

*With the Name of Allah, Ever Merciful, Most Merciful.*

# **A Polite Reconsideration of the Fatwa Permitting Interest-Based Mortgages for Buying Homes in Western Societies**

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## CONTENTS

<b>FOREWORD BY DR. ‘ALI AHMAD AL-SALUS .....</b>	<b>4</b>
<b>INTRODUCTION .....</b>	<b>8</b>
<b>A SCHOLARLY DEBATE, NOT A PARTISAN CONFLICT .....</b>	<b>10</b>
<b>THE PREMISES FROM FIQH FOR THOSE WHO PERMIT INTEREST-BASED MORTGAGES .....</b>	<b>12</b>
PRELIMINARY OBSERVATIONS UPON THESE PREMISES FROM FIQH .....	13
<i>The first observation [Two mutually inconsistent premises].....</i>	<i>13</i>
<i>The second observation [The effect on efforts to establish alternatives].....</i>	<i>14</i>
<i>The third observation [Opening the door to further concessions] .....</i>	<i>14</i>
<b>THE FIRST PREMISE: USING AS EVIDENCE THE HANAFI POSITION PERMITTING DEALING IN RIBA IN <i>DAR AL-HARB</i> .....</b>	<b>16</b>
THE FIRST COMMENT [NO DISCUSSION ABOUT THE STRENGTH OF THE PREMISE].....	16
THE SECOND COMMENT [THE STRONGER MAJORITY VIEW IS OPPOSED TO THIS PREMISE] .....	16
THE THIRD COMMENT [EVALUATION OF THE EVIDENCES OF THE HANAFI POSITION] .....	18
HAS THE VIEW OF ALLOWING RIBA WITH THE <i>HARBI</i> IN <i>DAR AL-HARB</i> OCCURRED IN THE OTHER <i>MADHHABS</i> ? .....	23
THE FOURTH COMMENT [COROLLARIES OF THIS ARGUMENT] .....	24
THE FIFTH COMMENT [ECONOMIC IMPLICATIONS].....	25
THE SIXTH COMMENT [REGARDING THE RELEVANCE OF THE HANAFI POSITION TO THE SUBJECT UNDER DISCUSSION].....	26
<b>THE SECOND PREMISE: TREATING NEEDS LIKE NECESSITIES IN ALLOWING THE FORBIDDEN .....</b>	<b>31</b>
THE FIRST COMMENT [A POSITIVE ASPECT] .....	31
THE SECOND COMMENT [THE HANAFI POSITION HAS NOT ACTUALLY BEEN TAKEN] .....	32
THE THIRD COMMENT [DEFINITION OF “NEED” AND CONDITIONS FOR APPLYING IT] .....	32
THE FOURTH COMMENT [THE NEED FOR A HOME IS NOT MET ONLY BY OWNERSHIP].....	35
THE FIFTH COMMENT [THE EXISTENCE AND APPLICABILITY OF THE NEED] .....	35
IMAM AL-JUWAYNI’S ANALYSIS OF THIS PRINCIPLE .....	36
HOW DID AL-JUWAYNI <i>RAHIMAHULLAH</i> IMPLEMENT THIS PRINCIPLE, SPECIFICALLY IN THE CASE OF HOMES? .....	37
THE RESPECTED DR. AL-QARADAWI’S CONDITIONS IN THE MATTER OF NECESSITY .....	39
THE SIXTH COMMENT [BETWEEN NEEDS AND COMFORTS] .....	41
THE SEVENTH COMMENT [THE DIFFERENCE BETWEEN NEED OR NECESSITY AT INDIVIDUAL AND COMMUNAL LEVELS].....	44
<b>THE THIRD PREMISE: WHATEVER IS PROHIBITED AS A MEANS IS ALLOWED OUT OF NEED.....</b>	<b>46</b>
THE FIRST COMMENT [WHICH MATTERS ARE INTRINSICALLY-PROHIBITED, AND WHICH ARE PROHIBITED AS MEANS?].....	46
THE SECOND COMMENT [DEVOURER AND PAYER OF RIBA ARE EQUALLY CURSED] .....	48
<b>THE FOURTH PREMISE: THE NON-OBLIGATION TO ESTABLISH THE CIVIL, FINANCIAL AND POLITICAL RULINGS OF THE SHARI’AH OUTSIDE <i>DAR AL-ISLAM</i> .....</b>	<b>49</b>
THE FIRST COMMENT [DANGER OF OPENING THE DOOR TO ALL KINDS OF EVIL].....	49
A NECESSARY CORRECTION.....	50
THE SECOND COMMENT [UNDERMINING OF EFFORTS TO BUILD ALTERNATIVE INSTITUTIONS].....	51

THE THIRD COMMENT [THE OBLIGATION OF CAUTION] .....	52
THE FOURTH COMMENT [THE REAL SITUATION IS OFTEN REVERSED WITH RESPECT TO PERSONAL AND PUBLIC MATTERS].....	53
<b>THE FIFTH PREMISE: THE OVERRIDING BENEFITS ACCRUING FROM RIBA-BASED HOME-OWNERSHIP .....</b>	<b>54</b>
THE FIRST COMMENT [THE DIFFERENCE BETWEEN ISLAMIC AND NON-ISLAMIC UNDERSTANDINGS OF “BENEFIT”] .....	54
THE SECOND COMMENT [“BENEFIT” IS NOT CONSIDERED IN THE FACE OF CLEAR TEXTS].....	56
THE THIRD COMMENT [EXAGGERATED BENEFITS OF HOME-OWNERSHIP].....	57
<b>THE SIXTH PREMISE: AVERTING THE SITUATION THAT A MUSLIM’S ADHERING TO ISLAM SHOULD BE A CAUSE OF HIS ECONOMIC WEAKNESS AND FINANCIAL LOSS.....</b>	<b>59</b>
THE FIRST COMMENT [A REMINDER ABOUT <i>TAQWA</i> ] .....	59
THE SECOND COMMENT [SACRIFICES OF THE EARLY MUSLIMS].....	59
THE THIRD COMMENT [THE DANGER OF THIS LOGIC] .....	60
<b>THIS STUDY HAS NO CONCERN WITH WHAT ARE CONSIDERED ADMINISTRATIVE EXCESSES.....</b>	<b>61</b>
<b>A SUMMARY OF THE FINDINGS OF THIS STUDY .....</b>	<b>65</b>
<b>CONCLUSION.....</b>	<b>67</b>
<b>APPENDICES .....</b>	<b>68</b>
APPENDIX 1: THE CONCLUDING DECLARATION OF THE FIRST FIQHI CONFERENCE OF THE FIQH COUNCIL AFFILIATED TO THE LEAGUE OF SHARI’AH SCHOLARS OF NORTH AMERICA .....	68
APPENDIX 2: OPINIONS REGARDING THE LATEST FIQH CONFERENCE OF THE LEAGUE OF SHARI’AH SCHOLARS OF NORTH AMERICA – SHAYKH MAHMUD AL-TAHHAN EXPRESSES RESERVATIONS ABOUT THE RESOLUTIONS OF THE CONFERENCE .....	70
APPENDIX 3: “WHAT PERMITS RIBA IS NECESSITY ... NOT NEED” – DR. ‘UJAYL AL-NASHAMI, DEAN OF THE FACULTY OF SHARI’AH IN KUWAIT RESPONDS TO THE FATWA OF BUYING HOMES VIA USURIOUS LOANS.....	72
APPENDIX 4: THE CONCLUDING DECLARATION OF THE FOURTH ORDINARY SESSION OF THE EUROPEAN COUNCIL FOR IFTA’ AND RESEARCH, CONVENED IN THE CITY OF DUBLIN, IRELAND, 18-22 RAJAB 1420 / 27-31 OCTOBER 1999.....	76
APPENDIX 5: A SCHOLARLY DISAGREEMENT WITH THE RESOLUTION PERTAINING TO BUYING HOUSES VIA USURIOUS LOANS .....	79
<b>REFERENCES .....</b>	<b>81</b>
<b>TRANSLATOR’S GLOSSARY OF COMMONLY-USED TERMS .....</b>	<b>82</b>

## FOREWORD by Dr. 'Ali Ahmad al-Salus

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All Praise is due to Allah, Pure and Blessed Praise as befits the Majesty of His Face and the Magnificence of His Power. Blessings and Peace be upon the Best of Messengers, who conveyed the message, fulfilled the trust, and left us upon a clear way, whose night is like its day, such that only a perishing one deviates from it.

This book is in response to the *fatwa*, issued by the European Council for *Ifta'* and Research and the Conference of the League of *Shari'ah* Scholars of North America, permitting Muslims settled in Europe and the USA to take loans on interest in order to buy homes.

With a polite scholarly style, indicating an abundance of knowledge, gentleness of character, sincerity of brotherhood and concern for Islam and Muslims in the West, the respected brother Dr. Salah al-Sawi has managed to clearly prove the falsity of the *fatwa*, and to explain the immense harm which it entails. By pursuing the bases of the *fatwa*, and following all its premises in logical order, he has refuted each one of these in such a way as to leave no room for doubt about its falsity.

Therefore, this precious study is in no need of an explanatory introduction. However, I wish to address every Muslim, whether in the East or West, with a few words. Since the above-mentioned *fatwa* opposes Islamic legal texts, I wish to begin with some words of Imam al-Shafi'i, followed by words from Shaykh-ul-Islam Ibn Taymiyyah.

Al-Shafi'i transmits with his chain of narrators on the authority of Sa'id b. al-Musayyib, "that 'Umar b. al-Khattab decreed that the blood-money should be fifteen camels for the thumb, ten for the forefinger, ten for the middle finger, nine for the next finger, and six for the little finger." Al-Shafi'i then says, "Since it was known – and Allah knows best – to 'Umar that the Prophet had decreed fifty camels for the hand, and since the hand comprises five fingers differing in their beauty and benefits, he treated each one accordingly, ruling for each finger a portion of the blood-money of the whole hand. This was analogical reasoning upon a report. However, when they found the letter in the possession of the family of 'Amr b. Hazm containing, 'The Messenger of Allah, may Allah bless him and grant him peace, said: **For each finger, ten camels are due,**' they took this position. They did not accept the letter in the possession of the family of 'Amr b. Hazm – and Allah knows best – until it was proved to them that it was the letter of the Messenger of Allah.

"In this hadith there is evidence for two matters: firstly, acceptance of a report; and secondly, that the report is accepted when its soundness is established, even if no Imam acted upon a report similar to the one accepted. Further, it is evidence that if there existed in the past the practice of one of the Imams, and then a report was found from the Prophet, may Allah bless him and grant him peace, contrary to the practice of the Imam,

his practice would be abandoned for the report from the Messenger of Allah. Yet further, it is evidence that the hadith of the Messenger of Allah, may Allah bless him and grant him peace, is established in itself, not by the practice of others after him. The Muslims did not say, ‘Umar acted differently to this amongst the Muhajirun and Ansar, and neither you nor anybody else mentioned that you had something contrary to it.’ Rather, they took the position obligatory upon them, of accepting the report from the Messenger of Allah, may Allah bless him and grant him peace, and abandoning every practice contrary to it.

“Had this reached ‘Umar, he would have taken a similar position, Allah-Willing, as he did in similar cases when reports reached him from the Messenger of Allah, may Allah bless him and grant him peace, due to his piety towards Allah, his fulfilling his obligation to follow the command of the Messenger of Allah, may Allah bless him and grant him peace, and his knowledge that no one has authority alongside the Messenger of Allah, and that obedience to Allah lies in following the command of the Messenger of Allah, may Allah bless him and grant him peace.”

Al-Shafi’i then supports his previous statement, transmitting with his chain of narrators that ‘Umar b. al-Khattab used to say, “The blood-money must be paid by those liable, and the wife cannot inherit from the blood-money of her husband.” However, al-Dahhak b. Sufyan later informed him that the Messenger of Allah, may Allah bless him and grant him peace, had written to him, “that the wife of Ashyam al-Dibabi should inherit from the blood-money of her husband,” whereupon ‘Umar changed his opinion.<sup>1</sup>

Ibn Taymiyyah says, “Those of the Salaf who permitted the exchange of one dirham for two dirhams were more numerous and of more honoured status than these [referring to those who permitted a certain type of gambling]. Ibn ‘Abbas, Mu’awiyah and others made a concession in the case of one dirham for two dirhams, since their interpretation was that usury is only prohibited in deferred payment, not in spot-transactions. Similarly, there were those who thought that prohibited wine refers only to the intoxicant made from grape-juice; they understood from ‘intoxicants’ only one of its types, and thought the prohibition was specific to this type. ‘Gambling’ includes all its types, just as ‘intoxicants’ and ‘usury’ include all their types. It is not permissible for anyone to pursue the mistakes of the people of knowledge, just as it is not permissible for him to speak about the people of knowledge and faith except as they deserve, for Allah Exalted has forgiven the believers regarding those matters in which they have erred, as He said, **‘Our Lord! Do not punish us if we forget, or err!’** Allah said, ‘I have answered this prayer.’ He has commanded us to follow what has been revealed to us from our Lord, and not to follow any authorities besides Him. He has commanded us not to obey any creature in disobedience of the Creator, and to seek forgiveness for our brothers who preceded us in faith, so we say, **‘Our Lord! Forgive us, and our brothers who preceded us in faith**

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<sup>1</sup> See al-Risala, pp. 422-6, and read Shaykh Ahmad Shakir’s footnotes and references for the narrations in the margin. See also my book, “The Story of the Attack upon the Sunnah,” sections, “The Sunnah is Revelation,” and “The Holding Fast of the Salaf to the Sunnah,” pp. 10-17. [Translator’s note: See Majid Khadduri’s translation of al-Shafi’i’s Risala, Islamic Texts Society, 2<sup>nd</sup> ed., pp. 261-3.]

...’ until the end of the ayah. This is something which is obligatory upon the Muslims in all matters resembling these.”<sup>2</sup>

What Imam al-Shafi’i and Ibn Taymiyyah have mentioned explains what is obligatory upon every Muslim regarding the mistakes of the people of knowledge. It is not permitted to abandon the texts and follow the mistakes of the people of knowledge, but at the same time it is not for a Muslim to speak about the people of knowledge and faith except as they deserve.

**The Messenger, may Allah bless him and grant him peace, has cursed the one who consumes *riba* and the one who pays it, and he said, “They are equal (in sin).”** In another hadith regarding *riba*, **“The one who gives it and the one who receives it are equal.”** So if anyone, whoever he may be, says that the two of them are not equal, do we accept his statement, or the statement of Allah Exalted, as explained upon the tongue of His Messenger, may Allah bless him and grant him peace ??

Some of those who have stood behind this fatwa, such as the respected Shaykh al-Qaradawi, have explained in the past that such eccentric fatwas are not to be followed! For example, when the fatwa appeared permitting the banks’ interest income, Shaykh al-Qaradawi resisted it strongly, and continues to do so. One of the things he mentioned was that the Islamic Research Assembly had given the fatwa in its Second Conference that such income was haram, and that ‘*ulama*’ from 35 countries had participated in this Conference, and he mentioned the names of some of the exceptionally great ‘*ulama*’ who took part in the issuing of this fatwa. He then said, “Such collective *ijtihad* cannot be revoked; if it is possible to revoke it, this can only be done by collective *ijtihad* greater than it, or at least equal to it.”

Now, that Conference itself stated, in the same fatwa, “Lending with interest is prohibited, and is not permitted by need or necessity. Borrowing with interest is similarly prohibited, and the sin of this is not removed except in the case of absolute necessity.” The situation of necessity-based borrowing was then described, exactly as for any other intrinsically-prohibited (*haram*) matter, and no mention was made of “need.”

The Fiqh Assembly of the Organisation of the Islamic Conference has unanimously declared as follows: “The home is one of the basic human needs, and must be fulfilled in *shari’ah*-compliant ways with halal wealth. The way taken by banks operating in real estate and housing (commercial and residential property) or other such institutions, i.e. lending with interest, whether the rates are low or high, is a way which is prohibited under the *Shari’ah*, because of the involvement of *riba* in the transaction.”

The Assembly received several questions from the Institute for Islamic Thought in Washington, including one regarding buying a home to live, a car for personal use and domestic furniture through loans from banks and institutions which impose a fixed profit on those loans. The Assembly answered that this was not allowed under *shari’ah*, and did not mention, for example, that the Muslims of Washington were in *dar al-harb*.

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<sup>2</sup> Majmu’ Fatawa Shaykh al-Islam 32:238-9.

In addition, the respected Dr. al-Sawi has explained at the end of this valuable discussion some of the administrative excesses during the issuing of this fatwa, and the precedence given to the voices of non-specialists over the voices of specialists, all of which entails that this was not a collective fatwa to begin with, let alone one that can revoke previous fatwas issued by fiqh assemblies. I was extremely moved by the position taken by the respected Shaykh Wahbah al-Zuhayli, who said whilst crying, “We will have a situation with you on the Day of Resurrection.”

As for this fatwa, although it is a mistake, we must not forget what Imam al-Shafi’i said regarding the obligation to follow the text, and what Shaykh-ul-Islam mentioned, that it is not for a Muslim to speak about the people of knowledge and faith except as they deserve.

The respected Shaykh al-Qaradawi shares the concerns of the Muslims around the world, and has borne much for their sake, and so because of that we love and respect him, and always pray for him. Nevertheless, we also disagree with him greatly, but at the same time we recognise his station and worth, and the loftiness and nobility of his aim.

We ask Allah Exalted to save us from mistakes in word and action, and we invoke blessings and peace upon His Messenger, the Best of Mankind. **Glorified is your Lord, Lord of Dignity, above what they attribute. Peace be upon the Messengers, and all Praise be to Allah, Lord of the Worlds!**

## INTRODUCTION

Praise be to Allah. Blessings and Peace be upon the Messenger of Allah, and upon his family and companions.

After returning from travelling outside the United States, I had the opportunity to peruse the concluding declaration of the first Fiqh Conference of the League of Shari'ah Scholars, convened in Detroit, Michigan, USA in Sha'ban 1420. This included the resulting conclusions permitting interest-based loans for buying homes, in accordance with the common practice in America. I also saw the concluding declaration of the fourth session of the European Council for Ifta' and Research, convened in Dublin, Ireland in Rajab 1420, i.e. around three weeks before the American conference. The European session had come to the same conclusion regarding this issue. I further perused some of the academic papers from these two conferences, and written records of the discussions which took place around them at different levels.

In these few pages, I wish to contribute some research and reflections upon this issue, both from its fiqhi framework and its practical implementation, including sincere advice and responses to some of these conference resolutions. In all of this, I ask Allah, Mighty and Exalted, to benefit supporters and opponents equally with these words, and to make sincerity and correctness our partners in whatever we do or leave, for He is the Authority in that, and has Power over it. Amin, O Allah!

Although the resolutions of these two conferences have been circulated widely and become common knowledge, I saw it fitting to state them concisely before adding my comments and reflections. This will facilitate understanding of the discussion and be of benefit to those who have not seen the resolutions, and to those who live outside the Western societies but are concerned with the situation of the Muslims wherever they may be, and are keen to offer them their sincere advice whenever possible.

The reference for our discussion will be what was issued in the two Declarations (the Declaration of the European Council for Ifta' and Research and the Declaration of the Conference of the League of Shari'ah Scholars of North America), stating the permissibility of taking interest-based loans to buy houses for residence outside the lands of Islam, in keeping with the common practice in Western societies. This practice entails the bank lending the homebuyer an amount equal to the price of the house, with the repayments being spread over a long period of time, the bank receiving compound interest such that the total repayment can be many times the amount of the original loan. These declarations were based on treating need (*hajah*) like necessity (*darurah*) in allowing the forbidden, or relying on the position of Imam Abu Hanifah and his student Muhammad al-Shaybani, viz. the view that dealing in *riba* is allowed in *dar al-harb*.

The concluding declaration of the Conference of the League of Shari'ah Scholars of North America, convened in the United States, included the following:

“The current method of buying homes via banks who pay the price to the seller, and receive instalments from the buyer, is fundamentally riba, and is not allowed for a Muslim when he can find a shari’ah-compliant alternative which fulfils his need. Such alternatives include a contract with a company which provides finance on the basis of interest-free repayment by instalments (*bay’ al-ajal*), fixed profit margin (*murabahah*), or diminishing partnership (*musharakah mutanaqisah*), etc.

“Where a shari’ah-compliant alternative is not found, and a Muslim wants to own a house via banking finance, most of the participants take the view that it is allowed to own the house via a mortgage from the bank, due to the need which is treated as a necessity. Two conditions must be satisfied: that the Muslim is outside *dar al-Islam*; and that the need exists for the generality of those settled outside the Islamic lands to resist social, economic, moral and religious corruption, and to achieve the benefits entailed by protecting the religion and Islamic personality. He must limit himself to a house which he needs for residence, and not use this method for trade or investment ...”

The concluding declaration of the European Council for Ifta’ and Research, after stressing the need for efforts to provide shari’ah-compliant alternatives or persuade the interest-based banks to convert these schemes into ones acceptable under the Shari’ah, stated the following in the fourth note of its resolution numbered 2/4:

“Since neither of these two options is possible at present, the Committee views, in the light of the evidences, principles and considerations of the Shari’ah, that there is no harm in turning to this method of an interest-based loan to buy a house needed by a Muslim for him and his family to live in, with the conditions that he does not have another house which suffices him, that the house being bought is his main residence, and that he does not have enough spare wealth to buy the house by other means.

This is despite the fact that the majority of the people of fatwa for about a quarter of a century have continued to forbid this transaction, due to its consisting of clear, definite riba (riba on loans). It is established with certainty amongst the people of knowledge that the prohibition of riba is one of the things known by necessity from the *dīn* of Islam, and that bank interest is prohibited riba, and that only situations of necessity (*darurat*) can permit riba. However, numerous inquiries from many people settled outside the lands of Islam in diverse places, mentioning many details which illustrate the extent of the need and expected benefits, caused several of the people of fatwa to reconsider their *ijtihad* in this matter, and to give a concession due to the general need for it, implementing practically the principle of fatwa changing due to the change in time, place and situation, and relying upon the justifications from *fiqh* indicated earlier.”

## A SCHOLARLY DEBATE, NOT A PARTISAN CONFLICT

Before we begin our discussion and comments on these two declarations, I would like to indicate the basis that should govern comments and discussions such as these, and research and studies such as those under discussion. This basis is sincerity to Allah, to His Book, to His Messenger, to the leaders of the Muslims and to their common folk. Hence, any discussion should not go beyond purely fiqhi grounds, which distinguishes a scholarly debate, remaining away from agitation and provocation, or mutual accusations and abuse. This is because amongst the participants in this Conference were people of grace and leadership in goodness, who have endured suffering due to their support of Islam. Some of them have worn the badge of honour during the years of oppression which the Ummah has experienced during the second half of the twentieth century, paying with the blood of their heart, the light of their eyes, their personal security and stability of life, for their rectitude in Islam, their holding to the Truth and their fulfilling of the way of Allah Exalted. Hence, any discussion must not go beyond the limits of etiquette which our righteous predecessors upheld during their scholarly differences. Scholarly differences must not lead to violating the dignity of one's opponents, no matter how mistaken their *ijtihad* or method of reasoning may seem. This is because we have preserved from the heritage of our predecessors, may Allah be pleased with them, that

*The flesh of the people of knowledge is poisoned;  
The Way of Allah in exposing their malefactors is known:  
So whoever fires slander with his tongue at the people of knowledge,  
Allah punishes him before his death with the death of his heart!*

Such overstepping of limits, let alone the turmoil and strife it causes, includes transgression and oppression which no one who fears Allah, and knows that he will meet Him, would dare to commit and bear its consequences! The matter becomes even more ugly when partisan desires appear in the way, so that an issue is accepted or rejected because it agrees with the preference of this party or the other – by the Truth, this is an obscenity and disgrace, and puts one's entire actions at risk! Someone who is “mistaken” but sincere in intention to Allah may be more pleasing to Allah than one who is “correct” but whose intention is crowded with partisan desires and organisational links!

From another angle, we respect what motivated those who issued these declarations to view this matter [of mortgages] as permissible, viz. the preservation of the religious conscience amongst the generality of Muslims where the situation accommodates it, and following what is narrated from the Prophetic guidance, that whenever he had the choice between two matters, he would choose the easier option as long as it did not involve sin, but if it was sinful he would be the furthest of people from it. We regard this alone as their motivation, and do not endorse the angry accusations of “liquid faith” or audacity before Allah and His Messenger! This is because we only know about many of them that they vehemently express what they believe to be the Truth, not caring in that about the anger or pleasure of the people – we regard them as such, and Allah will take them to account, and we do not ascribe purity to anyone before Allah. After that, if they are

correct we hope that Allah will reward them twice, but if they are mistaken we hope that they will not be deprived of the reward of the mistaken *mujtahid*, although this does not rule out differing with them and pinpointing gaps in their analysis, even declaring them mistaken if the matter demands it. This is because we have learnt from them, and those like them, that sincerity is a right of Allah, His Book, His Messenger, the leaders of the Muslims and their common folk, and that sincere advice must be given offered in the best manner, and that it must be accepted, no matter how it was given. We have learnt from them, and those like them, the statement of al-Hafiz al-Dhahabi, may Allah have mercy on him, about his shaykh al-Harawi, “The Shaykh of Islam is beloved to us, but the Truth is more beloved to us than the Shaykh of Islam!” Thus, I hope that their hearts will accommodate this, and that they take what we write in this essay in the best way, and Allah knows what is behind all aims, and He is the Guide to the Even Way.

