

Necessity as a pretext for violation of Islamic Commercial Law: A Scenario of Mortgage Contract in the UK

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Abstract

This article attempts to examine some Islamic legal maxims in relation to the practice of mortgage in the UK. It looks at various products offered by either conventional banks or Islamic banks to determine whether necessity can be used as a pretext to breach the prohibition of riba. It answers, in light of maqasid al-shari'ah (the spirits of Islamic law) through these legal maxims, the argument of those who condemn outright the "halality" of the current products of Islamic mortgage and suggest an amenable solution.

The paper traces the development of Islamic mortgage in Britain and the involvement of Muslims in this development. It further exposes the principle of necessity in Islamic law and its role in relieving its adherent from hardship. The paper then argues that if provision is a settled rule in Islamic law, application of it to the present situation of Muslims in Britain is inevitable. The effect of refrainment of Muslims from participation in the current global economy, especially, property investment particularly in the West at large, will put Muslims in the desecration of wealth.

Keywords: Legal Maxims, Necessity, Commercial Law, Mortgage, Muslims in the UK

1. Introduction

Islamic Finance in the UK

Britain has been familiar with the concept of an Islamic financial market in wholesales and high-net-worth investors since the 1980s. But major growth has only been witnessed in the last five years (Michael Ainley et al, 2007, 6). Islamic finance retail products only appeared in the UK markets in the 1990s because of its uncompetitive nature and the inability to secure governmental regulations. Islamic financial practices were unprotected compared with other conventional ones, thus rendering the services unpopular and slow-growing. (ibid).

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In recent times, specifically since early 2000s, there have been tremendous changes to Islamic finance in Britain; both in wholesale and retail. (Michael et al, *ibid*, Abdul Karim, 2008, 192). There has been an increase in concern from government and the private sector on the development and practice of Islamic finance (Abdul Karim, *ibid*.). London has been seen as the most suitable centre for the Islamic finance market (Rodney, 1999, 421-425, Abdul Karim, 2008, 190-191). Some of the reasons for the rapid growth of Islamic finance especially in the UK could be, among others, the increase in the demand of Islamic finance. According to Michael et al, the reasons for the changes include, fast expansion of Islamic finance globally, suitability of London as markets and skills base for this growth, availability of “Islamic windows” in some of the conventional financial institution as a result of their long experiences in the Middle East and South East Asia countries and stark hike of the oil price which leads to “excess liquidity in the Middle East” (Michael, et al, 2007, 189-192). Furthermore the UK government commitments in enacting legislation to accelerate and facilitate the development of Islamic finance which was translated in the Finance Acts 2003, 2005-2006 and more recently Finance Act 2007 which “clarified the tax framework further in the case of Sukuk”,² contribute to this development (Michael, et al, *ibid*).

In recognizing the potential input and development of Islamic Finance, the UK financial regulators, the Bank of England and the FSA, pay more serious attention to Islamic Finance (Michael, et al. *ibid*, 8-10). In 1995, Lord Edward George, the then Governor of the Bank gave a significant lecture at the conference on Islamic finance organized by the Islamic Foundation in London. In his speech, Lord George recognized the potential of Islamic finance in the global economy and the need to integrate it into the context of London’s tradition of “competitive innovation” (*Ibid*.).

This remark was first translated into action in 2001 when a high-level working group chaired by Lord George was established to look into the barriers of Islamic finance in Britain. One of the barriers identified was the issue of double stamp duty levied on the Islamic mortgage transactions (*Ibid*, 10-12). In August 2004, the FSA gave authorisation to the Islamic Bank of Britain (IBB) as the first wholly Islamic retail bank in the country (*ibid*, 14).

Islamic Home Finance Products (Mortgage) in Britain

Home financing in the UK is seen as a method of giving citizens the opportunity of getting onto the property ladder. Thus, it is set to boost their chance of having future

2 Sukuk plural of sakk is “an instrument for pooled securitization” similar to bonds in conventional finance system. See Iqbal, Munawar and Philip Molyneux, *Thirty Years of Islamic Banking*, UK and New York, Palgrave Macmillan 2005, p. 134

assets, because “paying the full value of the house upfront” is almost impossible for most citizens as the “house prices are above average people’s reach” (Omar, et al. 2009, 370). The earliest Islamic mortgage in the UK is dated back to 1988 when a-Baraka bank offered the Gulf Arabs mortgages structured through an *ijara* (rental contract) (Rodney 2007, 19). From 1997, the United Bank of Kuwait followed suit in offering a mortgage based on *murabaha*, (mark-up) and in 1998 it started offering housing finance based on an *ijara* structure (Rodney, *ibid.*). Islamic mortgage started gaining popularity and becoming more competitive from 2004 after the abolition of double stamp duties imposed on both *ijara* and *murabaha* products (Rodney, *ibid.*). Al-Buraq, a subsidiary of the Arab Banking Corporation, engaged in the business of Islamic housing finance; with more resources and devotion using Bristol and West as benchmarks, it was considered as a “leading player in the United Kingdom market” (Rodney, *ibid.*). Al-Buraq’s Islamic mortgage takes another dimension by initiating a product branded as *ijara* and *musharka* (rent and diminishing) (Rodney, *ibid.*).³

