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**Opinion of Dr Muhammad Munir, Chairman Department of Law, Faculty of Shar'iah & Law appearing as a Jurist Consult in Shariat Petition No. 4 - L of 2001 *Sh. Aftab Ahmad vs. The Government of Pakistan***

1. The petitioner has challenged the applicability of sub-section 3 of Section 18 of The Financial Institutions (Recovery of Finances) Ordinance 2001 (hereinafter the FIO 2001) on the touchstone of the Qur'an.
2. That Section 18(3) mentions that the validity of any document executed prior to the date of enforcement of the FIO 2001 shall not be affected.
3. That Section 18(2) of the FIO 2001 mentions that finance agreements executed by or on behalf of a financial institution and a customer shall be duly attested in the manner in Article 17 of the Qanun-e-Shahadat Order 1984 (hereinafter QSO 1984).
4. That the petitioner has challenged the validity of Section 18(3) of the FIO 2001 on the basis of its exemptions of documents executed prior to the coming into force of Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act 1997 (Act XV of 1997) (hereinafter BCA 1997) and Financial Institutions Ordinance 2001 (para C of the Petition).
5. That the key issue is whether Section 18(3) of the FIO 2001 and Section 17(3) of the BCA 1997 that mentions that documents be attested in the manner provided in Article 17 of the QSO 1984 and that nothing shall

invalidate any document executed prior to the coming into force of the FIO 2001 and BCA 1997. In other words Section 17(3) of the BCA 1997 and Section 18(3) of the FIO 2001 do not have retrospective effect and that this is against the Qur'anic verse 2:282.

6. That the petitioner is of the opinion that Section 17(3) of the BCA 1997 and Section 18(3) of the FIO 2001 should be given retrospective effect. Consequently, all documents executed prior to 2001 and 1997 that are not attested according to the manner provided in Article 17 of the QSO 1984 be declared to be against the Injunctions of Islam.
7. That the precise question that needs answer is whether giving Section 18(3) of the FIO 2001 prospective effect is in conformity with the Injunctions of Islam?
8. Below we examine, first, what is the Qur'anic scheme regarding giving laws retrospective effect? Secondly, how is the question of retrospectivity dealt with in Ahadith literature? Finally, what guidance is available in the Constitution of the Islamic Republic of Pakistan regarding the process of Islamisation?
9. The precise answer whether Islamic laws be given retrospective effect in our legal system and whether Section 18(3) of the FIO 2001 be given retrospective effect is 'No'.
10. Reliance is placed on many Qur'anic verses in which past and closed transactions are exempted and laws are given prospective effect: first, verse

2: 275 has prohibited interest or *riba* but has exempted 'past and closed transactions'.

11. The Qur'an says, "As for those who devour interest, they behave as the one who Satan has confounded with his touch. Seized in this state they say: "Buying and selling is a kind of interest," even though Allah has made buying and selling lawful, and interest unlawful. Hence, he who receives this admonition from his Lord, and then gives up (dealing in interest), may keep his previous gains, and will be for Allah to judge him. As for those who revert to it, they are the people of the Fire, and in it shall they abide." (2:275).
12. Consequently, if a certain transaction was declared unlawful it did not mean that all such transactions which had taken place prior to the prohibition should be deemed to be void and that all the earnings of people accumulated through these transactions would be either seized or declared illegal property.
13. Allah says in the Qur'an regarding prohibited degrees of marriage, "Do not marry the women whom your fathers married, although what is past is past. This indeed was a shameful act." (4:22).
14. Thus, the Qur'an declared marriage with a step-mother prohibited it did not necessarily follow that the children of such marriages which had been contracted in the past before this revelation were to be reckoned illegitimate, and that the offspring from such marriages would be disinherited.
15. Similarly the Qur'an exempts past and closed transactions in verse 4:23 when it says, "Forbidden to you are your mothers, your daughters, your

sisters and your mother's sisters, your brother's daughters and your sister's daughters, your milk-mothers, your milk-sisters, the mother of your wives, and the stepdaughters - who are your foster-children, born of your wives with whom you have consummated the marriage; but if you have not consummated the marriage with them, there will be no blame upon you (if you marry their daughters). It is also forbidden for you to take the wives of the sons who have sprung from your loins, and to take two sisters together in marriage; although what is past is past. Surely, Allah is All-Forgiving, All-Compassionate."

16. Allah has prohibited hunting in the state of pilgrim sanctity (*ihram*) in verse 5: 95 but has pardoned whatever has passed, "Allah has pardoned whatever has passed."
17. The Qur'an says, "[O Prophet!] Tell the unbelievers that if they desist from evil, their past shall be forgiven and if they revert to their past ways, then it is well known what happened with the people of the past." (8: 38).
18. That it is reported by 'Abdullah ibn 'Umar that the Messenger of Allah said: "Whatever division of inheritance was made during the Ignorance period, stands according to the division of the Ignorance period, and whatever division of inheritance was made during Islam, it stands according to the division of Islam." (Sunan Ibn Majah, hadith no. 2749).
19. That the established position under 227 (1) of the Constitution of Pakistan, i.e. all the existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Qur'an and the Sunnah and that "no law shall be

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enacted which is repugnant to such Injunctions" should be read together with sub-Article 2 of Article 227 which says, "Effect shall be given to the provisions of clause (1) in the manner provided in this Part", i.e. Part IX, Islamic Provisions.

20. That under Article 228 there shall be a Council of Islamic Ideology which is already working.
21. That under Article 230 the functions of the Council are: 1. to make recommendations (under Article 230 (1) (a)); 2. Advise a House/Assembly/President/Governor on any question referred to it on the Islamicity of proposed legislation; 3. To make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam; and 4. To compile for the guidance of Parliament/Assemblies of how such Injunctions of Islam be legislated.
22. It follows that Articles 227 - 230 provide a process and a mechanism of how laws could be brought in conformity with Islam by the Parliament or Provincial Assemblies with the recommendations/advise/and guidance of the Council. These Articles do not provide that a law that is apparently against the Injunctions of Islam will cease to be valid.
23. That should a law or provision of law be apparently against the Injunctions of Islam, the process provided for is to challenge the same in the Federal Shariat Court which has the powers and jurisdiction to declare the same invalid.
24. The conclusion of the foregoing is that the Qur'anic scheme of legislation is that laws be given prospective effect and not retrospective effect.

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25. Therefore, the Shariat Petition No. 4 – L of 2001 be graciously dismissed.

Submitted by

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