

# Legal Maxims and Islamic Financial Transactions: A Case Study of Mortgage Contracts and the Dilemma for Muslims in Britain

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## Abstract

This article aims to focus on legal maxims related to financial transactions to explore whether they offer any solutions for Muslims concerned with this dilemma, and to investigate how such legal maxims can be used to shape the way in which Muslims in the West perceive today's mortgage issues. Some questions raised are the following. When entering a mortgage contract, does a Muslim's intention change the ruling of the transaction under the pretext of the two maxims *al-'umūr bi maqāṣidihā* ("matters considered according to intention") and *hal al-'ibrah fī l-'uqūd bi l-maqāṣid wa l-mā'anī aw bi l-alfāz wa l-mabānī* ("in contracts, is effect given to intention and the meaning or expression and form")? Can one be certain that mortgages are completely *ḥarām* (unlawful) when considering the maxim *al-yaqīn lā yazūl bi l-shakk* ("certainty cannot be repelled by doubt")? What aspects of *ḥarām* are found in mortgages and can they be marginalized by the maxim *al-darūrāt tubīh al-maḥẓūrāt* ("necessity makes the unlawful thing lawful")? If Islam allows *bay' al-istiṣnā'* (contract for manufacture) on the basis of *'urf* (custom), can mortgages also be permitted under the maxim *al-'ādah muḥakkamah* ("custom is authoritative")?

## Keywords

legal maxim; mortgages; Muslims in the UK, intentionality; certainty; doubt; necessity; custom

## 1. Introduction

The circumstances in which Muslims find themselves in today's world in general and in the Western world in particular compel contemporary

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Islamic scholars to seek extricable and Islamic-compliant solutions to resolve problems. Financial transactions are one of the subtle issues facing Muslims in the West. The majority of these Muslims either opt for such financial transactions, despite the fact that there is a clear injunction regarding illegality under Islamic law or avoid involvement in any transaction tainted by usury (*ribā*), regardless of whether illegality is or is not clearly proven. In other words, we find Muslims at both ends of a broad spectrum: e.g., those who are not concerned with the legality of their actions in terms of Shari'ah law and those who abstain from anything that might tarnish their faith regardless of actual illegality.

In any case, one can justify both choices. Muslims opting to make transactions may adhere to the doctrines of intentionality, presumption of continuity (*istiṣhāb al-ḥal*) and necessity (*ḍarūrah*). Here, intentionality implies that, while one has good intentions, reality does not permit one to stick to the rules. Presumption of continuity subsumes under permissibility of anything until proven otherwise. Necessity renders that which is unlawful legal under certain circumstances. However, necessity may not justify one's action with the precept of precaution in religion. The relevant questions to ask are: does not Islamic law state that intention must corroborate with action; are there clear-cut texts regarding prohibition of interest; and are mortgages necessary? In other words, is home ownership essential, a necessity or mere luxury? Regarding the latter, can a Muslim's action be justified in light of the fact that, as now construed, mortgages and other financial transactions are not clear-cut issues, whereas continuity of certainty (*yaqīn*) is one of the principle tenets upon which Islamic law rests.

### 1.1. *Muslims in Britain*

It is difficult to obtain exact figures but an estimate suggests that the Muslim population in Great Britain numbers 1.4-1.8 million or 3% of the total population.<sup>1</sup> The National Census in 2001 calculates 1.6 million

<sup>1</sup> Serena Hussain and Tufyal Choudhury, *Muslims in EU: Cities Report United Kingdom, Preliminary Research Report and Literature Survey*, (UK: Open Society Institute, 2007) 10-13. The Report of the Runnymede Trust Commission on British Muslims and Islamophobia, *Islamophobia—A Challenge for Us All*, (London: The Runnymede Trust, 1997), 14, estimates a population of 1.2-1.4; the most recent estimate is 1.8 million. See *The Guardian*, 17/6/2002. A recent article claims that the Muslim population has surged to 3 million; see Omar Masood, Jamel E. Chichti, Walid Mansour and Qazi Awais Amin, "Role of Islamic Mortgage in UK", *International Journal Monetary Economic and Finance*, 2 (3/4) (2009) 368.

Muslims, 60% of whom are under the age of 30, living in Britain. Nearly one-half of Britain's Muslim population was born in the UK. Moreover, huge numbers of Muslims are also currently studying or working in the UK; their number is nearly impossible to estimate because the British Government lists these immigrants by country of origin, not by religion.<sup>2</sup>

Because Islamophobia is on the rise in some areas, housing a Muslim family in such neighbourhoods could place them in imminent danger. In the run up to the 2001 general elections, the BNP (British National Party) focused its campaign on attacking Islam and the British Muslim community.<sup>3</sup> During the elections, riots involving young Muslims erupted in the towns of Oldham, Burnley and Bradford where Muslim communities are predominant. Vandalism and verbal as well as physical abuse by white youths got out of hand as local BNP factions mounted their campaigns for the general election. Commenting on this riot, the BNP leader Nick Griffin said that the riots were "not an Asian or Black problem, but a Muslim one".<sup>4</sup>

### 1.2. *British Muslim Assets in the UK*

By 1998, a total of 176 Islamic banks were operating in 38 countries, according to the International Association of Islamic Banks (IAIB).<sup>5</sup> These banks held assets worth \$148 billion, with nearly \$1.2 billion in aggregate net profits.<sup>6</sup> Sir Howard Davies, former chairman of the Financial Services Authorities in the UK, said: "there was a gap in the market for retail sector Islamic banking products, which would cater to nearly two million UK Muslims".<sup>7</sup> Approximately 3 million Muslims are permanent residents in the UK (i.e., 50% of all UK ethnic minorities) with estimated savings of ca. £1 billion, while over 500,000 Muslims visited Britain in 2001,

<sup>2</sup> Hussain and Choudhury, *supra* note 1 at 7.

<sup>3</sup> Serena Hussain and Tufyal Choudhury, "The situation of Muslims in the UK" in: *Monitoring the EU Accession Process: Minority Protection*, (UK: Open Society Institute, 2002) 377; at: <http://www.mcb.org.uk/downloads/osi.pdf> (last accessed 21/04/2010).

<sup>4</sup> *Ibid.*; Interview on Newsnight, BBC 2, 26/6/2001; see also *The Oldham "Riots": Shattering the Myths* (London: BRAIN, 2001); see also N.M. Ahamed, F. Bodi, R. Kazim and M. Shadjareh, *The Oldham Riots: Discrimination, Deprivation and Communal Tension in the United Kingdom* (London: Islamic Human Rights Commission, 2001) 13.

<sup>5</sup> Masood *et al.*, *supra* note 1 at 368.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

spending nearly £600 million.<sup>9</sup> The liquid assets of the 5,000 wealthiest Muslims in the UK are estimated at over £3.6 billion. It is indicated that, among the estimated 1.65 million, 300,000 adult Muslims in the UK have annual incomes  $\geq$  £30,000<sup>10</sup> and that the number of wealthy British Muslims is rapidly growing.<sup>11</sup> From this information, one can assume that 25% of all adult Muslims are excellent prospects for banking and financial products (see Table 1).<sup>12</sup>

### 1.3. Condition of Muslims in Britain

Ethnic data reveal severe deprivation among Pakistani and Bangladeshi Muslim communities in all aspects of life: education, employment, housing, healthcare and access to justice.<sup>13</sup> One-third of the Muslim population lives in the 10% most deprived neighbourhoods.<sup>14</sup> The data also reveal that 29% of Pakistani and Bangladeshi pupils took  $\geq$ 5 GCSE grade A+ to C-

Table 1. Annual Income for UK Muslims

Age Bracket	< £30k	> £30k
18-24	244,470	56,138
25-34	154,421	61,453
35-44	194,977	95,515
45-54	159,122	55,758
55-64	108,259	22,972
$\geq$ 65	70,925	2,005
Total	922,174	292,941

Source: Datamonitor, Policy Studies Institute, Labour Force Survey (1999).<sup>8</sup>

<sup>8</sup> This data is more than a decade old after which no new official census has been available. It is predicted that today's population might have increased more than 10% and that Muslim assets in Britain might have grown more than 2% as the demand and immigration status of Muslims in Britain is growing.

<sup>9</sup> *Birmingham Post*, Birmingham, UK, 21/9/2002; John Duckerss, *The Sunday Telegraph*, London, UK, 3/11/2002, Jenny Knight 12.

<sup>10</sup> See Table 1.

<sup>11</sup> UK to encourage Islamic Mortgage, BBC Business News, 18/2/2002; at: <http://news.bbc.co.uk/1/hi/business/1826834.stm> (last accessed: 27/3/2010 at 12:01 pm).

<sup>12</sup> Masood *et al.*, *supra* note 1 at 368.

<sup>13</sup> Hussain and Choudhury, *supra* note 1 at 4.

<sup>14</sup> *Ibid.*, 7.

showing the lowest ever national average of 49%.<sup>15</sup> One reason, among others, could be the calibre of people with whom Muslims must share a neighbourhood. It is alleged that the higher the calibre of people amongst whom one lives, the better the facilities and quality of amenities one encounters. This attitude also prevails in the UK. The standard level of education is very poor in some schools serving communities where lower calibre people live, in contrast to schools serving areas where professionals and people higher on the social ladder live.

Policy of catchments, feeder schools, family designations and admission to higher schools are firm practices in the UK. Although reports claim that children are protected against discrimination in schools, complaints can only be addressed when there is potential and an eminent population of Muslims in that catchment.<sup>16</sup> Moreover, data indicate that ethnic minorities suffer from low employment rates, with incomes below the minimum wage, compared with two-fifths of other ethnic minority households.