From above enunciation, it can be deduced that there are three major Islamic mortgage products in the UK which are claimed to be *Shari’ha*-compliant contracts, namely, *Murabaha*, *Ijara wa iqtina’* and *musharaka mutanaqqisah*.⁴ However, Michael, A. *et. al.* (2007) consider *ijara* and *musharaka* as one mechanism, although it seems that they agree that there are different features in *musharaka* and *ijara*. In *ijara* the ownership of the property is transferred to the customer, while in the *musharaka* the customer increases his/her share gradually as he/she “gradually buys the provider’s equity in the property” by the payments made every month (Michael, *et al.op. cit.* 20-21).

Murabaha products can generally be described as sale of an item at a disclosed profit margin (Abdullah, 1999, 76, Frank and Samuel, 2006, 182). In the realm of mortgage, *murabaha* is implemented in a form that the home buyer will find a desired home and approaches a bank to buy it for him from the vendor for the agreed price between the bank and its customer. Subsequently, the bank will immediately resell it to the customer at an agreed profit margin over the cost of the house. The home-buyer will pay the price of the property in instalments over an agreed period of years, and

3 HSBC also offers a similar product; see <http://www.hsbc.co.uk/1/2/personal/current-account/more/amanah-finance> (accessed last 12/12/2010)

4 These three products are being repackaged all the time. Some merged *musharak* with *ijar* or branded *ijara* as lease ends with sale *ijarahal-muntahabitamlik*. See Michael Ainley et al., p. 20. There is another product called *istisna’* (future manufacturing) under which the bank finances the construction of a house under the request of a home seeker with the agreement to buy it. See Hans Visser, p. 112. This product has not been explored, as far as I know, in providing mortgages in the UK.

mortgage the property to the bank in order to secure the instalments that are due (Hans, 2009, 107, Michael, et al, 2007, 20, Timothy 2005, 18).

Traditionally, *murabaha* in Islamic *fiqh* is a system of trading where A is in need of commodity which he/she could not get directly from C but through an intermediary of B, though B does not have the product with him (Abdullah, op. cit. 76). It is defined as “sale of a commodity at the price which the seller B paid for it originally, plus a profit margin known to the seller B and the buyer A” (Abdullah Ibid. 76). *Murabaha* has been conducted in Islamic commercial transactions mainly for commercial purposes and for someone who does not want to be involved directly but instead through a middleman (ibid).

As popular as *Murabaha* is, there is no direct evidence from either the Qur’an or from the Hadith on the legality of it. Rather, the Classical Islamic scholars justify it from different references. Imam Malik (d179 AH) referred to the practice of the people of *Madina*; Shafi‘(d. 204 AH) based it on *istishabal-hal* (presumption of continuity); while Hanafi jurist Marginani (d. 593/1197) based its validity on the people’s needs (Abdullah, ibid 77). This suggests that the validity of *murabaha* is based on secondary evidences, viz, *amal ahlal-madinan* (the practice of the people of Madina), *istishabal-hal* (presumption of continuity) and *istihsan* (juristic preference). Thus, application of it in this contemporary age is opened to diversity and subject to criticism. This is why some contemporary scholars see the modern application of *murabaha* in the current Islamic financing similar to the prohibited *riba*, as will be explained below (Ibid, 95).

Murabaha in the banking system involves two essential elements; the purchase price and related cost, and an agreed upon mark-up (profit) (Abdullah, ibid. 77, Nabil 1986, 94). In the modern *murabaha*, the product is expended to deferred payment where the buyer has no cash price at the recipient of the commodity. Thus, the seller will give him time to pay in instalments (Abdullah, ibid). The feature of *murabaha* which could be the basis for its validity are: (1) the cost of the original price of the commodity, the profit margin and other related costs should be known to the buyer; (2) the subject should be commodity against money; (3) the seller should possess the subject of the sale and (4) the payment is deferred (Abdullah ibid. 77).

The controversy surrounding the validity of *murabaha* as deferred payment sale evolves when there is mark-up (profit) plus the cost in lieu of the time allowed for the payment (Abdullah, ibid.). From Islamic classical jurists, Hanafis, Shafis and many other jurists of Islamic law hold the halality of the increase in deferred payment (Abdullah, ibid; al-Shawkani, n.d. 5:152). Malik and Shafi did not sanction such increases in their discussion on the product of *murabaha* (Shafi‘ al-Umm, 1968, 3:31-

35). Ibn Qayyim (d. 751/1356) of Hanbalis is quoted to have said “when someone sells something for hundred on deferred payment basis or for fifty on cash payment basis, there is no *riba*” (Abdullah, op. cit. 79). Despite all arguments in support of the lawfulness of this product, Michael Ainley et. al. (2007, op. Cit. 20) observe that this product “has rarely been used in the UK”.

