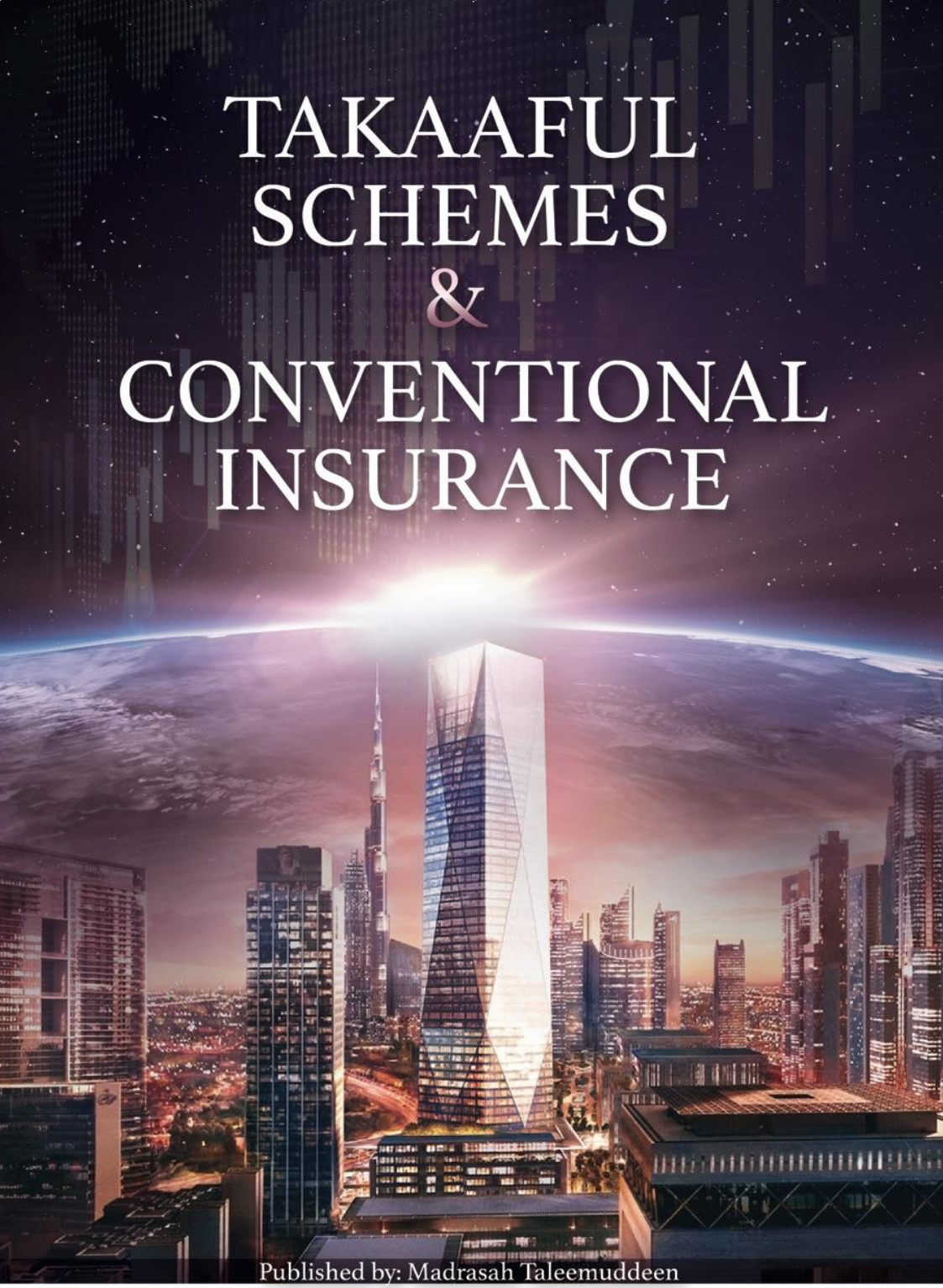
TAKAAFUL SCHEMES & CONVENTIONAL INSURANCE



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Question

I recently heard about Takaaful insurance and was interested in taking out a scheme to cover my home, business, cars, etc. Takaaful claims to be fully Shari'ah compliant, but when I went to the Takaaful website and saw the different schemes that they offer, I couldn't see any difference with normal insurance. Also, when I dialed the number on their website, I reached a conventional insurance company who told me that Takaaful is part of them and operates under their license. Can you please explain to me whether Takaaful is permissible or not? Jazakallah.

Answer

After carefully studying and examining the Takaaful scheme, we have not found it to be any different to conventional insurance. Conventional insurance has been declared haraam by all the Ulama on account of the elements of interest and gambling being found in it. When we examine the Takaaful scheme, we find that it contains the very same two elements of interest and gambling. Apart from this, the operation and workings of both are identical. When both have the elements of interest and gambling and the operation and workings of both are identical, both will share the same Shar'ee ruling. The mere changing of the name will not make it Shari'ah

compliant. Rather, Shari'ah compliancy is dependent on the nature of the contract.[1]

In order for a contract to be deemed Shari'ah compliant, it must conform to all the criteria of Shari'ah and there should be no invalid conditions included in it. If any contract meets the criteria of Shariah and is void of invalid conditions, it will be regarded as a Shari'ah compliant contract and the benefit that one receives through it will be halaal. On the converse, if any invalid conditions or haraam elements are included in the contract, it will render the contract non-Shari'ah compliant. Thus, it will not be permissible for one to enter into such a contract. If one enters into such a contract, one will be sinful and the wealth acquired through such a contract will be ruled as haraam.[2]

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[1] العبرة في العقود للمقاصد والمعاني، لا للألفاظ والمباني.(شرح القواعد الفقهية ٥٥)

الكفالة بشرط براءة الأصيل حوالة والحوالة بشرط مطالبة الأصيل كفالة كذا في السراجية.(الفتاوى الهندية ٣/ ٣٠٥)

ولو شرط جميع الربح للمضارب فهو قرض عند أصحابنا وعند الشافعي – رحمه الله – هي مضاربة فاسدة، وله أجرة مثل ما إذا عمل. (وجه) قوله أن المضاربة عقد شركة في الربح، فشرط قطع الشركة فيها يكون شرطا فاسدا.(ولنا) أنه إذا لم يمكن تصحيحها مضاربة تصحح قرضا؛ لأنه أتى بمعنى القرض، والعبرة في العقود لمعانيها، وعلى هذا إذا شرط جميع الربح لرب المال، فهو إبضاع عندنا؛ لوجود معنى الإبضاع.(بدائع الصنائع ٦/ ٨٦)

٢ (ومنها) شرط لا يقتضيه العقد وفيه منفعة للبائع أو للمشتري أو للمبيع إن كان من بني آدم كالرقيق وليس بملائم للعقد ولا مما جرى به التعامل بين الناس نحو ما إذا باع دارا على أن يسكنها البائع شهرا ثم يسلمها إليه أو أرضا على أن يزرعها سنة أو دابة على أن يركبها شهرا أو ثوبا على أن يلبسه أسبوعا أو على أن يقرضه المشتري قرضا أو على أن يهب له هبة أو يزوج ابنته منه أو يبيع منه كذا ونحو ذلك أو اشترى ثوبا على أن يخيطه البائع قميصا أو حنطة على أن يطحنها أو ثمرة على أن يجذها أو ربطة قائمة على الأرض على أن يجذها أو شيئا له حمل ومؤنة على أن يحمله البائع إلى منزله ونحو ذلك؛ فالبيع في هذا كله فاسد؛ لأن زيادة منفعة مشروطة في البيع تكون ربا لأنها زيادة لا يقابلها عوض في عقد البيع وهو تفسير الربا.والبيع الذي فيه الربا فاسد أو فيه شبهة الربا، وإنها مفسدة للبيع كحقيقة الربا على ما نقرره إن شاء الله تعالى.(بدائع الصنائع ٥/ ١٦٩)

الأصل فساد العقد بشرط لا يقتضيه العقد ولا يلائمه إلا في صور منها ورود النص به كشرط الخيار.(رد المحتار ٥/ ١٠٨)

وكل شرط لا يقتضيه العقد وفيه منفعة لأحد المتعاقدين أو للمعقود عليه وهو من أهل الاستحقاق يفسده.(الهداية ٣/ ٤٨)

Is Takaaful an ‘Aqd-e-Tabarru’ (Benevolent Contract) or an ‘Aqd-e-Mu’aawadah (Bilateral Contract of Exchange)?