According to the National Census in 2001, a larger percentage of Muslims owned their accommodations, paid by loan or mortgage, rather than other types of occupancy. Most British Pakistanis were less likely to report their occupancy profile, thus making it very difficult to create a unified profile for Muslim accommodations. By and large, "Muslims as a group share the experience of living in poor quality housing, whether owned or rented from the social or private sector."<sup>17</sup>

The 2001 Home Office Citizenship Survey for England found that, for the most part, respondents with a religious affiliation lived in areas with low to moderate levels of deprivation; the exceptions were respondents affiliated with the Muslim community. A significantly larger proportion of Muslim respondents lived in areas with the largest levels of deprivation.<sup>18</sup>

The quality of the homes occupied by Muslims also raises concerns. "The FNSEM found that, though all minority groups lived in poorer housing conditions, Pakistani and Bangladeshi Muslims have the highest level of overcrowding when compared with all other groups".<sup>19</sup> After the Oldham riots in 2001, a report by the Islamic Human Rights Commission<sup>20</sup> describes how British Pakistanis and Bangladeshis spent a longer time on

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 34.

<sup>17</sup> Hussain and Choudhury, *supra* note 3 at 6 and 36.

<sup>18</sup> *Ibid.*, 32.

<sup>19</sup> *Ibid.*, 36.

<sup>20</sup> *Ibid.*, 34.

waiting lists, were more likely to be offered lower-quality housing and were segregated into specific estates around the centre of the town.<sup>21</sup> Poor housing and neighbourhoods leads to poor health facilities and inadequate social Islamic finance in the UK.

Britain has been familiar with Islamic financial market concepts in wholesales and high-net-worth investors since the 1980s, but major growth has only been witnessed during the last 5 years.<sup>22</sup> Retail products in Islamic finance only appeared in the UK markets during the 1990s. The uncompetitive nature of such financial products and the inability to secure Government regulations, which renders these practices unprotected compared to other conventional products, causes these services to be unpopular and slow-growing amenities.<sup>23</sup>

Recently, tremendous changes have taken place within Islamic finance in Britain, both in wholesale and retail. Both the Government and private sector have expressed much more concern about the development of Islamic finance. London has been seen as a centre for the Islamic finance market. Some reasons for the rapid growth of Islamic finance are, i.e., the global expansion of Islamic finance, markets and skills base, Islamic windows, excess liquidity in the Middle East, public policy and taxation, and a single financial regulator.<sup>24</sup>

In recognizing its potential input and development, UK financial regulators such as the Bank of England and, since 1998, the FSA have begun paying more serious attention to Islamic Finance.<sup>25</sup> In 1995, Lord Edward George, then Governor of the Bank of England, gave a significant lecture at the Conference on Islamic Finance organized by the Islamic Foundation in London. In his speech, Lord George recognized the potentiality of Islamic finance in the global economy and the need to integrate it into the context of London's tradition of "competitive innovation".<sup>26</sup> This remark was first translated into practice in 2001 when a high-level working group chaired by Lord George was established to identify the obstacles facing Islamic

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<sup>21</sup> Ahamed *et al.*, *supra* note 4, 37.

<sup>22</sup> Michael Ainley, Ali Mashayekhi, Robert Hicks, Arshadur Rahman and Ali Ravalia, *Islamic Finance in the UK: Regulation and Challenges*, Financial Services Authority, 9 November 2007; at: [www.fsa.gov.uk/pubs/other/islamic\\_finance.pdf](http://www.fsa.gov.uk/pubs/other/islamic_finance.pdf) (last accessed 26/07/09 at 09:04).

<sup>23</sup> *Ibid.*, 6.

<sup>24</sup> *Ibid.*, 189-192.

<sup>25</sup> *Ibid.*, 8-10.

<sup>26</sup> *Ibid.*, 8.

finance in Britain, one issue of which is the double stamp duty put on Islamic mortgages.<sup>27</sup> In August 2004, the FSA authorized the Islamic Bank of Britain (IBB) as the first entirely Islamic retail bank in the country.<sup>28</sup>

#### 1.4. *Islamic Home Finance Products in Britain*

Home financing in the UK is seen as the way to give citizens an opportunity to climb the ladder towards home ownership. Thus, it is aimed at boosting their chances to have future 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”.<sup>29</sup>

There are three major Islamic mortgage products in the UK which claim to be Shari’ah-compliant contracts: namely, *murābahah*, *’ijārah wa iqtinā’*, and *mushārakah mutanaqqisah*.<sup>30</sup> *Murābahah* can generally be described as the sale of an item at a disclosed profit margin.<sup>31</sup> In the realm of mortgages, *murābahah* is implemented as follows. A prospective home buyer will approach a bank to buy from a seller a house that he desires for a price agreed upon with the bank. The bank will immediately resell it to the customer at an agreed profit margin above the price of the house. The home buyer will pay for the property in instalments over an agreed period of years and mortgage the property to the bank in order to secure the instalments that are due.<sup>32</sup>

*’Ijārah* in Islamic jurisprudence is the rental/lease of an item, the orientation of which is towards profit. *’Ijārah wa iqtinā’/muntaha bi tamlīk* is

<sup>27</sup> *Ibid.*, 10-12.

<sup>28</sup> *Ibid.*, 14.

<sup>29</sup> Masood *et al.*, *supra* note 1 at 370.

<sup>30</sup> These three products are constantly being repackaged. Some merge *mushārakah* with *’ijārah* or brand *’ijārah* as lease ends with sale (*’ijārah al-muntaha bi tamlīk*). See Ainley *et al.*, *supra* note 22 at 20. *Istīṣnā’* (future manufacturing) is the product under which a bank finances the construction of a house, including the agreement that the individual wishing to buy it will indeed do so. See Hans Visser, *Islamic Finance: Principles and Practice* (UK: Edward Elgar Publishing Ltd., 2009) 112. However, as far as the author is aware, this product has not yet been explored as means to provide mortgages in the UK.

<sup>31</sup> Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Ribā and its Contemporary Interpretation* (Leiden-Boston: Brill, 1999) 76; Frank E. Vogel and Samuel L. Hayes, III, *Islamic Law and Finance, Religion, Risk, and Return* (Leiden: Brill, 2006) 182.

<sup>32</sup> Visser, *supra* note 30 at 107; Ainley *et al.*, *supra* note 22 at 20; Ainley *et al.* at: [www.iibu.com/buy\\_home/buyhome.htm](http://www.iibu.com/buy_home/buyhome.htm) (last accessed 24/07/09 at 19:30); see also, Timothy Edmonds, *Regulation of Financial Services (Land Transactions) Bill*, Research Paper 05/50, 17 June 2005-2006, Business and Transport Section, House of Commons, 18.

the rental of an item, which is ultimately sold to the client. In the case of *'ijārah wa iqtinā'*, home financing is implemented when the bank purchases property for a client at an agreed price, first rents and thereafter sells it to the client at the end of a defined period of years at the price originally agreed upon when drawing up the contract. The client's monthly payments to the bank will be twofold: one to pay the rent and the other to be held by the bank as assurance that the client will be financially able to purchase the property at the end of the rental period.<sup>33</sup>

*Mushārakah mutanaqisah* is a method of diminishing partnership utilized by financier and home buyer alike, both entering into an agreement by which the bank buys the house with its greater capital, while the home buyer adds some share of the amount, from 10%. At the same time, the home buyer will enter another agreement with the financier to rent the property. The money he pays to the financier has a twofold purpose: one portion will pay his rent and another part will serve as amortization towards buying more shares from the financier. In the course of time, the financier's share in the house will diminish while that of the home buyer will increase. In the end, the home buyer will hold all the shares and eventually become the sole owner of the property.<sup>34</sup>

The three models may sound straightforward in principle but there are observations, reservations and argumentations to be made on their legality/*ḥalālity* under Islamic law. Before proceeding, it is pertinent to mention that these three models are not equally practised in Britain. In fact, some products are more attractive than others, depending on how the financier packages the product.

*Murābahah* and *'ijārah mutanaqisah* products are provided by one of the longest-established banks in Britain, the Ahli United Bank (AUBUK), formerly known as the United Bank of Kuwait.<sup>35</sup> One major criticism of *murābahah* products is that the profit margin is calculated using the LIBRO (London Inter-Bank Offered Rate) or other conventional systems for the present value of the future interest payments. This causes Muslims to be sceptical and question whether the product is purely Islamic. Economically, *murābahah* does not enjoy the facility afforded conventional mortgages in the sense that interest payments on home finance are not

<sup>33</sup> Visser, *supra* note 30, 109.

<sup>34</sup> *Ibid.*, 111.

<sup>35</sup> Edmonds, *supra* note 32 at 18; *ibid.*, 107-109.

income-tax deductible.<sup>36</sup> It is also observed that, although the transaction is straightforward, it is costly in the sense that it requires two transfers of property. Initially, two stamp duties were imposed on any *murābahah* product, but this has since been rectified. It is not surprising when some financiers decided to switch to another product.<sup>37</sup>

For *'ijārah wa iqtinā'*, the lease payment is geared towards an interest rate and LIBOR is used as benchmark. Because the AUBUK reviews monthly payments each year, this casts a shadow of uncertainty on the product which might be considered *gharar*. Moreover, if the home owner, who bears the financial risk of a drop in the housing market, can no longer afford to make monthly payments, then the house will be sold by the financier.<sup>38</sup> By and large, *'ijārah wa iqtinā'*, as it is now practised, cannot be considered Shari'ah-compliant as it is neither sale nor rent but rather a mixture between the two which indulges *gharar*.<sup>39</sup> In addition, this product is costly in the sense that it involves two sale transactions and two transfers of ownership. However, it is deemed suitable and more attractive from the financier's perspective because, since 2004, it enjoys the added security of being regulated by the FSA alongside conventional mortgages.<sup>40</sup>

*Mushārahah mutanaqisah* might have offered the best and most straightforward product which could have been 100% Shari'ah-compliant, were it not that the capital to buy the property in the first instance comes from interest-oriented shareholders (i.e., the financier). Also, *mushārahah mutanaqisah* is not offered on its own but rather in combination with *'ijārah*.<sup>41</sup> In the case of the Al-Buraq *mushārahah mutanaqisah* scheme in the UK, the bank purchases the client's home property using its own capital 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 bank and client so as to reflect the ratio of their contributions to the purchase price. The client then lives on the property as a tenant and

<sup>36</sup> Visser, *ibid.*, 107.