Ijara in Islamic jurisprudence is a rental/lease of an item which is a profit orientation. And *ijara wa iqtina/muntaha bi tamlik* is a rental of an item ended by selling the item to the client. In the case of home financing, *ijara wa iqtina* is implemented through the purchase of a desired property by a bank on behalf of its client from the vendor at an agreed price, renting it to the client for a period of years, and then selling it to the client at the end of the period at a price agreed between them at the beginning of the contract. The monthly payments of the client to the bank will be in two forms: one as a rent payment, the other an amount that is held by the bank as an assurance that the client will be able to pay for the purchase of the property when required to do so at the end of the rental period (Hans, op. cit. 109).

Musharaka in classical Islamic jurisprudence is a system where investors contribute proportionally to a particular business, although there are verses of the Quran which mention the term from its verbal root but do not refer to the concept of *musharaka* in this sense of business transaction as it is understood in the Islamic jurisprudence. Verses 4:12 and 38:24 and several traditional sayings attributed to the prophet could be the locus stand of the validity of the mechanism in Islamic transactions (Abdullah, op. cit. 59, Ibn Qudama 1981 5:3.). The elaboration of *musharaka* products through the epoch of Islam could “be the product of *ijtihad*” of Islamic jurists (Abdullah, op. cit. 59). Thus, *Musharaka* is used in a very broad scope in Islamic *fiqh*. There are certain characteristics stipulated in *fiqh* literature to make such a mechanism valid. The capital will be shared according to the ability of each partner, the management of the funds will be equally distributed among the partners and no one has absolute right to dictate to another. Though, one can be delegated to run the business, the other reserves the right of abating any activities deemed to be inappropriate (Abdullah, op. cit. 60-61, Ibn Qudama, op. Cit. 5:14-18, Ibn Rushd, n.d, 2:189-191). Also, the duration of the business may be short or long and the termination of the contract can be made by any of the partners. Moreover, profit and loss will be shared among the partners according to their contribution. Nawawi (d. 676/1277) states that “the profit and loss should be in proportion to the capital provided, whether or not the labour provided by the partners is equal (Abdullah, op. Cit. 61, al-Nawawi, n.d. 2/215). From Hanafis’ and Hanbalis’ view, profit can be shared as stipulated in the contract (Abdullah, op. cit. 61). However, there is no disagreement among the scholars with regard to loss. They all agreed that loss must be shared according to the capital

contribution. This is evident in the legal maxim which states thus: “loss sharing should strictly follow the capital contribution ratio” (al-Sayyid Sabiq, 1985, 3/77).

The three models may sound straightforward in principles but there are observations, reservations and arguments on their legality/halality in Islamic law. Before dwelling on that, it is pertinent to mention that these three models are not being practised equally in Britain. In fact, some products are more attractive than others depending on how the financier packages each of them.

Murabaha and *ijara mutanaqqisa* products are being provided by one of the longest-established banks in Britain, Ahli United bank (AUBUK), formerly known as the United Bank of Kuwait (Hans, op. cit. 107-109). Some of the strong oppositions to *Murabaha* product are that the profit margin is calculated using (London Inter-Bank Offered Rate) LIBOR or other conventional systems as for the present value of the future interest payments. This creates scepticism in Muslims about the product as not purely Islamic. In terms of economics, *murabaha* does not enjoy the facility given to the conventional mortgage in the sense that interest payments on home finance are not deductible for income tax purposes (Hans, 2009, 107). It is also observed that though the transaction is straightforward, it is costly in the sense that it requires two transfers of the property. Initially, two times stamp duties were paid on any *murabaha* product, but that has been removed. It is not surprising to see some financiers offering this product switching to another (Hans, ibid, 107-109).

For *Ijara waiqtina*, the lease payment is geared to an interest rate and LIBOR is used as a benchmark. In Ahli United bank practices, the monthly payment is reviewed every year. This casts uncertainty which might be labelled as *gharar* (meaning) to the product. Also, it is observed that the home seeker bears the risk of a fall in price of the house, and if he could no longer pay the monthly payment, the house will be sold by the financier (Hans, ibid 110, <http://www.iibu.com>). By and large, *ijara wa iqtina* as it is being practised, cannot be called Shariah-compliant as it is neither a full sale nor full rent but rather a mix of sales which indulges *gharar* (Hans, ibid. 110). Besides, the product is costly, in the sense that it involves two sales transactions and two transfers of ownership. However, from the financier’s perspective, it is deemed suitable and more attractive because it enjoys the FSA regulation since 2004 alongside other conventional mortgages and has the advantage of securitisation (Michael, et al, op. cit. 20, Hans, op. cit. 110).