## THE PREMISES FROM FIQH FOR THOSE WHO PERMIT INTEREST-BASED MORTGAGES

The two declarations relied on the following premises in allowing interest-based mortgages for buying homes outside *dar al-Islam*, in accordance with the studies presented during the conferences, and the discussions around them:

- 1) What is attributed to Imam Abu Hanifah and some other people of knowledge, of the permissibility of dealing via invalid contracts in *dar al-harb*, including dealing in *riba*. Note that the final conference declaration of the League of Shari'ah Scholars does not mention this premise, although its academic papers and fiqhi discussions clearly included it, as opposed to the concluding declaration of the European Council for Ifta' and Research, which includes a clear mention of this premise in its text.
- 2) The principle of treating need similarly to necessity in allowing the forbidden. Since a home is one of the necessary needs which must be met, either by renting or ownership, and since renting leads to many undesirable consequences, there is a general need for Muslims in this land to partake in this arrangement. This ensures an overall benefit, and repels the overall harms; hence the view that usurious loans are allowed in order to ensure these benefits and repel these harms.
- 3) What is connected to the previous principle and established in Fiqh, that whatever is prohibited as a means towards evil may be allowed out of need, while whatever is intrinsically prohibited can only be permitted out of necessity. Since what is intrinsically prohibited is the devouring of *riba*, that is what is only permitted out of necessity, but those things that lead to that, such as paying *riba* or writing or witnessing the contract, are prohibited as a means towards evil, so they are permitted out of need.
- 4) That the Muslim is not obliged under the Shari'ah to establish Islamic civil, financial and political law and other such matters which are related to the general system, in a society which does not accept Islam, since this is not within his capability. The prohibition of *riba* is one of these rulings which is related to the essential nature of the society and to the philosophy of the state and its social and economic orientation. Rather, the Muslim is required to establish the rulings which concern him personally such as those of ritual worship, food, drink and dress, and those related to marriage, divorce, remarriage, 'iddah, inheritance and other personal matters. These are such that if these matters are constrained for him, and he is not able to establish his religion in them in any way, it becomes obligatory for him to migrate within Allah's spacious earth as soon as he finds a way to do so.
- 5) The consequences of not dealing with these invalid contracts, including *riba*, in *dar al-harb*, i.e. that a Muslim's holding fast to Islam becomes a cause of his economic weakness and financial loss, whereas the basic principle is that Islam strengthens a person and does not weaken him, increases him in prosperity and does not decrease

him, and benefits him and does not harm him.

- 6) The overall benefits which will result from the permissibility of owning houses in this way: protection of one's religion and Islamic personality, improvement of the Muslims' living conditions and liberation from the economic shackles upon them. Thus they will be able to fulfil the obligation of da'wah and take part in building the society at large, such that their level will rise. They will then deserve to be called the best nation brought forth for mankind, and will become a radiant image of Islam in front of the non-Muslims.

These are the most important premises from fiqh upon which the two declarations relied in allowing usurious loans for homebuying to Muslims settled in these societies.

### **Preliminary Observations upon these Premises from Fiqh**

We have some general observations upon these premises, which we would like to state before discussing these points in detail, and these observations can be summarised as follows:

#### *The first observation [Two mutually inconsistent premises]*

These two resolutions have mixed two basic premises, each of which applies in a different context to that of the other.

- ◆ Assuming the derivation of the Hanafis that it is allowed to deal in riba and other invalid contracts in *dar al-harb*, we have a transaction that is fundamentally permitted in a situation of ease and choice. In fact, if the objective of looting the wealth of the *harbi* and weakening his power is taken into account, it would not be unreasonable to say that this transaction is one which is rewarded, and could be considered from some of its aspects as a type of *jihad* in the way of Allah!
- ◆ Assuming the second premise of "treating need similarly to necessity in allowing the forbidden," we have a transaction that is fundamentally prohibited and allows no concessions except in the absence or insufficiency of alternatives, as the two conference declarations clearly stated, and is only permitted by necessity, or by pressing need which is treated as necessity. If this is the preference of the two declarations, then there is no need to rely on the Hanafi statements quoted due to the obvious difference between the two contexts. The transaction according to the Hanafis is fundamentally permitted, whether the situation is one of ease and choice or one of being constrained and forced. However, the transaction according to the issuers of the two declarations is fundamentally prohibited, and can only be allowed in the absence of alternatives and a pressing need for it.
- ◆ From another angle, the Hanafi position only applies to *dar al-harb*, and the ruling does not extend to *dar al-Islam*, whereas the second position is general, covering *dar al-Islam* and *dar al-harb* equally. Hence, the latter position, especially when it is

referenced in the final resolutions while a reference to the first position is neglected, opens the way to applying this *ijtihad* in the Muslim lands. This is because the need there may be more pressing, and the alternatives more limited, so there would be no justification for limiting the judgment to *dar al-harb* alone, this being a baseless specification and an invention of a ruling without evidence.

*The second observation [The effect on efforts to establish alternatives]*

This opinion undermines every good effort to provide Islamic alternatives in Western societies which will free Muslims from usury (*riba*) and doubt (*ribah*), and will really protect their religious conscience. These efforts are not through following the opinions of the people of knowledge in their mistakes, nor in their weak *ijtihad* resulting from the chaos of the situation and the difficulty in dealing with it, nor through liberally conferring legal validity on dubious or invalid transactions. Rather, these efforts consist of establishing financial investment institutes which roll their sleeves up and provide Muslims with sound Islamic alternatives, strengthening their position in the path of protecting their identity and avoiding becoming absorbed into the Western societies. These efforts will also strengthen the Muslims in general, rather than simply individuals, and permanently rather than temporarily, on a foundation which can be referred to and built upon, rather than on walls which only shield their builders!

In this context, I would like to quote the words of the respected Dr. Yusuf al-Qaradawi in his precious essay, *Bank Interest is Prohibited Usury*, which he wrote in refutation of the respected former *Mufti* of Egypt when the latter ruled that banking interest is permitted. Explaining the role of scholarly mistakes in diverting the Islamic resurgence and ruining its instruments, he says (p. 26), “The most amazing thing is the readiness of some of the people of knowledge to take up this trend, helping to destroy Islamic thought, resurgence and institutes, even though they do not realise it or mean it!”

*The third observation [Opening the door to further concessions]*

The *fiqhi* attitude that the Conference has taken opens the way to a whole series of concessions wanted by people for needs which they see as pressing, and which should be treated as necessity in permitting the forbidden. Those who open this door must open those doors also, otherwise they will be accused of contradiction and inconsistency. This is because opening the door to dealing in invalid contracts in *dar al-harb* will not stop within the limit of dealing in *riba* only, but will extend to dealing in all prohibited transactions. Those people of knowledge who allowed dealing in *riba* in *dar al-harb* also allowed selling prohibited items there, such as pig, intoxicants and idols, and this will be indicated in detail during the later discussion of the position of the Hanafis in this issue.

From another angle, the application of the principle, “Treating needs like necessity in permitting the forbidden,” is not specified to the case of homes only, but it must generally extend to cover food, drink and dress and everything that people need in their lives,

whether they are farmers, artisans, traders, labourers or students. Hence, if the understanding of “need” is not clarified and its conditions not established, we will have opened the door wide to removing the yoke of duty and escaping from many of the restrictions of responsibility, through reasons thought to be of public interest or need, whereas in reality they are no more than desires and lusts!

**After these general observations, we will begin what we see as the most important specific observations and comments on these premises, asking Allah for help, capability and correctness.**

## THE FIRST PREMISE: USING AS EVIDENCE THE HANAFI POSITION PERMITTING DEALING IN RIBA IN *DAR AL-HARB*

This point has been referred to previously by Dr. Mustafa al-Zarqa, may Allah have mercy on him, in several fatawa issued by him, as indicated by the respected Dr. ‘Abd al-Sattar Abu Ghuddah in his paper presented to the Conference. The two conferences have relied upon this position in their final view of allowing this transaction, although the concluding declaration of the League of Shari’ah Scholars of North America did not refer to it in its text. However, the discussions during the Conference and the papers presented confirm that this point was considered and relied upon to support the conclusion.

We have a number of comments on this premise, which we summarise as follows:

### **The first comment** [No discussion about the strength of the premise]

Not one of those using the Hanafi position in this matter as evidence has discussed its basis: whether it is strong or weak, correct or mistaken. It is as though one is proceeding from an assumed axiom which is that all fiqhi opinions, as long as they are attributed to one of the Imams who are followed, are therefore in the realm of generally-accepted views, so that they can be relied upon, and conclusions can be based on their foundation, no matter how valid they are. However, this is contrary to what is well-known amongst the people of knowledge, that the basic principle regarding matters in which people differ, is that one refers to Allah and His Messenger, as Allah says, “**If you differ in anything, refer it to Allah and His Messenger, if you believe in Allah and the Last Day.**”<sup>3</sup> I do not think that it escapes most of those who have allowed this transaction, what the scholars of *usul* have established in their statement,

*Not every disagreement is acceptable:  
Only a disagreement which is plausible.*

We have learnt from the conference participants and those like them that truth is not recognised through men, but men are recognised through truth. They have often repeated to our ears the saying, “Recognise the truth: you will recognise its people!”

### **The second comment** [The stronger majority view is opposed to this premise]

The Hanafi position in this issue is opposed by the majority position that the prohibition of riba does not change through a change in place, for riba is prohibited on every land and under every sky. Hence, it is not lawful for a Muslim to deal in riba with *harbis*, whether

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<sup>3</sup> al-Nisa’ 4:59

in paying or receiving. Their evidences for this position are more upright and correct, and these include:

- 1) The absoluteness of the sacred texts in prohibiting riba, not specifying this prohibition to certain places rather than others, nor to certain groups of people rather than others.
- 2) The prohibition of riba applies to non-Muslims just as it does to Muslims according to the correct view amongst the different views of the people of knowledge regarding the addressing of prohibitions to the non-Muslims. Allah Exalted has said, "... **and their taking of riba when they had been forbidden to do so, and their devouring the wealth of the people unjustly.**"<sup>4</sup> The Exalted also said, "**The food of those who were given the Scripture is lawful for you, and your food is lawful for them.**"<sup>5</sup> This ayah is a clear text that they are addressed with the *furū'* (rulings) of the Shari'ah, as stated by Qadi Abu Bakr ibn al-'Arabi in *Ahkam al-Qur'an* (1/647). When have the prohibitions ever been a matter limited to the Muslims in the lands of Islam, such that when they leave these, they can treat Allah's prohibitions as lawful?! Especially as the Prophet, *sall-Allahu 'alayhi wa sallam*, said, "**Fear Allah wherever you may be**"!<sup>6</sup>
- 3) The analogy of the prohibition of riba between the Muslim and *harbi* in *dar al-harb*, with its prohibition between the Muslim and one guaranteed security (*aman*) in *dar al-Islam*. For the one guaranteed safety in *dar al-Islam*, the prohibition of riba between him and the Muslim is agreed by *Ijma'*.<sup>7</sup> The Hanafis themselves are among those who have quoted this *Ijma'*.<sup>8</sup> Similar is the situation when the Muslim enters *dar al-harb* in safety, otherwise we have an unavoidable contradiction.
- 4) The result of prohibiting riba in dealings between Muslim and Muslim, but permitting it in dealings between Muslim and *harbi*, of imitating the Jews in their prohibiting riba in dealings between Jew and Jew, but permitting it in their dealings with the Gentiles! "**That is because they said, 'There is no way obligatory upon us regarding the Gentiles'**"<sup>9</sup>

It is stated in the Book of Deuteronomy attributed to Musa *'alayhis-salam*, Chapter 23, "You shall not lend to your brother upon usury: the usury of silver, the usury of food, the usury of anything which is lent upon usury." It is also stated there, "The stranger, you may lend to him upon usury, but your brother, you shall not lend to him upon usury, that the Lord your God may bless you."

This is quite apart from the double standards and two-facedness which is dismissed

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<sup>4</sup> al-Nisa', 4:161

<sup>5</sup> al-Ma'idah, 5:5

<sup>6</sup> Related by Ahmad, Abu Dawud and al-Tirmidhi from the hadith of Abu Dharr *radi-Allahu 'anhu*, cf. *Sahih al-Jami' al-Saghir*, vol. 1 hadith no. 97.

<sup>7</sup> cf. *al-Majmu'* of al-Nawawi 9/443 and *al-Mughni* of Ibn Qudamah 4/39)

<sup>8</sup> cf. the *Hashiyah* of Ibn 'Abidin 5/186

<sup>9</sup> al-'Imran:75

by a pure nature and rejected by a sound intellect. The respected ‘*allamah* Dr. al-Qaradawi has indicated this meaning in his precious book *Bank Interest is Prohibited Riba* (p. 19), “From the blessing of Islam to humanity is that it has prohibited *riba* totally and utterly; in fact, it has prohibited everything that leads to it or supports it, and has not stated as the corrupted text of the Torah says, that *riba* is prohibited in the mutual dealings amongst the Israelites, but permitted when they deal with others. Rather, Islam has prohibited *riba* in every transaction, whether with a Muslim or a non-Muslim, for Islam does not appear with two faces, and does not measure with double standards.”

I assume that Islam is still that Islam, and that it continues not to appear with two faces, and does not measure with double standards!

### **The third comment [Evaluation of the evidences of the Hanafi position]**

The evidences of the Hanafis for their position of permitting dealing with invalid contracts in *dar al-harb* are debatable; in fact, upon analysis they are weak and incoherent.

- 1) The hadith of Makhul, “**There is no *riba* between a Muslim and *harbi* in *dar al-harb*,**” which is regarded as the mainstay of their evidences in this matter, has been rejected by the people of knowledge of both hadith and fiqh. Al-Shafi’i said about it, “The evidence used by Abu Yusuf for Abu Hanifah’s position is not authentically established, so there is no proof in it.”<sup>10</sup> Al-Zayla’i said, “*Gharib*,” i.e. it has no basis. Al-Nawawi said about it, “*Mursal* and *da’if*, so there is no proof in it.”<sup>11</sup> Al-‘Ayni said in *al-Binayah*, “This is a *gharib* hadith, having no *musnad* foundation.”<sup>12</sup> Ibn Qudamah said in *al-Mughni* (4/46), “Their narration is *mursal*, and we do not know its authenticity. Further, it is possible that its intended meaning is to forbid it. It is not allowed to leave a prohibition revealed in the Qur’an, made manifest by the Sunnah and confirmed by *Ijma’*, for an unknown report which is not quoted in a *sahih* or *musnad* collection, nor in any reliable book.”

Even assuming its authenticity, there is the possibility that its meaning is forbiddance, similar to the saying of the Exalted, “**The Hajj is in known months. So whoever performs the duty of the Hajj therein, there is no obscenity, wickedness or argumentation in the Hajj.**”<sup>13</sup> Al-Nawawi, may Allah have mercy upon him, says, “The answer regarding the hadith of Makhul is that it is *mursal* and *da’if*, so there is no proof in it. If it were authentic, we would interpret it to mean that *riba* is not allowed in *dar al-harb*, thus combining all the evidences.”<sup>14</sup>

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<sup>10</sup> *Siyar al-Awza’i* by al-Shafi’i, 7/359

<sup>11</sup> *Al-Majmu’* of al-Nawawi, 9/392

<sup>12</sup> *Al-Dirayah fi takhrij al-Hidayah*, 2/158

<sup>13</sup> al-Baqarah, 2:197

<sup>14</sup> *Al-Majmu’* of al-Nawawi, 9/392

When an evidence bears several possibilities as to its meanings, using it as evidence for a particular possibility is invalidated, or it is understood in the light of definite evidences such as those which prohibit *riba*, for it is not allowable to abandon such evidences for an unknown report which is not related in any of the books of the Sunnah.

- 2) Their next evidence is calling to witness the fact that the Prophet *sall-Allahu 'alayhi wa sallam* only annulled the *riba* of al-'Abbas during the Farewell Pilgrimage, although he had been a Muslim in Makkah from before, and *riba* was prohibited on the day of Khaybar. The Prophet did not annul any of his *riba* since his embracing Islam in Makkah, which was then *dar al-harb*, until it became *dar al-Islam* upon conquest. That this is evidence for the allowability of *riba* in *dar al-harb* is debatable; in fact, it is a weak argument. The first objection to it is that if this interpretation is correct and that al-'Abbas used to deal with *riba* in Makkah since it was *dar al-harb*, then how do they explain his continuing upon *riba* after the Conquest of Makkah and its conversion to *dar Islam* in 8 H until the Farewell Sermon in 10 H?! The stance of al-'Abbas, *radi-Allahu 'anhu*, is open to several different interpretations, including:

- ◆ This situation was a specific matter for al-'Abbas only, due to many issues surrounding his stay in Makkah during its days as a place of *Kufr*. The Prophet *sall-Allahu 'alayhi wa sallam* had permitted for him much greater matters, such as outwardly professing polytheism and announcing *kufr* in Makkah in the days of the polytheists.
- ◆ The hadith annulling the *riba* of al-'Abbas refers to his earlier *riba* dealings, for there is no indication that al-'Abbas *radi-Allahu 'anhu* continued upon *riba* after embracing Islam.
- ◆ Assuming for argument's sake that he did continue upon *riba*, he may not have known of the prohibition of *riba* due to his being settled in Makkah, far from the place of the descent of revelation in Madinah, so the Prophet *sall-Allahu 'alayhi wa sallam* wished to set and establish this principle on that day. This interpretation, as well as the previous one, is indicated by al-Subki in his completion of *Al-Majmu' Sharh al-Muhadhdhab* of al-Nawawi (9/392).
- ◆ That the *riba* which al-'Abbas used to deal in with the people of Makkah in those days was *riba al-fadl*, and not *riba* on debts, whose prohibition was well-known. The prohibition of *riba al-fadl* was established by the Sunnah, and knowledge of this prohibition was not widespread amongst the Companions, for it occurred on the day of Khaybar in the seventh year AH, as indicated by what is narrated from Ibn 'Abbas, *radi-Allahu 'anhu*, that he said, "There is no *riba* in hand-to-hand selling; *riba* is only in deferred payment." Hence, this could have been the transaction of al-'Abbas in Makkah, for the prohibition may not have reached him.

- ◆ Perhaps the prohibition of *riba* was not totally established in those days, until the saying of the Exalted was revealed, “**O you who believe! Fear Allah, and give up what remains of usury, if you are indeed believers!**”<sup>15</sup> This was after the tribe of *Thaqif*’s embracing of Islam in the ninth year AH, i.e. just before the Farewell Hajj. Hence it is possible that al-‘*Abbas* dealt in *riba* in Makkah until Allah categorically prohibited it by revealing this noble ayah. Perhaps this view is supported by the view of some of the people of knowledge that the prohibition of *riba* was gradual, and that the last *ayah* to be revealed regarding *riba* were those of Surat al-Baqarah, by which the prohibition was established with a definite text forbidding every unjustified increase over the capital amount. It is even related that this ayah was the last of the ayah of the Qur’an to be revealed, for al-Bukhari has transmitted from Ibn ‘*Abbas* his statement that “the last *ayah* revealed to the Prophet, *sall-Allahu ‘alayhi wa sallam*, was the *ayah* of *riba*,” and al-Bayhaqi transmitted a similar statement from ‘*Umar*.<sup>16</sup>
- ◆ From another angle, it is not related at all that the Companions, *radi Allahu ‘anhum*, ever dealt in *riba* with the *ahl al-harb*. If the Companions had understood dealing in *riba* with *harbis* to be permissible, this would have been related from them. The absence of such quotes indicates that this hadith does not indicate such permissibility.

It is worth reflecting at this point that the Hanafis consider the indication by a general text of its individual instances as conclusive evidence, and they do not allow the specification of such a general text at all by speculative evidence such as *khbar al-wahid* or *qiyas*. This is because for them, the general texts of the Qur’an and *mutawatir* Sunnah are conclusively-established and have conclusive indication, and whatever is so cannot be specified by speculative evidence. This is so because according to them, specification is a change of the meaning, and speculative evidence cannot change the meaning of conclusive evidence. By this principle, they have rejected many authentic, clear texts, such as their rejection of what occurs in the hadith of Fatimah bint Qays that the Prophet, *sall-Allahu ‘alayhi wa sallam*, did not grant her residence or maintenance, applying the general statement of the Exalted regarding divorced women, “**Let them live in the same style as you live, according to your means**”.<sup>17</sup> We are not concerned here with discussing this principle and explaining that the majority of the people of knowledge are against it, but the question which we pose here is: why did the Hanafis oppose their own position in this issue regarding the evidence of the general text, accepting the specification of general texts which decisively prohibit *riba* by evidences which do not reach the level of valid proof, neither in authenticity nor indication?

- 3) As for their calling to witness that the wealth of *harbis* is in principle *halal*, and hence allowed for a Muslim without a contract, and therefore allowed with an Islamically-invalid contract to which they agree, and that this is not treachery towards them, then

<sup>15</sup> al-Baqarah 2:287

<sup>16</sup> cf. *Ahkam al-Ta’amul bi ‘l-riba* by Dr. Nazih Hammad, pp. 28-32.

<sup>17</sup> al-Talaq:6

this in turn is a weak argument and debatable. Its weakness is in the following aspects:

- ◆ It is contradicted by the fact that when a *harbi* enters *dar al-Islam* with security, it is agreed that it is not allowed for a Muslim to have *riba* transactions with him. Were what they mention to be correct, it would apply equally to *dar al-Islam* and *dar al-harb*. If they say: “the *harbi* gains protection by entering *dar al-Islam*, and so his wealth becomes protected, thereby being excepted from its fundamental rule of being permissible; the latter rule permits the Muslim to receive *riba* from him in *dar al-harb*,” then our reply is as follows: “The situation is similar when the Muslim enters their land with security, for they gain protection thereby, and their wealth becomes protected. If this protection is lifted by mutual agreement in *dar al-harb*, then it must also be lifted in *dar al-Islam*, otherwise we have an unavoidable contradiction!” The Hanafis distinguish between the two types of security (*aman*): the security of the *harbi* in *dar al-Islam* and that of the Muslim in *dar al-harb*, whereby the former security applies both to the *harbi* and to the Muslims whilst the latter security only protects the wealth of the Muslim, leaving the wealth of the *harbis* in its original permissible state relative to him. This distinction is baseless, for as Dr. Nazih Hammad says, how can a haram earning which is mutually agreed be treachery in one case and not so in the other? How can his dealing in *riba* with the *harbi* secure in *dar al-Islam* be treachery, whilst the same transaction with the *harbi* secure in *dar al-harb* is not treachery?!<sup>18</sup>
  - ◆ It does not follow from the permissibility of their wealth as booty that their wealth is also permissible through Islamically-invalid contracts, for intercourse with their women is permitted as booty but not permitted by Islamically-invalid contracts. This objection has been challenged by distinguishing between intercourse and wealth, for intercourse is only permitted through a specific way, not through general permissibility, unlike wealth, which is allowed through general permissibility or by the agreement of its owner.
  - ◆ This reason (*'illah*) for the judgment – if we accept it for the sake of argument – is limited to the Muslim receiving an increase from the *harbi*, but is not valid in the opposite case when the *harbi* is receiving an increase from the Muslim, as in the case of this matter of buying houses through usurious loans from *harbis*.
- 4) As for their calling as witness the fact that Abu Bakr al-Siddiq had a bet with the polytheists regarding the domination of the Romans over the Persians, with the knowledge and approval of the Prophet *sall-Allahu 'alayhi wa sallam*, then this is debatable, and the people of knowledge have given several answers to it, including:
- ◆ That it is abrogated by the Prophet *sall-Allahu 'alayhi wa sallam* forbidding uncertainty (*gharar*) and gambling. It occurs in one of the narrations of this hadith from Niyaz b. Makram al-Aslami that “some of the Quraysh said to Abu Bakr, ‘That is between us and you – your companion thinks that the Romans will

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<sup>18</sup> see *Ahkam al-Ta'amil bi 'l-Riba* by Dr. Nazih Hammad, p. 26.

defeat the Persians in a few years, should we not bet on it?’ He said, ‘Yes,’ and that was before the prohibition of gambling.” Further, Imam Ahmad and the authors of the Sunan have related from the hadith of Abu Hurayrah *radi-Allahu ‘anhu* the statement of the Prophet *sall-Allahu ‘alayhi wa sallam*, “There is no racing except in spear-throwing, camels and horses,” and this is the view of the companions of Malik, al-Shafi’i and Ahmad.<sup>19</sup>

- ◆ Not accepting that this bet was prohibited and that its contract was corrupt, for the type of betting which is prohibited is invalid betting in which the religion has no benefit. As for the betting in which there is the domination of the symbols, evidences and proofs of Islam, such as the bet of Abu Bakr *radi-Allahu ‘anhu*, this is legal, in fact it is more legal than betting on fighting and horse- and camel-racing!<sup>20</sup>
  - ◆ Not accepting that the Prophet *sall-Allahu ‘alayhi wa sallam* allowed wealth gained in this way, for it is narrated that when Abu Bakr *radi-Allahu ‘anhu* won the bet and took the stakes, he brought it to the Prophet *sall-Allahu ‘alayhi wa sallam* who ordered him to give it in alms. Sufyan al-Thawri used the apparent meaning of this hadith as evidence that had the wealth been pure, the Prophet *sall-Allahu ‘alayhi wa sallam* would not have ordered him to give it in alms.<sup>21</sup>
- 5) As for their using as evidence what is narrated from his words *sall-Allahu ‘alayhi wa sallam*, “Any house allocated in *Jahiliyyah* is according to the allocation of *Jahiliyyah*,” and their statement that any estate allocation in the land of *Jahiliyyah* is upheld even if it is opposed to the rulings of Islam, and that *riba* transactions are an analogous case, it is a weak argument. This is because it is possible that the meaning of the hadith is that any contracts concluded amongst the polytheists before Islam are not revoked or reviewed, and hence this meaning takes the hadith outside the issue being discussed. The possibility of this meaning is indicated by the hadith of Ibn ‘Abbas *radi-Allahu ‘anhu*, “Every division allocated in *Jahiliyyah* is as it was divided; every allocation reached by Islam is upon the allocation of Islam.”<sup>22</sup>

To summarise: these are in general the evidences of the Hanafi scholars for their position. We have seen the weakness in this evidence, in the presence of which it is not correct to particularise the clear, definite texts transmitted regarding the prohibition of *riba al-nasi’ah* with such weak possibilities. Due to this, the other widely-followed *Madhhabs* did not accept the view of the Hanafis in this matter; in fact, Abu Yusuf, student of Imam Abu Hanifah *rahimahumallah*, rejected this view also.