<sup>37</sup> *Ibid.*, 107-109.

<sup>38</sup> [http://www.iibu.com/buy\\_home/ijarahow.aspx](http://www.iibu.com/buy_home/ijarahow.aspx) viewed last 29/09/09 at 12.10 pm; see also Visser, *supra* note 30 at 110.

<sup>39</sup> Visser, *ibid.*, 110; Tarek el-Diwany (2003) at: [www.isnacanada.com/chc.htm](http://www.isnacanada.com/chc.htm).

<sup>40</sup> Ainley *et al.*, *supra* note 22 at 20; Visser, *ibid.*, 110.

<sup>41</sup> Therefore, the second product is no longer practicable since it can be embedded into *mushārahah*. No wonder that some financiers are now switching from *'ijārah* to *mushārahah*.

pays rent to the bank, the amount of which is adjusted to reflect that the client is part-owner with a beneficial interest in the property. In addition to paying rent, over time the client buys the bank's beneficial interest in the property and eventually becomes full owner of that interest. At this stage, when the client no longer owes rent, ownership is formally transferred to the client's name at the Land Registry. One should note that in some other diminishing partnership contracts, the property is held by the financier in trust for itself and for the client.<sup>42</sup>

### 1.5. *Mortgage Dilemma for Muslims in the UK*

Since 31 October 2004, the *murābahah* product has been defined as a mortgage contract regulated by the FSA.<sup>43</sup> However, the *'ijārah* product falls outside the scope of FSA mortgage regulations. It has been strongly suggested that it may be embedded in one of a number of definitions of a reversion plan.<sup>44</sup> Timothy observes that "mortgage loans, whether structured as endowment policies or repayment mortgages, also have the repayment of interest at their heart".<sup>45</sup> As such, this does not comply with Islamic law. Thus, Muslims in Britain face a dilemma in the sense that they are left with two options: i.e., either using a financial product which they find offensive to their religious principles, or choosing an alternate, more Shari'ah-compliant arrangement, although not 100% compliant according to the dictates of Islam.<sup>46</sup>

Apart from obstacles imposed by Islamic jurisprudence, many governmental legislative constraints also complicate matters for Muslims. In his address at the Islamic Home Finance Seminar held in London in March 2003, Lord George, former Governor of the Bank of England, highlighted "some of the obstacles to the growth of Islamic mortgage finance":

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<sup>42</sup> Several other banks that are following suit and offering diminishing partnership in the UK are: United National Bank, HSBC, Lloyds TSB and the Islamic Bank of Britain. Although HSBC has been offering Islamic home finance in accordance with *'ijārah wa iqtinā'* principles, this has changed to *mushārahah mutanaqqisah* in recent times. See Haitham al-Haddad and Tarek el-Diwany, "The Islamic Mortgage: Paradigm Shift or Trojan Horse?" (2006) at: [http://www.islamic-finance.com/Islamic\\_mortgages.pdf](http://www.islamic-finance.com/Islamic_mortgages.pdf), 2.

<sup>43</sup> Edmonds, *supra* note 32 at 20.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, 19.

<sup>46</sup> *Ibid.*, 18.

- (1) Stamp duty because of the nature of the transaction, involving initial ownership by the financier, stamp duty may need to be paid twice (or even more frequently if the financier changes) or at a higher rate than for a conventional mortgage;
- (2) Higher regulatory capital charges where conventional mortgages—and indeed *murābahah* mortgages—attract a capital risk weighting of 50%, some Islamic mortgages—*ijārah*—attract a higher rate of 100%.
- (3) Disadvantages under various public sector home ownership schemes—such as Right to Buy or Rent to Mortgage where, because of the involvement of the financier as the owner of the property, the purchaser may be unable to take advantage of the benefits offered under the schemes.
- (4) Disadvantages in terms of the cost of housing element of income-support or income-based job seekers Allowances compared with that which applies in the case of a conventional mortgage, with that cost element based upon interest rates on conventional mortgages.

The question also arises regarding legal costs. It remains unclear, in the case of an Islamic product, whether a single solicitor can advise both the financier and home buyer because of the financier's role in ownership of the property.<sup>47</sup>

## 2. Role of Islamic Legal Maxims in the Mortgage Dilemma of Muslims in Britain

Islamic legal maxims are one of the sciences in Islamic jurisprudence which aphoristically subsume all the spectrums of Islamic Shari'ah law. The subject matter is defined as "statements of principles that are derived from the detailed reading of the rules of *fiqh* on various themes".<sup>48</sup> Islamic scholars

<sup>47</sup> Sir Edward George, Speech to Islamic Home Finance Seminar, London, 27 March 2003, quoted in Edmonds, *supra* note 32 at 19.

<sup>48</sup> Muhammad Hashim Kamali, "Qawā'id al-Fiqh: The legal maxims of Islamic law", *Journal of the Association of Muslim Lawyers*, 3(2) (October 1998) at: [www.aml.org.uk/journal/](http://www.aml.org.uk/journal/) (last viewed 21/06/2006 14:03) 1; cf. Mawil Izz Dein, *Islamic Law: From Historical Foundations to Contemporary Practice* (Notre Dame, IN: University of Notre Dame Press, 2004) 113-114; Mustafa Ahmad al-Zarqā, *Al-Madkhal al-Fiqhī al-'Amm*, Vol. 2, 7th edn. (Damascus: Matba'ah Jami'ah, 1983/1383) 933.

have agreed upon five basic Islamic legal maxims as tenets upon which Islamic law is based. Each of these five legal maxims has several sub-maxims which function either as exegeses to the grand maxim or provide conditions and restriction to it. These five legal maxims are: (1) the role intention plays in Muslim actions (*al-'umūr bi maqāṣidihā*); (2) the evaluation of certainty and doubt in evidence (*al-yaqīn lā yazūl bi l-shakk*); (3) the facility guaranteed in the face of hardship (*al-mashaqqah tajlib al-taysīr*); (4) Islamic law's preference in eliminating harm (*al-darar yuzāl*); and (5) the *locus standi* of custom (*al-'ādah muḥakkamah*).<sup>49</sup>

Each of these maxims will be dealt with in relation to financial transactions in Islamic law, specifically home finance products. By and large, these maxims will be studied with regard to transactions from the overall objectives of Islamic law and suggestions will be given on whether existing mortgage products, be they conventional or acclaimed Islamic, are worthy of acquisition by Muslims in Britain, based on the circumstances under which they are living.

### 2.1. Maxim of Intention and Action

In Islamic law, intention is an important criterion for determining whether an action is lawful or unlawful.<sup>50</sup> The Islamic legal maxim coded to deal with intentionality in action is *al-'umūr bi maqāṣidā* ("Actions are considered together with their intentions").<sup>51</sup> This is one of the five basic legal maxims agreed upon by Islamic scholars because of its consistency with and relevance to Islamic jurisprudence. It implies that any action, whether physical or verbal, should be interpreted according to the individual's intention. Islamic jurists have provided much textual evidence to justify the legality of this maxim. The most authentic direct evidence is the Ḥadīth reported by many traditionalists, particularly Al-Bukhārī and Muslim, in

<sup>49</sup> Abdul Rahman al-Suyūṭī, *Al-Ashbah wa l-Nazā'ir* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1983/1403); Zayn al-Abidin Ibn Nujaym, *Al-Ashbah wa l-Nazā'ir 'alā Madhhab Abī Ḥanīfah al-Nu'man* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1993/1413); Muhammad Siddiq al-Burnu, *Al-Wājiz fī 'Idah Qawā'id al-Fiqhiyyah al-Kullīyyah*, 5th edn. (Beirut: Muḥassasah al-Risalah, 2002/1422); Mustafa Ahmad al-Zarqā, *Sharh al-Qawā'id al-Fiqhiyyah*, 2nd edn., (Damascus: Dār al-Qalam, 1989/1389).

<sup>50</sup> Sobhi Rajab Muhamassani, *Falsafat al-Tashrī' fī l-Islam (The Philosophy of Jurisprudence in Islam)*, (trans.) Farhat J. Ziadeh) (Kuala Lumpur: The Open Press, 2000) 160.

<sup>51</sup> Al-Suyūṭī, *supra* note 49 at 8; Ibn Nujaym, *supra* note 49 at 27; Ahmad al-Hamawī, *Ghamz 'Uyūn al-Basair Sharh al-Ashbah wa Nazā'ir*, Vol. 1 (Beirut: Dār al-Kutub al-'Ilmiyyah, 1985/1405) 37.

which the Prophet is reported to have said: "Actions are judged according to intentions".<sup>52</sup>

This maxim relates to matters where the legal ruling is based on both action and intention. Conversely, within the Islamic legal framework, some rulings can be established only considering intention, such as willingness to perform ritual duties, which in fact implies that intention can be considered without the involvement of action. However, in most cases or as a fundamental principle, the essence of intention is ostensibly effective when coupled with action. Al-Sarakhsī (d. 483/1090) emphasizes that "*al-aṣl 'anna l-niyyah idhā tajarrad 'an al-'amal lā takun mu'aththirah [fī l-'umūr al-duniyawīyah]*" ("Fundamentally there is no effect for intention devoid from act [in worldly matters]).<sup>53</sup> This is because intention is not being overtly expressed or physically executed and it is applicable to mundane matters.<sup>54</sup> Thus, if an action is coupled with intention, that act will be judged with regard to its intention.