Musharaka mutanaqqisa might have been the best option and most straightforward product which could be 100% compliant with Shariah; if it were not that the capital money to buy the property in the first instance comes from an interest oriented shareholder (the financier). Also, *musharaka mutanaqqisa* is not offered in isolation.

It must be combined with *ijara*.⁵ In the case of the Al- Buraq *musharaka mutanaqqisa* scheme in the United Kingdom, the bank purchases the property desired by the home-buying client using its own funds plus a deposit provided by the client. Although the property is registered in the name of Al-Buraq at the Land Registry, the diminishing partnership contract splits the so called “beneficial interest” in the property between the bank and the client so as to reflect the relative size of their contributions to the purchase price. The client now lives in the property as a tenant and pays rent to the bank. The amount of the rent is adjusted to reflect the fact that the client owns part of the beneficial interest in the property. In addition to the rental payment, over time the client buys the bank’s beneficial interest in the property and eventually becomes the owner of all of that interest. At this stage, the client’s total rental payment is zero and the final formal step is taken of transferring ownership into the name of the client at the Land Registry. It should be noted that in some other diminishing partnership contracts, the property is held by the financier in trust for itself and the client.⁶

Timothy (2005, 19) observes that “mortgage loans, whether structured as endowment policies or repayment mortgages, also have the repayment of interest at their heart”. As such it does not comply with the Islamic faith. Thus, Muslims in Britain face a dilemma in the sense that they are left with two options; either taking out a financial product to which they have religious objections to or of making alternative arrangements which are more compliant with their faith, though, the second alternative may not be one hundred per cent compliant with the dictate of the religion, but albeit, it stands as the lesser evil to their faith (ibid, 18).

Muhammad al-Bashir (2001, 25) when comparing the risk of *istisna’* and *murabaha* points out that *murabaha* cannot be lawful until the bank (financer) owns the property. This condition is deduced from the saying of the prophet which runs thus: “Do not sell what is not with you.” (Abu Dawuda Hadith no. 2187). This renders the practice of *murabaha* as it is currently practised un-Islamic.

Necessity as a pretext for the violation of rules in Islamic Commercial Law

If anything is to be used to justify the current mortgage products either under conventional or purported Islamic financiers, though the threshold of haramity is

5 This means that the second product is no longer practicable since it can be embedded into *musharaka*. No wonder that some financiers are now switching from *ijarato musharaka*

6 Some other banks that follow suit in offering diminishing partnership in UK are: United National Bank, HSBC, Lloyds TSB and Islamic Bank of Britain. Though, HSBC has been offering an Islamic home finance in accordance with *ijarahwaiqtina* principles, but it has been changed to *musharakahmutanaqqisah* in recent time. See Tarek El-Diwany and Haitham al-Haddad, *The Islamic Mortgage: Paradigm shift or Trojan Horse?*, 2006, p.2

inevitable, the pretext of hardship or necessity will be, to some extent, a convincing justification. This is because any other pretexts are tantamount to refutation and contention. Necessity in Islamic commercial law poses many questions. Among these is to what extent someone can violate settled rulings under the pretext of *darura*. Necessity, *de jure*, is recognized as *exucast legem* for the breaching of any ruling in Islamic law. But what is not clear is to what extent one can indulge under this pretext, bearing in mind that Islamic law firmly distinguishes between *daruuraat*, (necessity) *haajjiyyaat* (needs) and *tahsinaat* (embellishments).

Necessity is a settled principle explored to avert the dictate of the law in Islamic law (Mashood 2003, 37 and 41). In most classical literatures, necessity (*darura*) has been defined as a situation in which one has fear of losing his/her life (al-Jassas, 1405, 1: 129; al-Zarkashi, 1405, 2: 319; al-Suyuti, 1403, 61; al-Hamawi, 1985/1405, 1:277) This does not mean that the scope of necessity is restricted to that phenomenon. Al-Zarkashi (d. 794 H) has given the example of preserving properties as one of necessities that Islamic law aims to achieve (Al-Zarkashi, 1405 AH 2:317). While analysing the maxim of “necessity permits prohibited things”, al-Zarkashi is quoted to have said: “...similar to that is taking back without his permission the property of a person who has refused to pay back his debt, if that property is similar to what such a person has taken” (Ibid cf. al-Suyuti, 1403AH, 60).

Necessity is extended to prevent and protect religion, property, offspring and intellect (Muhammad al-Ghazali 1993/1413, 2/481-482, Wahba, 1997/1418, 54) Al-Ghazali (d. 505/1111) in his effort to relate necessity to the *maslaha* (public interest) explains that *maslaha* is meant to preserve “the objectives of the Shariah with regards to man which are five; it preserves their religion, life, reason, offspring and their property” (Muhammad al-Ghazali, *ibid*). He contends that “everything which partakes in keeping these five principles is a benefit and everything which disturbs their existence is an injury and to drive away such a disturbing thing is also a benefit” (*ibid*.)