It has been said [during the conferences] that many an instance of *ijtihad* was not accepted by the general mass of the people of knowledge in its time, but the ummah inclined to it later, and found in it a way out of its crises after a period of time. Similar is

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<sup>19</sup> *Al-Farusiyyah* of Ibn al-Qayyim, p. 6.

<sup>20</sup> *ibid.*

<sup>21</sup> *Al-Sayr al-Kabir*, 4/1411.

<sup>22</sup> *Sunan Abi Dawud*, 2/114.

the case of the *ijtihad* of Shaykh-ul-Islam in the matter of the three divorces, swearing upon divorce, etc. This statement is intrinsically true, but the dispute is regarding its applicability to the issue under discussion. This is because it is clear that the *ijtihad* of Shaykh-ul-Islam in these matters was not accepted merely because Shaykh-ul-Islam said so, but because one who reflects on these matters notices the strength of his arguments, and some of the righteous Salaf from the blessed generations took positions which logically follow from these arguments. Therefore, please note the difference between the two situations!

### **Has the view of allowing riba with the *harbi* in *dar al-harb* occurred in the other *madhhabs*?**

It has been related from some of the Imams the allowability of this in the absence of security between the Muslim and the *harbi*. Majd al-Din ibn Taymiyyah says in *al-Muharrar* (1/318), “Riba is prohibited in *dar al-Islam* and [*dar*] *al-harb*, except between a Muslim and *harbi* who have no security between them.” Such a statement is also quoted from other Hanbali ‘*ulama*’. Similarly, it is related from some of the Maliki ‘*ulama*’ that this is *makruh* and not *haram*, for Ibn Rushd the Grandfather says in *al-Bayan wa ‘l-Tahsil* (17/291), “Similarly, riba with the *harbi* in *dar al-harb* is *makruh*, and not *haram*, because since it is allowed for him to take from his wealth when he is not given security, it is not *haram* for him to deal with him in riba. This is disliked since he has not taken the wealth in the way it was allowed for him to do so, but has taken it from him with a riba transaction.”

It is clear that these texts do not support those who take the position of permissibility in this matter [of mortgages], due to two reasons:

1. These texts assume the absence of security between the Muslim and the *harbi*, which is opposite to the contemporary situation, since we are speaking about a transaction which we carry out with a people in whose land we live, having ties of security and trade between us and them. Upon this much, the allowers and forbidders [of mortgages] agree, since none of them says that there is no security between us and these societies, and in the mere possibility of owning homes for residence is the biggest evidence of this kind of security.
2. These quotes speak about receiving riba from the *harbi*, not about giving it to him; any general quotes in this context must be understood to apply to the former. An example of this is what is narrated from Imam Ahmad that he said, “Riba is not *haram* in *dar al-harb*.”<sup>23</sup> This is understood to apply to receiving, not paying, for Ibn Muflih has given the reasoning behind this quotation by saying, “For their wealth is allowed, and only protected by the security in *dar al-Islam*, so whatever is not so is allowed.”<sup>24</sup> This reasoning indicates that the permissibility is limited to the situation of receiving riba, as is obvious. The contemporary issue posits giving riba to the

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<sup>23</sup> *Al-Furu’* of Ibn Muflih, 4/147.

<sup>24</sup> *Al-Mubdi’ Sharh al-Muqni’*, 4/157.

*harbi*, not receiving it from him, and we shall present detailed comments about this in the next section.

### **The fourth comment [Corollaries of this argument]**

The Hanafi position (allowing dealing with Islamically-invalid contracts in *dar al-harb*) entails corrupt rulings and corollaries which untie the bonds of the prohibited matters one by one, and which our contemporaries, who have based their opinion about this issue on that position, do not adhere to. Amongst such conclusions are, by way of example:

1. The permissibility of dealing in *riba* with those who embrace Islam in *dar al-harb* but do not migrate, for their situation is the same as that of other *harbis*. It is stated in *al-Durr al-Mukhtar*, “The ruling on one who embraces Islam in *dar al-harb* but does not migrate is like that of a *harbi*, so a Muslim can deal in *riba* with him; this is contrary to the view of the others [i.e. the other three main Sunni *Madhhabs*]. This is because the wealth of such a person is not protected; were he to migrate to us, then return to them, there would be no *riba* [permissible], by agreement.”<sup>25</sup> It is stated in *Bada’i’ al-Sana’i’* of al-Kasani (5/192) during his discussion of the conditions which make a transaction *riba*, “Amongst these are that the two sides of the exchange have legal value, i.e. that they entail a right of the slave [of Allah]. If one of them does not entail a right of the slave, *riba* does not apply. Based on this principle, there is an exclusion for when a Muslim enters *dar al-harb* and exchanges one dirham for two dirhams with a man who embraced Islam in *dar al-harb* but did not migrate to us, or participates in other transactions which are invalid in *dar al-Islam*. This is permitted in the view of Abu Hanifah, but not permitted in the view of the two [Abu Yusuf and Muhammad al-Shaybani], for in his view, although protection [of the wealth] is established, value is not.” So do those who base their view on this position adhere to this, allowing Muslims visiting [non-Muslim lands] to deal in *riba*, where they receive the increase, and other corrupt transactions, with their brothers, the new Muslims in these societies?!
2. The permissibility for new Muslims in these lands to deal in *riba*, paying or receiving, as long as they do not migrate, whether this is with fellow new Muslims or with other *harbis*. This is due to the fact that protection of their wealth is fundamentally related to the land in which they live. Ibn ‘Abidin has indicated this in his *Hashiyah*, saying, “It is known from what the author has mentioned, along with his reasoning behind it, that if two people embrace Islam over there and do not migrate, *riba* also does not apply between them.”<sup>26</sup> It is clear that *hijrah* is not possible these days in the vast majority of cases, so do the new Muslims spend their entire lives following a religion in which there is no influence of the prohibition of *riba*?!
3. The permissibility of gambling and betting against the disbelievers, and of selling prohibited items to them, such as wine, carrion and pig-flesh, since these are means to

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<sup>25</sup> *Hashiyah Ibn ‘Abidin*, 5/186.

<sup>26</sup> *Hashiyah Radd al-Muhtar*, 5/187

obtaining their wealth which is in principle permissible to take. They [the Hanafis] do not look at the corruptness of the contract in itself, but at the contract as being a means to obtain the wealth of a people which is neither protected nor fundamentally valid [for them]. These contracts are thus nothing but means by which such people are persuaded to part with their wealth willingly, and thereby treachery in obtaining their wealth is avoided.

Al-Sarkhasi the Hanafi says in his book *Al-Mabsut* (10/95), “If one who has an agreement of security with them exchanges one dirham for two, cash-in-hand or with deferred payment, or deals with them in wine, carrion or pig, then there is no harm in this in the view of Abu Hanifah and Muhammad, may Allah Exalted have mercy upon them. In the view of Abu Yusuf, may Allah have mercy upon him, none of that is allowed, for the Muslim adheres to the rulings of Islam wherever he may be, and amongst the rulings of Islam is the prohibition of this type of transaction.”

In *Fath al-Qadir* of al-Kamal ibn al-Humam (7/38), it is stated, “If a Muslim who enters their land with security sells one dirham for two dirhams, it is lawful, and similarly if he sells them carrion or pig, bets with them or takes their property, it is lawful, all of it, in the view of Abu Hanifah and Muhammad, unlike Abu Yusuf.”

Hence, do our brothers who allow this [mortgage] transaction accept this position, and allow the Muslim to deal in selling prohibited items such as carrion, wine and pig-flesh, or allow him to gamble in these societies?! And can a person say that were the *ijtihad* of the Hanafi scholars in this area to be given attention again, then within a decade Islamic feeling would become naturalised, and the religious conscience of Muslim men and women settled in the Western societies would become programmed, to accept transactions in *riba*, participating in gambling, trading in wine, carrion, blood and pig-flesh and all other prohibited matters!!

### **The fifth comment [Economic implications]**

The Hanafi position entails the outflow of Islamic capital outside the lands of Islam for non-Muslims to use for investment, leaving the lands of the Muslims in a state of poverty and economic weakness. This is because the security offered by foreign banks is greater, and the usurious profits which they offer their customers is higher, so if this door is opened fully, there will not remain any surplus wealth in the lands of the Muslims. This is what led the respected Dr. Mustafa al-Zarqa, despite his inclination to make a concession in this matter, to protect the position of Abu Hanifah from abuse in our contemporary issue, and he mentioned that were Abu Hanifah to be alive in this age, he would never have permitted such a transaction. He, may Allah have mercy upon him, says,

“I do not believe that the above-mentioned view of the two Imams, Abu Hanifah and Muhammad, entails that the Muslims today in different Islamic lands are allowed to deal with foreign banks, depositing their wealth with them for usurious

profit. This is because of the difference in the prevailing conditions and ways of today compared to then, for in the time of Abu Hanifah, dealing with the people of *dar al-harb* entailed going to their lands, with the associated difficulties and hardship, leaving the matter confined to a tiny and limited number of individual cases. As for today, and with the modern means of wireless communication, any trader can deal with whomever he wishes anywhere on the earth with any amount he likes, in a matter of minutes. He can transfer any amount of money to any bank or store and conclude insurance contracts, and foreign banks give greater profits than local ones.

“Hence, if the view of Abu Hanifah, which was based upon the prevailing conditions of his time as mentioned, were to be applied today in our conditions, it would lead to the movement of Islamic capital to foreign lands for non-Muslims to invest it, leaving the lands of the Muslim depositors in poverty and economic weakness. I do not see this as allowable from an Islamic viewpoint, especially after the establishment of Islamic banks across the length and breadth of our lands, even in some foreign lands also. Were Abu Hanifah, may Allah have mercy upon him, alive today, he would not have permitted this transaction in this age.”<sup>27</sup>

### **The sixth comment [regarding the relevance of the Hanafi position to the subject under discussion]**

We have the following observations regarding the relevance and applicability of the Hanafi position to the issue under discussion, i.e. the view of allowing the purchase of houses through interest-based loans:

- 1) The proponents of a concession in this matter do not agree with the Hanafis regarding the ruling on dealing in *riba* in *dar al-harb*. This is because the Hanafis say that such a dealing is fundamentally lawful, even in a situation of ease and choice, based on the previously-mentioned arguments. However, those allowing a concession for mortgages say that such dealing is fundamentally prohibited, taking the view of the majority of scholars, only allowing it in the case of necessity or a general need which takes the place of necessity. They have clearly stated this in every declaration they have issued, so note well the divergence of the two paths!
- 2) The proponents of a concession in this matter would not be happy for it to be announced that they label the Western societies as *dar al-harb*, even if not from a fiqhi standpoint, then from a sound political standpoint. They would not be happy for them to be quoted to the world as advising their youth and their gatherings that the wealth of the people in these societies is permissible: that when the Muslim leaves the land of Islam, the wealth of the world becomes lawful for him; that he does not need to avoid anything except deception and treachery [in obtaining this wealth]; that there is no difference in this between *dar al-aman* and *dar al-harb* - all of this in a time

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<sup>27</sup> *Fatawa Mustafa al-Zarqa*, 617.

when Islam and callers to Islam are under attack from all sides, and accusations of terrorism are hurled at them in every land and under every sky. There is no better indication of this than the fact that the concluding declaration of the last conference which was convened in America did not mention this premise, sufficing with the principle of treating needs as necessities in allowing the forbidden. Perhaps this was in answer to sincere advice offered to the convenors of the conference by people of experience in these societies.

- 3) In the issue under discussion [mortgages for buying homes], it is the Muslim who pays the surplus to the *harbi*, rather than vice-versa, for it is he who is taking a usurious loan from the *harbi* and repaying the loan many times over. Hence, this is the reverse of the case allowed by the Hanafis, and to which their fiqhi arguments apply. This is because the Hanafi view of permissibility is for the case where the profit is for the Muslim, whilst our situation is opposite to that, so note again the divergence of the two paths!
- ◆ The explanation of this is that the perspective of the Hanafis in this issue is that *riba* fundamentally does not occur between a Muslim and a *harbi* in *dar al-harb*, for *riba* is the name given to a surplus gained through a contract. However, the profit gained by the Muslim from the *harbi* is not justified as the result of a *riba* contract, but is justified by the fundamental permissibility of the wealth of the *harbis*. Hence, the contract which the Muslim makes with the *harbi* does not gain him possession of the *riba* increase, but gains him the agreement which unties the bond of *aman* (security), returning the wealth of the *harbi* to its original state of lawfulness for the Muslim. Thus, the Muslim's taking the *riba* increase in this situation is like his taking over pastures and other permissible property.
  - ◆ The position of the Hanafis regarding this is only when the profit is for the Muslim, as their explicit statements and implied reasoning equally indicate, so perhaps a quick perusal of the trusted works of the Hanafi madhhab will emphasize and clarify this:
    - i) It is stated in *Bada'i' al-Sana'i'* of al-Kasani (5/192), one of the major reference works of the Hanafi *Madhhab*, in his explanation of their position, "that the wealth of the *harbi* is not protected, but intrinsically permissible [for the Muslim], except that the Muslim with an agreement of security is forbidden from seizing it without the approval of the *harbi* due to the treachery and betrayal entailed. However, if the *harbi* gives it by his choice and approval, then this obstacle is removed, so the taking of the wealth becomes a seizing of un-owned, permissible property. Such seizing is legally valid and ensures legal possession, like seizing firewood or hashish."
    - ii) Al-Kasani further clarifies the matter by saying, "By this it becomes clear that the contract here does not justify the possession, but rather it gains a condition for possession, i.e. the approval [of the *harbi*], for the *harbi*'s possession does not cease without this condition, and as long as his possession is valid, seizing

his wealth does not become legal possession [for the Muslim]. However, once the *harbi's* possession ceases, possession is established for the Muslim by taking or seizing, not by the contract, so *riba* does not occur, for *riba* is the name given to a surplus gained through a contract.” (ibid. 7/132)

- iii) In *al-Durr al-Mukhtar*, it is stated, “(There is no *riba* between a *harbi* and a Muslim) with security, even with an Islamically-invalid contract or gambling (over there), because the *harbi's* wealth there is permissible, and is absolutely lawful by his approval without treachery. This view is different to that of the other three [Imams].” Ibn ‘Abidin has commented upon this in his *Hashiyah* by saying, “It is stated in *Fath al-Qadir*, ‘It is clear that this reasoning entails the lawfulness of entering into such a contract when the profit is gained by the Muslim. *Riba* is more general than that since it includes any case where one dirham is exchanged for two, whether the Muslim or the *kafir* profits. Declaring the issue as being lawful is general and covers both situations, as it does in gambling, where the wealth at stake may be won by the *kafir*. Hence, it is apparent that the permissibility of such a contract is specified to the case where the Muslim makes the profit. The author has forced his fellow-scholars to accept the logical conclusion that their intent in permitting *riba* and gambling is for when the surplus is gained by the Muslim. This is in view of the underlying reasoning behind the judgment, even though the absolute answer is contrary to this. Allah, Glorified and Exalted, knows best what is correct.’ I say: This is indicated by what is in *al-Sayr al-Kabir* and its commentary, where the author says, ‘When the Muslim enters *dar al-harb* with security, there is no harm in his taking their wealth with their agreement by any means, because he is taking the permissible in a manner devoid of treachery, so it is wholesome for him. The captive and the one with security are equal in this. He can even sell them one dirham for two, or sell them carrion for dirhams, or take from their wealth through gambling – all of that is wholesome’.” Ibn ‘Abidin, may Allah have mercy upon him, then commented upon this by saying, “Thus, see how he has made the crux of the matter the taking of their wealth with their approval. Hence, it is known that what is meant by *riba* and gambling in their words is what is done in this manner, even though the wording usually follows its own reasoning.”<sup>28</sup>
- iv) In *Al-Mabsut* of al-Sarkhasi, in his explanation of the perspective of Abu Hanifah and Muhammad in this issue, he says (10/95), “They say that this is taking the wealth of the *kafir* with his approval. This means that their wealth is fundamentally permissible, except that he has guaranteed not to betray them. Hence, he gains their approval through these methods to avoid treachery, and then takes their wealth because it is fundamentally permissible, not because of the contract. In this way, the situation is different from those [non-Muslims] who have security in our lands, for their wealth has become protected by the contract of security, so it is not possible for the Muslim to

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<sup>28</sup> *Hashiyah Ibn ‘Abidin*, 5/186

take their wealth with the ruling of permissibility, taking it via these invalid, prohibited contracts.”

Hence, the Hanafis do not permit *riba* or other definitely prohibited matters in *dar al-harb*, as is often mistakenly assumed, but in fact they speak about two distinct issues:

- 1) **The first issue** is the absence of a cause of prohibition to begin with, as is the situation with the matter of *riba*. This is because they do not permit the *riba* increase in *dar al-harb* from a consideration of the *riba* contract, since they do not admit its possibility to begin with between a Muslim and *harbi*, even if its outward form may occur. This is because from their above-mentioned perspective, they see the principle regarding the wealth of *harbis* as being one of lawfulness, and that when the Muslim gains a surplus from them with their approval, he gains that due to their approval and not due to the contract. By their approval, their wealth reverts to being lawful as it was to begin with, and is excused from the ties of security which made their wealth unlawful for them. Hence, their wealth becomes permissible like all other permissible matters, so the surplus is not justified for him by considering it as *riba*, but by considering its original lawfulness, i.e. that the fundamental principle regarding their wealth is lawfulness. Similar is the situation with respect to their concessions regarding selling carrion or pig to the *harbis*, for they do not look at the contract of trade in itself, but they view it as a means to obtain the *harbis*' wealth in a way devoid of treachery. This is because carrion and pig is with respect to the Muslim just like non-existent items; they are not items of value. Hence if he offers these to them to obtain their wealth, then he has offered them nothing in exchange for their wealth.

We are not concerned here with refuting this view, because its corruptness is apparent. These contracts have not ceased to be prohibited. Carrying and selling wine has not ceased to be prohibited, whether it is carried to a Muslim or to a *harbi*; selling pig has not ceased to be prohibited, etc. However, we are trying to understand the position of these scholars: to explain that the root of all these rulings is that the wealth of the *harbis* is fundamentally permitted; that these Islamically-invalid contracts are as though they are non-existent; that the Muslim does not justify taking their wealth through these contracts, but gains their approval only through them in order to be free of treachery, and then he gains their wealth thereafter by considering its original lawfulness with respect to him.

- 2) **The second issue** is that of establishing the *shari'ah* punishments upon those who commit the relevant offences outside *dar al-Islam*. The Hanafis do not view that the punishments are established upon such a person, due to the absence of the means and power required to support the establishing of punishments. However, the offender incurs the sin of the crime and remains in danger, under the threat of the Divine Will with respect to the punishment in the Hereafter.

It is stated in *Bada'i' al-Sana'i'* of al-Kasani (7/131), “As for the rulings which differ between *dar al-Islam* and *dar al-harb*, they are of several types. One of them is that a

Muslim, when he commits *zina* in *dar al-harb* or steals or drinks wine or accuses a Muslim of *zina*, he is not punished for any of that, because the Imam has no power to establish the punishments in *dar al-harb* due to the lack of authority.” Hence, the issue here from the point of view of the Hanafis is that of establishing the limits and implementing the punishments, not of lawfulness and prohibition. Otherwise, could it be thought that they would allow *zina*, theft and the drinking of wine for the Muslim living in *dar al-harb* ?!

We are not concerned with refuting the basis of the Hanafi position in this matter, for a detailed explanation of that has already preceded. However, the aim is to prove that their position does not support those who legalise usurious loans for buying homes, since in this case, the Muslims are paying the surplus to the *kafirs*.

It would not be appropriate to say in this matter that the Hanafi position is of permissibility where the benefit is for the Muslim, so that when the situation is reversed and taking loans from them and paying them *riba* becomes helpful for the Muslim, as in the subject under discussion, then the ruling must be similarly reversed, based on the fact that *fiqhi* rulings apply alongside their corresponding causes, with regard to whether these are present or absent. [i.e. It is not right to say that paying *riba* is beneficial to the Muslims since they can own homes that way, and so that the Hanafi position should allow this also.] This is because the Hanafi position regarding the permissibility of taking the surplus *riba* from the *harbi* is based on the fact that their wealth is fundamentally permissible, and that seizing it with their approval is of the same nature as seizing other lawful property. Hence, it is a ruling connected to its basis and reasoning. Obviously, the wealth of the Muslim with respect to the *harbi* is not fundamentally lawful; rather, the basic principle is that it is unlawful and protected. Hence, note that a reverse analogy cannot be applied in this matter due to a distinguishing factor!

## THE SECOND PREMISE: TREATING NEEDS LIKE NECESSITIES IN ALLOWING THE FORBIDDEN

The concluding declaration issued by the Fiqh Conference of the League of Shari'ah Scholars mentions that "the home is one of the necessary needs which must be fulfilled, whether this is by renting or ownership. Renting a home for a Muslim settled in America is not without many consequences. Amongst these are those related to the size of the family, finding an appropriate place to live, and the control of the landlords over the tenants. The way currently found of buying homes via mortgages from banks who pay the price to the seller and take instalments from the buyer, is fundamentally *riba*, and is not allowed for a Muslim when he can find a shari'ah-compliant alternative which fulfils his need. Such alternatives include a contract with a company which provides finance on the basis of interest-free repayment by instalments (*bay' al-ajal*), fixed profit margin (*murabahah*), diminishing partnership (*musharakah mutanaqisah*), or other methods. Where a shari'ah-compliant alternative is not available, and a Muslim wants to own a house via a bank mortgage, most of the participants take the view that it is allowed to own the house via a mortgage from the bank, due to the need which is treated as a necessity ... This is upon the condition that he must limit himself to a house which he needs for residence, and not for trade or investment."

Before this, the concluding declaration of the fourth sitting of the European Council for Ifta' and Research, had mentioned approximately the same meaning. It had some introductory sentences emphasising the prohibition of *riba* and that bank interest is prohibited *riba*; it then appealed to the Muslims to strive to invent doubt-free shari'ah-compliant alternatives and to negotiate with conventional European banks to convert the mortgage transaction into a form acceptable under shari'ah. The declaration then says, "Since neither of these two options is possible at present, the Committee views, in the light of the evidences, principles and considerations of the Shari'ah, that there is no harm in turning to this method of an interest-based loan to buy a house needed by a Muslim for him and his family to live in, with the conditions that he does not have another house which suffices him, that the house being bought is his main residence, and that he does not have enough spare wealth to buy the house by other means."

We now have a number of comments about this premise:

### **The first comment [A positive aspect]**

The two conferences have done well in clearly stating that in principle this transaction is a type of prohibited *riba* which a Muslim is not allowed to partake in in the presence of a shari'ah-compliant alternative. Thus, they have not done what many unfortunate ones do, who always say, "Riba is prohibited, but ... what is *riba*?"

This illustrates the clear difference between the approach of the two conferences in dealing with this issue and that of many unfortunate ones attributed with shari'ah

knowledge, who exclude bank interest in principle from the ambit of prohibited riba, and misguide the nation with this cliched phrase, “Riba is prohibited, but what is riba?” This is something for which the two conferences are to be praised, in any event.

### **The second comment [The Hanafi position has not actually been taken]**

Neither conference has taken the real Hanafi position in this matter, i.e. the ruling on riba in *dar al-harb*, as understood by the permitters of this transaction. This is because the Hanafis, based on the understanding of their true position, allow this transaction to begin with, so it is included within a basic validity in a situation of ease and choice, and not only in a situation of necessity or a need which is treated as necessity. Since the latter is in fact the position of the permitters of the mortgage, all the time and effort was spent during and outside the sessions of the conferences in discussing the position of Abu Hanifah, and incorporating it into the *fiqhi* premises upon which they relied in allowing the mortgage, yet in the end they do not actually agree with his position, not even comparably, although they reach almost the same practical result!