It is agreed among all the Ulama that conventional insurance is impermissible on account of it being an ‘Aqd-e-Mu’aawadah (Bilateral Contract of Exchange), and on account of the money which one pays to the insurance company being in exchange of something that is uncertain. Hence, the elements of riba and qimaar are found in it, and this is the actual factor that renders the contract impermissible. When we examine the Takaaful contract, we find that it is also an ‘Aqd-e-Mu’aawadah (Bilateral Contract of Exchange), and the benefits which one will receive are also uncertain. Therefore, this contract is also impermissible and besides bearing a different name, it is no different to conventional insurance.

Those Ulama who regard Takaaful as permissible say that Takaaful is different to conventional insurance. Conventional insurance is an ‘Aqd-e-Mu’aawadah (Bilateral Contract of Exchange) and Takaaful is an ‘Aqd-e-Tabarru’ (Benevolent Contract). They say that the monthly premiums paid to Takaaful are a tabarru’ (gratuitous contribution and not in exchange of one’s monetary contribution). In other words, this is a pure donation, and one is not paying the monthly premiums to receive anything. However, one should understand that in order for something to be a voluntary contribution and donation and exclude it from being an ‘Aqd-e-Mu’aawadah (Bilateral Contract of Exchange), the factor of compulsion should not be found[3], whereas the factor of compulsion is glaringly evident

[3] لأن الجبر على التبرع ليس بمشروع.(الفتاوى الهندية ٥/ ١٦٠)

in the Takaaful contract, just as it is evident in the conventional insurance contract. It is well known to all that in order for one to qualify for the benefits of insuring one's property, one is required to accept the conditions of the contract. When the participant is required to accept the conditions of the contract and ensure that he promptly pays the monthly premiums, and in the case of defaulting, his contract is terminated, then this itself is indicative of this contract being one of compulsion and not volition. Hence, there is no difference between a conventional insurance scheme and a Takaaful scheme.

Furthermore, it is undeniable that a person's 'contribution' is purely to receive the benefit at the time of an emergency. Hence, it is clear that this is a monetary exchange and not a 'donation'.

Below we will compare the Takaaful scheme to a conventional insurance scheme in order to prove that it is an 'Aqd-e-Mu'aawadah (Bilateral Contract of Exchange) and that there is no difference between a conventional insurance scheme and a Takaaful scheme.

وإذا مات من عليه زكاة أو فطرة أو كفارة أو نذر لم يؤخذ من تركته عندنا إلا أن يتبرع ورثته بذلك وهم من أهل التبرع فإن امتنعوا لم يجبروا عليه. (الفتاوى الهندية ١/ ١٩٣)

The Comparison between Takaaful and Conventional Insurance

When Takaaful and conventional insurance are compared, one will arrive at the conclusion that they are exactly the same, and it is only the name that is different.

1) In conventional insurance, one has the option of insuring different items. One can insure his home, vehicle, business, belongings, etc. against theft, fire, destruction and damages through natural disasters, etc. Takaaful also offers the exact same policies.

2) In conventional insurance, in the event of any of the above disasters occurring, the insurance company pays the policy holder the amount for which the insured item was covered. In Takaaful, the procedure is exactly the same. After the insured item is damaged or destroyed, the participant will place a claim which will be duly investigated by Takaaful. After the claim is processed and approved, Takaaful pays him out for the amount covered in his contract.

3) The policy holder in conventional insurance has to pay a monthly premium for his policy to continue. Similarly, the participant in Takaaful also has to pay a monthly premium for his contract to continue.

4) If the policy holder defaults on payment in conventional insurance, his policy will be cancelled and he will no longer be covered by the insurance company. Similarly, if the participant in Takaaful defaults on payment, his contract will be cancelled.

5) In conventional insurance, the monthly premiums are stipulated based on the value of the items insured together with the client's level of risk, etc.

In Takaaful, the monthly premiums are also stipulated based on the same factors.

6) When a person faces a tragedy and places a claim to his insurance company, the insurance company charges him excess. Similarly, in Takaaful, when a person faces a calamity and places a claim, the Takaaful scheme charges him an excess.

7) The insurance company charges the client monthly premiums in exchange of paying the bills of the client at the time of a tragedy or paying him a certain amount of wealth that is covered in his insurance policy. This transaction, in actual fact, is a transaction of paying money for receiving money at a deferred, uncertain time and event in the future. This type of transaction is ruled and regarded as haraam in Shari'ah as it is not permissible for one to pay money to receive money at a deferred time. Hence, the elements of gambling and interest are found in an insurance contract. Similar is the case of Takaaful. One is required to pay the monthly premiums in order to receive money at a deferred, uncertain time and event in the future.

It is thus clear that there is no difference between conventional insurance and Takaaful.

8) Furthermore, it should be noted that Takaaful schemes re-insure with a conventional insurance and operate under their licence. Hence, when the masses are encouraged to take out a 'so-called Islamic insurance' with the Takaaful scheme, they should be apprised that Takaaful is linked to a 'mother' insurance. If the purpose of moving away from conventional insurance is to acquire the same benefits in a halaal manner, then due to Takaaful re-insuring with a conventional insurance, the outcome is that the client is still under the umbrella of conventional insurance.

When Takaaful is linked and associated to a conventional insurance company and functions in exactly the same way, how can it ever be regarded as Shari'ah compliant through merely having a different name?

The Element of Qimaar (Gambling)

After scrutinizing the conventional insurance scheme, the Ulama have concurred that it contains the element of gambling.

In the case of car insurance, one pays the monthly premiums in order to secure himself against the risk of being hijacked or meeting in an accident. However, one is uncertain as to whether he will be hijacked or meet in an accident in the future. In the case of home insurance, one pays the monthly premiums in order to secure himself against a burglary, fire, etc. However, in this case as well, one is uncertain as to whether one's home will be afflicted by a burglary, fire, etc. Hence, the four mazhabs are unanimous on the fact that entering into this type of contract is impermissible as it contains the element of qimaar (gambling).

The Definition of Gambling

The definition of gambling according to all the four mazhabs is for one to pay for something which he is uncertain of acquiring. [4]

[4] حدثنا وكيع، عن سفيان، عن عاصم، عن ابن سيرين، قال: «كل شيء فيه خطر فهو من الميسر»(مصنف ابن أبي شيبة ٢٦١٧١)

In the case of gambling, one spends a certain amount of money in the hope of gaining something which he is uncertain of acquiring. There is a possibility of him losing all his money and acquiring nothing, and there is also the possibility of him acquiring more or less than what he had initially spent. Through this definition, it is clear that gambling is not confined to casinos and gambling dens. Rather, gambling is also existent in any contract where one pays for something which one is uncertain of acquiring. Therefore, due to the element of gambling, all insurance schemes and policies are impermissible in Shariah.

When one compares Takaaful to the conventional insurance scheme, one finds that both are identical. One pays monthly premiums to secure and safeguard himself against the risk of theft and burglary or other forms of damage and destruction. Many verses of the Qur'an and Ahaadith of Rasulullah (sallallahu alaihi wasallam) severely condemn the evil sin of gambling. [5]

لأن القمار من القمر الذي يزاد تارة وينقص أخرى وسمي القمار قمارا؛ لأن كل واحد من القمارين ممن يجوز أن يذهب ماله إلى صاحبه ويجوز أن يستفيد مال صاحبه فيجوز الازدياد والنقصان في كل واحدة منهما فصار ذلك قمارا وهو حرام بالنص.(البحر الرائق ٨/٥٥٤ ، رد المحتار ٦/ ٤٠٣)

فإن الغرر هو الخطر الذي استوى فيه طرف الوجود والعدم بمنزلة الشك (بدائع الصنائع ٥/ ١٦٣)

قوله : (والميسر) هو لعب القمار وهو كل لعب تردد بين الغنم والغرم. (حاشية البجيرمي على الخطيب ١٢/ ٢٢٠)

قد تقدم أن الفاصل بين المسابقة الشرعية والقمار، أن المقامر يكون على خطر من أن يغنم أو يغرم، بخلاف المسابق، فعلى هذا إذا كان الجعل منهما، ولم يدخلا محللا لم يجز، لوجود معنى القمار فيه، وهو الخطر في كل واحد منهما.(شرح الزركشي على مختصر الخرقي ٧/ ٥٩)

[5] يأَيُّهَا الَّذينَ ءامَنوا إِنَّما الخَمرُ وَالميسِرُ وَالأَنصابُ وَالأَزلـٰمُ رِجسٌ مِن عَمَلِ الشَّيطـٰنِ فَاجتَنِبوهُ لَعَلَّكُم تُفلِحونَ ﴿٩٠﴾ إِنَّما يُريدُ الشَّيطـٰنُ أَن يوقِعَ بَينَكُمُ العَدٰوَةَ وَالبَغضاءَ فِى الخَمرِ وَالميسِرِ وَيَصُدَّكُم عَن ذِكرِ اللَّهِ وَعَنِ الصَّلوٰةِ فَهَل أَنتُم مُنتَهونَ ﴿٩١﴾ (سورة المائدة)

