AL QALAM

Consultation on an Alternative Finance Product described as Sharia-Compliant

13th Rajab 1435 AH / 13th May 2014

In the Name of Allah, the Beneficent, the Merciful

Overview

The Department for Business Innovation & Skills (BIS) have released a consultation document (April 2014) on what is described as a Sharia-compliant alternative finance product for university tuition fees. (See: https://www.gov.uk/government/consultations/sharia-compliant-student-finance) The BIS consultation document states that this model has been proposed and developed by experts in Islamic finance and has been approved by the Sharia Supervisory Committee of the Islamic Bank of Britain.

The purpose of this document is both to set out the Al-Qalam Sharīʿah Scholar Panel's formal view as to the consultation process itself, and also as to the Sharīʿah validity of the proposed. 'Takāful based', model.

In so far as the consultation process itself, this is a positive step for the following reasons:

1. The BIS consultation paper acknowledges, on page 8, that there is some evidence that prospective Muslim students are not going to university because of their religious aversion to the current interest based loan system. It is the experience of our own panel members, through the numerous (dozens if not hundreds of queries received) that many students are indeed not going to university because of the interest based loan issue. Indeed we note the government is only planning to introduce an alternative model from September 2016, which is over two years away, and we would encourage this date to be brought forward if at all possible, given the substantial impact further delay will have on affected students.
2. We support efforts to develop a model along clearly established and credible principles prevalent within the Islamic Finance sector.
3. We support the appointment of a British based Sharīʿah supervisory panel, and would recommend this panel reflects the ethnic and jurisprudential school composition within the British Muslim community.

On page 18 of the BIS consultation document the Al-Qalam Sharīʿah Panel is listed amongst the list of individuals/organisations consulted. Whilst Al-Qalam has been in discussions with BIS regarding two other potential models[1], we have not been consulted on the proposed model. We have, however, subsequently had discussions and exchanged correspondence with two of the

[1] Based on Ijārah and commodity Murābaḥah.

Sharīʿah panel members of the IBB and these discussions, along with the BIS consultation paper itself have allowed the Al-Qalam Sharīʿah Panel to form a tentative view as to the Sharīʿah permissibility of the proposed model. We wish to place on record our thanks particularly to Samir Alamad, for developing the proposed model, and also to the IBB Shariah Supervisory Panel, for spending time and effort in liaising and sharing information with us on this important matter.

The tentative opinion of Al-Qalam Panel is that an amended version of the Takāful model proposed in the BIS consultation document may form the basis of an acceptable alternative subject to the how the model is operationally developed in the future. It is critical that the model, when developed, remains gratuitous (donation based) and does *not* end up being commutative (compensation based), as this is the single most important characteristic in so far as Sharīʿah permissibility.

This document now seeks to:

1. **Address the government requirement that the proposed model replicates the repayment and debt levels of the conventional model.**
2. **Address whether Sharīʿah principles recognise the value of money over time**
3. **Explore the proposed (Takāful) model in more detail**
4. **Make some concluding remarks**

Al-Qalam understands that the finer details of the proposed model are yet to be developed so this response relates only to the basic structure of the proposed model.

1. **Replicating the repayment and debt levels of the conventional model**

The BIS consultation document sets a number of criteria that a Sharīʿah-compliant student finance product needs to achieve. These are briefly mentioned below:

- Repayment and debt levels should be identical to the traditional loan so that students are no worse or better off.
- Making repayments should be as easy and should be possible through the UK tax system.
- Same application procedure via the Student Loans Company with no extra burden.
- Transparent and easy to understand.

The consultation document also states that: "The Government believes that is [sic] important to ensure that any alternative student finance product would be acceptable to the majority of the UK's Muslim community and to others who may wish to take advantage of this type of finance."

Essentially, the criteria is that the alternative student finance product should behave in exactly the same way as a traditional student loan and should be acceptable to the majority of the UK's Muslim community and to others who would otherwise be deterred from taking a traditional student loan as they considered it to be incompatible with their beliefs.

It is our view that, whilst replicating an interest based benchmark would be disliked from a Sharīʿah perspective, this would not be considered impermissible.

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2. Do Sharīʿah principles recognise the value of money over time?

Under the predecessor (pre-September 2012) student loan system, a student could take out up to a maximum of around £3,000 each year. There was interest charged at a rate of RPI or 1% above the highest base rate of a nominated group of banks, whichever was lower. Repayments were made at a rate of 9% of any yearly income above £16,365.