The later conference in America was clearer regarding this, since it totally omitted any reference to the Hanafi position in justifying its resolutions, although it referred to it implicitly by mentioning the contrary view, saying, “There are those who view the impermissibility of using the bank mortgage, even in the case of a need which is treated as necessity, saying that one should suffice with renting as an alternative to ownership, notwithstanding the well-known advantages which the tenant loses. They take support from the *fiqhi* viewpoint which says that riba is prohibited both within and outside *dar al-Islam*, and that it is only permitted in case of necessity defined by the shari’ah, and not for a need, even though the latter be of a general nature.”

### **The third comment [Definition of “need” and conditions for applying it]**

This is regarding the definition of a “need,” the conditions for applying this concept, and the difference between it and “necessity.”

In the Arabic language, “need” (*hajah*) is “whatever leaves the life of a person extremely difficult if it is not present.” In the terminology of fiqh, it is “whatever is required for ease and the removal of constriction which usually leads to difficulty and hardship, accompanied by the losing of benefit. If it is not taken care of, then in general it causes difficulty and hardship.”

As for the conditions for applying the concept of “need” (*darurah*), the people of knowledge have discussed this and mentioned several, including:

- ◆ That considering this concept does not nullify the underlying ruling, and because of this, *jihad* behind tyrant rulers is valid. This is because *jihad* is necessary to protect the religion, whilst the consideration of uprightness in the ruler is complementary to

that: if the complementary factor nullifies the underlying ruling, it is not considered.

- ◆ That the need should be existent, not expected. Thus, concessions are only valid to take advantage of when the person is practically involved in their causes. Hence, one intending to travel cannot benefit from the concessions of travelling merely through the intention; rather, he must be practically involved in travelling.
- ◆ That taking advantage of the concessions for “need” should not entail opposing the objectives of the lawgiver. If concessions are granted for the sake of ease and fulfilling the needs of the people, it is not for someone to devise ways of instantiating a cause in order to take advantage of its concession, such as beginning a journey merely to shorten the prayers or break the fast in Ramadan, or to give his wealth away in order to avoid the obligatory Hajj.

As for the difference between “need” and “necessity”, the two can be differentiated from several aspects, including:

- 1) Necessity is more severe than need, for necessity is based upon doing what is an absolute must, and a person cannot leave it, whereas need is based on making things easier, so a person could leave it.
- 2) Necessity allows the forbidden, whether the necessity affects an individual or the community. In contrast, need does not entail concession or exclusion from the general ruling unless the need is that of the general community. This is because every individual has new and unique needs all the time, and it is not possible to have a specific law for every person, unlike necessity, which is rare and coercive.
- 3) The exclusive ruling that applies to necessity is a temporary allowance of what is forbidden by the text of the shari’ah. This allowance ends with the disappearance of the necessity, and is limited to the person under the yoke of necessity. As for rulings which are established based on need, they do not revoke any text, but only oppose principles and analogical reasoning [of Fiqh], and they are established in a permanent manner by which those in need and others can benefit from them.

Because of this, when the jurists discussed this principle, they did not illustrate it in the vast majority of cases by allowing any definitely prohibited matters which are agreed upon by consensus to be prohibited, and any contracts involving them to be invalid. Examples of these are *zina*, *riba al-nasi’ah*, drinking or selling wine, eating or selling pig-flesh, or similar matters whose prohibition is known from the religion by necessity. Rather, most of the applications of this principle which they mentioned belong to the sphere of contracts which are legal to begin with, but they mentioned that the legal validity of these is opposed to analogical reasoning, due to the consideration for the aspect of need. For example, some of the applications which they have mentioned are the validity of *ijarah* (renting or hiring), *ju’alah* (offering a reward to whoever achieves a certain task, etc.), *hiwalah* (exchanging or transferring debts), *salam* (advance payment on deferred delivery of goods) and *istisna’* (payment

for manufacture of goods), and that these have been permitted contrary to analogical reasoning due to the general need for them. This is because *ijarah*, *salam* and *istisna'* are cases of selling non-existent, and selling the non-existent is invalid, but these are allowed due to the need of the people. In *ju'alah* there is uncertainty, and *hiwalah* involves selling one debt for another, which is forbidden. Actually, in all of these contracts, you will find traces of their legal validity to begin with in the view of many of the people of knowledge. For example, the legality of *ijarah* and *salam* is established by the Book, the Sunnah and *Ijma'*, and similar can be said about *hiwalah* and *ju'alah*, for their validity is also established by the Sunnah and *Ijma'*. One who consults the books of Fiqh will find this to be true, and in fact there are people of knowledge who disputed that these matters are basically opposed to analogical reasoning. One who reflects upon these examples will find that they represent a type of juristic justification of some legal contracts such that the latter are shown to be consistent with the fundamentals of the shari'ah and the principles of fiqh. With this matter, the subtlety and detail of these principles, and their precision in the secondary rulings which they include and exclude, become apparent.

Al-Suyuti says in his *Al-Ashbah wa 'l-Naza'ir* (p. 88), "The fifth principle: Need is treated as necessity, whether it is general or specific. **Of the former** (general need) are: the validity of *ijarah*, *ju'alah*, *hiwalah* and similar matters, which have been allowed contrary to analogical reasoning, due to the first matter including a contract upon benefits which do not yet exist, the second having uncertainty, and the third involving selling one debt for another. This is due to the general need for these, for when a need becomes general, it is like necessity. Of this type also is the guarantee of redress, which is allowed contrary to analogical reasoning, for when a seller sells something he owned, the price which he has taken is not a debt upon him such that he should guarantee it, but this is due to the people's need to deal with unknown parties, and the lack of assurance that other people may have rights to the sold goods. Of this type also is the issue of reconciliation by giving up rights, and the permission to look at the opposite sex for certain dealings, and other similar matters. **Of the latter** (specific need) is that repairing a dish with silver is allowed out of need, without consideration for the absence of material other than silver. This is because manufacturing vessels from gold and silver is fundamentally permissible, but here the objectives related to the silver are other than decoration, such as repairing a crack or binding or strengthening the vessel. Of this type also is that eating from the booty in *dar al-harb* is permissible out of need, and it is not a condition that there should be someone else with him."

One who considers the examples which he, may Allah have mercy upon him, mentioned, finds that they are all from the sphere of valid transactions, whose validity is established by other evidences, but the discussion is about justifying them from fiqh principles and shari'ah fundamentals, such that the arrangement and consistency of the composition of the shari'ah rulings is made clear.

### **The fourth comment [The need for a home is not met only by ownership]**

There is no dispute about the fact that the home is one of the necessary needs of the human being which must be fulfilled, whether this is through renting or ownership or any other way in which one can have a home. The very existence of a shelter (home) to which a person can return is indisputably one of his basic needs, but what is disputed is the insistence that this need can only be fulfilled by ownership, and the consideration that ownership itself, out of all possibilities, alone represents this basic need in all situations, in such a way that a concession is granted regarding a prohibited matter whose prohibition is known from the religion by necessity. On top of that is the insistence that this need cannot be met by renting in all situations; this was stated and emphasised in one of the papers presented to the Conference of the League of Shari'ah Scholars.<sup>29</sup>

Every evidence which has been presented or could be presented in this instance, none of it could be specified only to home-ownership: it can only be specified to the starting-point of having a home in itself. There is a difference between discussing the starting point of a shelter or home in itself, and diverting this to a particular form such as ownership or renting. Having a shelter in a home which protects from heat, cold, the gaze of passers-by and all other natural matters is something for which there is no alternative and it cannot be done without. It is this which is indicated by all the evidences brought by those who speak about the importance of a home and the pressing need for it. As for making ownership itself represent this basic need, such that the need for a home is only fulfilled through it, then there is nothing in the evidences of the shari'ah or the experienced situation which supports this conclusion in any way.

Since the first shortcoming here is the mix-up between the intrinsic basis of a home and a particular form in which it is manifested, followed by applying the evidences for the former to the latter, then perhaps the first correction is to remove this mix-up and lift this confusion. I hope that in this manner, the way is prepared to deal well with this question, and for opponents over the issue to meet upon a common word.

### **The fifth comment [The existence and applicability of the need]**

This is regarding the existence of this need which demands that it be treated as necessity in allowing the forbidden, and the extent of the prohibited matters which it allows.

In principle, the need for the prohibited does not exist, nor is its existence conceivable, unless the legal alternative which fulfils this need disappears. Similarly, the necessity for the prohibited does not exist, nor is its existence conceivable, unless the legal alternative which fulfils this necessity disappears. If the prohibited becomes widespread in everything by which necessities are needs are fulfilled, then this situation exists, and the way is prepared to discuss it. For example, if we were to say that the need for a shelter where a person can take refuge is one of his necessities, and then we were to look around

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<sup>29</sup> cf. *Buying Houses via Interest-Based Loans outside Dar al-Islam* by the respected brother Dr. Muhammad Qutnani.

and find no shelter except by home-ownership, and were to find no way to home-ownership except via usurious loans, then it would be correct to say that this situation had arisen which allows the person to partake in the forbidden as much as fulfils the necessity. In such a situation, another question would arise, which is that the necessity is fulfilled by a minimum level of shelter: a closed area which protects from heat, cold and the elements. So then would we stop at the level of necessity in fulfilling this need, only taking the minimum shelter, since necessity is determined according to its level? Or would it be possible to expand upon this a little, so we reach the level of needs, due to the obvious difficulty and major hardship entailed in the level of necessity, especially when the need becomes general, the circle of necessity widens and its time-period lengthens? Here comes the role of this principle, “Needs are treated like necessities in allowing the forbidden,” to bring some necessary ease, without which strength would be lost, structures demolished, and the people would be prevented from taking part in the ebb and flow of earning a livelihood! It would then be said that whilst the situation is like this, it is not compulsory for the person to remain at the level of necessity only; he can take steps without which his present and future situation would be harmed, without going beyond the level of need and into comfort and luxury, in application of this principle. This is what Imam al-Haramayn al-Juwayni has discussed in his book *Al-Ghiyathi*, decisively solving the matter with an unprecedented, precious analysis. Yet people came after him who did not read it properly or understood it wrongly!

### **Imam al-Juwayni’s analysis of this principle**

- ◆ He *rahimahullah* explained that by “need” is not meant desires or longings, but what is meant is the repulsion of harm, and whatever is anticipated to corrupt the structure, diverting people from taking part in the hustle and bustle of daily life. He *rahimahullah* says, “By ‘need’ we do not mean the longing and eagerness of the people for food, for it is possible that one desiring a thing is not harmed by being deprived of it. Hence, there is no consideration for desires or longings. What is considered is the repulsion of harm, and maintaining the people upon what establishes their capabilities.” He *rahimahullah* concluded this section by saying, “The people take [such steps] without which their present or future situation would be harmed. By the “harm” which we have mentioned during this discussion, we mean whatever is anticipated to corrupt the structure, or cause weakness which diverts people from taking part in the hustle and bustle of daily life.”
- ◆ He *rahimahullah* did not make benefit the measure of the need which is treated like necessity in allowing the forbidden, saying, “If it is said, ‘Why do you not make the relevant consideration the benefit of the person concerned?’ We would reply that this question has strayed far from the paths of guidance! For if we establish a general need in favour of the majority of the people, equivalent to a necessity for an individual in permitting what would be prohibited in a situation of choice, then it is impossible to imagine an increase in the prohibited being benefit, comfort or luxury.

This is the final explanation in this matter.”<sup>30</sup>

- ◆ As he *rahimahullah* mentions, the hypothetical issue is that the *haram* covers all areas of the earth, and that all means of earning are corrupted, so that the people find no way at all to seek the *halal!* The question which he poses in this situation is: should the people remain in such a situation within the limits of what keeps them barely alive and repels the danger of death, or can they take more according to the level of need?! The latter answer is obvious here, since remaining at the level of necessity only in this situation entails “loss of power, breaking of aspirations, demolition of structures, and the resulting loss of cultivation, agriculture, means of earning and protecting livelihoods, by which the affairs of the creation are definitely upheld, leading to the destruction of the people. This would include people of power and their aides, and the Muslim soldiers protecting the frontiers – if they were to weaken, falter and give in, the unbelievers would become bold and invade the lands of Islam, and thus paths would be disconnected and the system would be destroyed.”<sup>31</sup>

So consider, may Allah have mercy on you, these conditions which this great Imam has mentioned:

- ◆ “Need” in his view does not mean merely the longing or eagerness for something.
- ◆ “Need” in his view does not mean benefit, comfort or luxury.
- ◆ “Need” in his view means the repulsion of harm, and maintaining the people upon what establishes their capabilities.
- ◆ That the absence of any steps taken entails the corruption which he indicated, or something near to it, in the present or future.
- ◆ The hypothetical situation is that the *haram* covers the whole earth, and that all means of livelihood are corrupted, and that the people find no way at all to seek the *halal!*

### **How did al-Juwayni *rahimahullah* implement this principle, specifically in the case of homes?**

- ◆ **A man’s need for a home is a pressing need.**  
It did not escape him *rahimahullah* to discuss homes specifically, saying, “As for homes, then I hold that a man’s home is one of the most pressing needs: a refuge which can shelter him, his family and his children; there is no way he can do without this.” Thus, he began by explaining that a man’s need for a home is one of his most pressing needs, and is something without which he cannot do.
- ◆ **Conditions attached to treating this need like necessity in allowing what is not lawful.**  
He did not leave the matter general, but rather explained that the concession of allowing the prohibited in order to attain a home is constrained by a number of tight conditions, which he explains by saying, “This situation is hypothetically reached

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<sup>30</sup> *Al-Ghiyathi* of al-Juwayni, pp. 480-1.

<sup>31</sup> *ibid.*, pp. 476-7.

when the *haram* has become widespread, and the people of all regions and areas do not find a way to move from their lands to lawful places, and they are not able to re-employ unused land and build homes other than the ones where they live.”<sup>32</sup>

He *rahimahullah* then increases the matter in clarity: “It is then incumbent to suffice with the level of need, and anything related to comfort and luxury is prohibited.”<sup>33</sup> He further emphasises the conditions attached to this concession by saying, “Amongst what is related to the final explanation of this is that everything which we have mentioned regarding it applies only when the prohibited matters have become widespread, and the ways to the lawful have been blocked. However, if the people are able to attain the *halal*, it is incumbent upon them to leave the *haram* and bear the fatigue involved in earning the *halal*. This is if what is within their power is enriching from poverty, sufficient, fulfilling necessity and meeting need. However, if it does not meet the general need, but only fulfils certain requirements and meets certain needs, then it becomes incumbent to attend to the general need. Thereafter, the remainder of the need is met with what is not lawful according to the detailed manner mentioned previously.

If it is said, ‘What you have mentioned of the prohibited matters covering all areas of the earth, and of the *haram* infiltrating all levels of humanity, then what is the answer if this is limited only to certain aspects?’ We would reply: If the people are able to move to places where they have the capability to attain the lawful, this becomes incumbent. If this is not possible, and they are a sizeable group, a large number, such that were they to suffice with bare survival and wait for the time of necessity to pass, they would be cut off from their requirements [of daily life], then the answer regarding them is like the answer regarding the people in general: they should take steps according to the level of their needs, as we have detailed ...”<sup>34</sup>

**In the light of these quotes, which we have intentionally given in full, we can explain that his conditions specifically regarding homes can be summarised as follows:**

- That the *haram* covers all areas of the earth and the ways to the *halal* are cut off, otherwise it is incumbent to bear the fatigue associated with earning the *halal*.
- That the people find nowhere lawful to move to from their lands.
- That they are not able to re-employ unused land and build other homes.
- That they do not have the capability to move to other places.
- They must suffice with the level of need, and anything related to comfort or luxury is prohibited.

◆ **More caution regarding the matter of homes**

One very strong indication of the caution of the Imam *rahimahullah*, and his keenness not to exceed the bounds of need, is that he made the measure of need for a concession in clothing, when the *haram* covers all parts of the earth, similar to the measure of need for a bankrupt person whose debts surround and trap him. This

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<sup>32</sup> *ibid.*, p. 486.

<sup>33</sup> *ibid.*, p. 487.

<sup>34</sup> *ibid.*, pp. 487-8.

measure is that appropriate clothing be left upon him as is fitting for his position in society. However, in the matter of homes, he mentioned that the person should suffice with the minimum home with consideration of his position in society, but did not say that his actual home should be left for him. He said, “The one trapped in debt, bankrupt, has appropriate clothing left upon him as befits his place in society, and he suffices with the minimum home as befits his position in society. The relevance of this is that we say: when the prohibited matters become dominant, everyone suffices with the clothing which would be left with him were he to go bankrupt.” He then poses a question, “Why is the home of the bankrupt person not left for him, but rather it is incumbent upon him to suffice with the minimum home as befits his position in society?” He goes on to answer this by saying, “We would say: the reason for this is that he can usually find a shelter for a negligible rent, so he must suffice with that.”<sup>35</sup>

So consider, may Allah have mercy upon you, his conditions in this matter. Then, return the sight: do you see any shortcoming or excess in establishing that necessity is determined according to its level, and that need is treated with what meets it? Then, return the sight twice more, do you see “need” in his view as anything other than repelling harm in the present or future, and that the harm which he means is whatever is anticipated to corrupt the structure or cause weakness which diverts people from the hustle and bustle of the matters of livelihood? Do you see him faltering in seeking legal alternatives before granting concession regarding what has spread and become common of the *haram*? Then, compare what I have quoted to you with the views of our beloved brothers who allow this matter, and study the effect of a concession in the matter of an owned home with its advantages and luxury, compared to the words of this great Imam?!

### **The respected Dr. al-Qaradawi’s conditions in the matter of necessity**

He, may Allah protect him and lengthen his lifetime, says in his precious book, *Bank Interest is Prohibited Riba* (pp. 110-1), under the heading, ‘An essential note about the claim of necessity’:

“Before I end this discussion, I wish to establish that there is a principle about which there is no disagreement, and it is that necessities have their own rulings established under the law. Just as necessity allows for the individual to eat carrion, blood and pig-flesh in the case of starvation as stated in the Generous Qur’an, ‘**So whoever is forced by necessity of starvation, without transgressing into sin, then Allah is Forgiving, Merciful**’<sup>36</sup>, the necessity for the ummah is considered likewise, and this allows for it what was forbidden in a situation of choice.

All that is required in both situations is three matters which must be considered:

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<sup>35</sup> *ibid.*, p. 486.

<sup>36</sup> *al-Ma’idah*, 5:3

**Firstly**, that the necessity is practically experienced, and is not a mere claim in order to allow the clear *haram*. This matter has its supports and indications with the people of knowledge and vision. One should ask regarding this trustworthy people of knowledge and experience in the matters of finance and economics who do not follow their desires, and do not sell the Hereafter for the earlier world, ‘**And none will inform you like one who is aware.**’<sup>37</sup>

**Secondly**, that all doors to the halal have been closed to the one compelled, whether it is an individual or a government, despite attempts to find ways to it, and that no legal alternatives are found which meet the need and can benefit in escaping from the limit of necessity and its overpowering domination. Where alternatives are found, and the door to the *halal* is open, then it is not allowed to take refuge in the *haram* under any circumstances.

**Thirdly**, that what is permitted out of necessity does not become a fundamental or a principle; rather, it is a temporary exclusion which fades with the disappearance of the necessity. This is why the people of knowledge have added to the principle, ‘Necessities allow the forbidden,’ other complementary and conditional principles which say, ‘What is allowed out of necessity is determined according to the situation.’ These are derived from the saying of the Exalted, ‘**Whoever is compelled out of necessity, without transgression or overstepping, there is no sin upon him.**’ Whoever exceeds the bounds of necessity in time or measure has transgressed and overstepped.”

There is no comment or anything to add to what the respected shaykh has mentioned here!!

If matters are not conditioned in this way, there would be major ruptures appearing in the religion, and the door would be opened in these societies to removing the yoke of responsibility and permitting most of the prohibited matters through the infusion of desires and misconceptions! Some examples of this follow:

Someone who remains a bachelor for a long time in this land has a pressing need to satisfy his sexual urge. There are often many obstacles in the way of marriage: legal, social and material. Hence, is it valid to say that such a need allows the person to fornicate, or to partake in some of its preludes?

Traders and workers in these lands have a clear need in many situations to take a usurious loan in order to firmly plant their investments, and to enable them to survive and compete in a world in which there is no place for petty little enterprises. Is it valid to say that this need justifies usurious loans as long as the benefit in this is for the Muslim? They also have the need for a concession to trade in wines and pig-flesh, in the sense that these are considered as parts of a total enterprise into which no-one should enter unless he accepts it in totality. Similar is the situation with Seven-Eleven and Shoppers stores and others, so is it valid to say something similar about these situations?!

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<sup>37</sup> Fatir: 14

The Muslims in general have a need for ease in the matter of meat, due to the sparsity of stores which sell halal meat and the obvious increased prices of the latter. Hence, is it valid to say that this need justifies their eating carrion, such as that which is strangled or beaten to death, etc.?!

After all of the above, there remains a final question: why is the application of this principle limited to the West, and a similar verdict not given for the East, whereas the need there is more pressing and alternatives there are more constrained?!

### **The sixth comment [Between needs and comforts]**

This is regarding the mix-up between the level of needs and that of comforts in the hierarchy of achieving common benefit. The understanding of “need” in the terminology of the scholars of *usul*, as previously indicated in the words of al-Juwayni, is whatever leads to difficulty and hardship in its absence. Al-Shatibi defines it as “what is required for the sake of ease and lifting of constraints which normally lead to difficulty and hardship in its absence. If this need is not attended to, the people generally experience difficulty and hardship, but not overall corruption which is anticipated in the case of [legislating] general benefit.”<sup>38</sup>

This can be represented in our situation by a person with a large family whose rented home becomes constricted and he feels difficulty in staying there. This is the kind of need around which the argument centres as to whether or not it permits the prohibited, for the level of need is above the level of necessity. The necessary is that which is essential to establish the requirements of *din* and *dunya* such that if it is not found, the requirements of *dunya* do not function in a settled manner, but rather in a state of corruption, immorality and loss of life. The latter case can be represented in our situation by a person for whom the doors of renting and interest-free loans are closed, and he has no possibility of buying a home, so that he becomes vulnerable to being thrown out on his face without shelter. This is the type of situation which is a case of necessity, for which the people of knowledge are agreed that it permits of the forbidden what is required to repair the situation.

From the above, it is emphasised that the need meant here is, by the nature of things, not simply comfort or luxury or mere ease and an increase in pleasures, for that belongs to the level of comforts (*tahsinat*), which al-Shatibi defines by saying, “Taking what is appropriate of the best of habitual things, and avoiding filthy situations which are abhorred by intelligent minds.”<sup>39</sup>

This can be represented – and the representation is purely to conceive the level of comfort in the hierarchy of common benefit – by a trader who wishes to take a usurious loan in order to expand his business, hoping to increase his profit. Or it could be a young man in the prime of his life who has not yet married, or who has recently married and has

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<sup>38</sup> *Al-Muwafaqat*, 2/4-5.

<sup>39</sup> *ibid.*, 2/5

a reasonable income, who wishes to buy a home instead of renting, since this is more comfortable for him and a more profitable investment for his wealth. It is clear that none of the people of knowledge has said that comforts can be treated as necessity in allowing the forbidden!!!

It follows that what the Conference has mentioned of the advantages and benefits of *riba*-based home-ownership is not valid on its own as a justification of concession. What is required would be a pressing need added to that which would bring the matter out of the zone of comforts and into the zone of needs at least, to prepare the way to analyse this *ijtihad*, assuming it is a plausible *ijtihad*, alongside the other *ijtihad* upon which are the majority of the people of knowledge: the view that a situation of necessity must exist to justify a concession in the matter of *riba al-nasi'ah* upon the prohibition of which the entire *ummah* is agreed, this being a prohibition of ends, not a prohibition of means! Only then could a person in such a situation consult his heart, or whomsoever he wishes of the people of knowledge, until he can decide which of the two views is stronger.

The general form of the resolutions of the two conferences, which can be understood from the way these are dressed and expressed, is something which needs careful and detailed consideration. This is because the wording is wide enough to include both levels: needs and comforts, and opens the door to conclusions which the respected leaders who have issued this fatwa do not endorse, for they are in piety and religion at an indisputable status. This is how we reckon them, and Allah is their real reckoner, for we do not ascribe piety to anyone before Allah.

The absolute declaration that needs are to be treated as necessities in allowing the forbidden will open the door to dozens of possibilities and other applications, perhaps some of which have not even occurred to the mind of the issuers of the declaration. These will lead us to permit what Allah has totally forbidden in the matter of transactions and dealings (*mu'amalat*):

- The student may come to us and say that he needs to take a usurious loan in order to complete his studies, since no-one in these societies can afford the expenses of studying, by Allah, except the children of very rich people, and how few they are!
- The doctor may come to us after graduation to say that he needs to equip his clinic or hospital in order to begin his working life and establish himself economically, and he does not have the required cash-flow for that, nor can he find an interest-free loan.
- The same student may come to us after graduation and say that he is in need of marriage, and cannot find funds or an interest-free loan, and so he wishes to use a credit card to pay for the expenses of marriage, repaying that in instalments, which by the nature of things involves *riba* increase.
- He may come to us again after that to say that he needs to bring his father and some of his family to attend his wedding, or that he wants to travel to them so that they may share in his happiness, for it is the happy moment of life as they say. He wishes to pay for the required travel tickets by credit card, along with the resulting increased *riba* payments.