Unlike ritual practices where intention is paramount to the validity of the action, in *mu'amalah* (Islamic commercial transaction), intentions are considered essentially to exist and regulate other elements of action,<sup>55</sup> because Islamic transactions are not originally meant to invoke ritual behaviour but rather "to bring a religious evaluation system to bear on ordinary life."<sup>56</sup>

Much has been written about the importance of intention in Islamic transactions in general and in commercial exchange in particular. Baber Johansen has discussed in great detail the effects of Islamic transactions. His work elusively exposes the importance accorded to action in Islamic 'commercial transactions' as opposed to 'social transactions'. As Baber explains, in the latter, the risk is significant in terms of social disruption if intention has to play a vital role and firm decisions have to be made while in the former they do not.<sup>57</sup>

<sup>52</sup> Al-Bukhārī, *Ṣaḥīḥ Bukhārī*, Ḥadīth No. 1; Muslim, *Ṣaḥīḥ Muslim*, Ḥadīth No. 1599.

<sup>53</sup> Al-Sarkhasī, *Al-Mabsut*, Vol. 1 (Beirut: Dār al-Ma'rifah, n.d.) 239.

<sup>54</sup> Muhammad Siddiq Al-Burnu, *Mawsu'at al-Qawā'id al-Fiqhiyyah*, Vol. 1 (n.p., 1416 H) 159.

<sup>55</sup> Paul R. Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunni Fiqh*, (Leiden: Brill, 2006) 97-98.

<sup>56</sup> *Ibid.*, 97; cf. Baber Johansen, "Valorization of the Human Body in Muslim Sunni Law", in: J.J.S. Devin, Baber Johansen and Amy Singer (Eds.), *Law and Society in Islam* (Princeton: Markus Wiener, 1996), 71.

<sup>57</sup> *Ibid.*, 71-93.

Discussions on the Islamic legal maxim involving intention centre around financial mortgages and the maxim's legal effect on contractual agreements: i.e., intention and the meaning stipulated in the agreement or the wording expressed in the agreement? Because Islamic scholars hold differing opinions, as a result the legal maxim invoked to deal with the matter also varies. Ḥanbalī, Mālikī and Ḥanafī jurisprudence say that effect is given to intention and the meaning in a contractual agreement, not only the wording and formation of expressions. Whereas, Ḥanafī<sup>58</sup> and Al-Shāfi'ī scholars add a question mark to emphasize that the principle is not always applicable.<sup>59</sup> Thus, the maxim coined thus : *Hal-l-'ibrah fi l-'uqūd bi l-maqāsid wa l-mā'ānī aw li l-alfadh wa l-mabānī* ("In a contract, should effect be given to intentions and meanings or the words and forms").<sup>60</sup>

Ibn Qayyim al-Jawziyyah (d. 1350 CE), a Ḥanbalī jurist, is thus quoted:

Should the law take into account only the manifest meaning of expressions and contracts even when the purposes and intents (*al-maqāsid wa l-niyāt*) appear to be otherwise? Or do aims and intents (*al-quṣūd wa l-niyāt*) have an effect which requires paying attention to them and taking them into consideration? The evidence of the Law (*'adillāt al-shar'*) and its rules concur that intentions in a contract determine whether the contract is legal or illegal.<sup>61</sup>

<sup>58</sup> Especially Abū Ḥanifah, as opposed to his two companions: Abū Yusuf (d. 767) and Al-Shaybanī (d. 804). The two uphold the Mālikī and Ḥanbalī viewpoints. See Al-Kasani, *Badā'i*, Vol. 4, 190, and Vol. 5, 169, quoted in: Oussama Arabi, (200-223) "Intention and Method in Sanhuri's Fiqh: Cause as Ulterior Motive", *Journal of Islamic Law and Society*, 4(2) (1997) 213-214.

<sup>59</sup> Al-Suyūṭī, *supra* note 49 at 166; Al-Zarkashi, *Al-Manthur fi l-Qawā'id*, Vol. 2, 371; Ibn Rajab, *Al-Qawā'id*, Art. 38.

<sup>60</sup> This maxim is re-coined from the maxim: "*Al-'Ibrah fi l-'Uqūd bi l-maqāsid wa l-mā'ānī lā bi l-alfadh wa l-mabānī*" ("effect is given to intentions and meaning in contracts, not words and forms") as agreed upon by Ḥanafī and Mālikī (see Ibn Nujaym, *supra* note 49 at 207; *Al-Majallah*, Art. 3) as opposed to the view of Shāfi'ī and Ḥanbalī which opines differently depending on the matter at hand. At times emphasis is on the meaning while at other times on the word. See Al-Ramali, *Nihayah al-Muhtaj*, Vol. 6 (Beirut: Dār al-Fikr, 1984/1404) 242; Al-Buhuti, *Kashshaf al-Qina*, Vol. 3 (Beirut: Dār al-Fikr, 1402) 446. My opinion inclines to separation between issues when applying this maxim since there is no uniqueness in the forms that different issues take.

<sup>61</sup> Ibn Qayyim al-Jawziyya, *Ilam al-Muwaqqi' in 'an Rabb al-'Alāmin*, Vol. 3 (Cairo: Al-Muniriya Press) 96-98; O. Arabi, *supra* note 58, 218.

From Ibn Qayyim's assertion, any intent that contradicts the tenet of the law should be pronounced null and void. Thus, he exemplifies:

If one sells a weapon to someone whom he knows will use it to kill a Muslim; then the sale is forbidden and invalid as it promotes crime and aggression; however, the sale is valid if he sells the weapon to someone engaged in holy war in Allāh's way.<sup>62</sup>

Ḥanafī and Al-Shāfi'ī scholars opine that legal procedure is given more consideration than hidden motives. According to Imām Al-Shāfi'ī in his 'magnum opus', regarding the legality of hidden motives:

The principle I follow is that any contract which is valid appearance, I do not nullify on the grounds of suspecting the parties: I validate it by the validity of its appearance; I take their intention to be reprehensible, if—were it made explicit—that intention would invalidate the sale. Thus I reprehend the purchase of the sword by a man if he plans to kill with it. Yet its sale by the vendor to the man who kills unjustly with it is not prohibited.<sup>63</sup>

While the two contrasting views are unanimous on the invalidity of a contract in which intention explicitly contradicts the Islamic law, Ḥanafī and Al-Shāfi'ī jurists are more ready "to inquire into the real intentions of the parties as long as the explicit terms of the contract are formally within the bounds of the law."<sup>64</sup> Mālikī and Ḥanbalī points of view incline towards the ethical moral responsibility of contracting parties. Little wonder that the two schools oppose the use of *hiyah* (legal stratagems) that ostensibly violate the spirit of the law.<sup>65</sup> Thus, if one intends to practice usury (*ribā*) by means of a sale contract, then he has committed usury from which the forms of sale (*surāt al-bay'*) does not absolve him.<sup>66</sup>

The maxim in question forms the basis for the argument that in contractual agreements the parties' intended meanings may possibly differ. More specifically, in today's relevant practices, a devout Muslim who intends to own a house in which to live and raise his family in a noble and Islamic environment may find himself in a system where the conventional usage of expression contradicts his faith. In other words, the form and

<sup>62</sup> Ibn Qayyim, *ibid.*, 96-98.

<sup>63</sup> Al-Shāfi'ī, *Al-Umm*, Vol. 3, 65, quoted by Sanhur, *Masdar*, Vol. 4, 57-58; Arabi, *supra* note 58, 212.

<sup>64</sup> Arabi, *ibid.*, 215.

<sup>65</sup> *Ibid.*, 220.

<sup>66</sup> Ibn Qayyim, *supra* note 61 at 98; Arabi, *ibid.*, 220.

expressions in a bank's contractual agreement may be ignored or re-interpreted to create a legitimate meaning in accordance to Islamic law.

The dilemma in this assertion, however, lies in the fact that the bank does not own a house to sell. How can it profit from something that it does not possess in light of the Ḥadīth that unequivocally denounces such a practice: *lā tabī' mā laysa indak* ("Sell not what is not with you").<sup>67</sup> Furthermore, another question related to the above suggestion regards the use of 'interest' that has become a conventional meaning denoting usury which is forbidden under Islamic law. It has already been mentioned but will be discussed later how the word 'interest' replaced 'usury' which has from the beginning been prohibited in Islam. Nevertheless, if the word 'interest' has become conventional and the product offered which includes interest is purely Islamic, should it still be prohibited? Fundamentally, the effect of an utterance is based on the intended meaning of the speaker in any matter. However, because of the broad scope of *mu'āmalah* in Islamic jurisprudence and the flexible rules accorded it to consolidate practices down through the generations, the majority of Islamic scholars, including Ḥanafī, Mālikī and some Al-Shāfi'ī and Ḥanbalī versions, agreed that effect is given to the intended meaning, not to the form and expression in which the contract is drawn up. For example, if Mr. A buys property from Mr. B and says to him "take this item as a trust until I return to pay for the property" then that item will be considered as *rahn* (mortgage). Thus the word 'trust' will be disregarded as the intended meaning of the depositor of the item is to render something as security for the property he bought.

In conventional and Islamic mortgages, if the agreement is based on *murābahah* or *bay' mu'ajjal* (deferred sale), the bank or financier has the right to repossess the property if the buyer defaults. However, today Western banks have gone a step further. Banks sell money, not property. Moreover, they add interest to the money they lend out which is considered usury in Islam. The fact of the matter is, however, that a Muslim borrower may equate the money which the bank loans him/her as property under the pretext of his/her intentionality; the added interest can then be seen as profit the bank makes upon selling the property to him at a higher price.