يَسـَٔلونَكَ عَنِ الخَمرِ وَالميسِرِ قُل فيهِما إِثمٌ كَبيرٌ وَمَنـٰفِعُ لِلنّاسِ وَإِثمُهُما أَكبَرُ مِن نَفعِهِما وَيَسـَٔلونَكَ ماذا يُنفِقونَ قُلِ العَفوَ كَذٰلِكَ يُبَيِّنُ اللَّهُ لَكُمُ الـٔايـٰتِ لَعَلَّكُم تَتَفَكَّرونَ ﴿٢١٩﴾ (سورة البقرة)

The Element of Riba (Interest)

In conventional insurance, the element of riba (interest) is found. When one faces a calamity or disaster and receives the payout, then based on the extent of the damage and the amount covered in the insurance policy, one may receive more or less than the amount that he had paid to the insurance company (in monthly premiums). In the case where one receives more than the amount that he had paid to the insurance company, the extra amount that he receives is riba (interest).[6]

When one compares Takaaful to a conventional insurance scheme, one finds that both are identical in this aspect as well. In the situation where one faces a calamity or disaster and receives the payout from Takaaful, one may receive more or less than the amount that he had paid to Takaaful. In the

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حدثنا عبد الله بن محمد، أخبرنا هشام بن يوسف، أخبرنا معمر، عن الزهري، عن حميد بن عبد الرحمن، عن أبي هريرة رضي الله عنه، قال: قال رسول الله صلى الله عليه وسلم: " من حلف فقال في حلفه: واللات والعزى، فليقل: لا إله إلا الله، ومن قال لصاحبه: تعال أقامرك، فليتصدق.(صحيح البخاري رقم ٤٨٦٠)

[٦] لأن الربا هو الفضل المستحق لأحد المتعاقدين في المعاوضة الخالي عن عوض شرط فيه (الهداية ٣/٧٨)

إذا شرط الأجل في المبيع العين فسد العقد وإن شرط الأجل في الثمن والثمن دين فإن كان الأجل معلوما جاز البيع وإن كان مجهولا فسد البيع ومن جملة الآجال المجهولة البيع إلى النيروز والمهرجان وقد ذكر محمد رحمه الله تعالى مسألة النيروز والمهرجان في الجامع الصغير وأجاب بالفساد مطلقا والصحيح من الجواب في هذه المسألة أنهما إذا لم يبينا نيروز المجوس أو نيروز السلطان فالعقد فاسد وإذا بينا أحدهما وكان يعرفان وقته لا يفسد العقد هكذا في المحيط ولم يجز بيع إلى قدوم الحاج والحصاد والدياس والقطاف والجذاذ كذا في الكافي وإن اشترى إلى فطر النصارى وقد دخلوا في الصوم جاز وقبل دخولهم في الصوم لا يجوز فإن أسقط الأجل الفاسد قبل مضيه ينقلب العقد جائزا استحسانا وعند زفر رحمه الله تعالى لا ينقلب جائزا والصحيح قولنا لأن مشايخنا قالوا العقد موقوف فيظهر أنه كان جائزا بإسقاط المفسد وهكذا روى الكرخي عن أبي حنيفة رحمه الله تعالى نصا وهو الصحيح.(الفتاوى الهندية ٣/ ١٤٢)

case where one receives more than the amount that he had paid to Takaaful, the extra amount that he receives is riba (interest).

Grave warnings have been mentioned in the Qur'aan Majeed and the Mubaarak Ahaadith regarding the grave sin of riba and the evil consequences that the one involved in riba will face in the hereafter. [7]

The Arguments of those who Regard Takaaful to be Shari'ah Compliant

Those who regard Takaaful to be Shari'ah compliant essentially present three arguments to establish that Takaaful is different to conventional insurance.

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[7] يأَيُّهَا الَّذينَ ءامَنُوا اتَّقُوا اللَّهَ وَذَروا ما بَقِىَ مِنَ الرِّبوٰا إِن كُنتُم مُؤمِنينَ ﴿٢٧٨﴾ فَإِن لَم تَفعَلوا فَأذَنوا بِحَربٍ مِنَ اللَّهِ وَرَسولِهِ وَإِن تُبتُم فَلَكُم رُءوسُ أَموٰلِكُم لا تَظلِمونَ وَلا تُظلَمونَ ﴿٢٧٩﴾(سورة البقرة)

الَّذينَ يَأكُلونَ الرِّبوٰا لا يَقومونَ إِلّا كَما يَقومُ الَّذى يَتَخَبَّطُهُ الشَّيطـٰنُ مِنَ المَسِّ ذٰلِكَ بِأَنَّهُم قالوا إِنَّمَا البَيعُ مِثلُ الرِّبوٰا وَأَحَلَّ اللَّهُ البَيعَ وَحَرَّمَ الرِّبوٰا فَمَن جاءَهُ مَوعِظَةٌ مِن رَبِّهِ فَانتَهىٰ فَلَهُ ما سَلَفَ وَأَمرُهُ إِلَى اللَّهِ وَمَن عادَ فَأُولـٰئِكَ أَصحـٰبُ النّارِ هُم فيها خـٰلِدونَ ﴿٢٧٥﴾ يَمحَقُ اللَّهُ الرِّبوٰا وَيُربِى الصَّدَقـٰتِ وَاللَّهُ لا يُحِبُّ كُلَّ كَفّارٍ أَثيمٍ ﴿٢٧٦﴾(سورة البقرة)

حدثنا محمد بن الصباح، وزهير بن حرب، وعثمان بن أبي شيبة، قالوا: حدثنا هشيم، أخبرنا أبو الزبير، عن جابر، قال: «لعن رسول الله صلى الله عليه وسلم آكل الربا، ومؤكله، وكاتبه، وشاهديه»، وقال: «هم سواء»(صحيح مسلم رقم ١٠٦)

حدثنا موسى بن إسماعيل، حدثنا جرير بن حازم، حدثنا أبو رجاء، عن سمرة بن جندب رضي الله عنه، قال: قال النبي صلى الله عليه وسلم: " رأيت الليلة رجلين أتياني، فأخرجاني إلى أرض مقدسة، فانطلقنا حتى أتينا على نهر من دم فيه رجل قائم وعلى وسط النهر رجل بين يديه حجارة، فأقبل الرجل الذي في النهر، فإذا أراد الرجل أن يخرج رمى الرجل بحجر في فيه، فرده حيث كان، فجعل كلما جاء ليخرج رمى في فيه بحجر، فيرجع كما كان، فقلت ما هذا؟ فقال: الذي رأيته في النهر آكل الربا " (صحيح البخاري ٢٠٨٥)

First Argument

The first argument is that conventional insurance operates as a profit based company. Whatever wealth is paid to the insurance company in the form of monthly premiums belongs to the shareholders of the company which may be used according to their discretion. They may invest a portion of the wealth in other investment schemes and use a portion of the wealth for paying out insurance claims, while the remainder may be distributed as profits among them. Overall, all the wealth that is paid to the company belongs to its shareholders and is regarded as their personal wealth.

As far as Takaaful is concerned, it is a non-profit scheme. The monthly premiums are paid to the scheme and no person is regarded as the owner of the wealth. The wealth is used to assist the beneficiaries of the scheme at the time of tragedies and calamities. Hence, the Takaaful scheme should be viewed as being different to a conventional insurance scheme.

Our Response

Our response is that the mere argument of a scheme being non-profit based will not render it Shari'ah compliant and justify the wrongs that are inherent in the contract itself. Hence, when the elements of qimaar (gambling) and riba (interest) are glaringly found in it, it will be ruled as impermissible according to Shari'ah.

One should understand that the end result of any contract being meritorious (i.e. the wealth being used for a good cause such as assisting people who are afflicted with a tragedy) cannot justify the wrongs that are contained in the contract. Consider the example of a person who deceives and steals wealth from the wealthy in order to assist the poor. The end result of such a person's actions being meritorious (i.e. assisting the poor)

will not justify the haraam that he has committed in acquiring the wealth, and thus his action will be ruled as haraam in Shari'ah.

Therefore, together with one's intention being good and the end result being laudable, one should ensure that the process which one adopts in reaching one's goal, from the inception to the end, conforms to the principles of Shari'ah.