The issue of necessity in having mortgage comes as a result of the sympathetic conditions of Muslims living in a non-conducive environment. Drawing from Serena and Tufyal’s report on the situation of Muslims in the UK, where a majority of Muslims were reported to have been housed in deprived rented accommodation, this could be used as justification for allowing Muslims to have mortgage in any available form from within the provision of necessity. (Serena and Tufyal, 2007, 32-35).

Legal maxims of necessity

There are many Islamic legal maxims related to the issue of necessity in Islamic transactions. One of the basic legal maxims on which many other subordinates rest is

the maxim *al-mashaqqa tajlib al-taysir* (Hardship begets facility) (Subhi, 2000, 152, Ahmad al-Zarqa, 1996/1417, 157). It is a maxim used as a legal concession for any recognized hardship in Islamic law. Thus, it serves the purpose of Islamic law in lessening and removing burden for people (Muhammad Hashim, 2003, 436-454). The legality of this maxim and its subdivisions are based on the overall objectives of Islamic law extrapolated from various textual evidences (Q. 2: 185, Q. 22:78, Q. 4: 28.). The Prophet is reported to have said “The Religion is very easy and whoever overburdens himself in his religion will not be able to continue in that way” (al-Bukhari, Hadith no. 39).

The relevance of this maxim and its like to the Islamic transactions in general and to the Islamic and conventional mortgage in particular lies in the fact that, even when there is a clear evidence on the prohibition of *riba*, it could be asserted that British Muslims are potentially facing difficulties in settling in an ideal environment, suitable for breeding model and exemplary family. Therefore, they have religious concession to breach the dictate of the text for protecting and preventing their *daruriyya al-khamsa* (five necessities).

Al-Suyuti (d. 1506) puts forward seven reasons for which facility is given, among others is *al-usurandumum al-balwa* (difficulty and general calamity) (Abdul Rahman 1403 AH, 77): From this it could be argued that having a home in a Western environment, be it in a conventional or Islamic way, without being involved in *riba* is impossible. Apart from what has been explained above, the monies used either by Islamic banks or conventional banks are provided through an interest based system and the profit margin is calculated based on the interest rate in the market. Mohammad Hashim (2003, 71) argues that “people (of this generation) are in greater need of *taysir* ... than ever before”. This is because, Mohammad Hashim explains, the condition of this modern society is so terrific in the sense that people are lured into temptation to sins. As such, the provision of Islamic concession for the elevation of hardship becomes utterly needed to ease the condition (Mohammad Hashim, Ibid). Thus, giving facility in the face of hardship and difficulty is paramount.

This ambit of difficulty has to be proportionally and appropriately dealt with from the spirit of the Islamic law. It is a settled principle in Islamic law that *idhaadaqa al-amr ittasa' wa idhaa ittasa'a dhaaqa* (“Whenever the circle of an affair narrows it is widened and whenever it widens it is narrowed”) (Al-Suyiti, op. cit. p. 83, Al-Zarqa, op. cit. p. 165; Muhammad al-Burnu, 2002/1422, 230). The essence of the above maxim is to lay emphasis on the grand maxim and to give more information on how it

is to be applied. It can be summarized thus that if there is an apparent *mashaqqah* (hardship), in any matter, there should be facility for it. And as soon as that *mashaqqah* disappears, the matter shall revert to its original rule. In other words, as al-Zariqa Ahmad (d.1357/1938) puts it, “if necessity and hardship cause facility, the facility should be enjoyed till the condition changes then one should revert to the normal rule” (Ahmad al-Zarqa, 163).

Wilson (2007, 3) claims that “Shariah compliant products [including mortgage] have been developed ...to serve most of their [Muslims’] financial needs and these products are at least as efficient as their conventional counterparts” . If that is true, there is no longer necessity for the Muslims to go for interest-based home finance, because from the settled rule of Islamic law, when there is no longer an excuse, the status quo is maintained (Muslihudein, 1980, 180), as the legal maxim states: “*Majaza li ‘udhurbatala bi zawalih* .(Abdul Rahman al-Suyut, 85). Based on this, the modern Islamic scholars, while endorsing investment in international conventional banking systems, require reversion to the original rule ending the provisional provision of being involved in *riba* when there is an alternative (Frank and Samuel, 2006, 39).

Through this provision of latitude during an emergency, Islamic law is proved to be perfect and universally suitable for any time and any circumstance. Muslihudein (1980, 180) elucidates on the importance of exploration of the principles of necessity for humans’ needs. He contends that “opportunities are provided under this rule to adopt what is essential as an ad hoc measure or tentative arrangement”. This ad hoc measure meant to serve its purpose while at the same time solving peoples problem, “proper solutions (must be sought for) in light of the text” (ibid). Once the proper solution is found, the law reverts to its original.

