويرجع بالدرك على من رجع عليه فان اعوز ذلك لم

يلزم الحاكم ذلك ويقول لصاحب الحق ان شئت جئت بكاغد اكتب لك فيه

فانه حجة لك ولست اكرهك عليه .

وان سال من ثبت محضره عند الحاكم ان يسجل به فعل ذلك وجعله نسختين

نسخة يدفعها اليه ونسخة يحبسها عنده والورق من بيت المال فان لم يكن فمن

مال المكتوب له .

ينبغي ان يجعل من بيت المال شي* برسم الكاغد الذي يكتب فيه المحاضر وال سجلات لانه من المصالح فانه يحفظ به الوثائق ويذكر الحاكم حكمه و الشاهد شهادته ويرجع بالدرك على من يرجع عليه فان امور ذلك لم يلزم الحاكم ذلك ويقول لصاحب الحق ان شئت جئت بكاغد أكتب لك فيه فانه حجة لك ولست اكرهك عليه فان اختار ان يكتب له محضرا فصفته .

33. To provide requisite funds out of Bait al-Māl, for the purpose of maintenance of records and files, is a much suitable way. It is in accordance with Maslaha, because, preservation of records and judgments is very much necessary. There is no responsibility of Court or Judge to provide written documents relating to the case to the parties if the public exchequer fails to provide suitable fund for the purpose. Anyhow the Court can ask the parties to bring with them paper and etc. so that the Court may provide them written documents of the case. It rests to the discretion of the parties, and the Court should not issue any order in this regards. (Ibn-e-Qudamah: Al-Mughni Vol.II p.234).

34. When a litigant person requests the Court to provide him a copy of the documents for personal record, the Court may have prepared two copies of such records, so that one copy may be given to the petitioner and the other may be preserved in the office of the Court. It is, however, necessary that necessary funds for the paper should be provided out of the public exchequer and if not so the petitioner should bear the expenses.

35. The appropriate way in this regard is that the fund may be

allocated in the public exchequer to meet the necessary expenses for the preservation of judgments/orders and proceedings of the Court, It is the demand of expediency for the reason that the documents and evidence of the witnesses is preserved in this way and one can refer to these documents at any time. Anyhow the Court is not responsible to bear these expenses but the Court has the jurisdiction to ask the petitioner that he may bear the expenses for getting the requisite written documents from the Office of the Court. (Al-Shrah Al-Kabeer on the margin of Al-Mughni Vol.II p.481).

36. In a recent book **نظام القضاء في الشريعة الإسلامية** by Dr.Abdul Karim Zaidan, an Advocate and Lecturer in Baghdad University, Matb'atul 'aini, Baghdad, 1989 writes that.-

١٨٢ - رسم الدعوى (١٥٥)

وهل يلزم المدعى بدفع رسم معين - أى مبلغ معين من المال - عند رفع دعواه الى القاضى للنظر فيها واصدار الحكم المناسب فيها؟ يبدو لى ان مرفق القضاء فى دار الاسلام لا تاخذ عليه الدولة اجرة باعتبار ان القضاء من وظائف الخلافة الشرعية وانه قرينة من القرينات لان القاضى يقتضى بين الناس بالحق و هو شرع الاسلام وويرد الظالم عن ظلمه ويوصل الحق الى مستحقه ، وهذا مما يامر به الاسلام ، وهذا الذى نذهب اليه تؤيده السوابق التاريخية ، فلم ينقل اليها ان الناس كانوا يدفعون رسما عن دعاواهم التى يرفعونها الى القضاء ،

(Whether a plaintiff could be required to pay a fixed fee i.e. a fixed amount at the time of filing a suit in the court of a Qadi to adjudicate a matter and pronounce the judgment?

37. It appears to me that Islamic State is no supposed to charge

duty on the dispensation of justice because the administration of justice is a duty of Islamic State and an action of Rurbah (nearness to Allah). Qadi is bound to perform his duties according to Shariah. It is his duty to repel an aggressor for his act of aggression and give the right to whom it is due. This is in accordance with Injunctions of Islam. The judicial history of Islam fully supports the contention. Nothing is found in the Islamic history to prove that such fees have ever been charged by Muslims. (Abdul Karim Zaidan: Nizamul Qada fil Shariat Islamia page 126. Baghdad 1984).

38. I may also refer to a book entitled as برصغیر پاک و ہند میں اسلامی نظام عدل گستری written by Professor Muhammad Abdul Hafeez Siddiqui published by Idara Tahqiqat-e-Islami, Islamabad, which reads as under:-

معرض قرآن اور حدیث میں عدل و انصاف سے متعلق اس طرح کے بیسیوں احکام اور ہدائیں ملتی ہیں۔ ان کا نچوڑ صرف یہ ہے کہ حاکم عدالت کو چاہیئے کہ اپنے ضمیر کو سامنے رکھ کر کافی امور اور تحقیق کے بعد فیصلہ کرے، عدل گستری کو انسانی فرائض میں داخل کیا گیا ہے۔ انصاف کے لئے معاوضہ لینے کا حکم نہیں ہے۔ کھلی عدالتی کارروائی پر زور دیا گیا ہے۔ قرآن و حدیث میں جو احکام بتائے گئے ہیں، ان کے مطابق فیصلے ہونے چاہیں۔ نیز عرف اور عادت اور انصاف کا لحاظ بھی رکھا گیا ہے۔ سچ پوچھے تو قرآن و حدیث اور خلفاء راشدین کے طرز عمل سے افلاطون کے "عدل مطلق" کو حقیقی معنوں میں عملی جامہ پہنایا گیا۔ یہ بنتھم کے اس خواب کی کہ عدل گستری مفت ہونی چاہئے، صدیوں پہلے کی تعبیر ہے۔

39. I may state that in the Islamic judicial system, the fountain head of justice and equity is the Almighty Allah. The enforcement of laws is the responsibility of the Muslim Ummah. That is why, the administration of justice is considered as one of the most important duties of human beings (الناس) and that is why it has been declared as the foremost responsibility of the State.

40. In my article-based book "Essays on Islam", published by Islamic Publications, Lahore, 1988, under the article "Administration of Justice in Islam" it has been stated by me that.-

"According to Islam it is one of the basic rights of a citizen to get justice. Therefore the state has no authority to charge any fee for the administration of justice. It is against the basic concept of justice in Islam to charge any court fee or to make the people bear the cost of litigation.

Islam believes in inexpensive and prompt justice and provides a judicial system for the purpose which ensures speedy justice without any monetary obligation on the part of the litigants,....."(p.109).