Second Argument

The second argument presented is that conventional insurance is an 'aqd-e-mu'aawadah (a bilateral contract of exchange where the benefits that one will receive in the future are in exchange of one's monetary contribution). Hence, the elements of qimaar (gambling) and riba (interest) existing in it invalidates it and renders it impermissible. As far as Takaaful is concerned, it is an 'aqd-e-tabarru' (a benevolent contract wherein one pays money on a voluntary basis, not in exchange of any monetary gain). Hence, in the Takaaful contract, it is clearly stated that the monthly premiums that one is paying is not in exchange of the benefits that one will reap at the time of encountering a tragedy, but is rather paid in order to render assistance to all those participants of the scheme who require financial assistance at the time of calamities.

Our Response

Our response is that in order for something to be a voluntary contribution, the factor of compulsion should not be found, whereas the factor of compulsion is glaringly evident. It is well known to all that in order for one to qualify for the benefits of the Takaful scheme, one is required to accept the conditions of the contract. When the participant is required to accept and abide by the conditions of the contract and ensure that he promptly

pays the monthly premiums, and in the case of defaulting, his contract is terminated, then this in itself is indicative that this type of contract is one of compulsion and is not voluntary. If the Takaaful scheme does not wish to pay for certain damages, the participant will regard it his legal right to demand that they should pay for the damages as he had promptly paid all his monthly premiums.

In essence, those who shift from conventional insurance to Takaaful only do so as they are told that this is an alternative for achieving the same end. Thus, the money that they are paying is only and solely to enjoy the benefits, otherwise no one will wish to pay anything. All this clearly shows that besides having a different name, Takaaful is the same as conventional insurance.

Third Argument

The third argument is that Takaaful is recognized by Shari'ah and there are many examples to support its permissibility. Among the examples proffered are the following:

1. The first example is that of the aaqilah (the family of a person who are commanded to assist him to pay the blood money). In the case where a person accidentally killed someone, then in an Islamic state, the killer and his family will be compelled to pay the diyat (blood money) of one hundred camels (according to the specification mentioned in the books of fiqh or its equivalent in another currency). Just as the family of a person is commanded to assist him at the time of need, similarly, in Takaaful, the monthly premiums are treated as monetary contributions given with the sole aim of rendering assistance at the time of a tragedy to all those who are part of the scheme.

2. The second example presented is that of shirkatun nahd (people who travel together in one group and pool their wealth to see to their needs during the journey). This form of contributing and assisting one another has been highly praised and greatly commended in Shari'ah. It is obvious that a group of people pooling their resources while travelling and sharing their food among themselves, is permissible. In doing so, they benefit from the food of others and allow others to benefit from their food. When this arrangement is closely examined, one finds that each person will not eat the exact amount of food that he has shared with others. Rather, some people will eat more while others will eat less, and this has been allowed in Shari'ah.

The very same arrangement is found in Takaaful. The purpose of the scheme is to render assistance to the participants of the scheme and alleviate their difficulties at the time of tragedies and calamities. Accordingly, it is possible that the wealth that one receives will be more or less than the monthly premiums that one had paid to the Takaaful scheme. Just as such an arrangement is permissible when people travel together and share their wealth among themselves, it should similarly be permissible for people to share their wealth among themselves in the Takaaful scheme.

3. The third example is that Rasulullah (Sallallahu Alaihi Wasallam) had praised the Ashariyyeen Sahaabah (Radhiyallahu Anhum) for their deep concern and enthusiasm to assist each other at the time of difficulty. It was the practice of the Ashariyyeen Sahaabah that whenever they were in constraints, they used to pool their food resources and thereafter distribute it equally among themselves. Each person would contribute whatever he had. Some contributed more while others contributed less. If any person did not possess anything and thus did not contribute anything, he would also receive a share. Hence, if we examine the practice of these Sahaabah (radhiyallahu anhum), we will find that it has a lot of resemblance with the Takaaful scheme, where different people contribute different amounts of wealth and everybody benefits from each other's wealth. Rasulullah

(Sallallahu Alaihi Wasallam) greatly appreciated their spirit of assisting each other at the time of difficulty.

Our response

Our response to the third argument is that all these examples do not in any way prove that it is permissible for one to enter into a haraam contract (a contract which is inclusive of the elements of gambling and interest) in order to assist people in need. Rather, all these examples only establish that at the time of travelling, the believers should share their food and show generosity to one another. Similarly, when a believer is in need, the other believers should assist him to the best of their ability. Accordingly, if one's family member unintentionally kills someone, the other family members are commanded to assist him in paying the blood money of the killed person. In this situation, Shari'ah has commanded the family to assist the person in paying the blood money as the blood money is a substantial amount.

In all these cases, one is not commanded to seek any remuneration in exchange of the kindness which one had showed or to bind each other through a contract where one has to pay monthly premiums for the kindness they receive from others. Furthermore, none of these examples prove that one should enter into a haraam contract to assist people. Thus, all these examples do not in any way establish the permissibility of the Takaaful scheme. How can one violate the clear and explicit commands of Allah Ta'ala under the pretext of trying to render assistance to the creation? There are many clear texts of the Qur'an Majeed and the Ahaadith which strongly prohibit this. In fact, severe warnings have been sounded in the Qur'an Majeed and Ahaadith for breaking the commands of Allah Ta'ala for the sake of people.[8]

[8] وعن النواس بن سمعان قال: قال رسول الله صلى الله عليه وسلم: «لا طاعة لمخلوق في معصية الخالق» . رواه في شرح السنة

The Hadith of Ash’ariyyeen

In an endeavour to prove the permissibility of Takaaful, some Ulama quote the Hadith of Ash’ariyyeen. However, this Hadith, does not have any relevance with Takaaful schemes. Below we will present the Hadith of Ash’ariyyeen and closely examine it to see whether it can be used as a basis for the permissibility of Takaaful.

عن أبي موسى، قال: قال النبي صلى الله عليه وسلم: إن الأشعريين إذا أرملوا في الغزو، أو قل طعام عيالهم بالمدينة جمعوا ما كان عندهم في ثوب واحد، ثم اقتسموه بينهم في إناء واحد بالسوية، فهم مني وأنا منهم (صحيح البخاري رقم ٢٤٨٦، صحيح مسلم رقم ٢٥٠٠)

It is reported from Hazrat Abu Musa Ash’ari (Radiyallahu Anhu) that Rasulullah (Sallallahu Alayhi Wasallam) said, “When the Ash’ariyyeen Sahaabah (Radiyallahu Anhum) exhaust their food supply during battle, or their food supply is decreased while living in Madinah Munawwarah, they all gather their food in one cloth and then distribute their food among themselves (thereby assisting each other and) giving each person an equal share in one utensil.” Nabi (Sallallahu Alayhi Wasallam) then said, “They are part of me and I am part of them.”

From this Hadith, we understand that the believers are encouraged to assist one another at the time of difficulty. The commentators of Hadith mention under the commentary of this Hadith that the the Ash’ariyyeen Sahaabah (Radiyallahu Anhum) shared their food among themselves in the manner of

وفيه: قطعت شعر رأسها أثمت ولعنت زاد في البزازية وإن بإذن الزوج لأنه لا طاعة لمخلوق في معصية الخالق.(رد المختار ٦/ ٤٠٧)

Ibaahat [9] (each one sharing his food with the other) and not in the manner of Mu'aawadhah (bilateral contract of exchange). Therefore, we understand that this gesture of generosity expressed among themselves was not in the

[9] حدثنا محمد بن العلاء، حدثنا حماد بن أسامة، عن بريد، عن أبي بردة، عن أبي موسى، قال: قال النبي صلى الله عليه وسلم: «إن الأشعريين إذا أرملوا في الغزو، أو قل طعام عيالهم بالمدينة جمعوا ما كان عندهم في ثوب واحد، ثم اقتسموه بينهم في إناء واحد بالسوية، فهم مني وأنا منهم».(صحيح البخاري رقم ٢٤٨٦)