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<sup>67</sup> This ḥadīth is reported by Abu Dawūd in Sunan ḥadīth no. 3503, see Muhammad Hashim Kamali, *Islamic Commercial Law: An Analysis of Futures and Options*, (Cambridge: The Islamic Text Society, 2003) 112. There are different interpretations of this Ḥadīth (see pp. 112-115).

From the above, one can deduce that when a Muslim hides his/her intention by construing the term ‘interest’ to mean ‘profit’ in a mortgage contract, be it conventional or Islamic, this act will be considered morally reprehensible to adherents of Mālikī, Ḥanbalī and Ḥanafī schools while perhaps acceptable to those advocating Al-Shāfi‘ī, and Abū Ḥanifa views. This may suggest that, because there is disagreement rather than consensus about a contract’s legality when devoid of explicit intention, the door remains ajar for further dialogue on the issue of contemporary mortgages and their legality.

## 2.2. Maxim of Certainty and Doubt

Another vibrant mechanism for evaluating the legality of current mortgage practices is to study whether the mortgage system creates certainty or uncertainty. The second basic legal maxim called upon to do this is *al-yaqīn lā yazūl bi l-shakk* (“certainty cannot be repelled with doubt”).<sup>68</sup> According to Al-Zarqā: “the importance of this maxim is unlimited because there is no part of *fiqh* to which it is not applicable”.<sup>69</sup> What is certain in Islamic commercial law is the presumption of legality and permissibility of trading: i.e. *al-aṣl fī l-buy‘ mu‘āmalāt al-hill wa l-hibah*<sup>70</sup> which can be inferred from Qur’ānic verse 2:18 in which Allāh says: “*wa aḥall Allāh al-bay‘* (“... and Allāh makes the sale lawful”)”.

In *mu‘āmalāh*, it is certain that a sale in any form is lawful. In other words, the fundamental principle of trading is its lawfulness: *al-aṣl fī l-bay‘ al-hill*. As the scope of commercial transactions broadens, the general ruling is permissibility except where texts clearly declare otherwise. Other than that nothing in them is forbidden. Ibn Taymiyyah contends that “Allāh Most High never prohibited a contract which is beneficial to Muslims and does not inflict harm upon them.”<sup>71</sup> This inevitably includes substantial mortgage contracts, money exchange and money transfer, if devoid of any malpractice.<sup>72</sup> In support of the fundamental legality of business

<sup>68</sup> Al-Suyūṭī, *supra* note 49 at 55; Ibn Nujaym, *supra* note 49 at 59; *Al-Majallah*, Art. 4; Al-Zarqā, *supra* note 49 at 79; Al-Zarqā, *supra* note 48 at 574; Al-Burnu, *supra* note 49 at 166.

<sup>69</sup> Al-Zarqā, *supra* note 49 at 78-80.

<sup>70</sup> Kamali, *supra* note 67 at 66-67.

<sup>71</sup> *Ibid.*, quoting from Ibn Taymiyyah, Taqī al-Dīn, *Nazariyyah al-‘Aqd* (Beirut: Dār al-Ma‘rifah, 1317 AH), 226.

<sup>72</sup> *Ibid.*, at 66-70.

transactions in Islam, the maxim of freedom of liability or *al-aṣl barā l-dhimmah* (“The fundamental principle is freedom of liability”)<sup>73</sup> and *al-aṣal-‘adam* (“The fundamental principle is non-existence of something”)<sup>74</sup> are cited by jurists. The bases for all these maxims can be inferred from many verses in the Qur’ān and Ḥadīth of the Prophet. The Qur’ān thus states: “We have subjugated to you all that is in the heavens and the earth” (Q45:13); “He it is who created for you all that is on the earth” (Q2:29); “Allāh has explained to you in detail what is forbidden to you unless you are compelled to it (Q6:119); etc. These and other verses are clear injunctions that fundamentally state that all that Allāh created for human beings for social utilities are lawful. Allāh Most High further declares explicitly what is prohibited and that it “needs to be clear and specific”.<sup>75</sup>

Having said that, the reasons current mortgage contracts are branded un-Islamic subsumes in the way and manner they are being conducted. In other words, here the margin of *ḥarāmīy* is the interest added to money borrowed by the person taking out a mortgage. El-Diwany gives some reasons why the system, even Islamic finance, is not Islamic. His observations can be summarized thus:

- Islamic mortgage rates are fixed just like in conventional mortgages.
- Banks are regulated not to lose money on the deal in case the Beneficiary defaults.
- Islamic financial banks mix systems, using conventional products with the hope of Islamising them although nothing has changed “over 40 years”.
- Fixing financial rates of return in advance using the Islamic triple contract.<sup>76</sup>

In addition to El-Diwany’s observations, another problem exists because banks that offer such divergent modified forms of Islamic home financing usually borrow (at interest on the money market) the money they use to purchase the property in the first leg of the *murābahah* transaction, which indeed is prohibited under Islamic law. Moreover, the profit rate is pre-

<sup>73</sup> Al-Suyūṭī, *supra* note 49 at 52; Ibn Nujaym, *supra* note 49 at 59; *Al-Majallah*, Art. 8.

<sup>74</sup> Al-Zarqā, *supra* note 49 at 107-100.

<sup>75</sup> Kamali, *supra* note 67 at 67; Mohammad al-Bashir Muhammad al-Amine, “*Istiṣnā’* and its application in Islamic Banking”, *Arab Law Quarterly*, 16(1) (2001) 27.

<sup>76</sup> Tarek el-Diwany, “Islamic banking isn’t Islamic” at: [http://www.islamic-finance.com/item100\\_f.htm](http://www.islamic-finance.com/item100_f.htm) (last accessed 23/03/2010 at 16:15).

determined.<sup>77</sup> But one must ask the question if *ḥarām* (i.e., interest paid by the bank to finance the property) and *ḥalāl* (i.e., gain that the home-buyer will derive from the property) collide, which of the two will supersede? The majority of Islamic scholars opine that the aspect of *ḥarām* (prohibited) will supersede as the maxim states: *idhā ijtama' al-ḥalāl wa l-ḥarām gullib al-ḥarām*.<sup>78</sup> According to Al-Sarakhsī: *al-akhdh bi l-iḥṭiyāt fi l-ribā wājib* (“Inclining to preclusion in *ribā* is obligatory”).<sup>79</sup>

Another uncertainty in current Islamic mortgages can be found in the IBB products *'ijārah* and *'ijārah wa mushārakah mutanaqqisah*. On its website, after welcoming clients and introducing its alleged Islamic products, the IBB states conditions and rules which place the *ḥalālity* of product under scrutiny.<sup>80</sup> One can infer from IBB's *'ijārah* or Home Purchase Plan that the bank is still using conventional norms which creates a dilemma for Muslims who are conscious of their faith.

All in all, while there are ambiguities in the *ḥalālity* of the present mortgage products, there is need for flexibility in dealing with the current financial sector, especially home finance, when it comes to the needs of the Muslims living in the West. This hypothesis is subsumed under the pretext of the maxim that will be detailed below.

### 2.3. Maxim of Hardship and Facility

To some extent the pretext of hardship or necessity, if anything, can be used convincingly to justify current mortgage products either under conventional or purported Islamic financiers. The issue of necessity to have a mortgage results from compassionate considerations regarding Muslims living in a non-conducive environment. A survey of Muslims dwelling in rented or council houses shows that the level of juvenile delinquency is higher than in areas where inhabitants are home owners.<sup>81</sup> This fact introduces a concern for how Islam requires Muslims to raise their offspring. Without

<sup>77</sup> Rodney Wilson, *Islamic Finance in Europe*, MUSMIN, RSCS Policy Papers, 2 (2007) 16.

<sup>78</sup> Al-Zarkashi, Vol. 1, *supra* note 59 at 15; Al-Suyūṭī, *supra* note 49 at 105; Ibn Nujaym, *supra* note 49 at 109.

<sup>79</sup> Al-Burnu, *supra* note 54 at 201.

<sup>80</sup> See: <http://www.islamic-bank.com/islamicbanklive/HomeFinance/1/Home/1/Home.jsp> (last accessed 24/03/2010 at 20:45). Among its astonishing conditions are the right of the bank to change the margin on any of its products after the contract has been completed and the statement that the home is at risk should the client fail to pay the fees due.

<sup>81</sup> The 2011 National Census may suggest an improvement but the result has not yet been published.

doubt, protecting and raising offspring well is one of the five fundamental necessities of life.

Many maxims are related to the issue of necessity in Islamic transactions. One of the basic legal maxims upon which many others are founded is *al-mashaqqah tajlib al-taysir* (“Hardship begets facility”).<sup>82</sup> This maxim is used as a legal concession for any recognized hardship in Islamic law and thus serves to lessen and remove people’s burdens.<sup>83</sup> The legality of this maxim, and its subdivisions, is based on the overall objectives of Islamic law extrapolated from various textual evidence.<sup>84</sup> 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.”<sup>85</sup>

The relevance of this and such maxims to Islamic transactions in general and to Islamic and conventional mortgages in particular lies in the fact that, even where the prohibition of *ribā* is clearly evident, one can assert that Muslims in Britain face difficulties in settling in an ideal environment suitable for raising model, exemplary families. Thus, they have religious concession to breach the dictates of the text calling for the protection and prevention of their *ḍarūriyyah al-khamsah* (five necessities).

Al-Suyūṭī puts forward seven reasons for which facility and legal concessions are given, among others, *al-usr wa ‘umūm al-balwa* (“difficulty and general calamity”).<sup>86</sup> From this one can argue that it is impossible to avoid *ribā* if one wants to own a home, particularly in the Western world, either using conventional or Islamic ways to finance. Apart from what has been explained above, money used either by Islamic or conventional banks is provided through an interest-based system, with the calculated profit margin based on the market’s rate of interest. Kamali argues “that people (of this generation) are in greater need of *taysir* [...] than ever before”.<sup>87</sup> As Kamali explains, conditions in modern society are so overwhelming in the sense that people are lured into the temptation to sin. Therefore, the Islamic provision for the concession to alleviate hardship becomes utterly

<sup>82</sup> Al-Suyūṭī, *supra* note 49 at 76; Ibn Nujaym, *supra* note 49 at 74; Al-Zarkashi, Vol. 3, *supra* note 59 at 169; Al-Zarqā, *supra* note 49 at 157; *supra* note 50 at 152.