41. Syed Sharifuddin Pirzada, an eminent jurist and former Attorney General of Pakistan, in order to give the historical background of the levy of Court-fee in Indo-Pak Sub-continent referred to Abdul Razzaq's case (PLD 1975 Karachi 944). He has also read out relevant passages appearing at pages 499 and 952 of the said Report. Reference

was also made by him to a case reported as The Secretary, Government of Madras, Home Department and another vs. Zenith Lamp and Electrical Ltd. (1973) 1 Supreme Court Cases 162. Besides, he also referred to Bengal Regulation of 1775 and Bombay Regulation 1802. Reference was also made by him to a quotation by K.P.Kirshna Shetty reported in AIR 1979 S.C. 855 known as Haryana case. Besides, for the proposition that there is no court-fee in Islam reference was made by him to "The Administration of Justice in Islam" by Al-Haj Mahomed Ullah S.Jung, page 173, relevant portion at page 177. Additionally, he referred to a portion from Imdadul Fatawa part III, by Mawlana Ashraf Ali Thanvi edited by Mawlana Muhammad Shafi page 429, and an extract from Fatawa Alamgiri. He also referred to an extract from 'Islami Nizam-i-Adalat, written by me. Lastly, he referred to the Objectives Resolution which has now been made substantive part of the Constitution as Article 2-A, and also Articles, 14, 25 and 37(d) and 39A of the Constitution of Pakistan, 1973. He concluded his submissions by referring to recent case decided by the Sindh High Court reported as Sindh High Court Bar Association v. Islamic Republic of Pakistan (PLD 1991 Kar. 178). I now intend to quote the relevant portions from the books and cases cited by Mr.Syed Sharifuddin Pirzada, the learned amicus curiae.

42. As regards Fatawa Hindiyyah (Arabic-Urdu translation) known as Fatawa Alamgiriyyah, translated by Allama Maulana Syed Amir Ali,

author of the Tafseer Mawahibur Rahman and 'Ainul Hidayah, published by Hamid and Company, Lahore, Syed Sharifuddin Pirzada referred to the following passage at page 132 :-

" اور قاضی کے محرر اور قسام کی اجرت کو اگر قاضی کی رائے میں مقدمہ والوں پر ڈالنا مصلحت معلوم ہو تو ایسا کریں اور اگر بیت المال سے لینا مناسب جائے اور اسمیں گنجائش ہو تو یہ بھی ہو سکتا ہے اور علیٰ ہذا القیاس وہ کاغذ جس میں مدعی کا دعویٰ اور گواہوں کی گواہی لکھتا ہے اگر مدعی سے لینا مناسب ہو تو لیوے ورنہ بیت المال سے بھی در صورت گنجائش ہو سکتا ہے۔"

43. In "امداد الفتاویٰ" (Imdadul Fatawa) part III by

Hakeemul Ummat Mawalana Ashraf Ali Thanvi edited by Mawlana Muhammad Shafi, published by Maktabah Darul Uloom, Karachi reference was made to question No.437 at page 429 which reads as under :-

حکم اجرت حکم تجویز عدالت انگریزی : سوال (۲۲۷) مدعی عدالت میں جب دعویٰ دائر کرتا ہے تو بعض اوقات یہ صورت پیش آتی ہے کہ حاکم ہردو فریق کو ایک یا دو اشخاص پر رضامند کرتا ہے کہ وہ اس مقدمہ کی تحقیقات کریں ، بعض دفعہ تو ان اشخاص کو صرف تحقیقات کا اختیار ہوتا ہے اور اس صورت کا نام یا ان اشخاص کا نام کمیشن ہوتا ہے ۔ اور ان کے حسب تحقیق حاکم حکم دیتا ہے ، اور بعض دفعہ ان اشخاص کو ہی حکم قرار دیا جاتا ہے جس کا نام ثالث ہے کہ وہ تحقیقات کر کے فیصلہ دیں ، دونوں صورتوں میں فریقین سے ایک رقم تجویز ہو کر وصول کی جاتی ہے اور وہ اس کمیشن اور ثالث کو دی جاتی ہے ، آیا یہ رقم اس کو لینی درست ہے یا نہیں ۔ دونوں صورتوں میں سے کس کو لینی درست ہے اور کس کو ممنوع ہے ؟

الجواب۔ یہ تحقیق اور فیصلہ دونوں باب قضا سے ہیں اور قضا پر اجرت

لینا جائز نہیں ، البتہ بیت المال سے بقدر کفایت نفقہ پانے کا مستحق ہے ، بوجہ اس کے کہ یہ شخص محبوس بحق مسلمین ہے ، اور بیت المال مال مسلمین ہے ، اور محبوس کا نفقہ من الحبس جابس کے مال پر بوجہ جزا الحبس کیے ہوتا ہے پس اس بنا پر اس مفتش و حکم کو اجرت لینا تو جائز نہیں ، لیکن چونکہ یہ ایک وقت خاص تک ان کے کام میں مشغول رہے ہیں ، اس وقت کے لئے ان کا ضروری نفقہ اہل معاملہ کے مال میں ہوگا ، پس بقدر نفقہ ضرور یہ اس وقت کے رکھ لینا جائز ہوگا ، باقی جو زائد ہو وہ اہل معاملہ کو واپس کر دیں۔ (۲ رمضان ۱۳۳۱ھ (حوادث ۲۰۱ ص ۱۱۵)

44. Syed Sharifuddin Pirzada also referred to the following

observations from Schacht's Introduction to Islamic Law pp.188-189:-

"The judge (kadi, Hākim). The kadi is a single judge. He is appointed by the political authority, but the validity of his appointment does not depend on the legitimate character of that authority-one of the matter-of-fact features in Islamic law...An appointment secured by bribery (rashwa) is invalid...Court costs are unknown in theory."

اسلامی نظام عدالت Reference was also made by him to a book

(written by me). Relevant portion appears at page 116 which reads

as under:-

۲۳- مصارف مقدمہ :

اسلامی نظام قانون و انصاف میں انصاف طلبی اور داد رسی شخص متضرر

کا حق ہے لہذا اس پر کوئی اور مالی ذمہ داری از قسم اسٹامپ ڈیوٹی یا کورٹ

فیس نہیں - البتہ مدعی کے بے سبب یا عداوت کی بنا پر دعویٰ دائر کرنے کے سبب

فریق ثانی کو ہرجانہ دلایا جاسکتا ہے۔

Litigation Expenses:

In the Islamic System of Law and Justice, to seek justice and ask for redress (relief) is the right of the person harmed. Therefore, there is not on him any financial liability in the nature of stamp duty or court-fee. Of course, on the plaintiff's filing suit unreasonably or vexatiously the other party may be compensated by imposing fine on such plaintiff. (Translation).

45. Reference was made by Syed Sharifuddin Pirzada to the following paragraph which appears at page 9 of the book "The Administration of Justice in Islam" by Al-Haj Mahmomed Ullah S. Jung, pub.Lahore, which reads as under:-

"Bentham had expressed a hope that justice should be administered gratis, and that no stamp-duties or other duties should be leviable on judicial proceedings. The above view is in complete harmony with the Muslim theory. There are no duties leviable in Islam. There are no stamps or court-fees. Justice is administered gratis."