قوله: (إن الأشعريين) جمع أشعري، بتشديد الياء نسبة إلى الإشعر، قبيلة من اليمن، ويروى: إن الأشعرين، بدون ياء النسبة، وتقول العرب: جاءك الأشعرون بحذف الياء. قوله: (إذا أرملوا) ، أي: إذا فني زادهم، من الإرمال، بكسر الهمزة وهو فناء الزاد وإعواز الطعام، وأصله من الرمل، كأنهم لصقوا بالرمل من القلة كما في قوله تعالى: {ذا مترية} (البلد: ٦١) . قوله: (فهم مني) أي: متصلون بي، وكلمة: من، هذه تسمى اتصالية، نحو: لا أنا من الدد ولا الدد مني. وقال النووي: معناه المبالغة في اتحاد طريقهما واتفاقهما في طاعة الله تعالى. وقيل: المراد فعلوا فعلي في المواساة.وفيه: منقبة عظيمة للأشعريين من إيثارهم ومواساتهم بشهادة سيدنا رسول الله، صلى الله عليه وسلم، وأعظم ما شرفوا به كونه أضافهم إليه. وفيه: استحباب خلط الزاد في السفر والحضر أيضا، وليس المراد بالقسمة هنا القسمة المعروفة عند الفقهاء، **وإنما المراد هنا إباحة بعضهم بعضا بموجوده.** وفيه: فضيلة الإيثار والمواساة. وقال بعضهم: وفيه: جواز هبة المجهول. قلت: ليس شيء في الحديث يدل على هذا، وليس فيه إلا مواساة بعضهم بعضا والإباحة، وهذا لا يسمى هبة، لأن الهبة تمليك المال، والتمليك غير الإباحة، وأيضا: الهبة لا تكون إلا بالإيجاب والقبول لقيام العقد بهما، ولا بد فيها من القبض عند جمهور العلماء من التابعين وغيرهم، ولا يجوز فيما يقسم إلا محوزة مقسومة كما عرف في موضعها.(عمدة القاري ١٣/ ٤٤)

إن الأشعريين إذا أرملوا في الغزو إلى آخره معنى أرملوا فني طعامهم وفي هذا الحديث فضيلة الأشعريين وفضيلة الإيثار والمواساة وفضيلة خلط الازواد في السفر وفضيلة جمعها في شئ عند قلتها في الحضر ثم يقسم **وليس المراد بهذا القسمة المعروفة في كتب الفقه بشروطها ومنعها في الربويات واشتراط المواساة وغيرها وإنما المراد هنا إباحة بعضهم بعضا ومواساتهم بالموجود** وقوله صلى الله عليه وسلم (فهم مني وأنا منهم) سبق تفسيره في باب فضائل جليبيب.(شرح النووي على مسلم ١٦/ ٦١)

قوله – رضي الله عنه – بعث رسول الله – صلى الله عليه وسلم – بعثا قبل الساحل يريد جيشا غازين ومرتصدين لعابر السبيل من المحاربين وكانوا ثلاثمائة وأمر عليهم أبا عبيدة بن الجراح – رضي الله عنه – ليعود أمرهم وتصرفهم إلى حكمه لأن رأي الجماعة إذا لم يعد إلى واحد كثر فيه الاختلاف المؤدي إلى الفساد ولما فني زادهم ببعض الطريق وأمر أبو عبيدة بأزواد الجيش فجمعت فيحتمل – والله أعلم – أن يفعل ذلك أبو عبيدة لرأي رآه وموافقة أهل الجيش أجمع له على ذلك ورضاهم به **وإن كان يجوز أن يكون بعضهم أكثر زادا من بعض ويكون فيهم من فني زاده جملة إلا أنهم أردوا التواسي.** وقد روي عن النبي – صلى الله عليه وسلم – أنه قال: إن الأشعريين إذا أرملوا جمعوا زادهم فتواسوا فيه فهم مني وأنا منهم ويحتمل أن يكون أبو عبيدة حكم بذلك بينهم حين رأى أن منهم من قد فني زاده وخاف عليه سرعة الهلاك ومنهم من له زاد يكفيه وليس بموضع ابتياع ولا تسبب فألزمهم أبو عبيدة التساوي فيما عندهم من الزاد ولم يذكر في الحديث ثمنا وظاهر هذا أنه كان على وجه التراضي، والله أعلم فكان أبو عبيدة بن الجراح – رضي الله عنه – يقوتهم منه كل يوم يسيرا يسيرا استدامة للزاد وتسوية بين الناس حتى لم يصبهم إلا تمرة تمرة وفنيت بعد ذلك. (المنتقى شرح الموطإ ٧/ ٢٤٥)

form of any contract whereby each person was bound by the contract and was required to continue paying monthly premiums in order to benefit from the wealth of others. Hence, this Hadith can in no way be used as a basis to establish the permissibility of Takaaful. Rather, when viewed closely, this Hadith resembles a family function to which various family members bring food which is then shared and eaten by everybody together. No sensible person among the family will regard the food he is eating at the function to be in lieu of the food he brought, especially when it is known that there are many family members among them who did not bring anything but are still allowed to partake of the food. Rather, everybody knows and understands that this is a pure gesture of generosity. However, in the Takaaful scheme, this is definitely not the case.

Does the Takaaful Contract Conform to the Maaliki Mazhab?

Any person viewing the Takaaful contract will understand that the element of gharar (uncertainty) is found. One does not know at which time he will face a tragedy and subsequently receive the payout. Since this element is one that invalidates a mu'aawazah contract (a bilateral contract), those who try to prove the permissibility of Takaaful attempt to answer this objection by saying that the Takaaful scheme is a Tabarru' contract and not a mu'aawazah contract (a bilateral contract), and according to the Maaliki Mazhab, gharar being found in a Tabarru' contract does not invalidate it. However, we have proved through the abovementioned arguments that this is not the case and this contract cannot be regarded as a Tabarru' contract as the element of compulsion is evident in it, thereby rendering it a mu'aawazah contract (a bilateral contract). We therefore understand that

there is no difference between a conventional insurance contract and a Takaaful contract.

Some people say that monthly premiums paid to the Takaaful scheme are not regarded as a mu'aawazah (an exchange paid to receive some benefit in the future), but are rather a gratuitous contribution from the side of the participant. The objection is then raised "How can it be a gratuitous contribution from the side of the participant, whereas the scheme has bound him to a contract?". If he ceases to pay the monthly premiums, his contract will be terminated and he will lose all the money he paid. If he continues paying, then this is on account of the contract and the fear of losing his money, not out of his free choice. Therefore, the aspect of it being a gratuitous contribution does not feature.

In response to this objection, those who regard Takaaful to be permissible say that according to Allaamah Hattaab Maaliki (Rahimahullah), it is permissible for one to make it binding on himself to give a gratuitous contribution to the poor. Hence, when he pays the money, it is not because the contract is making it binding upon him but because he made it binding upon himself. However, when the statement of Allaamah Hattaab (Rahimahullah) is examined and the Maaliki Mazhab is studied, one will realize that the Maaliki Mazhab does not recognize this to be permissible and the statement of Allaamah Hattaab (Rahimahullah) is taken out of context, as Allaamah Hattaab's (Rahimahullah) statement refers to the case where there is no contract from the party receiving the money. If anyone wishes to prove Takaaful being permissible based on the Maaliki Mazhab, he should present clear proof from the Maaliki mazhab that it is permissible for one to enter into a contract, and together with the contract, make it binding upon himself to continue paying money to the scheme. Obviously, this is not found in the Maaliki Mazhab and therefore, this contract is impermissible according to the Maaliki Mazhab as well.

NB: It is clearly stated in the books of the Maaliki Mazhab that if there is iltizaam of tabarru' from both parties, it will cause the arrangement to become a mu'aawazah contract due to the elements of gharar and riba being found and the mu'aawazah contract will be invalid.[10] Similarly, if there is iltizaam of tabarru' from one party and an 'aqd (contract) from the other party, then impermissibility in the Maaliki Mazhab will be to an even greater degree, since this is a clear 'aqd (contract) being formed between both parties. Hence, according to all the four mazhabs, the Takaaful contract is impermissible.

Can the Takaaful Scheme be Regarded as a Juristic Person

Some people try to prove the permissibility of Takaaful by regarding it as a "non-profit juristic person". The reason for them viewing the Takaaful scheme as a juristic person is so that the wealth of the scheme will not be owned by the shareholders of the company, as is the case in a conventional

[10] النوع الخامس الإلتزام المعلق الذي فيه منفعة للملتزم بكسر الزاي وهو على أربعة أوجه: الوجه الأول: أن يكون الفعل المعلق عليه إعطاء الملتزم له للملتزم أو لغيره شيئاً وتمليكه إياه نحو أن أعطيتني عبدك، أو دارك أو فرسك فقد إلتزمت لك بكذا أو فلك على كذا أو فلك عندي كذا الشيء يسميه، أو فقد أسقطت عنك الدين الذي لي عليك، أو إن أعطيت ذلك لفلان أو إن أسقطت الدين الذي لك على فلان فلك عبدي الفلاني أو داري ونحو ذلك فهذا من باب هبة الثواب وقد صرحوا بأنه إذا سمى فيها الثواب أنها جائزة ولم يحك في ذلك خلافاً، وأنها حينئذ بيع من البيوع فيشترط في كل من الملتزم به والملتزم عليه ما يشترط في الثمن والمثمون من انتفاء الجهل والغرر إلا ما يجوز في هبة الثواب مما سيأتي ذكره في التنبيه الرابع، ويشترط فيها أيضاً كون كل منهما طاهراً منتفعاً به مقدوراً على تسليمه فلا يجوز أن يكون أحدهما آبقاً ولا بعيراً شارداً أو جنيناً ولا ثمرة لم يبد صلاحها، ولا يجوز أن يكون طعامين كقوله إن أعطيتني أردباً من القمر فلك عندي قنطاران من السمن إلا أن يكون ذلك في مجلس واحد والطعامان حاضران. (تحرير الكلام في مسائل الإلتزام ١٩٩-٢٠٠)

insurance scheme. Rather, the Takaaful scheme itself will be the owner of the wealth and the wealth paid to the scheme will be regarded as a tabarru' (gratuitous contribution) to the portfolio, to be used for the assistance of the participants of the scheme when they are afflicted with a tragedy. In this way, Takaaful will be distinct from a conventional insurance scheme.