<sup>83</sup> Ibn Nujaym, *supra* note 49 at 85; Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3rd edn. (Cambridge: The Islamic Texts Society, 2003), 436-454.

<sup>84</sup> See, among others, Qur’an 2:185, 22:78, 4:28, 5; 5:7, and 2:286.

<sup>85</sup> Al-Bukhārī, *supra* note 52, *Kitāb al-Imām*, Ḥadīth No. 39.

<sup>86</sup> Al-Suyūṭī, *supra* note 49 at 77.

<sup>87</sup> Kamali, *supra* note 67 at 71.

necessary to ease conditions.<sup>88</sup> Thus, giving provisions in the face of hardship and difficulty is of paramount importance.

Therefore one must proportionally and appropriately contend with this ambit of difficulties from within the spirit of Islamic law. A set principle in Islamic law says: *idhā dāqa l-amr ittasa' wa idhā ittasa' a dāqa* ("Whenever the circle of an affair narrows it is widened and whenever it widens it is narrowed").<sup>89</sup> The essence of this maxim is to place emphasis on the grand maxim while giving additional information on how to apply it. In summary one can say that where there is apparent *mashaqqah* (hardship), in any matter, there should also be a provision for it. As soon as *mashaqqah* disappears, the matter shall revert to its original rule. In other words, as Ahmad al-Zariqa (d. 1357) puts it, if necessity and hardship cause facility, the facility should be enjoyed until the condition changes; then one should revert to the normal rule.<sup>90</sup>

Although home purchase schemes, be they *musharakah mutanaqqisah*, *murabahah* or *'ijarah wa tamlīk*, are not purely Islamic as critics claim, they still serve the very purpose of Islamic law by offering, especially poor, people with limited initial capital the opportunity to own their homes. Thus, such schemes promote social welfare, and any such measure is considered as serving the *maṣlahah* and hence desirable.<sup>91</sup> According to Al-Ghazālī, "the very objectives of the Shari'ah are to promote the welfare of the people, which lies in safeguarding their faith, lives, intellect, posterity and wealth. Whatever ensures the safeguarding of these five [elements] serves public interest and is desirable".<sup>92</sup> But, is owning a home *maṣlahah*, or living under shelter? Is it permissible to use the concept *maṣlahah* for something which is not classified as a necessity? If mortgage in Britain is thought to promote the welfare of citizens, including the Muslim minority, as indeed it is, then we must explore how the concept *maṣlahah* can be used

<sup>88</sup> *Ibid.*

<sup>89</sup> Al-Suyūṭī, *supra* note 49 at 83; Ibn Nujaym, *supra* note 49 at 84; *Al-Majallah* mentioned first part of the maxim in Art. 18; Al-Zarqā, *supra* note 49 at 165; Al-Burnu, *supra* note 49 at 230.

<sup>90</sup> Al-Zarqā, *supra* note 49 at 163; Al-Burnu, *supra* note 49 at 230.

<sup>91</sup> Ahamad Kameel, Mydin Meera and Dzuljastri Abdul Razak, *Islamic Home Financing through Musharakah Mutanaqqisah and al-Bay' bi Thaman Ajil Contracts: A Comparative Analysis*, p. 19. At <http://www.isra.my/media-centre/downloads/summary/7/10.html> (last accessed: 11/05/2010).

<sup>92</sup> Ihya al-Ghazālī, quoted in Kameel *et al.*, *ibid.*, 19; see also Umer Chapra, *Islam and Economic Challenge*, Cambridge: The Islamic Foundation, 1992).

to justify the lesser evil of existing Islamic home purchase products since there is no alternative at the moment. However, such rules may not be admissible in other environments where other avenues are available to achieve *maṣlaḥah*.

Ahamed *et al.* stress that it is essential to own a home in which to dwell for the purpose of shelter: “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”.<sup>93</sup> From their assumption one can infer that Ahamed *et al.* place home ownership under the concept ‘necessity’ which could render lawful that which is unlawful. One could compassionately suggest that, since the overall objectives of Islamic law aim to protect the five fundamental principles of life, having any type of home planning (mortgage) would be highly recommended if not compulsory because, if a Muslim neglects these principles, the spirit of the Sharī‘ah will automatically decline.

Another question worth answering is whether having a house is a need or necessity. From the perspective of Islamic law, *al-ḥājah* (need) is considered *al-ḍarūrah* (necessity) as the maxim says: *al-ḥājah tunazzil manzila l-ḍarūrah ‘ammah kānat aw khassah* (“Need, whether of public or private nature, is considered as necessity”).<sup>94</sup> The meaning of *al-ḥājah* (need) is of a lesser degree than *al-ḍarūrah* (necessity). Strictly, what Islam aims to provide for humanity can be classified in three categories:

- (1) What is termed *al-ḍarūrah* (necessity). *Ḍarūrah* is a situation where a person’s life, dignity, religion, offspring, and property would be endangered if he/she refused to commit an unlawful act. For this reason, a person is allowed to violate the rules to protect those things.<sup>95</sup>
- (2) What is termed *al-ḥājah* (needs). This is a situation where a person could encounter difficulty or hardship if he/she does not commit an unlawful act, although his/her life will not be in danger. It is recommended that such difficulty be prevented by committing what is unlawful. According to Ibn Qayyim (d. 751 AH) in an attempt to

<sup>93</sup> Kameel *et al.*, *supra* note 90 at 2.

<sup>94</sup> Al-Suyūṭī, *supra* note 49 at 88; Ibn Nujaym, *supra* note 49 at 91; *Al-Majallah*, Art. 32; Al-Burnu, *supra* note 49 at 242.

<sup>95</sup> Ali Haydar, *Ḍurar al-Ḥukkām*, Vol. 1, 38.

draw a demarcation between *darūrah* and *hājah*, claims that *hājah* is what is prohibited as a preventive measure (*sadd al-dhārī*) and becomes permissible for public interest while what is prohibited with definite purpose can only be permissible by virtue of necessity.<sup>96</sup> However, according to the maxim in question, *hājah* is regarded as *darūrah* in some circumstances.<sup>97</sup>

- (3) What is termed *al-kamāliyyah* or *al-tahsīniyyah* (luxury). This is exemplified by a situation where a person seeks something excessive to maximize enjoyment of his own life.

The first and second categories concern rights protected and provided for by Islam. The third category, however, is beyond discussion. Thus, if one breaks the law in order to enhance one's own luxurious lifestyle, then he/she will be in transgression and violation of the rules of Allāh. Therefore, placing money in excess of the capital needed to mortgage a house can be considered a luxury and thus regarded as unlawful. However, extra money for essential things needed 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. Other maxims act as its check and balance. The maxim *al-darūrah tuqaddar bi qadrihah* ("Necessities are estimated according to their quantity")<sup>98</sup> is set as condition and restriction to regulate the use of the provision of facility in the case of necessity. As mentioned above, the Qur'ān has categorically stated that the only acceptable excuse for breaking rules is reasonable and genuine necessity: *ghayra bāghin wa lā 'ādin* ("without wilful disobedience, nor transgressing due limits").<sup>99</sup> Any facility given should be minimized to curb abusive use of the pretext necessity. Thus, the excess in having a mortgage in the conventional system renders the action unlawful. In other words, under the *ribā* system, a Muslim is not allowed to have more than one mortgage, which would surpass the ambit of necessity. However, if the mortgage is contracted according to Islamic principles, the number of houses one can own is unlimited since this is classified under lawful trading. For example, if the size of someone's family is too

<sup>96</sup> Ibn Qayyim, *supra* note 61 at 119.

<sup>97</sup> Cf. Al-Shatibi, *al-Muwafaqāt*, Vol. 2, 8; Al-Ghazālī, *Al-Mustasfa*, (2) 481; Al-Amidi, *Al-Iḥkām fī Uṣūl al-Aḥkām*, (3) 393-396; Al-Razī, *Al-Mahsul fī 'Ilm al-Uṣūl*, Vol. 2, 578.

<sup>98</sup> *Al-Majallah*, Art. 22; Al-Burnu, *supra* note 49 at 239.

<sup>99</sup> Cf. Qur'ān 2:173, 6:145, and 16:115.

large to fit into one apartment, then more housing can be sought as this falls under the realm of necessity.

The yardstick for determining the proportion of facility to be granted under the pretext necessity is the five necessities recognized by law: i.e., religion, life, dignity, offspring, and property and that which would be required to preserve them.<sup>100</sup> However, it is also worth noting that the amount taken from prohibited things to protect these five necessities is relative because what is deemed necessary sustenance in one situation may not be sufficient in another case.

#### 2.4. Maxim of Prohibition and Elimination of Harm

The fourth basic legal maxim is *al-darar yuzāl* (“Harm should be removed”).<sup>101</sup> This maxim is based primarily on the Ḥadīth of the Prophet (*lā ḍarar wa lā ḍirār*: “No injury/harm shall be inflicted or reciprocated”)<sup>102</sup> and the general extrapolation of many textual evidence that prohibit inflicting harm and seeking for its elimination, i.e., “...After payment of legacies and debts: So that no loss (harm) is caused (to anyone)”.<sup>103</sup>

It is reported that a man approached the Prophet complaining about another man who planted a tree on his land, causing harm to the owner of the land. The Prophet asked the man to take the landowner’s compensation for his tree or to give it to the landowner as a gift. When the man refused both options, the Prophet asked the landowner to destroy the tree, saying to the tree’s owner “you are harming someone”.<sup>104</sup>

In anticipating and preventing any *ḍarar* which might destroy a Muslim family, one fundamental principle of Islamic law says that one should seek and use any means within the ambit of Shari‘ah law to prevent the occurrence of *ḍarar*. The maxim put forward is *al-darar yudfā’ diqadar al-imbkān*

<sup>100</sup> See Al-Ghazālī, Vol. 1, *supra* note 97, 139-140; Muhammad Muslehuddin, *Philosophy of Islamic Law and the Orientalists*, 2nd edn. (Lahore, Pakistan: Islamic Publications Ltd., 1980) 163.