Owing to the fact that, even if the products of home purchase schemes be it *musharaka mutanaqisa*, *murabaha* or *ijara wa tamlik* are not purely Islamic as seen by some critics, they serve the very purposes of Islamic law by giving people, especially the poor, the chance to own their homes with limited initial capital. Thus, the scheme promotes the welfare of the people and any measure that promotes this is considered as serving the *muslaha* and hence is desirable (Ahamad and Dzuljastri, <http://www.isra.my/media-centre/downloads/summary/7/10.html>).

According to al-Ghazali (d. 505/1111), “the very objectives of the Shari’ah are to promote the welfare of the people, which lies in safeguarding their faith, their life, their intellect, their posterity and their wealth. Whatever ensures the safeguarding of these five serves public interest and is desirable” (see Meera and Dzuljastri. p. 19, Umer 1992, Muhammad al-Ghazali, 1413 A.H 258). But is owning a home *muslaha*

or living under shelter? Is it permissible to use the concept of this *muslaha* for something which is not classified as necessity? If mortgage in Britain is considered as promoting welfare of the citizen, including the Muslim minority, as indeed it is, then the concept of *muslaha* must be explored to justify the lesser evil of existing Islamic home purchase products as there is not any alternative at the moment. However, that rule may not be admissible in other environment where other avenue could be used to achieve such *muslaha*.

Ahamed and Dzuljastri stress the essentiality of owning a home for the purpose of sheltering and dwelling: “home is a basic necessity for human life. Everyone needs a shelter for rest, sleep, comfort and protection from sun and rain. It is a place to dwell in comfort with family, therefore, owning a good home is an aspiration of everyone” (Ahamed and Dzuljastri 2). From their assumption, it can be inferred that Ahamed and Dzuljastri put owning a home under the concept of necessity which could render unlawful becoming lawful. Rodney also explains the importance of owning a house in the British society as opposed to renting. He states thus that “houses are regarded as investments in the United Kingdom, whereas rental payments are viewed as current spending which brings no long term security, or potential inheritance which can be passed on to family members in accordance with Islamic law” (Rodney, 1999, 50).

One could sympathetically suggest that, since the overall objectives of Islamic law are to protect the five fundamental principles that Islam aims to achieve, having home plans (mortgage) in any form would be highly recommended if not compulsory, owing to the fact that if these principles were neglected, the spirit of the religious will be automatically declined. But could it be that one can actualize these principles with any course? In other words, does the end justify the means?

To buttress the argument of justification for having mortgage in both ways, the five necessities have to be analyzed in light of the situation on the grounds. If it is certain that Islam gives paramount protection to these five necessities, in turn, there must be a second look into the ways these necessities must be protected with regard to the economic and social needs of Muslims.

(1) Protection of Religion

Protection of religion is at the forefront of the five necessities of Islamic objectives (Jasser, 2008/1429, 3). It is said that because of this Islam enacts punishment of apostasy (Wahbah, op. cit. 51). Beyond the classical theory of protection of religion, it could be argued that religion can be protected if Muslims in Britain could individually and collectively own houses in the same areas. This would, indeed, enable them to structure the areas according to their faith. There is no doubt that

concentration of Muslims in cities like Birmingham, Bradford and Leicester, etc., contributes to the availability of multiple mosques and Islamic cultural centres to affiliate Muslims to their religion and educate Muslim youngsters on the importance of their religion. According to the data, Birmingham has 105 mosques in total. In some areas, 12-14 mosques could be found, such as Sparkhill and Aston respectively (<http://www.salaam.co.uk/mosques/index.php>). Bradford also enjoys large numbers of mosques. There are 45 mosques in total, where 12, 7 and 5 mosques are situated in Girdlington, Lidget and Manningham respectively (ibid). Leicester, smaller in population compared to other cities in England, accommodates 20 mosques in total, where areas like Evington and Oadby host 7 and 5 mosques respectively (ibid). Were these not the case, Muslims would have suffered a weakening in their religious values as evident in most of the areas where such opportunities were not in place. It is also a fact that the availability of mosques and cultural centres gives elderly Muslims and their offspring the opportunity of observing their daily ritual regularly. Not only that, but they are able to echo their voice through a Muslim representative in political manoeuvres.