Our Response

Our response to this argument is that the concept of a juristic person is totally baseless in Shari'ah. This concept does not have any origin in the Qur'an, Hadith, lives of the Sahaabah, verdicts of the four Imaams, etc. Instead, it is a new invention in the world. In fact, the concept of a legal entity is a western oriented concept which is in vogue in the capitalistic economic system.

Upon close inspection, one will realize that this concept goes against the very core of the Islamic value system. This concept is in vogue in all listed companies and is the basis for the clause of limited liability in these companies. In other words, if the company is liquidated and there are no more assets, while money is still due to the creditors, then the creditors of such a company will have no recourse to claim the wealth owed to them by the company as the company itself is the owner of its resources. On the contrary, if any debtor of the company is unable to pay his debt to the company, the company has the right to sue him. In Islam, such a one-sided concept has no basis and is the cause of oppression and injustice.

The Shar'ee Ruling

According to Shariah, the shareholders of the company are the owners of the company together with its resources, in accordance to each shareholder's proportionate share. Therefore, the profits of the company

are reaped by the shareholders and in the case of liquidation, the shareholders will be held liable for paying the debts of the creditors in accordance to each shareholder's proportionate share. Just as each shareholder receives the profits of the company and has to pay his zakaat on the total zakaatable assets in proportion to his share (as the company is not a person and thus does not have to pay zakaat), similarly the purchases, the sales and the debts and liabilities of the company are all the responsibilities of the shareholders of the company. Even though the legal system does not hold the directors and shareholders of the company liable for the outstanding debts owed to the creditors if the company is liquidated, according to shariah, they are fully liable and accountable.

There is therefore no basis for the concept of a legal person in Islam, and hence the contract between the participants and the Takaaful scheme will be treated as an aqd mu'aawadha (a bilateral contract of exchange where the benefits that one will receive in the future are in exchange of one's monetary contribution). Hence, the elements of qimaar (gambling) and riba (interest) existing in it invalidates it and renders it impermissible, just as the same elements render conventional insurance impermissible.

The first person to introduce the concept of a juristic person from a Shari'ee perspective was Mufti Taqi Uthmaani (Daamat Barakaatuhum). His basis the juristic person on a waqf model, as a waqf is an independent entity which has the ability to purchase and obtain ownership. Through establishing this concept as a Shar'ee concept, Hazrat Mufti Taqi saheb sanctioned the clause of limited liability in listed companies and regarded it to be permissible. However, in doing so, he has opened the door to allowing many other impermissible contracts to become permissible on the mere basis of it being a juristic person, such as the Takaaful scheme, medical aids and hospital plans. In fact, through the concept of a juristic person, even conventional insurance will become permissible. The reality of the matter is that the Fuqahaa do not recognize the concept of a juristic person in Shari'ah.

Rather, they have clearly mentioned that in the mas'alah of waqf, the mutawalli (administrator) of the waqf will be liable for the purchases, debts or loans that he takes on behalf of the waqf, as the waqf is not a human being and cannot accept any liability and responsibility.[11] Therefore, when

[11] لا تجوز الاستدانة على الوقف إلا إذا احتيج إليها لمصلحة الوقف كتعمير وشراء بذر فيجوز بشرطين، الأول: إذن القاضي فلو ببعد منه يستدين بنفسه الثاني: أن لا تتيسر إجارة العين والصرف من أجرتها والاستدانة القرض والشراء نسيئة.(الدر المختار ٤/٤٣٩)

مطلب في الاستدانة على الوقف

(قوله: لا تجوز الاستدانة على الوقف) أي إن لم تكن بأمر الواقف، وهذا بخلاف الوصي فإن له أن يشتري لليتيم شيئا بنسيئة بلا ضرورة لأن الدين لا يثبت ابتداء إلا في الذمة واليتيم له ذمة صحيحة، وهو معلوم فتتصور مطالبته **أما الوقف فلا ذمة له والفقراء، وإن كانت لهم ذمة لكن لكثرتهم لا تتصور مطالبتهم، فلا يثبت إلا على القيم**، وما وجب عليه لا يملك قضاء من غلة للفقراء ذكره هلال، وهذا هو القياس لكنه ترك عند الضرورة كما ذكره أبو الليث وهو المختار أنه إذا لم يكن من الاستدانة بد تجوز بأمر القاضي إن لم يكن بعيدا عنه لأن ولايته أعم في مصالح المسلمين وقيل تجوز مطلقا للعمارة والمعتمد في المذهب الأول. أما ماله منه بد كالصرف على المستحقين فلا كما في القنية إلا الإمام والخطيب، والمؤذن فيما يظهر لقوله في جامع الفصولين لضرورة مصالح المسجد اهـ وإلا للحصر والزيت بناء على القول بأنهما من المصالح وهو الراجح هذا خلاصة ما أطال به في البحر (قوله: الأول إذن القاضي) فلو ادعى الإذن، فالظاهر أنه لا يقبل إلا ببينة وإن كان المتولي مقبول القول، لما أنه يريد الرجوع في الغلة وهو إنما يقبل قوله فيما في يده، وعلى هذا فإذا كان الواقع أنه لم يستأذن يحرم عليه الأخذ من الغلة لأنه بلا إذن متبرع بحر (قوله: الثاني أن لا تتيسر إجارة العين إلخ) أطلق الإجارة، فشمل الطويلة منها، ولو بعقود فلو وجد ذلك لا يستدين أفاده البيري، وما سلف من أن المفتى به بطلان الإجارة الطويلة فذاك عند عدم الضرورة، كما حررناه سابقا فافهم (قوله والاستدانة القرض والشراء نسيئة) صوابه الاستقراض. اهـ. ح وتفسير الاستدانة كما في الخانية أن لا يكون للواقف غلة فيحتاج إلى القرض والاستدانة، أما إذا كان للوقف غلة فأنفق من مال نفسه لإصلاح الوقف كان له أن يرجع بذلك في غلة الوقف اهـ ومفاده أن المراد بالقرض الإقراض من ماله لا الاستقراض من مال غيره لدخوله في الاستدانة مطلب في إنفاق الناظر من ماله على العمارة. في فتاوى الحانوتي الذي وقفت عليه في كلام أصحابنا أن الناظر إذا أنفق من مال نفسه على عمارة الوقف، ليرجع في غلته له الرجوع ديانة، لكن لو ادعى ذلك لا يقبل منه، بل لا بد أن يشهد أنه أنفق ليرجع كما في الرابع والثلاثين من جامع الفصولين، وهذا يقتضي أن ذلك ليس من الاستدانة على الوقف وإلا لما جاز إلا بإذن القاضي ولم يكلف الإشهاد. اهـ.قلت: لكن ينبغي تقييد ذلك بما إذا كان للوقف غلة وإلا فلا بد من إذن القاضي كما أفاده ما ذكرناه عن الخانية، ومثله قوله في الخانية أيضا لا يملك الاستدانة إلا بأمر القاضي، وتفسير الاستدانة أن يشتري للوقف شيئا وليس في يده شيء من الغلة أما لو كان في يده شيء، فاشترى للوقف من مال نفسه ينبغي أن يرجع، ولو بلا أمر قاض اهـ وما ذكرناه في إنفاقه بنفسه يأتي مثله في إذنه للمستأجر أو غيره بالإنفاق فليس من الاستدانة مطلب في إذن الناظر للمستأجر بالعمارة وفي الخيرية سئل في علية جارية في وقف تهدمت فأذن الناظر لرجل بأن يعمرها من ماله فما الحكم فيما صرفه من ماله بإذنه أجاب: اعلم أن عمارة الوقف بإذن متوليه: ليرجع بما أنفق يوجب الرجوع باتفاق أصحابنا وإذا لم يشترط الرجوع ذكر في جامع الفصولين في عمارة الناظر بنفسه قولين، وعمارة مأذونه كعمارته فيقع فيها الخلاف وقد جزم في القنية والحاوي بالرجوع وإن لم يشترط إذا كان يرجع معظم العمارة إلى الوقف اهـ.(رد المحتار٤/٤٣٩-٤٤٠)

the basis of a juristic person is clearly disproved, then all the abovementioned masaa'il will remain haraam, and this unfounded concept will not make the contract permissible and Shari’ah compliant.