46. As regards case-law, referred to by Mr.Sharifuddin Pirzada, he quoted Haji Razzaq's case (PLD 1975 Karachi 944) in which he himself appeared as counsel for the plaintiff and referring to historical aspect of the levy of court-fee/^{he}submitted that no court-fees were levied in the Chartered High Courts established by the Britishers in India and in their own country. In Calcutta High Court, court-fee was only Rs.20/- irrespective of the value of the suit, even of millions. Mr.Pirzada also submitted from his personal experience in the Bombay High Court, that the fee in Bombay High Court on the plaint was the same as that

in Calcutta High Court, while in Madras the position was altered by the Legislature after partition. As submitted by Mr.Pirzada, the Britishers introduced court-fee in the courts of India for charging it from the natives. There was, however, no court fee on suits in the Chartered High Courts established for British people. Though the above judgment in Abdul Razzak's case has been set whereby the Supreme Court of Pakistan on 25th February, 1991, in Civil appeals No.137/K to 145/K of 1979, but the historical position, as stated by Mr.Pirzada, remains the same.

47. In the case of The Secretary Government of Madras, Home Department and another Vs. Zenith Lamp and Electrical Ltd (1973) 1 Supreme Court Cases 162), on appeal from the judgment of Madras High Court it was, inter-alia alleged that the State was proceeding on the basis that the Court-fee had to compensate the Government both for the cost of civil as well as criminal administration which was unwarranted(p.162). The Supreme Court referred to several grounds stated in the Memo of Appeal. In ground D it was alleged:

"From the figures of 1963-64 available from the budget for 1964-65, it is seen that the fees levied exceeds the cost of administration of civil justice. The figures have further to be scrutinised and amended so that inadmissible items such as fees of Government's Law Officers are eliminated as it is not the duty of litigant public generally to bear the expense of the State's Law Officers."

In the said case State gave figures to show that the expenditure on the administration of justice was higher during the year 1964-65 than

the fee levied (page 165).

48. In paragraph 15 of the said judgment it was observed by the learned Judge that the English history shows that a very close connection existed between fees and cost of administration of civil justice. In the beginning, they were directly appropriated by the Court officials. The existing law shows that fees are not taxes and that it is not usual to delegate taxing powers to judges.

49. Paragraphs 17, 18 and 20 of the said judgment gave historical background as to the levy of Court-fees both in England and British India which are reproduced as under:-

"para 17. In the preamble, it is stated that the establishing of fees on the institution and trial of suits, and on petitions presented to the Courts was considered the best method of putting a stop to the abuse of bringing groundless and litigious suits."

"para 18. In section 11(4) it was laid down: the Munsiffs are to appropriate the fees they may collect under this section, to their own use, as a compensation for their trouble and an indemnification for the expense which they may incur in the execution of the duties of their office."

"Para 20. In the preamble to Bengal Regulation VI of 1797, the object is stated to be to discourage litigations, complaints and the filing of superfluous exhibits and the summoning of unnecessary witnesses on the trial of suits and also to provide for deficiency which would be occasioned in the public revenue by abolition of police tax as well as to add eventually public resources, without burdening individuals. The

enforceable by law and is not payment for services rendered.

53. It is not possible to formulate a definition of fees that can apply to all cases as there are various kinds of fees. But a fee may generally be defined as a charge for a special service rendered to individuals by some Government agency. The amount of fee levied is supported to be based on the expenses incurred by the Government in rendering the service, though in many cases such expenses are arbitrarily assessed.

54. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is a payment for special benefit or privilege.

55. It was, however, observed in the said judgment while discussing the point of tax and Court-fee that the overall limitation is that fees cannot be levied for the increase of general revenue (p.173).

56. Concluding the discussion of the matter it was observed that -

"This background does not supply a sure touch-stone for the determination of the question posed in the beginning of the judgment, but it does show that fees taken in court were not levied as taxes, and the cost of administration was always one of the factors that was present. In its origin in England fees were meant for officers and judges. In India indeed section 3 of the Court Fees Act, 1870 mentions "fees payable for the time being to the clerks and officers.

Section 15 of the Indian High Courts Act, 1861, also spoke

of fees to be allowed to sheriffs,..... and all clerks and officers of Court" We will therefore have to interpret the relevant Entries and various Articles of the Constitution in order to ascertain the true nature of Court-fees. (para 27)".

57. In another case State of Haryana v. Darshana Devi (AIR 1979 S.C. 855), interpreting the basic principle, in the teeth of Articles 14 and 39A of the Indian Constitution it was observed that the Court must give the benefit of doubt against levy of a price to enter the temple of justice until one day the whole issue of the validity of profit-making through sale of civil justice, disguised as court-fee, is fully reviewed by this Court.
58. It was a case where the High Court of Haryana extended the pauper provisions to auto accident claim of a widow applying thereby that no Court-fee was required by preferring claim against fatal accidents. A petition for special leave to appeal preferred by the Haryana State was dismissed by the Supreme Court with the observations quoted above.
59. In the above cited Haryana's case, it was observed by V.R. Krishna Iyer while refusing leave to appeal with a message tag as under:-

"The poor shall not be prised out of the justice market by insistence on court-fee and refusal to apply the exemptive provisions of Order XXXIII, Cr.P.C. So we are distressed that the State of Haryana, mindless of the mandate of equal justice to the indigent under the Magna Carta of our

Republic, expressed in Article 14 and stressed in Article 39A of the Constitution, has sought leave to appeal against the order of the High Court which has rightly extended the 'pauper' provisions to auto-accident claims. The reasoning of the High Court in holding that Order XXXIII will apply to tribunals which have the trappings of the civil court finds our approval. We affirm the decision.

Even so it is fair, for the State to make clear the situation by framing appropriate rules to exempt from levy of court-fee cases of claims of compensation where automobile accident are the cause.

Two principles are involved. Access to court is an aspect of Social Justice and the State has no national litigation policy if it forgets this fundamental. Our perspective is best projected by Cappallatti, quoted by the Australian Law Reform Commission.

The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights pre-supposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement -- the most basic 'human right' - of a system which purports to guarantee legal right."

We should expand the jurisprudence of Access to Justice as an integral part of Social Justice and examine the constitutionalism of court-fee levy as a facet of human rights highlighted in our Nation's Constitution. If the State itself should travesty this basic principle, in the teeth of Articles 14 and 39A, where an indigent widow is involved, a second look at its policy is overdue. The Court must give the benefit of doubt against levy of a price to enter the

temple of justice until one day the whole issue of the validity of profit-making through sale of civil justice, disguised as court-fee, is fully reviewed by this Court. Before parting with this point we must express our poignant feeling that no State, it seems, has, as yet, framed rules to give effect to the benignant provision of legal aid to the poor in Order XXXIII R. 9A of Civil Procedure Code, although several years have passed since the enactment. Parliament is stultified and the people are frustrated. Even after a law has been enacted for the benefit of the poor, the State does not bring into force by wilful default in fulfilling the condition since qua non. It is a public duty of each great branch of Government to obey the rule of law and uphold the tryst with the Constitution by making rules to effectuate legislation meant to help the poor."