The BIS consultation document assumes that this was actually acceptable to the majority of UK's Muslims and actually states on page 12: "The principles of Sharia law recognise the value of money over time." It is thus important to clarify the Sharīʿah position on the concept of Time Value of Money and the linking of the repayment of a loan with RPI or any other rate of interest. This is because this is an integral feature of both the two traditional student loan models although this principle would not impact on the proposed alternative finance model if it was truly to be gratuitous in nature.

In short, the Islamic Fiqh Academy of the OIC discussed this issue over a number of different sessions and eventually concluded by a majority decision as follows:

> ***The Council of the Islamic Fiqh Academy of the Organisation of the Islamic Conference*** in its Twelfth Session held in Riyadh (Kingdom of Saudi Arabia) during the period from 25th of *Jumad Thani* to 1st of *Rajab* 1421 AH (23-28/9/2000),
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> And having considered the recommendations, suggestions and final declaration of the *Fiqhi* and Economic Seminar on Issues of Inflation (in its three sessions of Jeddah, Kuala Lumpur and Manama),
>
> And after listening to the discussions of its members, experts and some Muslim *Fuqaha'a* on the subject,

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> **Decides the following:**
>
> **Firstly**: Reconfirmation of Resolution No. 42 (4/5) of the Council, which states that:
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> *"In principle debts that have already been created in terms of a certain currency should be repaid in terms of that same currency and not in terms of an equivalent value, because a debt has always to be settled with its exact similar. It is therefore impermissible to link the already existing debts, whatever their source might be, to price level."*
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> **Secondly**: …
>
> **Thirdly**: It is impermissible in *Shari'ah* at the time of concluding the debt contract to link the repayable amount to one of the following:
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> a) An accountancy currency
> b) Cost of living index or any other index
> c) Gold or silver
> d) The price of a certain commodity
> e) Growth rate of Gross National Product (GNP)
> f) Another currency
> g) Interest rate
> h) Price of a basket of commodities

> Indexation in this way is prohibited because it involves a great deal of *Gharar* and *Jahalah* (uncertainty and-lack of information), since both parties will not be in a position to know what will be the commitment at the end. Such lack of information violates one of the fundamental conditions of the contract validity. If the indicator used for indexation happens to show an increase, this will lead to discrepancy between the original debt amount to be repaid i.e. to commitment of usury.[2]

The above decision of the IFA is consistent with the position maintained by the preponderance of Muslim jurists throughout history and across all schools and, critically, remains the preponderant position amongst Muslim religious leaders within the UK. Therefore, the statement "The principles of Sharia law recognise the value of money over time." is incorrect and is inconsistent with the preponderance of past and present Muslim juristic thought.

For further elaboration, please refer to Appendix I.

Under the post-September 2012 student loan system a student can take out up to a maximum of £9,000 each year to cover tuition fees and additionally, up to £4,375 for maintenance costs.

During the course of study interest accumulates at a rate of RPI + 3%. After graduation, when the statutory repayment due date is reached the interest rate ranges from RPI to RPI + 3% depending on income. Repayments are made at a rate of 9% of any yearly income above £21,000.

The BIS consultation document acknowledges that some religious groups, particularly Muslims, may feel that the above arrangement is incompatible with their beliefs and, as a result may be deterred from entering higher education. However, as has been demonstrated above, this irregularity also existed under the pre-September 2012 system, as far as the preponderance of past and present Muslim juristic thought is concerned. Under the current system, the rate of interest has simply increased.

Before September 2012 some conscientious Muslim students and their families were able to self-fund the cost of tuition and maintenance fees, or else borrow interest-free from other family members.

However, with the increase in tuition fees up to £9000 post September 2012, this option no longer remains a possibility for the majority of Muslim families. Muslim students are left with the choice of either forgoing higher education or else taking out an interest bearing loan knowing that this is incompatible with their beliefs. There are also cases of Muslims taking out a student loan under the current system and then later realising that this is at odds with their beliefs leaving them remorseful and repentant. Al-Qalam has been approached on a number of occasions for advice in this regard. The need for a Sharīʿah-compliant alternative is thus growing. Al-Qalam has been working in conjunction with other partners to try to secure an alternative that is acceptable to the majority of UK Muslims and their religious leadership. It is hoped that the current consultation process will help to further this aim.

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[2] Resolutions and Recommendations of the Council of the Islamic Fiqh Academy, Resolution N0. 115(9/12) on Inflation and Change of Currency Value, p. 263-264.

3. Exploring the proposed (Takāful) model in more detail

The BIS consultation document has identified 'Takaful' as the basis on which the proposed model is structured. It also refers to the practice of raising funds between co-operating relatives.