Can the Takaaful Scheme be Regarded as a Waqf

Some people try to prove the permissibility of takaaful based on it operating as a waqf model. They claim that the scheme is made waqf and operates according to the laws of waqf. Since the waqf has the power to buy, sell, own, etc, the contributions given by the participants will be owned by the waqf fund. In the event of tragedies, calamities, etc, the participants of the waqf will be assisted in accordance to the terms of the waqf.

Our Response

There is no example of this type of waqf in Shariah where one is obligated to continuously pay monthly premiums in order for him to remain a beneficiary of the waqf. Waqf means to give something away voluntarily in a manner where one’s ownership totally ceases and the thing that one has

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الرابعة في الاستدانة لأجل العمارة حيث لم يكن غلة قال في الذخيرة قال هلال إذا احتاجت الصدقة إلى العمارة وليس في يد القيم ما يعمرها فليس له أن يستدين عليها لأن الدين لا يجب ابتداء إلا في الذمة وليس للوقف ذمة والفقراء وإن كانت لهم ذمة إلا أنهم لكثرتهم لا تتصور مطالبتهم فلا يثبت الدين باستدانة القيم إلا عليه ودين يجب عليه لا يملك قضاءه من غلة هي على الفقراء.(البحر الرائق ٥/ ٢٢٧)

given as waqf enters the ownership of Allah Ta'ala.[12] Thus we understand that waqf is an 'Aqd-e-Tabarru' (Benevolent Contract) wherein there is no compulsion of any sort.

When we examine the Takaaful scheme, we find that one is obligated through a contract to continuously pay money to the waqf portfolio in order for him to become and remain a beneficiary of the waqf whereby he will be able to receive financial assistance at the time of a calamity. This condition

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[١٢] وعندهما حبس العين على حكم ملك الله تعالى على وجه تعود منفعته إلى العباد فيلزم ولا يباع ولا يوهب ولا يورث كذا في الهداية وفي العيون واليتيمة إن الفتوى على قولهما كذا في شرح أبي المكارم للنقاية .(الفتاوى الهندية ٢/ ٣٥٠)

وشرائطه أهلية الواقف للتبرع من كونه حرا عاقلا بالغا وأن يكون منجزا غير معلق فإنه مما لا يصلح تعليقه بالشرط فلو قال إن قدم ولدي فداري صدقة موقوفة على المساكين فجاء ولده لا تصير وقفا. (البحر الرائق ٥/ ٢٠٢)

ولو وقف أرضا على رجل على أن يقرضه دراهم جاز الوقف ويبطل الشرط كذا في فتاوى قاضي خان. (الفتاوى الهندية ٢/ ٣٩٩)

وإن كان الواقف قال في أصل الوقف على أن يبيعها بما بدا لي من الثمن من قليل أو كثير أو قال على أن أبيعها وأشتري بثمنها عبدا أو قال أبيعها ولم يزد على ذلك قال هلال رحمه الله تعالى هذا الشرط فاسد يفسد به الوقف كذا في فتاوى قاضي خان. (الفتاوى الهندية ٢/ ٣٩٩)

في سير العيون حبس فرسا في سبيل الله عشر سنين ثم هي مردودة على صاحبها فهو باطل وعن يوسف بن خالد السمتي أستاذ هلال رحمه الله تعالى إن الوقف جائز والشرط باطل كذا في الذخيرة.(الفتاوى الهندية ٢/ ٤٠٧)

فلو قال إن قدم ولدي فداري صدقة موقوفة على المساكين فجاء ولده لا تصير وقفا لأن شرطه أن يكون منجزا جزم به في فتح القدير والإسعاف حيث قال إذا جاء غد أو رأس الشهر أو إذا كلمت فلانا أو إذا تزوجت فلانة فأرضي صدقة موقوفة يكون باطلا لأنه تعليق والوقف لا يحتمل التعليق بالخطر. وفيه أيضا: وقف أرضه على أن له أصلها أو على أن لا يزول ملكه عنها أو على أن يبيع أصلها ويتصدق بثمنها كان الوقف باطلا.(رد المحتار٥/ ٢٤٨)

الثامن أن لا يذكر مع الوقف اشتراط بيعه فلو وقف بشرط أن يبيعها ويصرف ثمنها إلى حاجته لا يصح الوقف في المختار كذا في البزازية وهو قول هلال والخصاف وجوزه يوسف بن خالد السمتي إلحاقا للوقف بالعتق.وأما اشتراط الاستبدال فلا يبطله كما سيأتي في محله .(البحر الرائق ٥/ ٢٠٣)

العاشر أن لا يكون مؤقتا قال الخصاف لو وقف داره يوما أو شهرا لا يجوز لأنه لم يجعله مؤبدا وكذا لو قال على فلان منه كان باطلا وفصل هلال بين أن يشترط رجوعها إليه بعد الوقت فيبطل الوقف أو لا فلا وظاهر ما في الخانية اعتماده.(البحر الرائق ٥/ ٢٠٤)

of continuously paying monthly premiums invalidates the waqf and changes the contract from an 'Aqd-e-Tabarru' (Benevolent Contract) to an 'Aqd-e-Mu'aawadah (Bilateral Contract of Exchange). Therefore, the elements of gambling and interest existing in such a contract will render it haraam.

Furthermore, when the participant is required to accept and abide by the conditions of the contract and ensure that he promptly pays the monthly premiums, and in the case of defaulting, his contract is terminated, then this in itself is indicative of the contract being one of compulsion and not one of volition. If the Takaaful scheme does not wish to pay for certain damages, the participant will regard it his legal right to demand that they pay for the damages, as he had promptly paid all his monthly premiums. If the contributions and the payout were tabarru' (gratuitous contributions), there would be no enforcement as there is no compulsion in a waqf model. Hence, such a contract cannot be recognized as a waqf according to Shari'ah.

Apart from this, the fact that the amount of the payout is determined by the insured items and the monthly contributions of the participants, as is done in a conventional insurance scheme, is clear proof of the takaaful scheme being an 'Aqd-e-Mu'aawadah (Bilateral Contract of Exchange).

In essence, the Takaaful scheme does not qualify as a waqf as there is no example of this type of waqf found in Shari'ah. Hence, this scheme will not qualify to be a waqf according to any of the four mazhabs. Therefore, in reality, Takaaful insurance is no different to a conventional insurance scheme.

The Waqf Model proposed by Mufti Muhammad Shafee Saheb (rahmatullahi alaih) and Approved by the Senior Ulama

Those who claim that Takaaful is Shariah compliant take support with the fatwa of Hazrat Mufti Muhammad Shafee' (rahmatullaahi alahi). They explain that Hazrat Mufti Muhammad Shafee' (rahmatullaahi alahi) has also presented this model for the muslim ummah.

Further, they claim that this model has not only been presented by this great luminary of Islam but has been blessed with the approval of other great scholars of that era, the likes of Hazrat Moulana Yusuf Binnori, Hazrat Mufti Wali Hasan, Hazrat Mufti Ashiq Ilaahi (Rahimahumullah). Hence, it is necessary for us to study the waqf model proposed by Hazrat Mufti Muhammad Shafee' (rahmatullaahi alahi) in order to see whether the Takaaful scheme, which they attribute to Hazrat Mufti Muhammad Shafee' (rahmatullaahi alahi) and the senior Ulama of Pakistan, is the same model presented by Hazrat Mufti Muhammad Shafee' (rahmatullaahi alahi). Below we will present the waqf model proposed by Mufti Shafee Saheb (Rahmatullahi Alaih).

If the Takaaful scheme does not conform to the model presented by Mufti Shafee Saheb and the senior ulama of Pakistan, then it will certainly be misleading to substantiate the permissibility of the Takaaful scheme with the fatwa of these senior ulama.

Question:

Is it possible to operate an insurance scheme in such a manner that there will be no interest involved?

Answer:

It is certainly possible to do so. The correct, Islamic manner in which this can be achieved is detailed below:

1. The funds collected from the policyholders as premiums should be used to form a trade partnership based on the Shar'ee laws of mudhaarabah. Hence, instead of accruing a fixed percentage of interest, the funds in the trade partnership will generate profit through trade which will be distributed between the policy holders.