60. From the above cited cases of Indian jurisdiction the important principles may be enunciated as under:-

- i) Court-fee is not a tax. It is a fee. The levy of court-fee must be proved to be a quid pro quo for the services rendered;
- ii) The overall limitation is that fees cannot be levied for the increase of general revenue;
- iii) Administration of justice is a social service;
- iv) Court fee amounts to levy of a price to enter the temple of justice.
- v) The poor shall not be prised out of the justice market by insistence on payment of court-fee;
- vi) Asking for court-fee, in disguise, is a sale of civil justice.

- vii) The jurisprudence of the Access of Justice as an integral part of Social Justice should be extended;
- viii) The Constitutionalism of court-fee levy as a facet of human rights, highlighted in the Constitution should be examined;
- ix) The levy of court-fee is a travesty of the basic principle in the teeth of Articles 14 and 39A of the (Indian) Constitution; and
- x) The levy of court-fee amounts to denial or hinderance in rendering social justice.

61. It is, however, noticeable, with satisfaction, that the people of Pakistan have achieved, to some extent, a free entry to the temple of justice, in or about 1982 by charging no court-fee on a suit upto the value of Rs.25,000/-, and in Sindh, very recently, by Finance Act, 1990 upto Rs.50,000/-. As regards suits for charging compensation under the Fatal Accidents Act, (of which the Indian Supreme Court seems to be complaining in Haryana's Case), and also the cases under the Succession Act, 1925 for obtaining succession certificate and letter of administration, the ad-valorem court fee has already been done away with in or about 1984. Now, only a fixed fee of Rs.15/- is payable irrespective value of the property, may be in millions, in respect of Succession Certificates and letters of administration.

And secondly, a Division Bench of the High Court of Sindh, in Sindh High Court Bar Association, Karachi, Vs. The Islamic Republic

of Pakistan (PLD 1991 Karachi 178) appears to have reached a

conclusion that the levy of court-fee is against the Islamic Injunctions, but could not so declare as the jurisdiction exclusively vests in this Court. The Court, however, stayed the operation of the new law of imposition of limitless court-fees by Sind Finance Act, 1990.

62. Mr.Muhammad Basheer Ahmad, later on, known as Mr.Justice M.B.Ahmad, in his famous book 'Judicial System of the Mughal Empire, Pakistan Historical Society (pp.92-93), on the question of court-fee stated as under:-

"Court fee and Stamps (Rusūm)

It was the practice of courts in the pre-Muslim period to charge fees for the adjudication of disputes proportionate to the value of the subject matter. According to Dr.Mukerjea the fees levied were 'Church, Dassatra and Pachatra. 'The Muslim codes that were followed in India are silent on the point. The Chapter, Kitab-i-Adab al Qadi, in the Fatawa-i-'Alamgiri makes it discretionary for the Qadi to charge the price of paper and ink from the plaintiff. The author of the Tabqat-i-Nasiri who was himself a Chief Justice under Sultan Nasir al-Din Mahmud writes that the Dadbek attached to his court had the duty of levying between 10 and 15 per cent of the subject matter but this was abolished by Malik Sayf al-Din who was appointed Dadbek during his term of office (Tabaqat-i-Nasiri, Br.Mus.MS. Or.1886; (also Raverty's), trans.p.788), as such fees were considered illegal (Tabaqat (Raverty p.790).

In his Enquiry into the Mughul System (Dow, vol III, p.LVII) Colonel Dow says that "legal fees were one fourth of the matter in dispute, equally levied upon the plaintiff and the defendant," and this regulation "was intended to prevent vexatious law suits as well as to bring to the people

speedy justice."

The learned author further stated :-

"The judgments in Baqiyat al-Salihah and those in Diwani Office at Hyderabad bear no stamps and no mention of court-fee is made. Like Bentham. ("Justice should be administered gratis"-Bentham). Muslim jurists have always considered the imposition of a court fee to be against public policy.

Stewart in his history of Bengal says that fees in the Courts of Judicature were ascertained with accuracy and precision.

It, however, appears to me that in medieval times litigation was the exception and not the rule, (Vide observations of Bhara Mal in Lubb al-Tawarkikh-i-Hind. Benier, p.236; Elliot VII, p.172). and that the Muslim rulers in the beginning did not favour the idea of charging fees from litigants. Later on as a measure to restrict the increase of litigation a scale of payments was fixed for the expenses of execution. Alamgir's Order mentioned in I.Q.L.MS.370 (Dastur) seems to prohibit the levying of any fee from a plaintiff. The East India Company in 1774 "on the advice of Muslim Jurists," considered the question of abolishing certain dues which the plaintiff had to pay on their plaints, but decided to retain them as "litigation was increasing." (I.O.L.Records.7th Report of the East India Company, (Committee of Secretary, 1772-73), p.239)."

(It may, however, be observed by me that Mughal India was no doubt ruled by Muslims, but it cannot be said to be an Islamic rule throughout and in all respects, with some exceptions to the period of Aurengzeb 'Alamgir').

Council of Islamic Ideology, appeared as Juris-consult and submitted that the object of the imposition of court-fee has been, as proclaimed by the legislators, is to prevent frivolous litigation and also to meet expenses to be incurred in the administration of justice on the State machinery. He quoted few passages from "Outlines of Indian Legal History" by Mr.M.P.Jain, 2nd edition, 1966, which read as under:-

"Before 1973, court fee on a sliding scale between 2 to 5% in proportion to the cause of action had to be paid by a person instituting a suit. This made litigation a costly proposition, for in addition to court fees, parties had to incur other expenses also, e.g., fees of the vakeel, travel from their homes to the adalats etc. They payment of court-fees was a hardship to the people, and even amounted to a denial of justice when people having a claim to prefer had to forgo it because of their inability to find the money to pay the court fees.

Payment of court fees had been justified on the ground that it discouraged litigation. That this result was not being produced was clear from the fact that a large number of cases remained pending in the courts. Many apprehended that abolition of court fees would raise enormously the number of suits coming before the courts. Cornwallis, however, did not share this view. In his opinion, people were not litigious; on the other hand, "the tax" which the "people were obliged to pay for having justice administered to them debarred many persons from recovering their rights." It was a cause of much inconvenience and hardship to the suitors, who regarded the levy as oppressive and obnoxious. The large number of pending cases,

according to Cornwallis, were due not to the litigiousness of the people, but to "dilatoriness and inefficiency of the administration of justice" and that "these evils can only be remedied by speedy and impartial decisions, and punishing the litigants according to the circumstances of the case, and not by imposing a fine upon all suitors indiscriminately, and then allowing their causes to remain for years undecided."