(2) Protection of Life

Life is sacred in Islam, and for this purpose, Islam enacts a law of retaliation (Wahaba, op. cit. 51). By analogy, it could be said that declining in Islamic moral value and psychological derailing are tantamount to destruction of lives which could happen through living in indecent environments. Having a mortgage may not pose any immediate threat on Muslims' lives. Indeed, concentration of Muslims in particular areas could pose danger on lives of Muslims. According to the official reports on the 2001 riot between BNP and Muslim communities in Oldham, 'segregation', and social exclusion of Muslim communities, among others, were identified as causes for the attack (www.mcb.org.uk/download/osi.pdf, accessed 19/01/11, 11:30, p. 86, and Serena and Tufyal 2007, 37,). This may not necessarily suggest that Muslims should not own their houses and have community integration. The job of the government in protection of its citizens is paramount.

(3) Protection of Offspring

Preservation and protection of offspring is one of the five necessities aimed to achieve in Islamic law (Muhammad al-Ghazali, op. cit. 258). Protection of this necessity extends to family orientation in Ibn Ashur's theory of *maqasid* (Ibn Ashur, 2001, 206). This theory includes good environment, decent orientation and suitable accommodation (Jasser, op. cit., 22). By extension, the protection of Muslim offspring could be achieved through preservation of Muslims' identity as mentioned

above under protection of religion and also by the means of provision of better housing for Muslim wards and raising them in better and decent environments. By contrast, this cannot be achieved if Muslims were to traditionally and culturally remain in social rented houses. According to the UK government statistics, it was claimed that “in 2003-2004 almost ...31 per cent of Muslims of working age had no qualification- the highest proportion for any religious group” in the UK (http://www.statistics.gov.uk/downloads/theme_compendia/for2004/FocusonReligion). It could be inferred from this mayhem that the standard of education received by Muslims is poor.

(4) Protection of Intellect

The theory of preservation and protection of intellect in Islamic discourse on *maqasid al-shariah* has been restricted to prohibition of intoxicants in classical Islamic literatures (Jasser, op. cit. 22). In contemporary theory, it has been extended to incorporate all spectrum of intellectual developments which include “propagation of scientific thinking, travelling to seek knowledge, suppressing the herd mentality and avoiding brain drain” (ibid).

By extension, intellect can be preserved by living in good housing, decent environment, quality and standard education, etc. This would be proven impossible if Muslims were to remain in unfit properties, junky environments, and overcrowded houses as reports show that Muslim households are most likely to be living in social rented accommodation and they are most likely to live in unfit houses and overcrowded environments (Serena and Tafyal op. cit 2007, 32-33).

(5) Protection of Property

Protection of property is also considered as a paramount necessity that Islam aims to achieve. Property includes moveable and non-moveable. There are many Qur’anic verses in which waste of properties is condemned (Q.17: 26 and 27). According to Rodney, owning a house is regarded as “investments in the United Kingdom, whereas rental payments are viewed as current spending which brings no long term security, or potential inheritance which can be passed on to family members in accordance with Islamic law” (1999, 436). Since it is difficult for average British citizens to buy their home with a cash down payment, to suggest to them to remain in rented housing is tantamount to encouraging a waste of Muslim resources.

To illustrate the argument, let us assume that Muslim A and Muslim B are British citizens. Both are working and earning the same salary. A rents his house for £12,000.00 pa while B buys his house with mortgage and pays the same amount as A

towards his mortgage. At the end of 20 years B paid his entire mortgage and owns the house while A remains a tenant. This means that A has wasted $\text{£}12,000.00 \times 20 \text{ year} = \text{£}240,000.00$. Going by the Datamonitor (1999), which indicates that out of 1.65 million estimate, 300,000 Muslims adults in the UK have annual incomes in the range of $\text{£}30,000/=$ and above. If those 300,000 were to remain as tenants, it means that Muslims will be losing $300,000 \text{ (Muslim Adult)} \times \text{£}240,000.00 \text{ (rent for 20 years)} = \text{£}7,200,000,000 \text{ (£}7.2\text{b)}$ every 20 years.

This absolutely contradicts the very fundamental principle of Islamic law and, indeed, such waste must be redressed. The remedy for it is either that Muslims should be given permission to become involved in conventional or purported Islamic banks until a permanent solution is sought or we advocate for radical change in the world economy. The latter is certainly impossible for many obvious reasons. Among others is that Muslims are not in control of the world economy. Thus, the former will be an immediate and amicable solution with the justification of provision of concession (*rukhsa*) as enacted in Islamic law.

Another question worth answering is whether having a house is a need or a necessity. From the Islamic law perspective, *al-haja*(need) is considered as *al-darura*(necessity) as the maxim says: *al-hajah tunazzil manzila al-darurah 'ammah kaanat aw khassah* "Need, whether of public or private nature, is considered as necessity" (Muhammad al-Burnu, 2002/1422, 242). The meaning of *al-haja* is need of a lesser degree than necessity. Strictly, what Islam aims to provide for humanity can be classified into three categories:

One: What is termed *al-darura* 'necessity'. *al-darura* is a situation where if one were to refuse to commit an unlawful act, his life, dignity, religion, offspring, and property would be endangered. For this, he is allowed to violate the rules to protect those things (Wahbah, op. cit. 67-68).