- He may then come and say that he needs to buy a car. Old, cheap cars break down often and are expensive to maintain, so he wishes to buy a new car via a usurious loan, and in fact, he may remember to say that he is keen to attend the congregational prayer with this car and to attain the reward of the first row!
- Every person may come to us with his particular enterprise expressing his need for a usurious loan to finance his investments by which he wishes to escape from the humiliation and uncertainty of salaried work, to clear his heart for Islamic work, and to participate in building the Muslim community.
- The trader may come and say that he sells with deferred payment, and that his need to convert his monetary papers to cash at discounted rates at the bank is a pressing need. This is because people do not have enough liquidity to buy up-front, and he does not have enough capital to fund all these instalments. Or he may come and say that there is no place in these societies for insignificant, tiny economic enterprises, and so he wishes to expand his business via usurious loans to erect the structure of his investments and to achieve enough strength to compete?
- The farmer may come and say that his need for a usurious loan to cover the expenses of his farming is a pressing need, especially those who work in the area of reclaiming land for cultivation, where the exorbitant expenses are well-known.
- The Muslim community may come and say that its need to establish an Islamic school is a pressing need, and it does not have the required funds for that, so it would like a concession regarding usurious loans to meet this need.
- In fact, it may come and say that we have bought a piece of land in order to build a mosque on it, and our funds have finished before completion of the work, so the need to complete this is a pressing need. The importance of establishing a house of Allah is no less than the importance of establishing an individual's house, for which you have granted the concession of usurious loans. So in turn, they want the concession to take a usurious loan in order to complete this building! This possibility, as well as the previous one, has actually happened in many places, and I do not think that these instances escape the attention of those who have allowed this concession.
- The matter may not stop at the limit of *riba* only, for someone may come and extend it to other prohibited matters, for many economic enterprises in these lands are polluted by the prohibited. Restaurants and supermarkets involve wine and pig-flesh. Their owners, or those who buy them may be forced to deal with them as they are since they are considered a chain of identical units [shops or restaurants]. So a Muslim investor may come and say that he has a need to enter this area as an alternative to being trapped in salaried work or petty loss-making enterprises, and so he wants a concession to own these large enterprises, along with the prohibited matters involved in them.
- We can imagine the danger of these claims when we call to mind what was mentioned in the papers of the Conference of the League of Shari'ah Scholars: that what is meant by necessity in matters of habit (*'adat*) is actually need, and not necessity as understood in matters of worship (*'ibadat*). Add to this what was mentioned in its concluding declaration, that the Muslim is not legally obliged to establish the civil, financial and political Shari'ah rulings etc. which relate to the general system in a society which does not believe in Islam since this is not within his capability. The prohibition of *riba* is one of these rulings which relates to the nature

of the society and the philosophy of the state and its social and economic orientation. Rather, the Muslim is required to establish the rulings which concern him specifically, such as the rulings of ritual worship, food, drink, dress and those related to marriage, divorce, re-marriage, waiting periods after divorce, inheritance and other personal matters. This is such that if he was placed under constraints in these matters and was not able to establish his religion in them in any way, it would be obligatory on him to migrate in Allah's spacious earth as soon as he found a way to do so.

- It is incumbent to provide an answer to this kind of question: Is this concession established to repel difficulty and hardship, or is it an ease in obtaining benefits and attaining the common good? If it is the latter, then the form of the answer should rather be treating needs and comforts like necessities in allowing the forbidden!! This is because the head of a small family could say: despite the fact that he does not feel any difficulty where he is, nor any shortfall in his income, nor excessiveness in the size of his family, but he wishes to own a home via *riba* for the sake of comfort and luxury. Or it could be that by the logic of benefit and the arithmetic of material earnings, he sees that this best for him and most profitable for his wealth. Or he might say that he wishes to replace his humble and battered car with a sleek new one, and why not? Is not a spacious house and a comfortable ride from the good and blessed fortune of the slave, as long as the matter is within the principles of legality?!
- In fact, it is not too much to suppose the governments in our lands using this argument, and justifying by it their need of usurious loans from the international arena. Further, they can justify their tourism projects, along with all the associated prohibited activities such as obscenity, intoxicants, nudity etc., by claiming to encourage the civilisation of tourism and maximise foreign investment! It is not enough in refuting this to say that the fatwa is specifically for outside of *dar al-Islam*, because the fatwa is based on a general principle, "Treating needs like necessities in allowing the forbidden." None of the people of knowledge of the past has said that the application of this principle is limited to contracts outside *dar al-Islam*: hence this specification becomes one without basis, a judgment without evidence!

### **The seventh comment [The difference between need or necessity at individual and communal levels]**

This is regarding the difference between the occurrence of need or necessity at the individual level and its occurrence at the community level. This is because it might be true to say that need occurs at the individual level due to the absence of a legal alternative which meets this need, but it is difficult to justify the same assertion at the community level, because it is quite within their capability to strive to escape from the situation of necessity or need that surrounds them. However, they are negligent and falter in doing so. Hence, a concession can be granted for individuals that may not be granted for the collective. It is well-established amongst the people of knowledge that a partial concession can be granted in something, but a total concession is withheld.

The application of this to the subject under discussion – assuming for argument's sake the occurrence of a general need due to the absence of alternatives at an individual level,

which is not correct – is that it is difficult to assert the absence of alternatives at a collective level in this manner, for it is within the capability of individuals together to escape from the supposed situation of necessity, and to come out of it by inventing a legal alternative. There is no obstacle blocking this, and nothing preventing them, for there is plenty of stored-up wealth, economic freedom, and plenty of minds which can manage this sufficiently well. Hence, what prevents this collective from rushing to end this state of necessity by forming organisations which manage this matter within a divinely-inspired framework and from reference to the Shari'ah?!

Based on this, were the declaration to limit the concession to an individual who falls into a situation of clear need, after he has described his circumstances to one whose piety he trusts of the people of fatwa, it would have reason to be considered. As for stating the concession in general terms and addressing it to the generality of the communities in the West, this doubles the error and makes it two-fold: once in supposing the absence of alternatives, and secondly in supposing the absence of capability in creating alternatives at a collective level. This is all after observing that if effort is concentrated on finding alternatives, and there is true determination upon this, then doors will be opened and difficulties will disappear by the permission of Allah, whether that is done at the individual or collective levels. We have seen Islamic banks in the West, such as Al-Taqwa Bank in Switzerland, attempt to extend their investment activities into this field. We have also seen the approach of some eastern Islamic banks towards investment in this field. Although these attempts begin weakly and do not fulfil all expectations, they will strengthen and their experience will increase gradually by the permission of Allah.

## THE THIRD PREMISE: WHATEVER IS PROHIBITED AS A MEANS IS ALLOWED OUT OF NEED

This premise is regarded as complementary to the previous one, and I wished to treat it separately due to its importance and the need to establish the truth about it. It can be summarised as appears in the concluding declaration of the European Council: “What is established in Fiqh, that whatever is prohibited as a means towards evil may be allowed out of need, while whatever is intrinsically prohibited can only be permitted out of necessity. Since what is intrinsically prohibited is the devouring of *riba*, that is what is only permitted out of necessity, but those things that lead to that, such as paying *riba* or writing or witnessing the contract, are prohibited as a means towards evil, so they are permitted out of need.”

We now have a number of comments about this premise, which we concisely state as follows:

### **The first comment** [Which matters are intrinsically-prohibited, and which are prohibited as means?]

One of the things which our fiqhi heritage has preserved for us is that what is prohibited as a means is *riba al-fadl*, not *riba al-nasi'ah*, and the evidence brought for this is statements of the Prophet *sall-Allahu 'alayhi wa sallam* such as, “Do not sell one dinar for two dinars, nor one dirham for two dirhams, for I fear that usury will befall you.”<sup>40</sup> Ibn al-Qayyim *rahimahullah* says, “*Riba* is of two types: explicit and hidden. The explicit type is prohibited due to the great harm in it. The hidden type is prohibited because it is a means to the explicit type. Hence, the former is prohibited as an end, whilst the latter is prohibited as a means. The explicit type is *riba al-nasi'ah*, and it is the one they used to carry out in Jahiliyyah, such as delaying payment of a debt and increasing its amount, increasing the amount every time payment was delayed until a hundred became thousands piled up ... So from the mercy of the Most Merciful of those who show mercy, and His Wisdom and Kindness to his creation is that he prohibited *riba* and cursed the one who devours it, the one who pays it, the one who writes it down, and the two who witness it, and he announced war with Him and war with His Messenger for whoever does not leave it.” He *rahimahullah* went on to say, “As for *riba al-fadl*, its prohibition is to block the means.”<sup>41</sup> He *rahimahullah* mentioned in another place that some of *riba al-fadl* is permitted out of need, such as the transaction of *'araya*, which is to sell fresh dates still on the tree for dry ones due to the impossibility of comparison between them. This is because fresh and dry dates are of the same category of produce, and one is definitely better than the other due to its freshness. However, this surplus is impossible to separate and distinguish. The basic principle in the matter of *riba* is that doubt in comparability is like knowledge of a difference in quality. Hence, the

<sup>40</sup> *Musnad Ahmad*, cf. *Al-Fath al-Rabbani*, 15/74.

<sup>41</sup> *I'lam al-Muwaqqi'in*, 2/154-5.

conclusion dictated by analogical reasoning would be that this transaction is prohibited, were there no *sunnah* regarding it. However, the Sunnah came and permitted it, for al-Bukhari and Muslim have transmitted on the authority of Zayd b. Thabit, “**that the Messenger of Allah, *sall-Allahu ‘alayhi wa sallam*, granted a concession in the case of fresh dates still on the tree, that they could be sold according to their estimated measure.**” Hence, it is this type of *riba* that can sometimes be permitted out of need under its conditions established by the people of knowledge in such situations.

As for *riba al-nasi’ah*, there is agreement that its prohibition is an intrinsic prohibition, that it is the one for which the Qur’anic threat of punishment originally came, and over it was announced war from Allah and His Messenger. When the Conference of the Islamic Research Academy convened in Cairo in 1385 H, it was stated in its resolutions that, “Lending with *riba* is prohibited, and permitted neither by need nor necessity. Borrowing with *riba* is similarly prohibited, and its sin is not lifted unless necessity calls for it, and every person must look to his religion when estimating his necessity.” This conference was attended by representatives and delegates from thirty-five Islamic states. It distinguished between lending and borrowing because necessity cannot fundamentally be imagined in the case of lending, which is only motivated by greed, avarice and open enmity to Allah and His Messenger. As for borrowing, it is the one where necessity is conceivable, such as a person on the brink of perishing, who cannot repel the danger to his life except with a usurious loan: in such a situation the concession is granted. However, no-one has said, as far as we know, that the prohibition of borrowing with *riba* is a prohibition of means, and that it can be permitted out of need.

This is what was established by the Islamic Research Academy over thirty-five years ago. Our respected teacher Dr. Yusuf al-Qaradawi quoted this as a witness in his refutation of the respected former Mufti of Egypt’s permitting bank interest. He wrote a valuable book on this topic called *Fawa’id al-Bunuk hiya al-Riba al-Haram* (“Bank Interest is Prohibited *Riba*”), and headed a section with the title, “A consensus of opinion (*ijma’*) can only be abrogated by a similar consensus.” In this section he mentioned the consensus of the *fiqh* assemblies on the prohibition of bank interest, and the opinions of the people of knowledge about the possibility of abrogating consensus. He, may Allah protect him and lengthen his lifetime, then ended the section by saying, “If we apply this to our situation here and even regard this consensus as of the *ijtihadi* type for the sake of argument, then a small group of people – most of whom are not specialised in *Fiqh*, and have not dived into its oceans – does not have the right to oppose this consensus which a new minority opinion, for the weaker cannot overpower the stronger. The assemblies must convene again to analyse the matter, if there are any new circumstances.” (p. 70)

So can we now ask the permission of our respected shaykh to employ the same argument and say: the weaker cannot overpower the stronger. The Conference of the Islamic Research Academy which was attended by representatives and delegates from thirty-five states resolved by consensus that borrowing with *riba* is prohibited, and that its sin is not lifted unless necessity calls for that. A small group of people – most of whom are not specialised in *Fiqh*, and have not dived into its oceans – does not have the right to oppose this consensus, resolving that the prohibition of borrowing with interest is a prohibition of

means, and that it is permitted out of need, for the weaker cannot overpower the stronger?!

The respected shaykh indeed has the right – for he is the *faqih, mujaddid* – to change his *ijtihad*. However, do we have the right to stand by what the majority established earlier, that the sin of borrowing with *riba* is not lifted unless necessity calls for it? Further, do we have the right to request the respected shaykh that the committees should convene again to analyse the matter if there are any new circumstances?!

In summary, the resolution of the two conferences that it is only lending with *riba* which is intrinsically prohibited, and therefore only permitted by necessity, whilst borrowing with *riba* is prohibited as a means and therefore permitted out of need, needs to be urgently reconsidered in the light of all the issues which have been indicated above in applying this principle to our contemporary situation.

### **The second comment [Devourer and payer of *riba* are equally cursed]**

The sacred texts relevant to this matter equally curse the one who devours *riba* and the one who pays it, for **the Messenger of Allah, sall-Allahu ‘alayhi wa sallam, cursed the one who devours *riba* and the one who pays it, and its witness and scribe**, transmitted by Muslim. Al-Nasa’i transmits via a different route on the authority of Ibn Mas’ud, who said, **“The devourer of *riba*, its payer, its two witnesses and its scribe are cursed upon the tongue of Muhammad, sall-Allahu ‘alayhi wa sallam.”**

Devouring interest is usually mentioned specifically because those about whom the ayat of the prohibition of *riba* were revealed used to live off *riba*. Otherwise, the punishment, as in this hadith, covers both devourer and payer. With these sacred texts, it is difficult to say that the prohibition of paying *riba* is a prohibition of means which is permitted merely by needs.

## **THE FOURTH PREMISE: THE NON-OBLIGATION TO ESTABLISH THE CIVIL, FINANCIAL AND POLITICAL RULINGS OF THE SHARI'AH OUTSIDE *DAR AL-ISLAM***

The concluding declaration issued by the European Council for Ifta' and Research mentioned this premise, considering it as one of the decisive factors in favour of the Hanafi position which says that there is no *riba* in *dar al-harb*. It mentions "that the Muslim is not obliged under the Shari'ah to establish the civil, financial and political rulings of the Shari'ah and other such matters which are related to the general system, in a society which does not believe in Islam, since this is not within his capability. The prohibition of *riba* is one of these rulings which is related to the essential nature of the society and to the philosophy of the state and its social and economic orientation. Rather, the Muslim is required to establish the rulings which concern him personally such as those of ritual worship, food, drink and dress, and those related to marriage, divorce, remarriage, 'iddah, inheritance and other personal matters."

We have comprehensively dealt with the Hanafi position in this matter, discussing and commenting on it, earlier. We mentioned that the declaration issued by the American conference omitted to refer to or imply the Hanafi position, sufficing with a reference to the principle of treating needs like necessities in allowing the forbidden. Whether this stance of the conference was a political one, such that the resolution would not be misunderstood when broadcast by the media, or it was a juristic one, seeing the danger and dreadful consequences of spreading the position of Abu Hanifah in this matter, the wording of this premise in this way obliges a number of comments, which we summarise as follows:

### **The first comment [Danger of opening the door to all kinds of evil]**

In the generality of this statement there is a danger and recklessness, of which the consequences are not praiseworthy. This is because this opens the door wide for the Islamic minorities to escape from all the rulings of civil, financial and political dealings with the claim that these are outside the limits of their capability and power, and Allah only burdens a soul with what it can bear! Thus, the matter does not stop at the limits of necessities or needs, but rather the basic principle becomes one of permissibility, as long as it is outside the framework of responsibility and duty.

- What makes traders, artisans and workers in general avoid *riba* in their dealings, when *riba* – according to the conference – is one of the rulings that is related to the essential nature of the society and to the philosophy of the state and its social and economic orientation: one is neither required nor able to change these, and one is not obliged to establish the rulings of the Shari'ah related to it?
- What makes investors in different sectors comply with the Shari'ah rulings on contracts, when the principles and conventions of these contracts are part of the

philosophy of the state and its economic orientation; one is not required to change these, and one is not obliged to establish the rulings of the Shari'ah related to it?

- What makes these minorities, after the issuing of this declaration, enter the political arena and establish political bodies which seek to defend their internal citizens' rights and to support the external issues and concerns of the ummah, when the message of the conference to them is that the Muslim is not obliged by Shari'ah to establish the civil, financial, political and other rulings of the Shari'ah which are related to the system in general, in a society which does not believe in Islam, since this is not within his capability?!
- After this, is it not possible for someone to say that this approach is a step in the direction of secularising the Islamic minorities by leaving what belongs to Caesar for Caesar (the civil, financial, political and other dealings which related to the system in general), and what belongs to Allah for Allah (the rulings on ritual worship, food, drink and dress, and those related to marriage, divorce, remarriage, 'iddah, inheritance and other personal matters)?! As for the former, they are not obliged by the Shari'ah to establish the Shari'ah rulings related to it because these are not within their capabilities since they are related to the essential nature of the society and to the philosophy of the state and its social and economic orientation. As for the latter, they are alone what are required to be established, and if this is not possible, *hijrah* becomes obligatory?!

### **A necessary correction**

The consequences and corollaries which follow from the reasoning mentioned earlier do not necessarily mean that these constitute the position of those who took this view or advanced this argument. Rather, the practical reality confirms that their position is contrary to that in most of what has been mentioned. Amongst them are those who have devoted their whole lives to reviving the ummah, renewing the religion in its life, and encouraging it to take the safer options in its religion. This Islamic awakening surfacing in the east and west of the world is nothing but the effect of their *jihad*, and the *jihad* of those like them, people of knowledge and carriers of the Shari'ah. It is amongst the fruits of their constant efforts and continual *jihad*. Many practising Muslims only recognised the danger of secularism through the studies and books of people like them.

Therefore, all mention of these logical conclusions are of the type which alert one's opponent in debate to the weakness of his argument or the danger of his views, and to possible real consequences which he would be the first to reject and absolve himself of them. It does not necessarily mean attributing these conclusions to them or defaming them on this basis, for the people of knowledge of the Shari'ah agree that the corollary of a person's position is not necessarily their position (*lazim al-madhhab laysa bi madhhab*), and that whoever takes people to account for what their views lead to, or attributes these to them, has erred. Shaykh-ul-Islam Ibn Taymiyyah, may Allah Exalted have mercy upon him, was asked, "Is the corollary of a person's position, their position

or not?” He replied as follows, “The correct view is that the corollary of a person’s position is not their position if they do not hold it. This is because if the person rejects and refutes it, attributing it to him becomes a lie upon him. Rather, this indicates the inconsistency of his view and his self-contradiction. Were the corollary of a person’s position to be their position, the pronouncement of *kufr* would follow upon everyone who said that *istawa’* [Ta Ha: 5] and other Divine Attributes were metaphorical (*majaz*) and not real (*haqiqah*), for the corollary of this view entails that none of His Names and Attributes are real.”<sup>42</sup>

Our opinion of those who advanced this argument and, based upon it, took the view of the permissibility of mortgages in this situation, is that they do not hold or adhere to these conclusions, but rather that they would reject them totally. Hence, mentioning them is only to prove the weakness of the argument which led to them, and the corruptness of the reasoning which produced them, without these being attributed to them or regarded as their position. I hope that this concept is remembered regarding all of the conclusions or consequences mentioned in this study that follow from the position of those who have taken the view under discussion, so please take note!

### **The second comment [Undermining of efforts to build alternative institutions]**

This general statement could weaken the determination and cut off the way to the attempts of the callers and reformers who invite the Islamic minorities to strive to create financial and political institutions to seek to improve their situation, protect their identity, and remain steadfast as far as possible upon the rulings of their religion. Otherwise, what would motivate the people to respond to such an invitation, as long as this area is fundamentally outside the framework of responsibility, and that the Muslim is only required to establish the rulings which concern him individually such as the rulings on ritual worship, food, drink and dress, and those related to marriage, divorce, remarriage, ‘*iddah*, inheritance and other personal matters?! Further, upon what is the call to the Muslims to participate politically and create institutions which further that and call to it? Upon what is the call to the Muslims to take advantage of the available atmosphere of freedom to establish financial institutions which will preserve for them in a clean Islamic framework a way to earn wealth and invest it?

What is the difference, in the view of the leaders who have issued this resolution, between food and drink on the one hand and accommodation on the other? They have organised all of them in one way by declaring that these are of life’s necessities which must be actualised, even by usurious dealings. However, they have then distinguished between them, considering the rulings of food and drink as being obligatory to implement on every land and under every sky, but they have made the rulings of accommodation not obligatory to implement due to their relation, as they say, to the essential nature of the society and to the philosophy of the state and its social and economic orientation?! Has it

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<sup>42</sup> *Majmu’ al-Fatawa* 20/217.

escaped our beloved brothers that many of the rulings of food and drink are also related to the essential nature of the society and to the philosophy of the state and its social and economic orientation? Is not the legality of wine and pig-flesh in these societies part of the philosophy of the state and its social and economic orientation? So why should we distinguish between two comparable matters or combine opposites in the wording of the resolution?!

They may say to us: we mean, in relation to food and drink, that one should establish the rule of Islam regarding what concerns him personally, so that he should seek the halal in his food and drink, but we do not require him to change the systems of the state since he does not have the power to do that. We would say: why did you not say that also about accommodation, differentiating between what concerns him personally, i.e. any contracts he concludes specifically for himself, and what relates to the systems of the state and the conventions of dealing with it; why do you not oblige him with the ruling of Islam in the former, and allow him some ease with the latter?

### **The third comment [The obligation of caution]**

This premise is opposed to what is established in Fiqh, that the Muslim is required to abstain from forbidden matters and to perform the obligatory matters as much as possible, **“When I forbid you from something, avoid it. When I command you in a matter, comply with it as much as possible.”** In fact, it is opposed to the example in their practical life of most of those who have taken this view, and to the scholarly contributions which they have presented to the ummah, for the record of the *jihad* of many of them does not cease to bear witness to that. The writings and words of the respected Dr. al-Qaradawi, for example, have always encouraged lofty ambition and strong determination, and brought the ummah up on holding to and preserving its identity; to strive with as much effort as possible in preserving what remains of the religion, and to revive what has decayed and been obliterated of its symbols and signs. He has never said to the ummah what some of the defeatists say, “It is not possible to achieve anything better than what has happened, so stick to the ritual worship and family issues, and surrender to every system and every ruler, so that you may allow others and yourselves to rest.” Were he to do that, many lives would be spared – in the way humanity views it – and many efforts would be restrained. However, the reverberation of his words and the words of guides and callers like him continue to resound in the depths of the ummah, alerting its heedless, awaking its sleeping and instilling in it the spirit of perseverance and resistance. They have had the most far-reaching of effects in rousing the ummah and inspiring its awakening, and in building in its lands Islamic institutes, whether economic or non-economic. Further, what is the writer of these lines, along with thousands like him, except one of the good deeds of people like them, a flame from their lights!!

If someone says to us that the conference limited this approach to those settled outside *dar al-Islam*, we would reply: the issue, as is clear from the explanation of it, is a matter of ability and capability, and not an issue of temporal or spatial limits. This is because

the Muslim is required to have taqwa of Allah wherever he may be, on every land and under every sky. There is no fundamental difference from the point of view of responsibility between the rulings of food and the rulings of accommodation, nor between the rulings of religion and the rulings of state: rather, all of that is law and religion, obligatory to be followed by everyone who has the power and capability to do so. I do not think it is hidden from many of those who took this view that the extent of freedom found in the European and American continents is vastly greater than that found in the Muslim lands, and that people of vision in these societies are able to achieve at the institutional level much that they are powerless to achieve in the Muslim lands.

**The fourth comment** [The real situation is often reversed with respect to personal and public matters]

The Muslim is not able to establish many of the rulings related to personal matters outside *dar al-Islam*. He is not able to openly announce his second marriage. He is not able to enforce his right of disciplining his wife, or to force her to perform the prayer or wear the *hijab* or other laws of the religion. He is not able to enforce his right of divorce whenever he wishes, except through the systems of the non-Muslim people and their courts. This is because divorce in their view is under the jurisdiction of the courts and not in the power of the husband. Divorce in their view must be preceded a period of physical separation. They recognise neither remarriage nor the *'iddah*. He is not able to safeguard his wealth from her in the event of divorce, for she is entitled to half his wealth in this situation, contrary to the judgment of the Shari'ah. . He is not able to enforce his right of disciplining his child: if he is discovered to have hit him, even with a *siwak*, then woe to him from the consequences! The least of these could be that his right of custody of his child is taken away and that this custody is given to another family which brings the child up upon rejection of Allah and His Messenger. He is not able to prevent his daughter from taking a boyfriend when she reaches the age of eighteen: if he does, then imprisonment awaits him.

On the other hand, he is able to establish many financial rulings in these lands. He can set up whatever investment companies he wishes, and to devise for them whatever systems of dealings he likes. He is able to set up a bank or a credit union and specify whatever regulations he wishes for it. He is only affected by what affects all economic institutions, i.e. the dangers of competition, and this is not a unique matter.