Lord Cornwallis in his desire to provide readiest recourse to justice abolished the court fees in 1773. The distribution of justice by the state was thus to be wholly free without being subject to any monetary imposition. Even appeals from the decisions of the lower courts could be prosecuted in higher courts without paying any court fees Cornwallis believed that one of the primary functions of the state is to ensure justice to its subjects, and to distribute justice free of cost to its citizens and he put this great ideal in practice in 1773 by making justice free. Shore's Government, in its anxiety to devise some formula to reduce the volume of work before the courts, came to the conclusion that the absence of court fees was responsible for the phenomenon of unprecedented volume of litigation in the country. Instead of increasing the number of courts, the Government characterised the inhabitants of Bengal, Bihar and Orissa as litigious who wanted to harass the courts by filing frivolous and vexatious suits. The Government's view was that no fees being levied on filing of suits, or filing of petitions, exhibits or papers in the courts, and the ultimate expense being moderate whatever be the length of time for which the suit might be pending, people instituted many groundless and litigious suits,

or protracted the trials by filing superfluous exhibits or calling unnecessary witnesses. As a result of this, work of the courts increased, and the judges could not decide suits expeditiously "which is essential for deterring individual from instituting vexatious claims, or refusing to satisfy just demands." The Government took the view that the imposition of the court fees was the best mode of stopping this practice. Accordingly Regulation XXXVIII of 1975 imposed court fees and thus the administration of justice was taxed by the Government." (pp.241-242).

64. The learned scholar, then, submitted that the British judicial system has never claimed Divine guidance. But the position of Islam in this matter is different altogether. The administration of justice in an Islamic polity is not only one of the prime State functions, but also it has been described as a sole purpose of sending prophets to make the people firm on justice. As such the imposition of any kind of the levy/fee/ or monetary return for seeking redress from any person wronged amounts to vitiate the Divine duty. It means, those who do not fulfil the condition of paying court fee their complaints do not qualify to be entertained by the court whereas every Muslim has been ordained to help his brother muslim in distress انصراخك ظالما او مظلوما

65. In another tradition 'Amr Bin Murrah has reported saying I have heard the Holy Prophet صلى الله عليه وسلم saying, whoever sovereign or the ruler shuts his doors off the needy and persons in distress, the Almighty Allah will also shut the doors of the heavens of

his needs and distress:

"وعن عمرو بن مرة قال: سمعت رسول الله صلى الله عليه وسلم يقول ما من امام
أو زال يغلق بابه دون ذوي الحاجة والخلة والمكة الا غلق الله ابواب
السماء دون خلته وحاجته ومكته" (رواه احمد والترمذى، نيل
الاوطار ج ٩ ص ١٧١)

According to another version the Holy Prophet صلى الله عليه وسلم
has been reported to have decreed that whoever, assisted in any dispute
unjustly, he would incur the wrath of Allah:

"عن ابن عمر عن النبي صلى الله عليه وسلم قال: من اعان على خصومة بظلم فقد
با" بغضب من الله" (رواه ابوداؤد، نيل الاوطار، ج ٩ ص ١٧٥)

66. All the three traditions quoted above establish beyond doubt
that imposition of court fee in the way of redressal of grievances amounts
to creation of hurdles, closing of doors of justice and assistance to
redress wronged.

67. Mr.G.M.Saleem, an Advocate of Karachi also sent, on his
own, a note against the levy of court-fee, in an Islamic State. It was
stated by the learned Advocate that charge of court fee or any other
levy is not permissible in Shari'ah. If it is charged or levied it would
be inconsistent with and repugnant to the Injunctions of Islam.

68. According to the philosophy of Shari'ah, the 'command' (amr)
or (hukm) on the one hand and the 'mercy' (rahmat or ni'mat), on the
other, are undoubtedly the blessing, grant, grace, favour, bounty and

endowment from Almighty Allah and consequently are to be dispensed free of any charge whatsoever. The institution of 'adl (justice عدل) and qist (equity قسط) are part and parcel of Allah's command. Therefore, adl and qist through courts of law have to be administered and dispensed without charging anything. I would like to refer the last recommendation made by the Council of Islamic Ideology in respect of the abolition of Court-fees, with reference to the Court Fees Act, 1870 and Punjab Court Fees (Abolition) Ordinance, 1973. It reads as under:-

"کونسل کی سفارش متعلقہ کورٹ فیس پر جزوی طور پر عمل کرتے ہوئے حکومت نے پنجاب کورٹ فیس (خاتمہ) آرڈیننس ۱۹۸۳ء کے تحت فوجداری مقدمات پر اور پچیس ہزار روپے کی مالیت کے دیوانی مقدمے پر کورٹ فیس معاف کر دی۔ اس سے عوام کو انصاف کے حصول میں بہت مدد ملی۔ کونسل کی رائے میں اسلامی عدل کے قیام کیلئے یہ ایک مناسب اقدام تھا۔ کونسل سفارش کرتی ہے کہ کورٹ فیس کو بالکل ختم کر دیا جائے تاکہ ہر شخص کو بلا اجرت انصاف مہیا ہو سکے۔"

(See Council's Annual Report 1987-88, pp.34-37).

69. Now, it seems proper to refer to the submissions made on behalf of the Federation and the four Provinces. No written statement was filed on behalf of the Federation. Mr. Iftikhar Hussain Chaudhary, Standing Counsel for the Federation of Pakistan, however, submitted that the court fee was charged to meet the various expenses incurred by the Government on administration of justice. He simply referred to the following passage from H.A.R. Gibb and Harold Bowen, a joint work, on "Islamic Society And The West", Oxford 1956 reprint, which is "a study of the impact of Western Civilization on Moslem Culture in the near East during eighteenth century", wherein on the subject of "The Administration of Law" at page 125, it was stated that:-

"By immemorial usage the judge was permitted to make a charge or 2½ per cent. on the object of litigation, by way of court

expenses. This sum was either deducted from the property in question, when possible, or was paid by the successful party. He had also certain rights on sales or transfers of offices, pensions and the like, and on the division of inheritances, and to a small signature fee on documents of judgments and other matters submitted to him from the various tribunals. The principal Kādīs in each area had in addition the general supervision of the mosques and of the endowments (wakfs) created for their upkeep or for other charitable purposes; and where, as at Damascus, appointments to professorial posts in the madrasas were made by diploma, the Kādī assigned vacant posts to candidates, subject to confirmation from Istanbul.

In the Ottoman system, moreover, the Kādī exercised not only judicial functions, but also a degree of general supervision over the conduct of the administration. Thus the Kādīs of the coastal cities in Egypt were enjoined to control the actions of the customs department and to certify the accounts before they were submitted to the Pasa. In the frequent disputes between rival factions and even rival Pasas they were called upon to act as mediators; occasionally they were authorized to depose a Pasa, and in the absence of a regularly-appointed governor they might even take over the government of a city or province."

The above passage was referred to show that during Ottoman period the Judges were allowed to charge fee @ 2½% to appropriate the same for their own use and expenses. In fact, it was then prevalent in English system. (Reference may be made to Indian Supreme Court's Zenith Lamp case, supra). In any case, it is no answer to the objection raised in the petition.