<sup>101</sup> Al-Suyūṭī, *supra* note 49 at 83; Ibn Nujaym, *supra* note 49 at 85.

<sup>102</sup> *Al-Majallāh*, Art. 19; Al-Suyūṭī, *supra* note 49 at 83; Ibn Nujaym, *supra* note 49 at 85.

<sup>103</sup> See Qur’ān 4:12, 4:5 and 2:233.

<sup>104</sup> Abū Dāwūd, *Sunān Abū Dāwūd* with Sharh, Vol. 15, 321-322; Ibn Taymiyyah, *Majmū’ al-Futawā*, Vol. 4, 47, and Vol. 28, 104; Muhammad Ibn Muflih, in: Abū Zahraha Hazim (Ed.), *Al-Furu’*, (Beirut: Dār al-Kutub al-‘Ilmiyyah 1418) (4) 219.

(“*Ḍarar* should be prevented as much as possible”)<sup>105</sup> because it is better to prevent than to cure harm. Although it is legally preferable to eliminate *Ḍarar* without causing any further *Ḍarar*, should that prove to be difficult, then harm must be proportionate.

Having said that, in the course of eliminating *Ḍarar* one important measure should be considered: i.e., the means of averting *Ḍarar* should not cause more *Ḍarar*. However, causing another *Ḍarar* can exceed or be equivalent to the present *Ḍarar*. The maxim *al-Ḍarar lā yuzāl bi mithlihi* (“Harm is not repelled by its like”)<sup>106</sup> emphasizes averting an equivalent *Ḍarar*. However, in the course of eliminating *Ḍarar*, it is expected that—in one way or another—more *Ḍarar* is likely to emerge. If both are harmful, one includes a higher degree of harm than the other. If both possess the same degree of evil or harm, then the doer is given the choice to select what is suitable for him, provided that no other people’s rights are affected. However, if one of the two is lesser than the other, the lesser *Ḍarar* should be committed to avoid greater *Ḍarar* as the next maxim will demonstrate.<sup>107</sup> The maxims that address this issue are coined *al-Ḍarar al-ashadd yuzāl bi l-Ḍarar al-akhaff* (“Greater injury should be prevented by committing lesser injury”).<sup>108</sup> Qur’ān verse 2:219 unequivocally states: “If they ask you concerning alcoholic drink and gambling. Say ‘In them is great sin, and (some) benefit for men, but the sin of them is greater than their benefit’.” Because of their greater sin, Allāh forbids both alcohol and gambling. This verse stands as evidence that, if there is evil (inferred from the word *ithm*) as well as benefits (*manāfi*), then evil should be obviated by not acquiring the benefit except where the benefit is greater than the evil, as the verse explains that *ithm* is greater than *manāfi*.<sup>109</sup>

<sup>105</sup> *Al-Majallah*, Art. 31; Al-Zarqā, *supra* note 48 at 587; Al-Burnu, *supra* note 49 at 256.

<sup>106</sup> Al-Suyūṭī, *supra* note 49 at 86; Ibn Nujaym, *supra* note 49 at 87; Ibn Muflih, *Al-Mubdi*’ (Beirut: Dār al-Maktab al-Islamī, 1400), (4) 301; Al-Zarkashi, Vol. 2, *supra* note 59 at 321; Ibn Taymiyah, *Maḥmū’ al-Futawā* (29) 189.

<sup>107</sup> Ali Haydar, *Sharh al-Majallah*, Vol. 1, 35; Al-Atasii, *Ḍurar al-Hukkam Sharh al-Majallah*, (Damascus: Hams Press, 1349), (1), 63.

<sup>108</sup> Ibn Nujaym, *supra* note 49 at 88; *Al-Majallah*, Art. 28; *cf.* “lesser evil or injury should be preferred (*Al-Majallah*, Art. 29). If two evils clash, the greater one should be prevented by committing the lesser one. See Al-Suyūṭī, *supra* note 49 at 87; Ibn Nujaym, *supra* note 49 at 89.

<sup>109</sup> Al-Burnu, *supra* note 49 at 275.

The criterion for choosing the most beneficial or least harmful should be taken from the point of reference of Shari'ah law. In other words, one should consider Islamic texts when choosing what is more beneficial and what has lesser evil. Islam attaches more importance to what is prohibited (*al-manhiyah*) than what act is required (*al-ma'murāt*). The Prophet is reported to have said: "If I ask you to do something, do of it as much as you can, but if I forbid you something, you should refrain from it".<sup>110</sup> Thus is it possible to take a mortgage (conventional or purportedly Islamic) that ostensibly contains *ribā* under the pretext of *ḍarar* and the claim that the injury to be incurred when abstaining from *ribā* in a mortgage scenario is greater than giving it? In general, the rule can be violated in the presence of *ḍarar*. However, one cannot claim the gravity of *ḍarar* or the danger envisaged by not acting to prevent *ḍarar*.

With regard to interest-based mortgage and the protection of the five necessities, both benefits and evils are interwoven in the fabric of this issue. If *ribā* is to be taken as a case study, then it is beneficial for home seekers by engaging in it while, at the same time, it is evil and harm to the public as a whole by indulging in it. However, determining which harm/evil is greater may prove impossible, thus leaving the individual to decide the issue on the grounds of what is best according to his/her own faith.

### 2.5. Maxim of Authoritativeness of Custom and Culture

The fifth and last legal maxim agreed upon among Muslim classical jurist is *al-'ādah muḥakkamah* ("custom is authoritative").<sup>111</sup> *Al-'ādah* is defined as "practices that have been penetrated deep among people by recurrence and acceptable to people of sound nature,<sup>112</sup> or a repeated matter which has no connection with reason".<sup>113</sup> *'Urf* is said to be synonymous with *'ādah* because they resemble each other in definition and concept. It is technically defined as "what is established in life from reason and acceptable by sound natural disposition".<sup>114</sup> Giving custom legal ruling is inevitable in Islam

<sup>110</sup> Al-Bukhārī, *supra* note 52, Ḥadīth No. 6858; Muslim, *supra* note 52, Ḥadīth No. 1337.

<sup>111</sup> Al-Suyūṭī, *supra* note 49 at 89; Ibn Nujaym, *supra* note 49 at 92; *Al-Majallah*, Art. 36; Haydar, *supra* note 94 at 40; Al-Zarkashi, Vol. 2, *supra* note 59 at 356; Al-Zarqā, *supra* note 49 at 219; Al-Hamawi, *supra* note 51 at 37.

<sup>112</sup> Al-Zarqā, *supra* note 48 at 838.

<sup>113</sup> Abu Sannah, *Al-'Urf wa L-'ādah fī Ra'y al-Fuqha*, (n.p.1992), 8; Ali M. al-Jurjani, *Kitāb al-Ta'rifāt*. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1988) 149.

<sup>114</sup> Al-Jurjānī, *ibid.*, 154.

owing to the nature of its universality the legality of the use of custom in Islamic Law is based on many textual evidence that are barely derivative and merely implicit. In Qur'an verse 7:199, in which Allāh enjoins three things among which is *'urf* (literally translated as good). In many traditions (*aḥādīth*, pl. Ḥadīth) of the Prophet, there are instances of giving customs authority and arbitration. The adjudication of custom can be found in the case of Barrā' Ibn 'Azib who approached the Prophet to ask about a camel which had entered and destroyed a man's garden. The Prophet said: "The safety of the property is to be borne by the owner of the property in the day and the safety of the animal is to be borne by the owner of the animal in the night". In another version he said: "...And the owner of the animal must be responsible for what the animal destroys in the night".<sup>115</sup>

From these two versions of traditional narrations, jurists adjudicate that if animals destroy property during the day their own is not liable, but if property is destroyed during the night, the owner will bear legal responsibility because the existing custom at that time was that owners of animals left their animals to forage for food during the day. However, acting contrary to that norm will mount to imposition of compensation on the perpetrator.<sup>116</sup> Remarking on the effect of this Ḥadīth, Ibn Najjar says: "this is the cogent and best ever proof of considering *'ādah* in Islamic rules".<sup>117</sup>

Having said that, there are many ways in which custom can be considered as an effective cause in Islamic issues. With regard to the issue of mortgage, it can be said that the conventional expression of interest in the banking system has gained customary usage even if it is not actually consider to be *ribā* referred to in Islam. Thus, to forbid uttering such a phrase in today's financial world could cause business to come to a halt and render Muslims backward in economic growth, whereas the set rule is *isti'mal*

<sup>115</sup> Al-Nasai', *Sunān*, Ḥadīth No. 5785; Abū Dāwūd, *Sunān Abū Dāwūd*, Vol. 8, Ḥadīth No. 3570, 17461, Muhammad Abdu l-Qadir Atā (Ed.), (Mecca: Dār al-Baz, 1994/1414) 342; Dār al-Qutni, *Sunān Dār al-Qutni*, Vol. 3, Ḥadīth No. 217, in: Sayyid Abdullah Hashim al-Madani (Ed.), (Beirut: Dār al-Ma'rifah, 1966/1386), 155; Ahmad, *Musnād*, Vol. 4, Ḥadīth No. 18629, (Cairo: Muassasah Qurtub, n.d.), 295.