Hence, the issue in these societies is not an issue of personal matters being viable whilst financial or civil matters are not viable. Rather, in all of these, there are matters which are possible and those which are not. Therefore, the basic principle in all of that becomes the principle of ability and capability. A person establishes out of all the rulings whatever he has the ability to establish, whether these are family, civil, financial or political matters. As for those matters where he lacks the capability, he strives avoid falling under their responsibility in the first place as much as he can. Of all this, whatever he is unable to achieve, then there is neither movement nor power except by Allah!

## THE FIFTH PREMISE: THE OVERRIDING BENEFITS ACCRUING FROM RIBA-BASED HOME-OWNERSHIP

This premise is summarised as indicated in the concluding declaration of the European Council: that permitting home-ownership in this way will meet the general need of the Muslim community living as minorities outside *dar al-Islam*. This includes protection of their religion and Islamic personality, improvement of the Muslims' living conditions and liberation from the economic shackles upon them. Thus they will be able to fulfil the obligation of *da'wah* and take part in building the society at large, such that their level will rise. They will then deserve to be called the best nation brought forth for mankind, and will become a radiant image of Islam in front of the non-Muslims.

We now have a number of comments on this premise, which we summarise as follows:

### **The first comment** [The difference between Islamic and non-Islamic understandings of “benefit”]

This is regarding the confusion between the understanding of “benefit” (*maslahah*) in the Shari'ah framework and its understanding in a purely man-made legal framework, in the wording of this concession and its resulting effects.

Linguistically, *maslahah* (benefit) is the opposite of *mafsadah* (corruption, harm). Hence, *maslahah* is just like *manfa'ah* (benefit) in form and meaning, while *salah* (wholesomeness) is the opposite of *fasad* (corruption). However, in the terminology of the scholars of *usul*, *maslahah* is the safeguarding of the objectives of the Lawgiver by attaining the public benefit and preventing corruptions from affecting them. The people of knowledge agree that the objectives of the Lawgiver with respect to the people are five: protection of religion, protection of life, protection of the intellect, protection of progeny and protection of wealth. They have also agreed on a number of matters here, which we summarise as follows:

- That the understanding of *maslahah* is to be referred to the guidance of the Lawgiver, and not merely to the desires and intellects of men. The human intellect is not able to independently fathom all *maslahah*, away from the guidance of the Lawgiver. Rather, it must have an intimate and an ordainer, and this is nothing other than the infallible revelation of the Qur'an and the Sunnah. The Exalted has said, “**Who is more astray than one who follows his desires, without guidance from Allah?**”<sup>43</sup> Hence, the *maslahah* which is considered in the view of the scholars of the Shari'ah is that which is based upon the objectives of the Lawgiver rather than simply the objectives of the responsible human. The Shari'ah has come to bring the human away from the calling of his desires such that he may become the slave of his Master, “**and were Truth to follow their desires, the heavens and the earth and all those**

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<sup>43</sup> Al-Qasas: 50

**in them would be corrupted.”<sup>44</sup> Al-Ghazzali says in *al-Mustasfa* (1/287), “The obtaining of benefit (*manfa’ah*) and prevention of harm are objectives of the creatures, and the wholesomeness of the creatures lies in attaining their objectives. However, we mean by benefit (*maslahah*) the safeguarding of the objectives of the Law. The objectives of the Law with respect to the creatures are five: it protects for them their religion, their lives, their intellect, their progeny and their wealth. Therefore, anything which entails protecting these five fundamentals is benefit (*maslahah*), and anything which undermines these five fundamentals is harm (*mafsadah*).”**

- That benefit and harm in the Shari’ah are not limited to this world alone, as held by utilitarians, but extend to include consideration of this world and the Hereafter together, in time and space, in harvesting the fruits of actions. Hence, righteous actions reap for beneficial fruits for their doers either now or in the future beyond. Thus, some of these fruits are reaped in this world whilst others are deferred until the Hereafter.
- That benefit is not contained within material pleasure alone, as held by materialists, but extends to also include spiritual pleasure and the happiness of the Hereafter.
- That the benefit to one’s religion is a basis of the other benefits, and takes precedence over all of them in case of opposition. Because of this, *Jihad* was legislated, including the endangering of life and the perishing of souls, in order to raise the objective of protecting the religion, and give it priority over all else.

These qualities taken together dictate that the soundness or corruption of actions is an effect of the legal rulings of responsibility: obligation, recommendation, prohibition, discouragement and permissibility. Were it not so, any benefit could not be derived from the religion.

Based upon this, mere habitual experience, intellectual discrimination and pure experimentation do not have the right to be independent assessors of the public benefit. Rather, there must be guidance from the Law that regulates all of that and drives its journey. Therefore, it is not allowed, for example, to rely upon what is advanced by some economists, of justifying dealing in *riba* to encourage trading activity and economic growth in the land. Similar is the case with the argument of some sociologists, that prostitution should be permitted to prevent it occurring in secret. Some psychologists and educationalists say that free mixing between the sexes should be permitted in public places in order to reduce the intensity of the sexual urge in adolescents. Some doctors say that pig-flesh is not filthy, or that having intercourse with women during their menses is not harmful. Some lawyers call for revoking the Islamic punishments and retaliatory measures with the claim that these entail savagery and barbarism, or by claiming that offenders have an illness which necessitates their cure, rather than their being criminals which necessitates their disciplining or elimination!

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<sup>44</sup> Al-Mu’minun: 71

This does not necessarily mean that the intellect should be prevented from thinking and reflection; rather, the Shari'ah has enjoined that, with the condition that this should be guided by the light of Allah, Mighty and Majestic, **“for him whom Allah does not grant light, he has no light!”**<sup>45</sup> The intellect, as stated by Shaykh-ul-Islam Ibn Taymiyyah rahimahullah, “is necessary for understanding the sciences and for the perfection and soundness of actions. By it, knowledge and action are perfected, but it is not independent thereby, for it is intrinsic to the self, a power within it analogous to the power of perception that is in the eye. When the light of faith and the Qur'an connect with it, it is like the light of the eye when the light of the sun or fire connect with it, but if it remains alone it does not perceive matters which it is incapable of understanding on its own. If it disappears completely, speech and actions in its absence become animal matters, which may have some love, ecstasy and taste just as animals may experience these. Hence, the states attained in the absence of revelation are defective, and statements opposed to the intellect are false. The Messengers brought that which the intellect cannot understand, and did not bring that which the intellect knows is impossible.” Thus, the relationship between the intellect and revelation is like that between the light of the eye and the light of the sun: no person can do without the two of them in perception and understanding.

Thus, any benefits or advantages accruing from usurious borrowing for home-ownership, in cases other than necessity, mentioned by the papers of the two conferences must be understood in the light of the points mentioned above. There is no sanctity for a “benefit” invalidated by the Shari'ah when it appears in the face of revealed texts which definitely indicate prohibition. This is because the people of knowledge have agreed definitely, as mentioned previously, that it is a condition for the acceptance of public benefit devoid of specific evidence (*al-masalih al-mursalah*) that it should not be contrary to the revealed texts, otherwise it is void, being purely desires and longings. Were the Messengers sent, and the Scriptures revealed, for anything other than preventing the people from moving with their desires, and bringing them out of what they might whimsically consider to be benefits and advantages based on their desires into the calling of guidance, such that they may become slaves of their Master instead of being slaves of their desires?!

### **The second comment [“Benefit” is not considered in the face of clear texts]**

The benefits and advantages of home-ownership via usurious loans mentioned by the conferences cannot go beyond being benefits in the face of clear, definite and authentic texts and evidences. These texts and evidences are the ones which came regarding the prohibition of *riba al-nasi'ah*, from the clear Generous Qur'an, the clear and authentic Purified Sunnah, and the consensus of the ummah upon the prohibition of that throughout the ages. The people of knowledge of the Shari'ah are agreed that any benefit which appears contrary to a revealed text is an invalid benefit which has no consideration, for the revealed texts are the place and repository of all benefits. Were it correct to allow “benefit” to judge the texts, the door would be opened wide upon its hinges to removing the yoke of responsibility and bringing the people out of the calling of guidance to the

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<sup>45</sup> al-Nur: 40

calling of desires. It would be correct, for example, that which we referred to earlier. The economists mention the necessity of *riba* for facilitating modern investments. The secularists mention the necessity of wine and licentiousness for encouraging tourism. The sociologists mention the necessity of granting a concession to prostitution in order to fight its secret occurrence. Even included would be what the ancient Arabs used to mention of the necessity of burying daughters alive in order to conceal the shame, and remove the humiliation brought upon the family. The corruption of all this is very clear!

### **The third comment [Exaggerated benefits of home-ownership]**

Many of the benefits mentioned may be exaggerated from a practical viewpoint, and I fear that this was a rosy picture painted by those seeking a verdict for the people of fatwa in order to make them say what they wanted. It was said long ago, “The *mufti* is the captive of the one seeking the *fatwa*.”

By way of example, what was mentioned, that a rented home does not fulfil all the needs of the Muslim, is debatable. The difference between renting and ownership can virtually be limited to the flexibility that is possible relative to the number of people in the family. The size of family that can be accommodated in an owned home is higher than that in a rented home, and therefore the matter differs according to the number of people in the family renting. If the family is of a limited number, then renting indisputably meets their need. However, if the family size exceeds the number permitted in rented accommodation according to the local system in these lands, then a relative difficulty begins and looking for alternatives is justified.

As for other considerations, owned and rented homes are alike. Choosing a home near to a mosque or school has no relationship with renting or owning, since homes available for rent are scattered everywhere, and are not less common compared to homes available for ownership. Hence, supposing that homes for ownership are plentiful in the neighbourhood of schools and Islamic centres, and that homes for rent are rare or non-existent there, is a baseless whim. What was mentioned of the possibility of Muslims living close together and creating a small Islamic society within the wider society also applies to both rented and owned homes, and neither option is better than the other in this respect. As for improving living conditions and raising the standard of living, no difference appears between renting and owning except after a quarter of a century, when the home becomes the property of its owner upon his paying all the instalments. No semblance of a strong link appears to the researcher between home-ownership and deserving to be called the best nation brought forth for mankind in the way stated in the concluding declaration of the European Council! The constituents of this goodness have been set forth explicitly in the Book of Allah, Mighty and Majestic, in the saying of the Exalted, “**You are the best nation brought forth for mankind: you enjoin goodness and forbid evil, and you have faith in Allah.**”<sup>46</sup> In fact, were a person to say: the matter is opposite to what they have stated, for the deserving of the label of this nation is by distancing itself from what its Lord has prohibited for it of explicit *riba* and the mutual

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<sup>46</sup> Al-‘Imran: 110

enjoining of that, and taking the hand of the one who goes contrary to it, he would be closer to the *ayah* in letter and spirit.

As for the feeling of security provided by an owned home, this is also debatable. If security from theft is meant, then crimes do not usually differentiate between owned and rented homes. In fact, it may be that burglars target owned homes more due to the extra material possession expected from the owners. If the possibility of eviction from the home is meant due to non-payment of the monthly amount, then the owned and rented home are equal in this, for the home-owner becomes a captive of the bank via the usurious loan throughout the period of repayment. The bank can take steps to guarantee obtaining its right if it wishes. Hence, just as the landlord can evict the tenant in the event of financial difficulties and non-payment of rent, the bank can evict the home-owner in the event of financial difficulties and non-payment of instalments. This is done by putting the home up for sale by auction in order to obtain the maximum price, and the bank does not care if it sells the home for a paltry amount, in which case woe to the financial loser! In fact, the statistics computed by some of the usurious banks confirm that the average stay of the home-buyer in the house that he buys is no more than seven years, after which he is forced to sell it and pay its price in cash to the lending bank, then to search for another house to buy in another district. The cause of this is several factors, including a change in the job circumstances, the need to move to another state, etc. This involves putting the house up for sale and incurring the loss, which is usually heavy because most of the amount paid in the early years goes towards the interest, and no significant proportion of it goes towards paying the underlying debt.

If what is meant by security is the economic security provided by the feeling of home-ownership, this could be true to some extent, but is this the need which justifies a concession regarding a matter which the ummah agrees is prohibited?! And is this the yardstick for measuring the needs which are treated as necessities in allowing the forbidden?!

## **THE SIXTH PREMISE: AVERTING THE SITUATION THAT A MUSLIM'S ADHERING TO ISLAM SHOULD BE A CAUSE OF HIS ECONOMIC WEAKNESS AND FINANCIAL LOSS**

The summary of this premise is that not dealing in these corrupt transactions, including *riba* in *dar al-harb*, will lead to a Muslim's adhering to Islam becoming a cause of his economic weakness and financial loss, when the basic principle is that Islam strengthens the Muslim and does not weaken him; it increases him in goodness and does not decrease him; it benefits him and does not harm him.

We have a number of comments on this premise, which we summarise as follows:

### **The first comment [A reminder about *taqwa*]**

The basic principle for the Muslim is that he has *taqwa* of Allah wherever and whenever he may be, by treating the *halal* as permissible and the *haram* as prohibited. He fills his heart with the certainty that whoever leaves something for the sake of Allah, Allah provides him with a better alternative. He does not become one of those who worship Allah upon an edge: if good comes to him he is content with it, but if an affliction befalls him he turns back on his face, thus losing both this world and the Hereafter!

### **The second comment [Sacrifices of the early Muslims]**

The history of Islam is full of the sacrifices made by the early Muslims out of faith and hope of reward, so they did not falter due to what afflicted them in the way of Allah, they did not weaken or give in. Among them were those who sacrificed their wealth, those who sacrificed their social status amongst their people, those who sacrificed their lives and shed their blood. Allah and His Messenger were always more beloved to them than anyone or anything else. None of them ever felt they were losing anything. None of them complained that Islam had weakened their power or decreased their wealth!

Hence, the statement that Islam affects the Muslim positively, not negatively, and that it strengthens him and does not weaken him is a true statement if the understanding of power and increase are widened to include both material and spiritual aspects, and their sphere is extended to include this world and the Hereafter together.

When Suhaib the Roman sacrificed his entire wealth in the way of Allah, Islam had not decreased him; in fact, it had increased him through what was stored up for him of permanent bliss and high ranks in the Hereafter. When Mus'ab b. 'Umayr, who was the most affluent young man in Makkah, died as a martyr-witness, they could not find amongst his possessions enough cloth for a shroud to cover his body. They only found a short garment, by which if they covered his head, his legs remained bare, and if they covered his legs with it, his head remained bare. Islam had not decreased him by this, but

in fact had increased him in loftiness and stature through the eternal bliss awaiting him in the Hereafter. The same thing can be said about all those who were expelled from their homes and possessions unjustly for no other reason except that they said, “Our Lord is Allah!” In fact, anyone who avoids the prohibited in every time and place and thus loses his wealth or weakens his profitability, it is not said about him that Islam has decreased and weakened him. In fact, it has increased him in purification, faith and purity. This is just as works of *zakat* and *sadaqah* do not decrease the wealth of the person as is well known, but rather increase him in purity, cleanliness and blessing. The Prophet sall-Allahu ‘alayhi wa sallam took an oath on this meaning when he said, “**Never at all did wealth decrease out of charity.**”<sup>47</sup>

### **The third comment [The danger of this logic]**

This logic could be used as an argument by anyone who transgresses into the prohibited. He will throw it in the face of those who advise him to repent, and encourage him to abstain from the prohibited matters. The trader who relies upon usurious loans in his trade will say to us: Islam increases the Muslim and does not decrease him, it strengthens him and does not weaken him: so how can I withdraw from my usurious dealings when nine-tenths of my trade is based on these?! The trader in prohibited items will say to us in turn: Islam increases the Muslim and does not decrease him, it strengthens him and does not weaken him: so how can I withdraw from my enterprises which I have built up, in which I have deep-rooted experience, with all that would entail for me of economic disaster and paralysis? The fortune-teller, soothsayer, magician and all other impostors will say the same thing to us.

Some people during the time of the Prophet were apprehensive about the ban on polytheists coming near the Sacred Mosque because of the consequences – as viewed by mortals – of the destruction of their trade and the loss of their supplies. Therefore, Allah Exalted revealed His statement, “**O you who believe! The polytheists are unclean, so let them not come near the Sacred Mosque after this year of theirs; and if you fear poverty, then Allah will enrich you from His Bounty if He wills.**”<sup>48</sup>

A picture-maker came to Ibn ‘Abbas and said to him, “I am a human being, and I live off my own hands’ work. I make these pictures.” Ibn ‘Abbas replied, “I will not say to you anything except what I heard from the Messenger of Allah, may Allah bless him and grant him peace. I heard him say, ‘**He who makes a picture, Allah will punish him until he can breathe the spirit (life) into it, which he will never be able to do.**’” The man was affected by fright and fear, and his face went pale from the terror of this threat! So Ibn ‘Abbas said to him, “If you really must make pictures, then make them of this tree, and everything which does not have a spirit.”<sup>49</sup> Thus he showed him a legal alternative, and did not allow his mere need to earn a living from his own efforts to be a justification for him to continue in something prohibited by the Shari’ah.

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<sup>47</sup> *Sahih al-Jami’ al-Saghir*, vol. 1, hadith no. 3025

<sup>48</sup> al-Tawbah: 28

<sup>49</sup> transmitted by al-Bukhari, *Fath al-Bari*: 4/525

## **THIS STUDY HAS NO CONCERN WITH WHAT ARE CONSIDERED ADMINISTRATIVE EXCESSES**

There is a last statement to be made: this is that this study has no concern with what are regarded as administrative excesses related to the running of matters within the halls of the conference of the League of Shari'ah Scholars of North America. This is because any mistake in such matters is not of an absolute nature which cannot be disputed or challenged. Rather, these are multi-faceted situations, and there is plenty of room to roam and fly in analysing them. There is scope and justification for *ijtihad* within these matters, and the matters can be explained or viewed in more than one way. If giving sincere advice is a must regarding them, then this must be with gentleness and polite words, remaining distant from emotions and passions.

- Therefore, this study has no concern with the allegation that the methods of electing the president of the conference and his deputy, and its secretary and his deputy, were not democratic (!), and that they bore more resemblance to elections in backward countries or dictatorships. This is because this claim, if it were true, could have a plausible reason or *ijtihad* behind it in the view of those responsible. Besides, we are cautious about borrowing the term “democracy” because of the shadows of secularism carried by it, even though the objective of those using the term here are clear, with no confusion. I think, however, that it is more fitting for people of knowledge, and more suited to the carriers of the Shari'ah, to remain far from using such ambiguous and provocative terms.
- This study has no concern with the allegation that specialised academic panels were not formed to study each issue raised, but rather these issues were discussed in a general mass way, with each person given three minutes to comment on each subject discussed. Such a situation – if this did indeed happen – may have plausible reasons specific to this gathering for being treated in this way. However, it would be better and more appropriate in general for matters of the *halal* and *haram* not to be dealt with in this manner, and with such haste, no matter how much it appears to those responsible that their *ijtihad* is stronger and that their view is more correct. Rather, the ways and means which have become customary for fiqh assemblies should be followed, for this – in our belief – is closer to the correct way and has more right to be followed.
- This study has no concern with the allegation that not all conference participants were invited to analyse the declarations issued and resolutions taken, and that the presidency of the conference invited whom it wished and excluded whom it wished. Thus, the voting on this and the rest of the fiqh matters was carried out during a special sitting whose members were chosen by the administration of the conference. This was in a session late on the Sunday evening, and a number of scholars who had discussed the matter on the Saturday were absent, so their voices were lost. Whatever the reality of the matter, what is hoped, in fact required, from conferences such as these is that the people of knowledge who are invited to the conference are given

enough opportunity of participate in the voting, and that the programme of the conference should be arranged as is appropriate for their circumstances and commitments. This will block the way to these kinds of speculations, and set an example in impartiality and objectivity, especially since this is related to issues of *halal* and *haram* in essential matters which touch the basics of life for millions of Muslims settled in the West, and has a huge effect on their present and future.

- This study has no concern with the allegation that the declarations and resolutions were not read out to the participants during the conference for them to endorse or amend them, contrary to the practice of all conferences. In fact, this is contrary to the programme of conference activities in its fourth day, which mentions the reading of declarations and resolutions to the participants. The author of these words does not know for sure what caused the administration of the conference to do this, if it really happened in this way? They may have justifications and excuses which absolve them, but this emphasises the necessity of such a final reading. Only after that can one be sure of attributing the views to the members, and attributing the concluding declaration to the Conference, whilst cutting off the avenue to internal whispers and suggestions.
- This study has no concern with the allegation that the conference administrative panel insisted on not mentioning those who opposed the declarations and resolutions taken regarding this matter, omitting their names and sufficing with saying that the conference had declared by majority vote such-and-such. Such opponents were not simply outstanding students of knowledge, but they included, by way of example:
  - the respected Dr. Wahbah al-Zuhayli, Lecturer in Fiqh at the Faculty of Shari'ah, University of Kuwait, who is reported to have said, weeping, "We will have a situation with you in front of Allah on the Day of Resurrection if you do not do this!" [i.e. record the names of those opposed.]
  - Dr. 'Atiq al-Qasimi, Lecturer in Fiqh in India and member of the Islamic Fiqh Assembly, India, who is reported to have said to the conference, "We are Hanafis and we live amongst Hindu idol-worshippers, yet we neither follow the words of Abu Hanifah in this issue nor issue fatwa based on them."
  - The respected Dr. Mahmud al-Tahhan, Lecturer in Hadith at the Faculty of Shari'ah, University of Kuwait.
  - Dr. Muhammad Ra'fat 'Uthman, Dean of the Faculty of Shari'ah and Law, Al-Azhar University.
  - Dr. 'Abdullah Mabruk al-Najjar, Lecturer in Fiqh at the Faculty of Shari'ah, Al-Azhar University and member of the Islamic Research Academy.
  - Dr. 'Ali al-Sawwa, Lecturer in Fiqh at the Faculty of Shari'ah, University of Jordan.

These were not ordinary people or junior students of knowledge. They demanded vociferally that their names be mentioned in the roll of those opposed to this resolution. After initial opposition, under the weight of their pressure and severe insistence, their request was agreed and they were promised that their demand would

be met. However, this promise was not to be fulfilled, and the concluding declaration omitted any reference to their names. This is what led some people to say that the conference administration had thus implemented in this way a type of coercion and subjugation of others. This is precisely the sort of bitter treatment which Islamists have tasted for half a century or more, and they have filled the world with opposition to it and agitation against its perpetrators. Some of them have had to migrate from their lands, leaving them without feeling sorry! So what is the matter with them today, when they have power in some areas, that they perform the same role, implement the same oppression, and make their opponents taste from the same cup?!! Again, I do not know – if this version of events is true – what caused our beloved brothers in the respected conference administration to do this? What kind of *ijtihad* stood in their minds to justify or explain this matter? Whatever the case, we are definitely sure that the right to have scholarly disagreement acknowledged and its people mentioned, is guaranteed for everyone who is invited to such a conference. This right is emphasised further if the person requests or insists upon it, by Allah, unless there is an absolute necessity which entails otherwise.

- This study has no concern with the allegation that the majority of those who participated in drafting this resolution were not people of knowledge and carriers of the Shari’ah. Rather, they included economists and educationalists whose votes, according to the rules of the ballot, were equal to the votes of the respected Dr. al-Qaradawi, the respected Dr. Wahbah al-Zuhayli or the Dean of the Faculty of Shari’ah and Law at Al-Azhar University! The claim is further that the specialist people of fatwa to whom this resolution can really be attributed are Dr. al-Qaradawi and Dr. ‘Abd al-Sattar Abu Ghuddah: as for most of those in favour after that, they are followers of these two; and that this was in the face of other specialist people of fatwa who were opposed, and they are many, and we have referred to some of them a little earlier. Although, most of the mass of those who participated in the voting are counted as students of knowledge, imams of mosques in this land, they would not put themselves forward as specialists and people of fatwa except by way of necessity when those who deserve this responsibility are absent. Such imams have enough piety and caution in spiritual matters to admit this themselves!
- This study has no concern with what was mentioned in some of the media coverage, that the majority vote claimed was by just three votes, in a situation where the presidency of the conference was responsible for wording the resolution, in what it included and excluded, and in directing the course of the conference in agreement with the *ijtihad* which it had already completed regarding this question. This is because everyone knows that its preparation of the fatwa of permissibility had already been completed, as is witnessed by the concluding declaration issued by the European Council about the same matter a little before this conference. Between the latter and the declaration of the conference of the League of Shari’ah Scholars of North America was no more than three weeks.

This study has no concern with all that has been mentioned, since it intended to limit itself to a purely academic response regarding the fiqhi premises of this resolution,

leaving these matters – with the great danger inherent in some of them, if true – for another time when the horizon is clear and the clouds of uncertainty are dispersed. In that situation, hearts would be better-prepared to accept mutual advice regarding these details and subtleties, and it may be that this will be soon by the permission of Allah.