70. A written statement was filed by the Chief Secretary, Government of Sind, respondent No.5, wherein it has been pleaded that the court-fee leviable in Civil matters is not repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. It was further pleaded that it is also not violative either of Article 2-A of the Constitution of the Islamic Republic of Pakistan. It was, inter-alia, submitted that presently the situation is quite different and full fledged Law Departments are working in the Provinces as well as in the Federal

Government where thousands of judicial officers are working with huge staff and crores of rupees are spent on the judiciary both subordinate and superior. It was further submitted that presently commercialisation is at its peak and the persons involved are also wealthy persons and their litigations are only for the personal & business monetary benefits of those parties. It was thus submitted that this Court "by invoking "Ijtehad" has to distinguish these types of litigations and separate them from the interpretation of justice as laid down in Holy Qur'an and Sunnah. So for as the Province of Sind is concerned, it was stated that the Mir (Talpuars) Rulers ruled over Sind for a long time upto 1843 when it was ultimately captured by the British. The Mirs prescribed the court-fee at the rate of 1/4 of the amount of the subject matter on all civil suits through their Ordinances.

71. A written statement was also filed by Raja Muhammad Afsar, Advocate General, Baluchistan, supporting the petition. It being short is produced as under:-

"That the Council of Islamic Ideology has already come to a finding that provision of justice to the citizens, irrespective of colour, caste or creed, is the religious-duty of an Islamic State. That such provision of justice must be free of any cost or charge. Consequently, the Council recommended that as soon as possible, the levy of court-fee be done away with, in all Constitutional. Civil and Criminal cases. Reference in this behalf, is made to PLD 1987, Journal, page 49/83-84.

That it will be relevant, and of some interest, that in colonial India, when the East India Company shed of its

cloak of a mere merchant-company and had busied itself with acquiring and occupying more and more territories, there existed a duality of legal systems. One system was the creation of Regulating Act of 1773, which envisaged a Supreme Court, for each Presidency Town. Under this Act, initially, the Supreme Court, at Calcutta, came to be established in 1774. The Supreme Courts of Madras and Bombay, were set up in 1801 and 1823, respectively. As the three Supreme Courts were set up by royal charters, and administered law on English pattern, they had no institution fee, whatsoever. But the position outside the three privileged Presidency Towns, was very different. There, that is, in mofussil, the courts which emerged with the extension of the company's rule, were not the Crown Courts, but were the courts set up by the Company, here, the administration of justice was associated with the management of revenue. Warren Hastings had, in 1780, imposed court-fee on suits, ranging from 2 to 5 per cent, of the value of the subject-matter. However, these fees were abolished by his successor, Lord Cornwallis, on the ground that a tax on justice was a disgrace to a civilized power. But only two years later, after the retirement of Lord Cornwallis, court-fees were re-introduced and subsequently enhanced. Reference in this behalf may be made to PLD 1975 Karachi 944 and Judgement dated 25-2-1991, rendered by a Full Bench of 5 Judges of Hon'ble Supreme Court, which was approved for reporting and is likely to be available in print, very soon.

The contents of the preceding paragraph would show that at different stages of human history, and even in un-Islamic societies a consciousness did exist that the fountain of justice must remain pure and un-adulterated by any charge or fee.

That Islamic concept of justice is indeed, more advanced and benign. In ordinary sense, ends of justice are considered to have been met if a person gets what is his due, a balance

is struck and each claimant is enabled to have his exact share. But Islamic concept of 'adl' and 'ehsan' does not stop there - it looks to what a person needs and endeavours to satisfy his genuine need rather than rudely passing on to him the mathematically worked out share of his. Therefore, it seems that levy of court-fee for dispensation of justice in an Islamic polity, is unthinkable.

That while supporting the Petition that levy of court-fee is un-Islamic, it is submitted that while doing away with court-fee, the fact must not be lost sight of, that we are living in a society which is overwhelmed by negative and evil influences. With the elimination of court-fee, it is feared, there will be an encouragement to frivolous and vexatious litigation, to say nothing of inflated claims. Therefore, it would be necessary, simultaneously, to make provision for some kind of security-deposit out of which, in fit cases, compensation be payable to the sufferer in any manner, at the hands of the plaintiff/complainant, on the pattern of the existing Supreme Court Rules."

72. Assistant Advocate General Punjab also filed a written statement on behalf of the Province of Punjab, wherein inter-alia, it was submitted that the total expenditure on the administration of justice in the Province comes to about 18 crores annually whereas the income on the court-fee is only about 8 crores. It was also submitted that "the abolition of court fee would create problem to meet the expenses of administration of justice for scanty financial resources."

73. The Government of N.W.F.P., does not appear to have filed any written statement.

74. Representatives of the three provincial Governments, namely,

Punjab, Sind and NWFP (particularly the former two) strenuously urged that Court fees are charged to defray the Court-expenses. According to the Assistant Advocate General of the Government of Punjab, the amount spent on administrations of justice during 1989-90 as demand No.11 comes to Rs.16,46,84,470, whereas the court-fee for the same year realised amounts to Rs.7,41,52,846, which comes to about 40% of the total expenditure. Expenses incurred include both on criminal justice as well as civil justice. The learned Assistant Advocate General was not, however, able to bi-furcate and give us separate figures as to the amount spent on Civil administration of justice. Moreover, it is doubtful whether the salaries of hundreds and thousands of Law-Officers and other expenses incurred on them can be paid out of Court-fees. The submission of Mr.Mangi that in Sind there is huge litigation involving crores of rupees and, therefore, Court fees should stay. There are wealthy people who should be asked to pay the court-fees. But the learned Assistant Advocate General, Sind, overlooked the fact that about 80% big nationalized industries are government controlled and their litigation, either by or against them, is being financed by such industries. Moreover, rich and poor must be treated equally. The principle and provisions of social justice as envisaged in the objectives, Resolution and embodied in Article 2-A, Articles 4, 5, 8, 24, 25, 29, 30, 31, 37 and 38, within the meaning and scope of Chapter 3-A of the Constitution, should not be lost sight of.

Sind, NWFP and Baluchistan have placed on record the several statutes empowering their respective governments to levy charge and collect court-fees. The relevant provisions thereof are reproduced as under:--

COURT FEES ACT, 1870

Sections 4,6,7 and 35 of the Court Fees Act, 1870.

"4. No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction;

or in the exercise of its extraordinary original criminal jurisdiction;

or in the exercise of its jurisdiction as regards appeals from the judgments (other than judgments passed in the exercise of the ordinary original Civil Jurisdiction of the Court) of one or more Judges of the said Court, or of a division Court;

or in the exercise of its jurisdiction as regarded appeals from the Courts subject to its superintendence;

or in the exercise of its jurisdiction as a Court of reference or revision;

Unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

Section 6.

"6. Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

Section 7.

