Use of Darurah in IBF

Several scholars have called attention to the concepts of ‘necessity’ (darura) and ‘need’ (hajah) as they have been used in Islamic finance. The concern is that these concepts may have been used or rather abused to justify prohibited practices. The concept of necessity has been used in Islamic law to grant concessions (rukhsah) in cases of necessity. This is based on the view, derived from the Qur’an, that some types of hardship are so great that avoiding them is permitted even if it means violating a divine command or prohibition. Thus, in emergencies a person may delay and even skip prayer if it is to save the life of a drowning person. Similarly, a starving person is permitted to eat pork or carrion, if this will save him from death by starvation. This helps to protect life, a leading objective (maqsad) of the Shariah. The ground for criticism is the perception that an appeal to necessity has been made even in cases where the hardship was not sufficiently great to justify departure from the authoritative text. Matters are complicated by the fact that there appears to be little consensus among Muslim scholars on what precisely constitutes hardship. Moreover, the meaning of “necessity” has in some cases been conflated with the meaning of “need” (hajah). The conflation of the meanings of “necessity” and “need,” however, represents a departure from the classical view, which distinguished between the two. Conflating the meaning of the two terms may have opened the door to the practice of permitting prohibited practices, as failing to meet a need causes a lesser degree of hardship than a failure to meet a necessity. According to the classical view, the appeal to necessity must meet several conditions in order to be acceptable under the Shariah. The necessity must be real and not merely imagined. Moreover, allowing a concession (rukhsah) on the ground of necessity must not violate other people’s rights. Another condition is that the concession must be temporary, and last only as long as the necessity. One area where misuse appears to have taken place is in the securitisation of Islamic sukuk. Here, a number of scholars allowed a departure from the Shariah concept of true sale and recourse to the common law notion of sale. This concession had far reaching implications, and gave rise to a number of new problems. A sale that falls short of a true sale is a sale in which the legal ownership of assets “sold” remains with the seller and is not transferred to the buyers. Only “beneficial” ownership is transferred to the “buyers” in such a sale. The seller remains the legal owner of the assets even after “selling” them to the buyer. Such a sale is recognised as a valid sale in the common law. However, it is not recognised as a valid sale under the Shariah. The rationale for allowing
the common law rather than the Shariah notion of sale is that a true sale would impose undue hardship on the buyers. The hardship comes in the form of higher prices of assets. Were a true sale to be executed, buyers would be obliged to pay stamp duties and perhaps even sales taxes. Given the structure of sukuk contracts, which feature repurchase agreements, the sellers would also have to pay stamp duties and sales taxes, when selling the sukuk assets back to their original owners. But does the need to pay stamp duties and taxes constitute sufficient “hardship” to justify a departure from the Shariah notion of a valid sale? Sales that fall short of true sales give rise to other problems. For example, a sale that falls short of a true sale requires the buyer to pay for an asset without obtaining legal ownership of any asset thus “purchased.” In other words, the buyer is required to give up value (the consideration) without receiving a recognisable counter value in the form of the legal ownership of the asset purchased. Is this compliant with the Shariah? Moreover, after “buying” an asset this way, the “buyer” “sells” the same asset back to its original owner. But as the new “owner” of the asset is not its legal owner, the would be “seller” in effect is “selling” an asset that he or she does not legally own. Is this acceptable under the Shariah? Moreover, this asset is being “sold” to a party that already – or rather still –owns that asset, in the legal sense at any rate. This other party is none other than its original owner, who never gave up legal ownership of the asset in the first place. One is hard put to see the sense – let alone compliance with the Shariah – in this type of transaction. Another example may be found in resorting to interest based financing for the purchase of homes. Home ownership is not a necessity. What is necessary is to have acceptable shelter. Such shelter can be obtained by renting, as not all rented accommodation is of a low standard. The view according to which Muslims should be permitted to use conventional mortgages to buy homes because otherwise they would have no access to proper accommodation is thus less than convincing.