<sup>116</sup> Ibn Abdu al-Barr, *Al-Tamhīd*, Vol. 11, in: Mustafā Ahmad al-Alawi (Ed.), (Morocco: Ministry of Endowment and Islamic Affairs, 1387), 89; Muhammad Abadi, *Awnu al-Ma'bud*, Vol. 9, 2nd edn. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1995), 350; Muhammad Ibn Ismail al-San'ani, *Subl al-Salaam*, Vol. 3, in: Muhammad al-Khawli (Ed.), 4th edn. (Beirut: Dār 'Ihya al-Turath al-Arabī, 1379), 264.

<sup>117</sup> Muhammad Ibn Ahmad al-Futuhi Ibn Najjar, *Al-Kawkab al-Munir*, Vol. 4, in: Muhammad al-Zuhayli and Nazih Hummad (Eds.), (Riyadh: Maktabah al-Ubaykan, 1997/1418), 40.

*al-nās hujjah yajib al-‘amal bihi* (“People’s practice is authoritative and should be reckoned with”).<sup>118</sup> This submission can be easily refuted by considering another text in which uttering ambiguous expressions is prohibited. Allāh says: “O believers! Address not the Prophet by the word *rā‘in*, but address him respectfully and listen to him” (Qur’ān 2:104). The reason for this prohibition was that the word *rā‘in*, being a homonym, was used abusively by some groups of non-Muslims in Madinah, although the Muslims used it with good intention.<sup>119</sup> Thus, from the theory of *sadd al-dhari‘a* (“blocking means to evil”), it can be suggested that the use of the term ‘interest’ must be avoided.

Islamic jurists differ on the use of expressions similar to the phrase *ribā* in business transactions such as *dah yazidah* or *dah dū zādah* (Persian phrase commonly used during the era when Islamic jurisprudence was documented): *dah* (10), *yazidah* (11) and *dū zādah* (12). Mālikī and Al-Shāfi‘ī jurists unconditionally permit such utterances while Ḥanafis permit them in a fungible way if the buyer knows the details of that commodity. However, Ḥanbalīs consider the utterance detestable.<sup>120</sup>

Generally, customs and practices must be taken into consideration in any matter that is not detailed or when its verdict is based on ‘*urf*’ and ‘*ādah*’ of the people who use it. In regulating the extent in which ‘*urf*’ is applied in Islamic law, Islamic jurists have unanimously agreed that if custom contradicts explicit Qur’ānic and Ḥadīth texts (*naṣṣ*), the customary rule should be discarded. In other words, custom is of no use when there is factual text.<sup>121</sup>

However, the relevance of the above maxim is to broaden the authority for enforcing custom under Islamic law. If a custom does not contradict texts, then it is enforceable. Besides, the maxim also includes various types of ‘*urf*’, be it general, individual, practical or verbal custom. It is unanimously agreed upon among Islamic jurists that if a custom is general, it is not restricted to a particular group of people, place or time such as customs practiced since the era of the Prophet to date, and it can specify the meaning of texts, and analogy is not applicable to it. One example is the manufacturing contract or *istiṣnā‘*. Although this type of contract contradicts the

<sup>118</sup> Ibn Rajab, *supra* note 60 at 121-122; *Al-Majallah*, Art. 37; Al-Burnu, *supra* note 49 at 292.

<sup>119</sup> Kamali, *supra* note 82 at 400.

<sup>120</sup> Muhammad Abdul Azeez al-Hudhayri, *Kitāb Bay‘ al-‘Ayyinah ma‘ Dirasah Mudāyanāt al-Aswāq*, 113.

<sup>121</sup> Al-Zarqā, *supra* note 49 at 2.

general principle of Islamic contracts, it is still allowed because it is a custom of people known since the first epoch of Islam.<sup>122</sup> It is also noted that the Prophet permits selling fresh dates in exchange for dry ones (known as *'arayah*) because it has become custom and the masses were in need of it although it has been forbidden for fear of usury and *gharar*.<sup>123</sup> The question that may be derived from this is whether conventional mortgages should be allowed on the basis that they have become general practice in Britain, including Muslims. Will changing this create an impasse for Muslims who are engaging in business transactions? Here, the spirit of Shari'ah law must prevail. Throughout the history of Islamic law some prevailing practices have been allowed because they only slightly contradicted the overall objectives of Islamic law, such as the case of *'arayah*, although by analogy they should have been forbidden; thus mortgages in this contemporary age may be provisionally allowed until alternative measures become available.

Moreover, *'urf qawli* is a conventional term used by a certain group of people, the specific meaning of which is intuitively understood among the people who use it without any linguistic indication. In other words, verbal custom is a custom which is used in lieu of the original language where the original word and true meaning have become obsolete and derelict.<sup>124</sup> One argument for rejecting the expression 'interest' in both conventional and Islamic transactions is because it is prohibited in Islam. However, if the word has become the conventional norm in a society, which does not necessarily mean the prohibited one, should it also be disapproved? The maxim *al-ma'ruf 'urfan ka l-mashrūt shartan* ("What is known by the virtue of custom is as a stipulated condition")<sup>125</sup> could be used to state that, since the phrase is well known among the two parties, it does not contain a prohibited transaction, especially in Islamic mortgage contracts, and the status quo of trading should be upheld. That means that the permissibility of such a contract is the rule.

However, the claim that the real meaning of 'interest' in Western custom is profit margin added to business deals can have its way in a subsidiary maxim on custom which states that *al-ḥaqiqah tutrak bi dalālah al-'ādah* ("Real meaning shall be left out for denotation of custom").<sup>126</sup> This

<sup>122</sup> Al-Burnu, *supra* note 49 at 277.

<sup>123</sup> Kamali, *supra* note 67 at 82.

<sup>124</sup> Al-Burnu, *supra* note 49 at 281.

<sup>125</sup> Al-Suyūṭī, *supra* note 49 at 92; Ibn Nujaym, *supra* note 49 at 99; *Al-Majallah*, Art. 43; Al-Burnu, *supra* note 49 at 306.

<sup>126</sup> *Al-Majallah*, Art. 40.

means that if the real meaning of interest is culturally considered to be a non-prohibited transaction, it could still be accommodated under Islamic law within the scope of *mu'āmalah*. However, Anwar Iqbal Qureshi sheds light on the systematic transformation of the original word 'usury', which means prohibited *ribā* in Islamic law, to the new word 'interest'. In his historical account on the development of 'interest' in the West, Qureshi explains that, during the reign of Henry VIII, prohibition of usury began to be renewed in 1545 after it had been strongly condemned and prohibited in the early stage of the Roman Empire.<sup>127</sup> The renewal of usury in that age was a result of the weakness of the Church and subsequently was what the reformist considered a reasonable charge of interest "on the plea of human weakness".<sup>128</sup> Thus, the word 'usury' began progressively to be replaced by 'interest'. If that is the case, it will be abhorrent and arguable to submit that the word 'interest' as used today in conventional banking shares no roots with *ribā* prohibited in Islam. This shows that there is no difference between the two words historically but rather an evolutionary derogation and acrobatic dissimilation of usage. Thus, the rule in Islamic law is that when a word has hidden meaning(s), moral counsel says to avoid it.

### 3. Conclusion

This article has sought for balance between rigidity in the application of Islamic rulings and the exercise of religious concessions. It is undeniable that Muslims living in the West face spiritual, social and economical challenges in their day-to-day activities. This calls for an enquiry into Shari'ah objectives (*maqāṣid al-sharī'ah*) in prohibiting certain aspects of business transactions. Among the Shari'ah's objective mechanisms are intentionality behind the ruling as well as the individual's intended action with regard to a particular issue. While intention may be solely considered in ritual activities, the same is not true for social activities in general and commercial endeavours in particular. Thus there are many reasons, among others, that the rights of a human being is linked to any litigation generated as a result of dispute among the parties involved in the contract. However, in mortgage issues, the effect seems to be given to intention and meaning

<sup>127</sup> Anwar Iqbal Qureshi, *Islam and the Theory of Interest*, (Lahore: Ashraf Press, 1961), 7.

<sup>128</sup> Qureshi, *ibid.*, p. 9.

rather than expression (verbal action). This forms the basis for allowing Muslim home seekers to have interpreted the expression stated in a mortgage contract differently. However, custom has the authority to determine the meaning of an expression if there is no explicit contradiction with Islamic texts.

However, the ambiguity in the purported Islamic finance mortgage has cast doubt on the certainty of *ḥalālity* of the products offered to Muslim home seekers. This creates a gap for critics of Islamic home finance to undermine efforts in the Islamization of Islamic finances in general and mortgages in particular. When considering Islamic concessions (*rukḥṣah*) in the face of hardship or necessity, however, ambiguity has far less an impact on the approval of such products provisionally in as much as the aim is to protect the five necessities of life set by Islamic scholars: i.e., religion, life, property, offspring and talent. To answer to what extent this provision can be exploited, one can turn to issue of proportionality and relativity. One has the right to recourse to *rukḥṣah* but without transgression. However, that which constitutes transgression is absolutely relative.

As Muslims enjoy their religious concession rights, they also have the obligation to strive for better conditions that will comply with their faith. Although it may prove more difficult with the power of international monetary organizations, there is still room for individual as well as collective efforts. Co-operatives could be one of the ways to solve the mortgage problem by which individuals and organizations who are mindful of their obligation before Islam invest in this business.

Islamic banks have to shoulder the responsibility of ascertaining the *ḥalālity* of their products to protect Muslim clients from unwarranted ostensible violation of Islamic rulings. This will ensure that their faith has not been compromised and the trust they vested in Islamic branded products has not been jeopardized. The British Government can also be pressed to acknowledge the fact that not only Muslims will benefit from interest-free home finance but also the general public that has been lured by conventional banks to avoidable economic recession and human depression.