"7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-

- i. In suits for money (including suits for damages or compensation, or arrears of maintenance of annuities, or of other sums payable periodically)-according to the amount claimed:
- ii. In suits for maintenance and annuities or other sums payable periodically-according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year:
- iii. In suits for moveable property other than money, where the subject-matter has a market-value-according to such value at the date of presenting the plaint:
- iv. In suits-
 - (a) for moveable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title,
 - (b) to enforce the right to share in any property on the ground that it is joint family property,
 - (c) to obtain a declaratory decree or order, where consequential relief is prayed,
 - (d) to obtain an injunction,
 - (e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and
 - (f) for accounts-

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal:

in all such suits the plaintiff shall State the amount at which he values the relief sought
- v. In suits for the possession of land, houses and gardens-

according to the value of the subject-matter; and such value shall be deemed to be-

where the subject-matter is land, and-

(a) where the land forms and entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenues,

and such revenue is permanently settled-
ten times the revenue so payable:

(b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid;

and such revenue is settled, but not permanently-
five times the revenue so payable:

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue,

and nett profits have arisen from the land during the year next before the date of presenting the plaint-

fifteen times, such nett profits:

but where no such nett profits have arisen therefrom-
the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood:

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above-mentioned-
the market-value of the land:

Explanation.-The word "estate" as used in this paragraph means any land subject to the payment of revenue, for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue:

(e) where the subject-matter is a house or garden-
according to the market-value of the house or garden:

vi. In suits to enforce a right of pre-emption-according to the value (computed in accordance with paragraph v of this section) of the land, house or garden in respect of which

the right is claimed:

- vii. In suits for the interest of an assignee of land-revenue-fifteen times his nett profits as such for the year next before the date of presenting the plaint:
- viii. In suits to set aside an attachment of land or of an interest in land or revenue-according to the amount for which the land or interest was attached:

Provided that, where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest.

- ix. In suits against a mortgagee for the recovery of the property mortgaged,
and in suits by a mortgagee to foreclose the mortgage,
or, where the mortgage is made by conditional sale,
to have the sale, declared absolute-
according to the principal money expressed to be
secured by the instrument of mortgage.
- x. In suits for specific performance-
 - (a) of a contract of sale-according to the amount of the consideration:
 - (b) of contract of mortgage-according to the amount agreed to be secured:
 - (c) of a contract of lease-according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term:
 - (d) of an award-according to the amount or value of the property in dispute:
- xi. In the following suits between landlord and tenant:-
 - (a) for the delivery by a tenant of the counterpart of a lease,
 - (b) to enhance the rent of a tenant having a right of occupancy,
 - (c) for the delivery by a landlord of a lease,
 - (cc) for the recovery of immoveable property from a

tenant, including a tenant holding over after the determination of a tenancy.

(d) to contest a notice of ejectment,

recover the occupancy of [immoveable property] from which a tenant has been illegally ejected by the landlord, and

(f) for abatement of rent-

according to the amount of the rent of the [immoveable property] to which the suit refers payable for the year next before the date of presenting the plaint.

xii. In suits not expressly provided for in this section, according to the value claimed, but such value shall not be less than a value which would attract a Court-fee of less than fifteen rupees.

Section 35.

"35. The [Appropriate Government] may, from time to, time by notification in the [official Gazette] reduce or remit in the whole or in any part of [the territories under its administration] all or any of the fees mentioned in the first and second schedules to this Act annexed, and may in like manner cancel or vary such order."

76. SCHEDULES I AND II OF THE COURT FEES ACT, 1870.

These Schedules are not being reproduced hereunder as they are quite lengthy and will encumber the judgment unnecessarily.

77. THE PUNJAB FINANCE ACT NO.XIV OF 1973

"8. In the Court-fees Act, 1870 (Act No.VII of 1870) in its application to the Province of the Punjab,-

(a) In section 7-

(i) In clause iv, the comma at the end shall be replaced by a colon and thereafter the following -

"Provided that nothing in this clause shall apply
to suits mentioned in clause iv-A,";

- (ii) after the existing clause iv, the following new
clause shall be added-

"iv-A. In suits for a declaratory decree with or
without consequential relief as to right in or title
to immovable property based on alleged sale, gift,
exchange or mortgage -

according to the value of the property,"; and

- (iii) for the existing clause v, the following shall be
substituted:-

"v. In suits for the possession of land, houses and
gardens-

according to the value of the subject-matter;
and such value shall be deemed to be-

- (a) where the subject-matter is land and
where net profits have arisen from such
land during the year next before the
date of presenting the plaint -

fifteen times such net profits;

- (b) where the subject-matter is land and
where no such profits have arisen
therefrom-

market value of such land;

- (c) where the subject-matter is a house or
garden -

according to the market value of the house
or garden;"

- (b) Section 35-A shall be deleted; and
- (c) for Schedules I and II, the Fourth and Fifth Schedules, respectively, appended to this Act shall be substituted.

78.

PUNJAB ORDINANCE, 1981

"2. "In the Court Fees Act, 1870 (VII of 1870), in schedule II, after Article 17, the following new Article 18 shall be added:-

"18-Plaint or memorandum
or appeal for recovery or
compensation or damages
under the Fatal Accidents
Act, 1855".

Fifteen rupees.

79.

SIND FINANCE ACT IV OF 1990

"4. Amendment of Act VII of 1870.- In this Court Fees Act, 1870, in its application to the Province of Sindh, in the First Schedule, in Article 1--

(a) in clause (iii), in column 3, for the words "exceeds thirty thousand rupees", the words "exceeds thirty thousand rupees but does not exceed six lac rupees" shall be substituted;

(b) after clause (iii), amended as aforesaid, the following clause shall be added:-

(iv) exceeds six lac rupees, seven and a half per centum of the first thousand, five per centum of the next twenty-nine thousand rupees, two and a half per centum of the next five lac and seventy thousand rupees and two per centum of the remaining value."

80.

SIND FINANCE ACT IV OF 1990

"7. Amendment of Sindh Ordinance XIII of 1978.- In the Court Fees

(Sindh Amendment) Ordinance, 1978, for the words Twenty-five thousand rupees", the words "Fifty thousand rupees" shall be substituted."

81. BALUCHISTAN FINANCE ORDINANCE, 1981

"3. Amendment of Act VII of 1870.- In the Court Fees Act, 1870 in its application to the province of Baluchistan.

(a) in section 7.

(i) after clause (iv), the following shall be added as clause(iv-a):-

(iv-a) Notwithstanding contained in clause, (i), in suits for a declaratory decree with or without consequential relief as to right in, or title to, immovable property based on alleged sale, gift, exchange or mortgage thereof according to the value of the property;"

(ii) for the existing clause (v), the following clause shall be substituted.

"(v) In suits for the possession of a land, house or garden- according to the value of the subject-matter, and the market value of the land, house or garden shall be deemed to be such value;"

(b) after section 7 the following new sections shall be inserted.

"7-A. Abolition of court-fees in certain cases.- Notwithstanding any thing contained in section 7 or in the Schedules, no court-fee shall ,except as provided in section 7-B, be, payable in.

(a) any criminal case; and

(b) any case of civil nature the value of the subject-matter whereof, or relief claimed wherein, does not exceed twenty-five thousand rupees."

"7-B. Payment of court-fees at punitive rate.-(1) If in a case of civil nature falling under clause (b) of section 7-A, the Court is of opinion that the claim or any part of it was false and either frivolous or vexatious the Court shall by order in writing, if the party

by whom the claim was preferred is present, call upon him forthwith to show cause why he should not pay court-fee on the entire claim or, as the case may be part thereof, at double the rate which would, but for section 7-A have been leviable in such a case under the Act, or, if such party is not present, direct issue of a summons to him to appear and show cause as aforesaid.