## A SUMMARY OF THE FINDINGS OF THIS STUDY

We can summarise all the findings of this study as follows:

- 1) Endorsement of what is emphasised by the definite legal evidences of the prohibition of *riba* in both its forms, *fadl* and *nasi'ah* [i.e. in both on-the-spot and deferred exchanges], and that bank interest is prohibited *riba*. This is what was established by all the *fiqh* assemblies in different parts of the Islamic world.
- 2) Endorsement of the fact that the basic principle is that *riba* can only be permitted by necessity, as for all the definite prohibitions of the Shari'ah. Anyone who is afflicted by a situation of necessity must turn to those of the people of fatwa in whom he trusts regarding their piety and knowledge, in order to determine the extent of his necessity.
- 3) Need is treated like necessity in allowing the forbidden when the required conditions are fulfilled. These conditions can be summarised as follows:
  - ◆ The occurrence of need according to its legal understanding. This is to repel harm and weakness which diverts people from engaging in and carrying out the matters of livelihood, and to keep people upon what supports their capabilities. It is not mere longing for something, mere desire for benefit, comfort and luxury.
  - ◆ The absence of valid alternatives. This means that the haram is widespread, and all paths to the halal are blocked. If this is not so, then difficulty must be borne to achieve the *halal*. Amongst these alternatives is renting, when there is a need for it.
  - ◆ Sufficing according to the degree of need, and not allowing anything related to comfort and luxury, or pure ease.
  - ◆ The lack of capability to move to other areas where valid alternatives can be attained.
- 4) Based on the above, the basic principle regarding one who is unable to own a home in a legal way involving no *riba* or doubt is to be content with renting. In this, there is an alternative to falling into what Allah and His Messenger have prohibited of *riba*.
- 5) When renting represents difficulty and clear hardship with respect to some people, due to considerations related to the size of the family or other factors, it is allowed to grant them a concession to own a house in this manner in the light of the rules mentioned above. This is only after referring to the people of knowledge to determine the extent of this need, and the extent of the fulfilment of its legal conditions. This is in order to evaluate the extent of the need's suitability to be treated like necessity in allowing this forbidden matter. Experience has shown that specifying a certain number of people in the family as a criterion is a purely a matter

of conjecture. This is because landlords do not attach importance to abiding by it, although they may mention it to the tenant in respect to the local law.

- 6) Endorsement of what was emphasised by the concluding declarations of the conferences of both the League of Shari'ah Scholars of America and the European Council for Ifta' and Research, of the necessity of action to provide Islamic alternatives to the problem of financing housing. This is either by creating Islamic institutions, which is better and more pleasing to the Lord, Majestic and Exalted is He, and more beneficial for his religion and slaves; or by persuading the western banks to amend their contracts in dealing with the Islamic minorities in such a way as to agree with the requirements of Islamic Law until the desired Islamic alternative is achieved. The latter is a matter which is relatively easy in these societies, and were the amount of effort spent in organising this type of conference around the issue to be spent in persuading the usurious banks to build the desired model, the way would be prepared to solving this problem, even if only in an elementary form!
- 7) Appealing to those capable in the Islamic world to build investment projects to provide housing for those needing it amongst Muslims settled in western societies. Allah will thus combine for them between profit in this world and reward in the Hereafter. Such projects could be via the well-known forms valid under the Shari'ah, such as *musharakah*, *murabahah*, *istisna'*, renting-ownership schemes etc. They should not exaggerate the level of their profits, so that this does not become an affliction which diverts the people fundamentally away from dealing with Islamic institutions, and causes them to have a bad opinion of the implementation of Islam when they are called to it, or its stirrings appear.

## CONCLUSION

These were the most important of our observations and comments on these two declarations. We have put them forth in a hurry, and have not fulfilled their right of comprehensive treatment. We place them before our beloved brothers who issued these declarations, hoping that these find a place of acceptance in their hearts, and that they find room in their valuable time to study these points and benefit from some of them. In the end, this is our limit in knowledge: so if it is correct, then this is from Allah, and to Allah alone belongs the grace and favour; if it is wrong, then this is from me or from Satan, and I retract my mistakes during my life and after my death.

On completion of this writing, I quote the words of the poet,

*Every writer will perish,  
But Time will preserve what his hands did write:  
So write not with your script anything except  
That which on Resurrection will be a pleasing sight!*

It is Allah we ask to forgive our mistakes, to cover our faults, to have mercy on our weakness, to repair what we have damaged, and not to give Satan a share of our actions, and to make out of what we write a wholesome provision to the Last Abode!

I appeal by Allah to every person who reads this work and benefits from some of what it contains to mention its sinful writer in righteous prayer unseen by people, and not to spare him any sincere advice, whether related to this work or others, for he may have discovered mistakes of the writer in other places.

It is Allah who is behind all pure intentions, and He is the Guide to the Straight Path.

## APPENDICES

### APPENDIX 1: The Concluding Declaration of the First Fiqhi Conference of the Fiqh Council affiliated to the League of Shari'ah Scholars of North America

Convened in Detroit, State of Michigan, 10-13 Sha'ban 1420 / 19-22 November 1999

Resolution Two: Buying Houses via Bank Mortgages

The conference participants addressed the problem faced by those settled in America of obtaining a house for residence in the commonly-followed ways. These are renting or ownership through a mortgage. They reached the following conclusions:

**Firstly**, the Conference recommends Muslims settled in western countries, and investment institutes in the Islamic countries, as follows:

- a) To work to provide Islamic alternatives to solve the problem of financing residences by creating a sufficient number of Islamic financial institutions or co-operative housing associations (which it is hoped will consider the circumstances and needs of those with limited income), in order to move from the situation of concessions and necessity to one of determination and choice.
- b) To work to support and strengthen existing Islamic institutions which work according to Islamic juristic rulings in order to enable them to create the above-mentioned alternatives.
- c) To study the contracts currently used by conventional banks in financing homes in order to arrive at a form which does not contradict the rulings of Islamic Law, and to work to persuade the banks to deal with these.

**Secondly**:

- 1) The home is one of the necessary needs which must be fulfilled, whether this is by renting or ownership.
- 2) Renting a home for a Muslim settled in America is not without many consequences. Amongst these are those related to the size of the family, finding an appropriate place to live, and the control of the landlords over the tenants.
- 3) The method currently available to buy homes via mortgages from banks who pay the price to the seller and take instalments from the buyer, is fundamentally *riba*, and is not allowed for a Muslim when he can find a shari'ah-compliant alternative which fulfils his need. Such alternatives include a contract with a company which provides finance on the basis of interest-free repayment by instalments (*bay' al-ajal*), fixed profit margin (*murabahah*), diminishing partnership (*musharakah mutanaqisah*), or other methods.
- 4) Where a shari'ah-compliant alternative is not available, and a Muslim wants to own a house via a bank mortgage, most of the participants take the view that it is allowed to own the house via a mortgage from the bank, due to the need which is treated as a necessity. Two conditions must be satisfied: that the Muslim is outside the land of Islam (*dar al-Islam*); and that the need exists for the generality of those settled outside the Islamic lands to resist social, economic, moral and religious corruption, and to achieve the benefits entailed by protecting the religion and Islamic personality. Further, he must limit himself to a house which he needs for residence, and not use this method for trade or investment.”
  - ◆ There are those who view the impermissibility of using the bank mortgage, even in the case of a need which is treated as necessity, saying that one should suffice with renting as an alternative to ownership, notwithstanding the well-known advantages which the tenant loses. They take support from the fiqhi viewpoint which says that *riba* is prohibited both within and outside *dar al-Islam*,

- and that it is only permitted in case of necessity defined by the shari'ah, and not for a need, even though the latter be of a general nature.
- ◆ It is clear from the explanations presented by some specialists regarding contracts currently implemented in home-buying that some of these are very close to the contract of bay' al-ajal (deferred payment by instalments) in substance. Here the principle, "Contracts are judged according to their objectives and meanings, not according to their words and form," is implemented. It is possible to justify these contracts by changing the conventional terminology employed in them.
  - ◆ All participants emphasise the prohibition of borrowing upon interest from banks, since this is a type of prohibited riba. The view of permitting home-buying via bank mortgages with the conditions mentioned previously is of the nature of an exception due to the necessity which is considered according to its level, or due to the need which is treated like necessity, with the original basic principle remaining one of prohibition.

## **APPENDIX 2: Opinions regarding the latest Fiqh Conference of the League of Shari’ah Scholars of North America – Shaykh Mahmud al-Tahhan expresses reservations about the resolutions of the conference**

(This article appeared in *Al-Sirat Al-Mustaqim* magazine no. 88, Dhu ‘l-Qa’dah 1420)

All Praise be to Allah. Blessings be upon the Messenger of Allah, and upon his family, companions and those who are loyal to him. This discussion is regarding the First Fiqhi Conference of the League of Shari’ah Scholars of North America convened in Detroit, State of Michigan, United States of America, 10-13 Sha’ban 1420 / 19-22 November 1999 and its (second) resolution related to the ruling on buying homes via usurious loans from usurious banks, in which it was stated, “Most of the participants take the view that it is allowed to own a house via usurious mortgages from the bank when a shari’ah-compliant alternative is not available, due to the need which is treated like necessity.” They claimed that the need for a home is not fulfilled by renting since the latter is not without many disadvantages. It was also stated, “There are those who view the impermissibility of using the bank mortgage (i.e. buying houses via usurious loans), even in the case of a need which is treated as necessity, saying that one should suffice with renting as an alternative to ownership,” although there is no doubt that the need is fulfilled when renting is available.

The conditions specified by those who allow buying houses via usurious loans are as follows:

- that the Muslim is outside the land of Islam (*dar al-Islam*);
- that the need exists for the generality of those settled outside the Islamic countries;
- that the Muslim must limit himself to a house which he needs for residence, and not use this method for trade or investment.

I say: We welcome the discussion of issues and problems, but not in this hasty manner. Since the wording of the resolution is not precise, so in order to clarify the situation, discharge my obligation and warn the Muslims so that they may not be deceived by this resolution and fall into prohibited riba dealings without knowledge or proof, I would like to explain the following:

- 1) Those who did not agree with this resolution constituted most of the participants invited from outside America of scholars of the Shari’ah, specialists and people of fatwa. There is no consideration given to the majority when these are not people of fatwa or Shari’ah specialists. The conference organisers had gathered people who were not specialists in the sciences of the Shari’ah; in fact, they had even invited, along with scholars and imams, the non-Muslim Mr. Peter Smith, economists, educationalists, etc. They intentionally omitted to mention the names of some participants, for they deleted my name from the list of participants although I was invited. The most prominent of those who did not agree with this resolution were:

- ◆ Dr. Wahbah al-Zuhayli, Lecturer in Fiqh at the Faculty of Shari’ah, University of Damascus
- ◆ Dr. Mahmud al-Tahhan, Lecturer in Hadith at the Faculty of Shari’ah, University of Kuwait
- ◆ Dr. Muhammad Ra’fat ‘Uthman, Dean of the Faculty of Shari’ah and Law, Al-Azhar University and member of the Islamic Research Academy
- ◆ Dr. ‘Abdullah Mabruk al-Najjar, Lecturer in Fiqh at the Faculty of Shari’ah, Al-Azhar University and member of the Islamic Research Academy
- ◆ Dr. ‘Ali al-Sawwa, Lecturer in Fiqh at the Faculty of Shari’ah, University of Jordan.
- ◆ Dr. ‘Atiq al-Qasimi, Lecturer in Fiqh in India and member of the Islamic Fiqh Assembly, India.
- ◆ Shaykh ‘Abdullah Salim from India, settled in America
- ◆ Shaykh Muwaffaq al-Ghalayini, Imam of the Islamic Centre of Ann Arbor
- ◆ Shaykh ‘Ala’ al-Din Ramadan, Imam of a mosque in California
- ◆ Dr. Hamud al-Salawi from Yemen
- ◆ Dr. Sharf al-Qudat, a university lecturer from Jordan
- ◆ Dr. Majdhub Yusuf Ba Bakr from Sudan
- ◆ Other people of knowledge

They requested the presidency of the conference to mention their names in a list of those not in favour of this resolution, but the presidency of the conference rejected their request. After a severe insistence on this request, the presidency of the conference promised to meet the demand but then broke its promise and did not mention their names. I wonder what the reason for this was?

- 2) What is the reason for riba being permitted out of need for the Muslim settled outside *dar al-Islam*, but not being permitted for the Muslim settled in dar al-Islam? In other words, is it permitted for a Muslim to not adhere to the rulings of Islam when he leaves the lands of Islam, when the Messenger of Allah sall-Allahu ‘alayhi wa sallam said, “Fear Allah wherever and whenever you may be” ?
- 3) The text of the resolution goes on to say: “It is clear from the explanations presented by some specialists regarding contracts currently implemented in home-buying that some of these are very close to the contract of bay’ al-ajal (deferred payment by instalments) in substance. Here the principle, ‘Contracts are judged according to their objectives and meanings, not according to their words and form,’ is implemented. It is possible to justify these contracts by changing the conventional terminology employed in them.” This is a strange and very dangerous matter which was not mentioned in the discussions during the conference but is from the conference presidency. It resembles the words of the non-Muslims about riba, as the Noble Qur’an quotes them, “That is because they say, ‘Trade is like usury,’ but Allah has permitted trade and prohibited usury.” The form employed in contracts has its value. I do not wish to enter into details, for the matter is well-known to the people of knowledge. It is not allowed to dilute matters until the halal mixes with the haram, for the halal is clear and the haram is clear. Thus, instead of working to create shari’ah-compliant alternatives and advising the Muslims to be firm in adhering to the rulings of their religion, the conference presidency decided to attempt to find a trick to permit the riba which Allah has prohibited through clear, definite texts in the Book and the Sunnah.
- 4) The running of the conference, and the atmosphere which the sessions of the conference were set, were not acceptable and not usual for conferences which research important scholarly matters. This is because of the following:
  - ◆ The method of electing the president of the conference and his deputy, and its secretary and his deputy, were not democratic; in fact, they bore more resemblance to elections in backward countries or dictatorships.
  - ◆ There was no voting on resolutions upon completing the discussion of each issue raised by the conference.
  - ◆ Specialised academic panels were not formed to study each issue raised. Instead, the issues were discussed in a general mass way, with each person given three minutes to comment on each subject discussed.
  - ◆ We – members of the conference – did not have documents, statistics or any kind of proof indicating the necessity of buying houses via usurious loans.
  - ◆ Not all conference participants were invited to analyse the declarations issued and resolutions taken. Instead, the presidency of the conference invited whom it wished and excluded whom it wished.
  - ◆ The declarations and resolutions were not read out to the participants during the conference for them to endorse or amend them, contrary to the practice of all conferences. In fact, this was contrary to the conference programme for its fourth day, which mentioned the issue of a panel to draft resolutions and the issue of the reading of declarations and resolutions to the conference participants. The president and secretary of the conference left early that day, and no resolutions were read out to the conference participants ...

**Mahmud al-Tahhan, Lecturer in Hadith Sciences, Faculty of Shari’ah, University of Kuwait.**

### **APPENDIX 3: “What Permits Riba is Necessity ... not Need” – Dr. ‘Ujayl al-Nashami, Dean of the Faculty of Shari’ah in Kuwait responds to the Fatwa of Buying Homes via Usurious Loans**

(This question and answer were published in *Al-Sirat Al-Mustaqim* magazine no. 88, Dhu ‘l-Qa’dah 1420)

**Question:** What is the ruling of the Sacred Law regarding buying houses in European countries via usurious loans when this is the only way to buy houses there? Is this regarded as one of the necessities which permit the forbidden? Or is it one of the benefits which is treated like necessity?

**Answer:** One of the definite matters is the prohibition of riba due to the clear text in the words of the Exalted, **“O you who believe! Fear Allah, and give up what remains of usury, if you are indeed believers. If you do not, then take notice of war from Allah and His Messenger”** (al-Baqarah: 278-9). The Prophet sall-Allahu ‘alayhi wa sallam said, **“Avoid the seven destructive matters,”** and mentioned riba amongst them (al-Bukhari 5/392, Muslim 1/93). On the authority of Jabir b. ‘Abdullah, may Allah be pleased with them both, who said, **“The Messenger of Allah cursed the consumer of riba, its payer, its writer and its two witnesses, and he said, ‘They are equal’.”** (Muslim 3/1219) There is no doubt that accommodation is one of the necessities of life which safeguard for a human being his life, wealth and dignity, or it is a need which is treated like necessity, whether it is a specific or general need. The justification of allowing or not allowing the buying of houses in Europe in this way is based upon the existence of necessity or need which is treated like necessity, and upon the answer to the questions, “Is riba one of the things which may be permitted due to a need which is treated like necessity? And is benefit a valid evidence for allowing usurious borrowing?” These were the most important points mentioned in the fatwa.

We say, and with Allah is all capability: The necessity according to the Shari’ah which permits the prohibited is not found in this matter, nor is the need which is treated like necessity. If we go to the level of denying need which is treated like necessity, using necessity as evidence is denied due to the non-occurrence of what is less than it. We shall mention the evidences of necessity and need which is treated as necessity, and we shall support our verdict with the words of the jurists, for the fatwa was issued without any supporting texts. We shall mention that which might be used as evidence so that we can also refute that with the words of the jurists. We shall also establish the extent of the matter, the subject of the fatwa.

We begin with the words of the jurists regarding the principle, “General need is treated like necessity,” and tie to the principle, “Necessities permit the forbidden.” We say: this principle is mentioned by many scholars of fiqh and usul, who mentioned cases of it, including the permissibility of ‘araya due to the general need, notwithstanding that ‘araya is selling goods to which riba applies for goods of the same type, where the two sides of the exchange are not equal in comparison. Some of the jurists’ texts regarding this are as follows:

Shaykh-ul-Islam Ibn Taymiyyah says, “The entire Shari’ah is based upon the principle that when a harm which dictates prohibition is opposed by an overriding need, the prohibited is permitted.” (1) He also says, “It is allowed out of need that which is not allowed without need, as for example the sale of dates on the tree for dry dates is allowed.” (2) He also says, “The Lawgiver does not prohibit types of trade of which people have need, due to an element of uncertainty; rather, He permits what is needed of such transactions.” (3)

Al-Zarkashi says, “General need amongst the people is treated like special necessity in the case of individuals.” (4)

In the *Majallah al-Ahkam al-‘Adliyyah* [the Ottoman Compendium of Court Judgments], it is stated, “Need is treated like necessity, whether it is general or specific.” (Article 32)

Al-Juwayni says, “Need in the case of the people in general is treated like necessity in the case of an individual.” (5)

We can formulate the argument of the fatwa as follows: The need of the Muslims in those countries dictates borrowing with *riba* to secure a home, such that stability and the upbringing of children are realised in appropriate environments; were we to take the view of forbiddance and prohibition, this would lead to landing the Muslims into difficulty and constraints.

We say: the principle, “General need is treated like necessity,” is a principle agreed upon, but it is not applicable to the situation of buying which generates *riba*. Rather, the principle, “Need is treated like necessity,” is understood by referring it back to its source principle which is the principle of necessity, of which the basis is the statement of the Messenger *sall-Allahu ‘alayhi wa sallam*, “**There should be no harm to oneself or harm to others: he who causes harm, Allah causes him harm; he who creates difficulties, Allah creates difficulties for him.**” (6) Al-Zarkashi and al-Suyuti say, “Several principles are related to this principle, the first of which is that ‘Necessities permit the forbidden matters, with the condition that the former are not less serious than the latter.’ This principle is illustrated by the allowances of eating carrion in case of starvation, of dislodging a morsel [stuck in the throat] with wine, of uttering a statement of *kufr* under coercion, of destroying property, of seizing the wealth of one who refuses to pay a debt without permission, and of combating an attacker, even if this leads to his killing.” (7)

When such matters are permitted, the principle applies that “The extent of what is permitted by necessity is determined according to the extent of the necessity.” Hence, the person under necessity only eats enough carrion to stave off death. Al-Jassas says about the saying of the Exalted, ‘**He has explained to you what He has prohibited for you, except that to which you are forced by necessity**’: “Necessity here is fear of harm upon his life or one of his limbs by not eating. Two meanings are included under this: firstly, that this occurs in a place where he finds nothing but carrion; and secondly, that other food is available but the person is forced to eat the prohibited under the fear of the threat of losing his life or limb; both meanings are intended by the *ayat* since both of them are possible. The Exalted explained the limits or measure of the necessity in His saying, ‘**Whoever is forced by necessity, without transgressing or exceeding the limits, there is no sin upon him.**’ Hence, He made the permission conditional upon the existence of necessity. Merely satisfying hunger is not considered here, since hunger does not initially permit eating carrion when there is no harm feared by not eating. The meaning of His saying, ‘**without transgressing or exceeding the limits,**’ is without transgressing or exceeding the limits in eating, and it is known that He did not intend to permit eating beyond satisfying the hunger.” (8)

Ibn ‘Atiyyah says, “The one transgressing eats beyond his need, so his eating becomes one motivated by desire. The one exceeding the limit eats carrion etc. whilst other food is available.” (9) Ibn Juzayy says, “Necessity is the fear of death. It is not a condition that he should remain patient until he reaches the verge of death: it is sufficient that there be fear of perishing, even if this is speculative.” (10) Ibn Qudamah says, “It is permitted for him to eat enough to stave off danger and secure safety from death, by *Ijma’*. It is prohibited to eat beyond satisfaction from hunger, also by *Ijma’*. In eating until satisfaction from hunger, there are two views. The stronger of these is that it is not permitted – this is the saying of Abu Hanifah, one of the two narrations from Malik and one of the two sayings of al-Shafi’i. The other view is that it is permitted to eat until satisfaction from hunger ... The necessity which permits this is that he fears death if he does not eat. Ahmad said, ‘If he fears for his life,’ whether that is from hunger, or fears that if he does not eat he will be unable to walk, thus being cut off from his companions and perishing, or that he will be unable to ride and thus perish. None of this is limited to a specific period of time.” (11)

From this, it is clear that the permissibility of the prohibited occurs in the case of necessity when its conditions are fulfilled; the most specific of these are:

- That he fears the loss of his life or one of his limbs; the ruling is not limited to eating, but applies to every necessity.
- That the extent of the necessity is determined by the circumstances, and is not widened to include pleasure, desire and provisions.
- That if he finds a way out other than carrying out the prohibited, the prohibited is not lawful for him. For example, he finds someone who lends him wealth or food, or he is able to buy upon credit, etc.

This is the situation of necessity where the intrinsically-prohibited is permitted. As for need, or the need which is treated like necessity, it does not mean that its ruling is the same as the ruling in case of necessity in every aspect, otherwise there would be no sense in making a distinction between need and necessity. What is meant by need is that the pressing need of the people regarding their livelihood and dealings cannot be lifted, and that without the permission, severe difficulty arises.

Al-Suyuti and others have illustrated the general need of the public by the validity of leasing, *ju'alah*, and *hiwalah*, saying, "These have been allowed contrary to analogical reasoning, due to the first matter including a contract upon benefits which do not yet exist, the second having uncertainty, and the third involving selling one debt for another." He gave an example of specific need as repairing a dish with silver, saying, "This is allowed out of need, without consideration for the absence of material other than silver. This is because manufacturing vessels from gold and silver is fundamentally permissible, but here the objectives related to the silver are other than decoration, such as repairing a crack or binding or strengthening the vessel." (12) Hence, need or that which the jurists treat like necessity could arise from an uncertainty that, were it considered, would lead to harms, difficulty and hardship which would nullify public or specific benefits.

Ibn Taymiyyah says, "The Lawgiver does not prohibit types of trade of which people have need, due to an element of uncertainty; rather, He permits what is needed of such transactions." (13) For example, that which is prohibited as a means may be permitted due to an overriding benefit.

Ibn al-Qayyim says, "What is prohibited as a means may be permitted due to an overriding benefit. For example, looking [at a woman who is not a close relative] is permitted for one proposing, a witness or a doctor, as an exception from the general prohibited gaze." (14) The need which is treated like necessity may be excepted by a text, as in the case of the selling of 'araya etc. These are the cases of needs which are suitable to be treated like necessity. When the ruling is valid out of need, it is conditioned by its extent contrary to the underlying principle, and its scope is not widened like that of the basically permissible. Hence, the basic principle is that the permission regarding the definitely-forbidden in case of need is only to the extent of the permitting need; any increase in permission requires an evidence in the view of Malik and al-Shafi'i, contrary to Abu Hanifah. This is because the established principle with Malik and al-Shafi'i is that when the forbidden is permitted out of need or necessity, the permission is conditional upon repelling the need or necessity, without increase, except with an evidence indicating an increase. This is the meaning of their saying, "Necessity is determined according to its extent." (15) Hence, that which lifts the prohibition of *riba* is necessity, not need.

Al-Zarkashi and al-Suyuti say, "Necessity is reaching a situation when if he does not partake of the forbidden, he dies or comes close to death, and this permits partaking of the prohibited. Need is as the case of the hungry person, who does not die if he does not find something to eat, but he is in difficulty and hardship, and this does not permit the prohibited." (16) Al-Shafi'i says, "The prohibited is not permitted by need; only by necessities such as fear of the loss of life. As for cases other than the latter, I do not know that need permits it. In such situations, the cases of need and absence of need are similar." (17)

Thus it is apparent that *riba*, which has a definite prohibition and which is in the highest ranks of the prohibited, is not permitted, and its like is not permitted, out of need, even if this is desperate. Because of this, the majority of the jurists rejected the view of the Hanafis that *bay' al-wafa'* ("transaction of discharge") was permitted. This is to sell goods with the condition that when the seller returns the price, the buyer returns the goods sold to him. The need for this transaction had become severe in Bukhara, and the transaction had become widespread due to the many debts upon its people. The Hanafis permitted it, although some of them rejected it, but the majority of jurists opposed it since it is utilising property in exchange for a loan, and this is a type of *riba*; alternatively, it is a conditional contract within a contract, which is not allowed. This is also the conclusion of the Fiqh Assembly in its eighth session.