Two: What is termed as *al-haja* 'needs'. This is a situation whereby a person could be in difficulty or hardship if he does not commit what is unlawful, although, his life will not be in danger. It is recommended that the difficulty should be prevented by committing what is unlawful. According to Ibn Qayyim, (d. 751/1356) in an attempt to draw a demarcation between *darura* and *haja*, he claims that *al-haja* is what is prohibited as a preventive measure "sadd al-dhari" and becomes permissible for public interest, while what is prohibited with definite purpose can only be permissible by virtue of necessity (Ibn al-Qayyim, 1973, 3/119). But according to the maxim in

question, *haja* is regarded as *darura* (dire necessity) in some circumstances (Frank and Samuel, op. cit 38).⁷

Three: What is termed as *al-kamaliyya* or *al-tahsiniyya*⁴ (embellishment). This is exemplified by a situation in which a person seeks an excessive thing to maximize the enjoyment of his life.

The first and the second categories are the rights protected by Islam and facilities are enacted for them. The last category, however, is out of the discussion. Thus, if law is broken in order to enhance such luxury life, the act will be considered as transgression and violation of the rules of Allah. Thus, having excess money on top of the capital amount of the house to be bought by mortgage can be considered as luxury and as such it is regarded as unlawful. However, extra money for essential things to make the house suitable for living can be included in the first two categories.

Be that as it may, the rule that permits use of the provision of necessity is not boundless. There are other maxims set as check and balance to that. The maxim *al-darura tuqaddar bi qadrihah* (Necessities are estimated according to their quantity) (Muhammad al-Burnu, op. cit, 239) is set as a condition and restriction to regulate the use of the provision of facility in the case of necessity. As mentioned above, the Quran has categorically stated that the only acceptable excuse for breaking rules is reasonable and genuine necessity. “*ghayra baghin wala ‘adin*” (without wilful disobedience, nor transgressing due limits”) (Q. 2:173, 6:145, 16:115). Thus, any facility given should be minimized to curb abusive use of the pretext of necessity. Thus, the excess in having mortgage in the conventional system renders the action unlawful. In other words, it is not allowed for a Muslim under the *riba* system to have more than one mortgage as that has gone beyond the ambit of necessity. However, if the mortgage is contracted Islamically, there is no limit to the number of houses to have since that is classified under lawful trading. Or if the size of someone’s family is larger than to have one apartment, more than one can be sought for in as much as it is under the realm of necessity.

The yardstick for determining the proportion of the facility to be granted under the pretext of necessity is the five necessities recognized by law, i.e. religion, life, dignity, offspring, and property and what would be required to preserve them (Muhammad al-Ghazali, op. cit. 139-140, Muhammad Muslihudien, op. cit. 163). However, it is also worth noting that the amount to be taken from these prohibited

⁷ Cf. al-Shatibi al-Muwafaqat, vol. 2, p. 8; al-Ghazali, al-Mustasfa, vol. 2, p. 481; al-Amidi, al-Ihkam fi usul al-Ahkam, vol. 3, p. 393-396; al-Razi, al-Mahsul fi Ilm al-Usul, vol. 2, p. 578;

things, to protect these five necessities, is relative as what is deemed to be a sustainable portion for one may not be sustainable for another.

Conclusion

This article has sought for balance between rigidity in the application of Islamic ruling and exercising religious concession. It is undeniable that Muslims dwelling in the West are facing challenges in their day-to-day activities; spiritual, social and economic. This calls for inquest for Shariah objectives (*maqasidal-Shariah*) in prohibiting certain things in business transactions. Among Shariah's objectives mechanisms is the provision of concession (*rukhsa*) in dire situation. This concession gives facility for breaching the dictate of religious ruling proportionally

Even if there is ambiguity in the purported Islamic finance mortgage, there is room for mitigation under the pretext of necessity. The pretext has rendered this ambiguity far less impact on approving these products provisionally in as much as the aim is to protect the five necessities mentioned by Islamic scholars.; religion, life, property, offspring and talent. To what extent can this provision be exploited? Here come the issue of proportionality and relativity. One has the right to recourse for *rukhsa* but without transgression. However, what constitutes transgression is absolutely relative.

As Muslims enjoying their religious concession rights, they also have obligation to strive for a better situation that will comply with their faith. Though, it may be difficult to do without international monetary organizations, yet there is room for individual efforts as well as collective. As al-Haddad and El-Diwany observe "Muslims in the West are attempting to implement certain elements of Shari'ah within an environment that is frequently inhospitable, and the formulation of an appropriate strategy is therefore rather complex" (Haytham and Tarek at <http://www.islamicmortgages.co.uk/index.php?id=283>). A co-operative could be one of the simple ways in solving the mortgage problem, by which individual and organization who are mindful of their obligation before Islam invest in this business.

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