(2) The Court shall record and consider any cause which such party may show and if the Court is satisfied that the claim was false and either frivolous or vexatious shall, for reasons to be recorded, direct that the court-fees on the entire claim or, as the case may be, part thereof, at the rate specified in subsection (1) above, shall be paid by such party.

(3) The order for payment of court-fee as aforesaid shall be in addition to and not in derogation of any other order which the Court may deem fit to make in the circumstances of the case.

(4) A copy of the order made under subsection (2) shall be sent by the court to the Collector of the District in which the party against whom order is made resides or ordinarily works for gain, and the Collector shall direct the party concerned to pay the court-fee within one month of the making of the order by him, failing which, the Collector shall proceed to recover the court-fee as arrears of the land revenue".

(c) Section 35-A shall be omitted.

(d) for Schedule I and II, the Schedules contained in the First and Second Schedules to this Ordinance shall be substituted."

"4. Substituted of section 4 of Ordinance IX of 1981.- For section 4 of the said Ordinance, the following shall be substituted, namely:-

"4. For the Schedule to Baluchistan Motor Vehicles Taxation Act, 1958 (XXXII of 1958), the Schedule contained in the Fourth Schedule to this Ordinance shall be substituted."

**NORTH-WEST FRONTIER PROVINCE COURT FEES
(ABOLITION) (AMENDMENT) ORDINANCE, 1980**

"2. Amendment of section 2 of N.W.F.P. Ord.XIV of 1978.- In the North-West Frontier Province Court Fees (Abolition) Ordinance, 1978 (N.W.F.P. Ord.XIV of 1978), hereinafter referred to as the said Ordinance, for section 2, the following section shall be substituted, namely:-

"2. Abolition of court-fee in certain cases.- Notwithstanding anything contained in the Court Fees Act, 1870 (VII of 1870), no court fee shall, except as provided in section 2-A, be payable in-

(a) any criminal case; and

(b) any case of civil nature the value of the subject matter whereof, or relief claimed wherein, does not exceed twenty-five thousand rupees".

**NORTH-WEST FRONTIER PROVINCE (COURT-FEES)
(AMENDMENT) ORDINANCE, 1982**

"3. Amendment of Schedule II of Act VII of 1870.- In the said Act, in Schedule II, after Article 21, the following new Article shall be added, namely:

"22. Plaint or memorandum of appeal for Fifteen rupees."
 recovery of compensation or damages
 under the Fatal Accidents Act, 1855".

**NORTH-WEST FRONTIER PROVINCE (COURT-FEES)
(AMENDMENT) ORDINANCE, 1984**

"2. Amendment of Schedule I to Act VII of 1870.- In this Court Fees Act, 1870 (VII of 1870), in Schedule I, for the existing entries at Serial No.11 and Serial No.12, the following entries shall respectively be substituted, namely:

Number		Proper Fee
"11.	Probate of a will or letters of administration with or without will annexed.	Fifteen rupees.
12.	Certificate under the Succession Act, 1889 (VII of 1889).	Fifteen rupees."

(for several provincial schedules to the court fees Acts/Ordinances, reference may be had from the relevant Statutes).

82. To sum up, it is apparent that Islam ordains the administration of justice as one of the foremost obligations of man (after the belief in Allah and His Messenger (ﷺ)). It is thus obligatory for an Islamic State to set up an easy, speedy and effective and free of charge judicial system. This system, of course, though not prescribed in detail by revelation, should be in total conformity with the teachings of Islam. Islam's judicial system establishes a direct link between the Creator and the created. A religious-minded person can easily perceive that a society created by Islam is based on the foundations of justice, equity, fear and the worship of Allah, as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (ﷺ). By judging between the disputants, a judge who has been appointed by the State, in fact, directs them to even path, *واهدنا الى سواء الصراط* for which the State can not charge any fee. Moreover, it should be fully comprehended that Islamic Social justice is a concrete concept carrying fundamental rights with it, enforcement whereof is the duty of State including judicial functionaries.

83. For the reasons discussed above, this Court has come to a unanimous conclusion that the provisions of sections 4, 6, 7 and 35 read with Schedule I and II of the Court Fees Act, 1870, section 8 read with Schedule IV and V of the Punjab Finance Act No. XIV of 1973, Punjab Ordinance, 1981, further amending Article 13 of Schedule II of the Court Fees Act, 1870, section 4 and 7 of Schedule I as amended by

Sind Finance Act IV of 1990, sections 3 and 4 of Baluchistan Finance (Amendment) Ordinance, 1981, the relevant provision of NWFP Court Fees Act/Ordinance including NWFP Court Fee (Amendment) Ordinance 1980, and any other provision in the Central and Provincial Statutes relating to charging of Court fees, which might not have been pointed out or referred to us by the representatives of respective governments, (for lack of information or any other reason) are declared as repugnant to the Injunctions of Islam.*

84. It may, however, be observed that in Islamic Judicial history there is ample evidence that the paper (stationery) on which the judgment used to be written was supplied by the litigants in case the Baitul Mal was short of funds. It may, therefore, be observed that the Government may recover stationery charges from the litigants, in case the said expenditure cannot be met by the Government Treasury.

85. Before parting with the case, we would like to observe that we are fully conscious of the apprehension as expressed by some of the law officers of the Government particularly the learned Advocate General Baluchistan that abolition of court fees on suits/appeals on ad-valorem or market value may encourage litigant public to file frivolous and vexatious suits, but that apprehension alone will not justify to desist us from enforcement of Islamic Injunctions. There are other ways

and means to keep in check the undesirable tendency on the part of the people who may be tempted, due to freedom from payment of court-fee, to take resort to false and frivolous litigation. We would advise the promulgation of legislation for making effective provision for awarding prompt and adequate compensation to the aggrieved party falling victim to such litigation. To achieve the object, it may be advantageously provided that in case the Court on the conclusion of the case records finding touching its false or frivolous nature it may simultaneously call upon the victimized party to file statement of expenses it has incurred and monetary consideration for the trouble and mental agony it has suffered in connection with litigation. The Court may be authorised to determine by a "summary inquiry" compensation payable to the aggrieved party on account of litigious expenses and physical and mental sufference. The amount of compensation so determined and awarded by the Court may be made recoverable like the decretal money.

86. This decision shall take effect on 31st December, 1991. On expiry of the said date, the said provisions of laws will be void and of no effect.

*Appended to this
is my additional note.
Shahab Khan*

Tanzil-ur-Rahman
(Dr. Tanzil-ur-Rahman)
Chief Justice

Ibadat Yar Khan
(Ibadat Yar Khan)
Judge

Fida Muhammad Khan
(Dr. Fida Muhammad Khan)
Judge

(Abdul Razzaq A. Thahim)
Judge

Abaid Ullah Khan
(Abaid Ullah Khan)
Judge