2. In order to use this trade partnership as a structure for people to mutually assist one another, the policyholders should consent and agree when paying their premiums, that a considerable, stipulated amount (e.g. a half, a third or a quarter) of the profits generated through the trade partnership will be deposited into a reserve fund and made waqf. The funds from this waqf reserve will be spent in assisting people who are struck by calamities and afflicted by tragedies, in accordance to the stipulated conditions of the waqf.[13]

3. At the time of calamities, assistance through the waqf fund will be restricted to those people who adhere to these conditions and have shares in this company (by taking out a policy). In Shari'ah, it is permissible to make stipulations and restrictions of this nature in a waqf fund. One such example of this is where a person makes something waqf for the benefit of his progeny.

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[١٣] (عقد شركة في الربح بمال من جانب) رب المال (وعمل من جانب) المضارب.)الدر المختار ٥/ ٦٤٥)

(قوله: والربح على ما شرطا) أي من كونه بقدر رأس المال أو لا لكنه محمول على ما علمته من التفصيل المار، وأعاده مع قوله مع التفاصيل في المال دون الربح للتصريح بأن هذا الشرط صحيح فافهم، نعم ذكره بين المتعاطفات غير مناسب، وقيد بالربح؛ لأن الوضيعة على قدر المال وإن شرطا غير ذلك كما في الملتقى وغيره.(رد المحتار ٤/ ٣١٣)

4. Every individual policyholder will be paid out his initial contributions which were paid as premiums together with his share of the profits generated through the trade partnership (in the case where he terminates his partnership, unless the trade partnership failed to make a profit and incurred a loss). This wealth will be regarded as belonging solely to him.

As far as the funds in the reserve fund are concerned, they will be regarded as waqf. At the time of a calamity, this person, who is contributing to the waqf, will also benefit from the waqf funds in the reserve. For a person to personally benefit from something that he made waqf does not contravene the laws of waqf. For example, if a person makes a hospital waqf for the benefit of the public, then he may also benefit from the hospital at the time of need. Another example is that of a cemetery. If a person makes a land waqf to be used as a cemetery, then he and his family members can also be buried on that land.

5. Rules and regulations should be formed to govern and control the manner in which funds are used for assistance at the time of calamities and disasters. A considerable amount should be stipulated for seeing to the needs of the bereaved and surviving heirs of the deceased.

As for those tragedies that are not normally regarded by people as natural disasters e.g. a person falling ill and passing away as a consequence of the illness, then the following option could be implemented:

If the person is of moderate health, it will be determined that his life expectancy period is sixty years. Hence, in the situation where he passes away before reaching the age of sixty, a small amount of assistance will be given to his family by the waqf fund.

If a person suffers from ill health or other medical complications, a suitable life expectancy period can be determined and stipulated in accordance to the person's personal condition.

6. If a policy holder defaults on payment after paying a few premiums, then to cancel his policy and keep the money that he contributed – as is normally done today in conventional insurance companies– is clear oppression and completely haraam.

However, in order for the insurance company to be safeguarded from incurring a loss due to such people, the contract should include the clause that if any policyholder wishes to terminate his policy and withdraw his share from the partnership, thereby ending his participation in the trade partnership, then he will not be paid out until a specified period of five, seven or ten years elapses. Furthermore, it can be explained and specified in advance that such a person will have a decreased share in the profit. All these are administrative affairs that will be subject to the judgement and decision of the committee. Such decisions will not affect the permissibility of the scheme in any way.

What I have outlined is merely a basic and concise model of how this scheme could be structured. If any group wishes to form such a scheme based on my model, then they should ponder further so that they may find ways to make it more effective and beneficial without any harms and problems. After running it for a trial period of one or two years, they will be able to make the necessary changes, subject to it conforming to the laws and principles of Shari'ah.

(Jawaahir-ul-Fiqh 4/544-546)

Examining the Model of Hazrat Mufti Muhammmad Shafee Saheb (Rahmatullahi Alaihi)

After examining the above model proposed by Hazrat Mufti Muhammmad Shafee Saheb (Rahmatullahi Alaihi), it is abundantly clear that the Takaaful schemes which are operating today are completely different to the model proposed by Hazrat Mufti Muhammmad Shafee Saheb (Rahmatullahi Alaihi) and the senior Ulamaa of Pakistan. Below we will highlight some of the main differences:

1. Hazrat Mufti Muhammmad Shafee Saheb (Rahmatullahi Alaihi) clearly highlighted that the wealth which each participant will pay to the scheme will be regarded as the capital of a mudhaarabah partnership. A mudhaarabah partnership is where one party contributes wealth as capital of trade and the other party uses the wealth to trade. The profits accruing from such a partnership will be shared among the partners on account of their capital in the partnership. In order to make this mudhaarabah partnership a means of the partners assisting one another at the time of calamities, a portion of the profits e.g. one third should be set aside in a separate fund. This fund will be made waqf for the benefit of all those who are affiliated to the partnership. In the event of any partner wishing to terminate his partnership, he will be paid out his share of the partnership and he will not be deprived of the wealth that he had invested in the partnership.

On the contrary, when we compare this model against the Takaaful insurance schemes, we find that all the wealth paid to Takaaful insurance schemes is specifically meant for insurance, whereas the wealth paid in the proposed model is actually an investment, and only a portion of the profits is reserved for the waqf fund. Hence, the primary purpose is investment

with the waqf being a secondary aspect, whereas in Takaaful, insurance remains the primary objective of the entire contract.

2. All contributions to Takaaful are lost in the case where one voluntarily terminates his policy or cannot afford to continue with the scheme, whereas Hazrat Mufti Muhammmad Shafee Saheb (Rahmatullahi Alaihi) had clearly condemned this and stated that this is “clear oppression and completely haraam”.

As far as the proposed model of Hazrat Mufti Muhammmad Shafee Saheb (Rahmatullahi Alaihi) is concerned, the money paid to the mudaarabah investment is not lost, but will be paid out after a specified period of time.

3. According to the proposed model of Hazrat Mufti Muhammmad Shafee Saheb (Rahmatullahi Alaihi), in the case where the waqf does not have sufficient funds (e.g. due to the mudhaarabah investment suffering a loss and not making a profit), then the members will not receive any assistance. They will all understand that they are not entitled to receive anything as the waqf is totally separate from the mudhaarabah investment which was formed to generate profits. It is common knowledge that this CANNOT happen in Takaaful, as the premiums paid to the fund are for this assistance and they are regulated by law to ensure that all claims are met. It is for this reason we find that Takaaful schemes end up re-insuring with other, bigger conventional insurance companies.

4. As far as the proposed model of Hazrat Mufti Muhammmad Shafee Saheb (Rahmatullahi Alaihi) is concerned, it is mentioned in this model that a stipulated portion of each shareholder’s profits of the mudaarabah will be placed in the waqf fund in order to assist the members of the mudaarabah investment. It should be noted that if this aspect (contributing to the waqf) is made a condition for the acceptance of the mudaarabah, then it will not be correct and will render the mudaarabah contract invalid, as it will enter under the purview of the prohibition mentioned in the Hadith of

“contracting with an unrelated condition” نهى رسول الله صلى الله عليه وسلم عن بيع وشرط.

We will thus understand the proposed model of Hazrat Mufti Shafee Saheb (Rahmatullahi Alaihi) to refer to a contract in which the waqf is not made a condition. Similarly, at the onset, the shareholders of the mudaarabah will be asked to invest a certain amount in the mudaarabah which will perhaps be paid in installments. However, a mudaarabah in which each shareholder is required to pay monthly premiums on a continuous basis forever is not recognized as a valid mudaarabah in Shari’ah, and this will impact on the contract rendering it impermissible in Shari’ah. Overall, Hazrat Mufti Shafee Saheb (Rahmatullahi Alaihi) mentioned these points without giving the full details of the masaa'il of mudaarabah, relying on the fact that the Ulama will understand the masaa'il of mudaarabah and apply them correctly, rather than abuse them. Hazrat Mufti Shafee Saheb (Rahmatullahi Alaihi) merely put forward a suggestion and thereafter mentioned at the end that the model is not final but should be further investigated to ensure that it is Shari’ah compliant and workable.

Conclusion

In conclusion, we understand that the proposed model of Hazrat Mufti Muhammmad Shafee Saheb (Rahmatullahi Alaihi) is not the model that Takaaful is using and that the Takaaful contract is no different to a conventional insurance contract. Hence, according to all the four mazhabs, it is haraam for one to enter into such a contract.