## References

- 1) *Majmu' al-Fatawa*, 29/49.
- 2) *Majmu' al-Fatawa*, 29/480.

- 3) *Majmu' al-Fatawa*, 29/227.
- 4) *Al-Manthur*, 2/317.
- 5) *Al-Ghiyathi*, pp. 478-9.
- 6) *Al-Mustadrak 'ala 'l-Sahihayn* of al-Hakim al-Naysaburi, p. 57, quoted in *Al-Qawa'id al-Fiqhiyyah al-Kubra* of Dr. Salih b. Ghanim al-Sadlan, p. 495. Refer to this for a full treatment of the narrations of "There is to be no harm or reciprocating harm."
- 7) *Al-Manthur fi 'l-Qawa'id*, 2/319; *Al-Ashbah wa 'l-Naza'ir*, p. 84.
- 8) *Ahkam al-Qur'an*, 1/150.
- 9) *Al-Muharrar wa 'l-Wajiz*, 2/72.
- 10) *Al-Qawanin al-Fiqhiyyah*, p. 182.
- 11) *Al-Mughni wa 'l-Sharh al-Kabir*, 11/74; *al-Majmu'*, 9/37.
- 12) *Al-Ashbah wa 'l-Naza'ir*, p. 88.
- 13) *Majmu' al-Fatawa*, 29/227.
- 14) *I'lam al-Muwaqqi'in*, 2/161.
- 15) *Qawa'id al-Muqri*, 1/231; cf. *Mawsu'ah al-Qawa'id al-Fiqhiyyah*, 2/87.
- 16) *Al-Manthur*, 2/319; *Al-Ashbah wa 'l-Naza'ir*, p. 85.
- 17) *Al-Umm*, publ. *al-Sha'b al-Misriyyah*, 3/38.

## **APPENDIX 4: The Concluding Declaration of the Fourth Ordinary Session of the European Council for Ifta' and Research, convened in the city of Dublin, Ireland, 18-22 Rajab 1420 / 27-31 October 1999**

### **Resolution 2/4: The ruling on buying homes via usurious bank mortgages for Muslims outside the Islamic countries:**

The Council analysed this issue which has caused widespread affliction in Europe and all the Western countries. It is the issue of homes which are bought via usurious loans from conventional banks.

A number of papers, both in favour and opposed, were presented to the Council and read to its members. These were then comprehensively discussed by all members, after which the Council reached the following conclusions through a majority of its members:

- 1) The Council confirms what the ummah has agreed upon of the prohibition of *riba*, that it is one of the seven destructive sins, that it is one of the major sins upon which war from Allah and His Messenger have been announced, and confirms what the Islamic Fiqh Assemblies have resolved: that bank interest is prohibited *riba*.
- 2) The Council appeals to the Muslims in the West to strive to create doubt-free *shari'ah*-compliant alternatives as far as possible, such as the *murabahah* transaction employed by Islamic banks, or by founding Islamic companies which build such housing for reasonable amounts affordable by the majority of Muslims, etc.
- 3) It calls upon Islamic organisations in Europe to negotiate with conventional European banks to change this dealing into a form acceptable under the *Shari'ah*, e.g. *bay' al-taqsit* (sale by instalments) in which the price is increased in return for a lengthening of the payment period. This will win for them a large number of Muslim customers who will deal with them on this basis, and is a common practice in some parts of Europe. We have seen a number of large Western banks opening in our Arab lands their branches which deal in accordance with Islamic Law, as in Bahrain and elsewhere. The Council can help in this by sending appeals to these banks to modify their approach with the Muslims.
- 4) Since neither of these two options is possible at present, the Committee views, in the light of the evidences, principles and considerations of the *Shari'ah*, that there is no harm in turning to this method of an interest-based loan to buy a house needed by a Muslim for him and his family to live in, with the conditions that he does not have another house which suffices him, that the house being bought is his main residence, and that he does not have enough spare wealth to buy the house by other means.

The Council has relied on two basic premises for its fatwa:

**The first premise** is the principle that "Necessities permit the forbidden." This is a principle agreed upon, derived from the texts of the Qur'an in five places, including the saying of the Exalted in Surat al-An'am, "He has explained to you what He has prohibited for you, except that to which you are forced by necessity," His saying in the same surah after mentioning the types of food prohibited, "Whoever is forced by necessity, without transgressing or exceeding the limits, then your Lord is Oft-Forgiving, Most Merciful." One of the matters which the jurists have established here is that need is treated like necessity, whether it is specific or general.

Need is that which if it is not fulfilled, the Muslim would be in hardship even though he is able to survive, unlike necessity, without the fulfilment of which he cannot survive. Allah has lifted hardship from this ummah by the texts of the Qur'an, as in the saying of the Exalted in Surat al-Hajj, "He has not placed upon you any hardship in the religion," and in Surat al-Ma'idah, "Allah does not wish to place hardship upon you."

The home which removes hardship from the Muslim is a home appropriate for him in its location, size and amenities, such that it is a real home.

Whilst the Council has relied on the principle of necessity or of need which is treated like necessity, it has not neglected the other principle which regulates and complements it, and this is that “the extent of what is permitted by necessity is determined according to the extent of the necessity,” so it has not allowed home-ownership for trade, etc.

There is no doubt that the home is a necessity for the Muslim individual and the Muslim family, and Allah has reminded His slaves of this favour of His by saying, “Allah has made for you, of your houses, homes.” The Prophet sall-Allahu ‘alayhi wa sallam made a spacious home one of the three or four ingredients of happiness. The rented home does not meet all the Muslim’s needs, and does not provide him with the feeling of security. It places a heavy burden upon the Muslim of what he pays to the non-Muslim. He remains paying his rent for years and years, and does not own a single brick at the end of it. During all this, the Muslim remains vulnerable to eviction from this home if his family increases or he has many guests. Similarly, when he gets old or his income reduces or dries up, he becomes vulnerable to being thrown out onto the street.

In contrast, owning a home safeguards the Muslim from this worry, and enables him to choose a home close to the mosque or Islamic centre and Islamic school. It also provides an opportunity for the Muslim community to have homes close together in order to create a small Islamic society within the wider society. Thus their children will know each other, their links will strengthen, and they can help each other to live in the shade of the concepts of Islam. Further, this enables the Muslim to prepare his house and organise it such as to fulfil his religious and social needs, as long as it is owned by him.

There is also, alongside this individual need of every Muslim, the general need of the community of Muslims who live as minorities outside *dar al-Islam*, which takes the form of improvement of the Muslims’ living conditions, such that their level will rise. They will then deserve to be called the best nation brought forth for mankind, and will become a radiant image of Islam in front of the non-Muslims. It also involves liberation from the economic shackles upon them, so that they may be able to fulfil the obligation of da’wah and take part in building the society at large. This dictates that the Muslim does not remain toiling and struggling all his life to pay the rent of his house and his living expenses, not finding an opportunity to serve his society or spread his da’wah.

**The second premise:** This is the position of Abu Hanifah and his companion Muhammad b. al-Hasan al-Shaybani – and it is the position according to which fatwa is issued in the Hanafi madhhab – as well as that of Sufyan al-Thawri and Ibrahim al-Nakh’i, being also one of the narrations from Ahmad and preferred by Ibn Taymiyyah, as stated by some Hanbalis, of the allowability of dealing in *riba* and other Islamically-invalid contracts between Muslims and others in *dar al-harb*. They have evidences for this position which are mentioned by Imam al-Tahawi and others, but there is not enough space here to mention these.

What the Hanafis mean by *dar al-harb* is whatever is not *dar Islam*, for the categorisation in their view is twofold, not three-fold. Hence *dar al-harb* for them includes what others term *dar ‘ahd* or *dar aman*. Thus, we prefer to express this meaning by our saying, “transactions outside *dar al-Islam*.”

There are a number of considerations which tip the balance in favour of this position. Amongst these are:

- 1) That the Muslim is not obliged under the Shari’ah to establish Islamic civil, financial and political rulings and other such matters which are related to the general system, in a society which does not believe in Islam, since this is not within his capability, and Allah does not burden a soul beyond what it can bear. The prohibition of *riba* is one of these rulings which is related to the essential nature of the society and to the philosophy of the state and its social and economic orientation.

Rather, the Muslim is required to establish the rulings which concern him personally such as those of ritual worship, food, drink and dress, and those related to marriage, divorce, remarriage, *‘iddah*,

inheritance and other personal matters. These are such that if these matters are constrained for him, and he is not able to establish his religion in them in any way, it becomes obligatory for him to migrate within Allah's spacious earth as soon as he finds a way to do so.

- 2) The consequences of not dealing with these invalid contracts, including *riba*, in the lands of these people, i.e. that a Muslim's holding fast to Islam becomes a cause of his economic weakness and financial loss, whereas the basic principle is that Islam strengthens a person and does not weaken him, increases him in prosperity and does not decrease him, and benefits him and does not harm him. Some of the people of knowledge from the Salaf used as proof for the Muslim inheriting from the kafir, the hadith, "Islam increases, and does not decrease," i.e. it increases the Muslim in goodness, and does not decrease him in it. Similar is the hadith, "Islam dominates, and is not dominated." If the Muslim does not deal with these contracts which they mutually agree amongst themselves, he will be forced to give what is demanded from him and not take anything in return. Hence, he will implement these laws and contracts regarding the prohibited matters against himself, but will not implement them regarding the gains he can achieve. Thus he will always have the debt, but never the gain. In this way, the Muslims will remain forever oppressed financially due to his holding fast to Islam. Islam never intended that the Muslim should be oppressed by holding to it, and that it should leave him – outside *dar al-Islam* – at the mercy of the non-Muslim, who sucks him dry and exploits him, whilst the Muslim is prohibited from dealing with the non-Muslim in return according to the prevailing contracts, and those recognised amongst themselves.

It is said that the Hanafi madhhab only allows dealing with *riba* in the case of receiving, not paying, for there is no benefit for the Muslim in giving, and that they do not allow dealing with Islamically-invalid contracts except with two conditions:

- 1) that the benefit in them should be for the Muslim;
  - 2) that there should be no treachery or betrayal towards the non-Muslim;
- and it is said that no benefit is achieved for the Muslim here.

Our reply is that we do not accept this [that the Hanafi madhhab is so specific]. Amongst the indications of this are the saying of Muhammad b. al-Hasan al-Shaybani in *al-Sayr al-Kabir*, and the unconditional statements of the early 'ulama' of the madhhab. Further, even though the Muslim is paying the interest, he is the one benefiting, for through it he owns the home in the end.

The Muslims who live in these countries have confirmed, verbally and through writing, that the instalments which they pay to the bank are approximately the same as the rent which they pay to the landlord; in fact, they are sometimes less. This means that were we to prohibit this transaction with the bank upon interest, we would prohibit the Muslim from owning a home for himself and his family, although this is one of the fundamental needs of the human being as expressed by the jurists. The Muslim may remain for twenty or thirty years or more, paying a monthly or annual rent but owning nothing, whereas it was possible for him to own the house in twenty years or less.

## **APPENDIX 5: A Scholarly Disagreement with the Resolution pertaining to Buying Houses via Usurious Loans**

(The undersigned wrote the following response to the resolutions of the European Council for Ifta' and Research, Fourth Ordinary Session, Rajab 1420 / October 1999, Islamic Cultural Centre of Ireland. It was published by al-Da'wah magazine no. 1726, dated 13 Shawwal 1420 / 20 January 2000, p. 26, under the heading, "Members of the European Council for Ifta' and Research: We did not agree with the fatwa which permits riba for buying property!")

With the Name of Allah, Most Merciful, Ever-Merciful

Praise be to Allah. Blessings and Peace be upon our Leader, the Messenger of Allah, and upon his family, companions and all who are loyal to him. The signatories to this scholarly disagreement have seen the resolution pertaining to buying houses via usurious loans which was passed by the majority of the members of the Council, and would like to state their disagreement as follows:

### **1. Regarding the justifications of the resolution**

The undersigned members of the Council view that buying houses via usurious loans from banks or other institutions is prohibited under the Shari'ah, and that the proofs offered to allow this do not support permissibility due to the following reasons:

- 1) This situation is not consistent with the Hanafi position, for the preferred view with them is that dealing with riba in *dar al-harb* is correct only when the land is actually a land of war, the Muslim is receiving rather than giving – as preferred by the Hanafi analysts such as al-Kamal ibn al-Humam in *Fath al-Qadir* and Ibn 'Abidin in *Radd al-Muhtar* – and that the transaction with the harbi takes place in *dar al-harb* with mutual agreement.

The first two conditions mentioned above are not fulfilled, for the European countries are not lands of war, and the Muslim in this case is giving rather than receiving. Hence, the legal cause upon which the resolution was based disappears, even though the resolution tries to generalise the second condition to cover the receiver and giver equally.

To the above, it should be added that the evidences quoted by the Hanafis in this issue do not constitute proof. There is not enough space in this brief response to quote what the people of knowledge, including some Hanafi '*ulama*', have said about this.

As for the statement that the division of land in the view of the Hanafis is two-fold and not three-fold, so that the land is either *dar Islam* or *dar harb*, then this does not refute our position of the non-allowability of this transaction, for the Hanafis view that *dar al-kufr* can be *dar aman*, or can be otherwise: when it is *dar aman*, this transaction is not lawful there.

- 2) The second reason for the non-allowability of this usurious transaction is the lack of the occurrence of necessity which would call for such a usurious transaction, whether this is individual or communal. This is because of the absence of the conditions attached to necessity under the Shari'ah, including:
  - a- That it should be actual, not expected; i.e. that it should really occur or it should be highly probable that a real danger exists for one's religion, life, intellect, progeny or wealth.
  - b- That it should be desperate, such that the person fears losing his life or one of his limbs, or that he loses all benefit if he leaves the forbidden.
  - c- That the person forced by necessity does not find a way other than the forbidden.

The situation of the Islamic community in any European country has not reached this extent, nor near it. Add to this the usually widespread availability of rented homes in these countries, in the presence

of which such necessity cannot occur.

- 3) In the light of our own experience settled in Europe, we do not see a pressing need to be treated like necessity such that the Muslim community should resort to this usurious transaction, let alone the position of the resolution of allowing usurious loans to ensure a home appropriate in its size and location.
- 4) We view that the economic weakness of the Muslim community referred to by the resolution is not due to its not dealing in this usurious transaction; rather, this is due to its disunity, the lack of operational use of its wealth, and the placing of this in usurious banks which increases them in strength upon strength and exploitation upon exploitation.
- 5) The silence of the resolution regarding the Shari'ah ruling on buying things other than houses via usurious borrowing. This will lead many individuals of the Muslim community to be reckless in dealing with clear riba in Europe on the basis of this fatwa.

## **2. The correct fatwa as we see it**

The undersigned view that buying houses via usurious loans in Europe is neither dictated by necessity nor required by a need which is treated like necessity. We view that this route is prohibited under the Shari'ah, and it is not correct to take it unless the person cannot find a house to accommodate him even via appropriate renting, he does not have enough money to buy such a home, he cannot find somebody who can give him an interest-free loan, he cannot find another shari'ah-compliant way to avoid mortgage-based home-buying, e.g. the murabahah transaction where there is an increase in price in return for an increase in the term of payment. Furthermore, the home that he buys must not exceed the limits of need, such as its rooms and amenities being more than he needs or that it has advanced features which require a large amount beyond his need.

May Allah bless our leader Muhammad, and his family and companions, and grant them peace. Praise be to Allah, Lord of the Worlds.

**Dr. Muhammad Fu'ad al-Barazi (Denmark) – signature**

**Dr. Suhaib Hasan 'Abdul Ghaffar (London) – signature**

**Plus two other members who had to travel before the completion of this document.**

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## TRANSLATOR'S GLOSSARY OF COMMONLY-USED TERMS

<i>'alayhis-salam</i>	“Peace be upon him,” a term used for Prophets of Allah.
<i>'allamah</i>	A person of great knowledge.
<i>'araya</i>	Fresh dates still on the date-palm, originally those reserved for distribution to the poor and needy. The <i>'araya</i> transaction involves exchanging a known quantity of dry (harvested) dates for an unknown but estimated quantity of fresh dates on the tree.
<i>'iddah</i>	The waiting period which a woman must observe upon divorce or her husband's death before she can marry again.
<i>'ulama'</i> , pl. of <i>'alim</i>	People of knowledge; scholars.
<i>Ahadith</i>	Plural of <i>hadith</i> .
<i>Ahl al-harb</i>	“People of war”; same as <i>harbis</i> .
<i>Ayah</i> , pl. <i>Ayat</i>	“Sign”; verse of the Qur'an.
<i>Bay' al-ajal</i>	A sale where the payment is made in known, fixed instalments over a fixed time period.
<i>Da'if</i>	“Weak”; in <i>Hadith</i> , a non-authentic report.
<i>Da'wah</i>	Invitation or call to Allah and Islam.
<i>Dar 'ahd</i>	“Land under an agreement”; same as <i>dar aman</i> .
<i>Dar al-harb, dar harb</i>	“Land of War”; a territory whose rulers or inhabitants are at war with <i>dar al-Islam</i> .
<i>Dar al-Islam, dar Islam</i>	“Land of Islam”; a territory where Islam is dominant or Islamic Law is applied.
<i>Dar al-kufr</i>	“Land of Kufr”; opposite of <i>dar al-Islam</i> . Some scholars divide this into <i>dar al-harb</i> and <i>dar aman</i> .
<i>Dar aman</i>	“Land of Security”; part of <i>dar al-kufr</i> which is not <i>dar al-harb</i> , due to an agreement of security and safety between the non-Muslim rulers and any Muslims residing or visiting there.
<i>Din</i>	“Life-transaction”; religion; Islam.
<i>Dinar</i>	A gold coin weighing approximately 4.2g.
<i>Dirham</i>	A silver coin weighing approximately 3g.
<i>Dunya</i>	This world; materialistic life.
<i>Fatwa</i> , pl. <i>Fatawa</i>	Verdict or ruling regarding a legal issue by a <i>mufti</i> .
<i>Fiqh</i>	The science of Islamic jurisprudence. The term literally means “understanding.” A <i>faqih</i> is someone who has understanding of the objectives, sources and rulings of Islamic Law.
<i>Fiqhi</i>	Relating to <i>fiqh</i> ; jurisprudential.
<i>Fuqaha'</i> , pl. of <i>faqih</i>	Experts in <i>Fiqh</i> .
<i>Gharar</i>	Uncertainty or unknown factor in a transaction.
<i>Gharib</i>	“Strange”; in <i>Hadith</i> , a chain of transmission which has only one narrator in at least one generation.
<i>Hadith</i>	The science of scrutinising the transmission of reports from the Messenger of Allah <i>sall-Allahu 'alayhi wa sallam</i> , the Companions and Followers. An individual <i>hadith</i> is a report of

	a saying, deed or approval of the Messenger <i>sall-Allahu ‘alayhi wa sallam</i> .
<i>Halal</i>	Lawful (permissible) under Islamic Law.
<i>Haram</i>	Unlawful (prohibited) under Islamic Law.
<i>Harbi</i>	One settled in <i>dar al-harb</i> .
<i>Hijab</i>	“Curtain, screen”; the veil worn by Muslim women.
<i>Hijrah</i>	Migration from one land to another for the sake of Allah and His Messenger.
<i>Ifta’</i>	Issuing <i>fatwa</i> .
<i>Ijma’</i>	Consensus of opinion of the relevant authorities on a particular issue. It is one of the sources of the <i>Shari’ah</i> .
<i>Ijtihad</i>	“Striving, exerting effort”; the process of arriving at a reasoned decision on a particular issue by a qualified scholar or <i>mujtahid</i> .
<i>Imam</i>	“Leader”; one who leads the Muslim prayer; a great scholar.
<i>Jahiliyyah</i>	“Ignorance-ism”; the pre-Islamic period of Arabia.
<i>Jihad</i>	“Striving” or holy war. Internal <i>jihad</i> is fighting against the evil whisperings of one’s own soul. External <i>jihad</i> is fighting <i>kufr</i> with one’s tongue, wealth and body or life.
<i>Kafir</i>	One whose life is based on <i>kufr</i> .
<i>Khabar al-wahid</i>	“Single-individual report”; in <i>Hadith</i> , a report which is not <i>mutawatir</i> , and so has a limited number of reporters in at least one generation.
<i>Kufr</i>	“Covering up”; rejection of Islam; unbelief.
<i>Madhhab</i>	School of Islamic Law; the totality of the principles and rulings of the founder of the <i>Madhhab</i> , as well as his students and all scholars who followed their approach.
<i>Makruh</i>	“Disliked”; in <i>Fiqh</i> , an action which is preferable and rewardable to avoid, although there is no sin in doing it.
<i>Mufti</i>	One who issues <i>fatawa</i> .
<i>Mujtahid</i>	One who performs <i>ijtihad</i> .
<i>Murabahah</i>	A sale involving a fixed profit or mark-up for the seller, where the seller discloses the information about the profit to the buyer.
<i>Mursal</i>	“Hanging”; in <i>Hadith</i> , generally used for a chain of transmission where a Follower quotes directly from the Prophet <i>sall-Allahu ‘alayhi wa sallam</i> , omitting the Companion from whom he must have heard the report.
<i>Musharakah</i>	Partnership.
<i>Musharakah mutanaqisah</i>	Diminishing partnership, e.g. an arrangement where a homebuyer and housing or financial institution share in the ownership of the house, with the homebuyer buying further shares in the house until it belongs totally to him.
<i>Musnad</i>	In <i>Hadith</i> , an unbroken chain of transmission. The term is also used for a collection of <i>ahadith</i> , where the <i>ahadith</i> are arranged according to the Companion who narrates them.
<i>Mutawatir</i>	“Widely-reported”; in <i>Hadith</i> , a report which is transmitted in large numbers in every generation such that its authenticity

	cannot be questioned.
<i>Qiyas</i>	In <i>Fiqh</i> , analogical reasoning for deriving the ruling on an unknown case from the ruling on a known case.
<i>radi-Allahu ‘anhu</i>	“May Allah be pleased with him,” a term used for the early generations of righteous Muslims, especially the Companions.
<i>Rahimahullah</i>	“May Allah have mercy upon him.”
<i>Rahimahumullah</i>	“May Allah have mercy upon them.”
<i>Riba</i>	Usury; interest; any unjustified increase or excess in one side of a transaction.
<i>Riba al-fadl</i>	<i>Riba</i> relating to the exchange of goods (barter), e.g. exchanging unequal quantities of gold or silver.
<i>Riba al-nasi’ah</i>	<i>Riba</i> relating to deferred payment, debt or credit, e.g. interest on loans.
<i>Sadaqah</i>	Voluntary almsgiving.
<i>Sahih</i>	“Sound, correct”; in <i>Hadith</i> , an authentic report.
<i>sall-Allahu ‘alayhi wa sallam</i>	“May Allah bless him and grant him peace,” a term used for Allah’s final messenger, Muhammad b. ‘Abdullah.
<i>Shari’ah</i>	Islamic Law. The term literally means a path or way.
<i>Shaykh</i>	A teacher or elder.
<i>Siwak</i>	Tooth-stick taken from certain types of tree.
<i>Sunan</i>	Plural of <i>sunnah</i> ; in <i>Hadith</i> , a collection of <i>ahadith</i> arranged according to their subject matter.
<i>Taqwa</i>	Fear of Allah; piety; observing the limits of Allah in one’s actions.
<i>Ummah</i>	The Muslim nation.
<i>Usul</i>	“Fundamentals, principles”; the sciences of the fundamental principles of Islam, sometimes used especially for <i>Usul al-Fiqh</i> .
<i>Zakat</i>	“Purification”; the obligatory almsgiving, one of the Five Pillars of Islam, which purifies one’s wealth and heart.
<i>Zina</i>	Unlawful sexual intercourse; fornication; adultery.

## ABOUT THIS BOOK

With a polite scholarly style, ... and sincerity of brotherhood, ... the respected brother Dr. Salah al-Sawi has managed to clearly prove the falsity of the fatwa, and to explain the immense harm which it entails. By pursuing the bases of the fatwa, and following all its premises in logical order, he has refuted each one of these in such a way as to leave no room for doubt about its falsity.

The Fiqh Assembly of the Organisation of the Islamic Conference has unanimously declared as follows: “The home is one of the basic human needs, and must be fulfilled in *shari’ah*-compliant ways with halal wealth. The way taken by banks operating in real estate and housing (commercial and residential property) or other such institutions, i.e. lending with interest, whether the rates are low or high, is a way which is prohibited under the *Shari’ah*, because of the involvement of *riba* in the transaction.”

As for this fatwa, although it is a mistake, we must not forget what Imam al-Shafi’i said regarding the obligation to follow the text, and what Shaykh-ul-Islam mentioned, that it is not for a Muslim to speak about the people of knowledge and faith except as they deserve.

Dr. ‘Ali Ahmad al-Salus