If the latter reference is to what is popularly known as a 'committee' then it should be known that this is simply a mutual borrowing and lending structure without any increment. Each member of the 'committee' gives the weekly, fortnightly or monthly agreed amount and the accumulated sum is given to one member. Essentially, the remaining members loan their instalment to the receiving member. The following week, fortnight or month another member receives the accumulated sum and this process will continue until all members have received the accumulated sum and also paid the same amount in. There is no increment. Once this process is concluded the 'committee' will come to an end and members are free to start another 'committee' should they choose to participate. If, at the end of this process, any member/members receive more or less than the sum of their contributions by design, then despite the intention being one of mutual cooperation, this will result in *ribā*. Not only is the proposed alternative finance product materially different to the 'committee' system, even if it had been identical, the incorporation by design of an increment, and a large one at that, would render the structure as non-Sharīʿah-compliant due to the incidence of *ribā*. In reality, mention of the 'concept to raise funds between cooperating relatives' only serves, intentionally or unintentionally, to deflect from a critical analysis of the Sharīʿah-compliance of the proposed model.

Given 'Takaful' has been identified as the basis for the alternative finance product, it is important to, firstly, determine the exact relationship of the proposed model with the prevalent understanding of Takāful, then mention the pertinent issues in the concept of Takāful which may be areas of concern, and finally, determine whether the proposed model validly fulfils the intended objective.

Relationship with Takāful:

The word Takāful comes from the root *kafala* which means to be or become responsible, answerable, accountable, amenable, surety, or guarantee for property owed by another person or for the appearance and presence of another person.[3] Takāful is from the sixth verb form of *kafala* where two subjects reciprocate in performing the same action described by the verb. The word Takāful does not actually appear in the works of classical jurists[4] and is a rather recent coinage by contemporary scholars who have used the word to represent a cooperative form of insurance as an alternative to the conventional model of insurance. Takāful in this sense literally means to guarantee one another.

From the further clarification that Al-Qalam has received from the original author of the proposed model, it is not strictly a Takāful based insurance that informs the basis of the proposed model but only the element of mutual assistance that underpins it. The word Takāful has been used simply for ease of reference.

[3] Lane, E. W., An Arabic English Lexicon, Suhail Academy, Lahore, Pakistan, 2003, 2:3001.
[4] In fact, the word Takāful is even historically absent from all the major Arabic lexicons.

However, in the view of Al-Qalam, a discussion of pertinent issues in the prevalent understanding of Takāful will help to bring coherence and clarity to the Sharīʿah basis of the proposed model as there is common ground between the two.

The prevalent Takāful is a form of risk management that aims to avoid the prohibitions of *ribā*, *gharar*, *qimār* and the exchange of mutually deferred counter values that are features of conventional insurance. This is principally achieved by substituting the compensatory (معاوضة) basis of conventional insurance with one of gratuitous offering (تبرع) otherwise referred to as a donation. Within the Sharīʿah a contract made under the principle of a donation removes the prohibited elements of *ribā*, *qimār* and the exchange of mutually deferred counter values and allows the toleration of *gharar*. Essentially, a Sharīʿah-compliant Takāful structure must be based on a pure gratuitous offering and if it develops an element of exchange the prohibitions of *ribā*, *gharar*, *qimār* and the exchange of mutually deferred counter values will return.

There are generally three prevalent models of Takāful based on the contracts of Muḍārabah, Wakālah and Waqf respectively. The Muḍārabah model was first developed and practiced in Malaysia but remained a compensatory contract and consequently suffered from serious Sharīʿah compliance issues. This led to the proposal of a Wakālah-based model which was a significant improvement on the Muḍarabah based model but still attracted criticism from a number of Sharīʿah scholars. The Wakālah-based model is prevalent in the GCC and also formed the basis for the now defunct Salaam Insurance company. A third model, which is practiced in Pakistan and is based on Waqf, aimed to avoid the criticisms that were raised against the Wakālah-based model.

Whilst the BIS consultation document has not indicated any specific model of Takāful the most appropriate model to help tease out the issues that may arise in the alternative finance model is the Wakālah-based model. In the interest of brevity, rather than explain how a Wakālah-based Takāful model works, only the issues relative to the proposed model will be discussed.

Pertinent issues in Takāful:

The Accounting and Auditing Organisation for Islamic Financial Institutes (AAOIFI) has produced a standard (No. 26) on Islamic insurance. The standard approved the Wakālah-based model on the basis of majority opinion. The AAOIFI standard identifies two constructs and uses analogy to argue the legitimacy of the position taken as follows:

3. The Shari'a ruling that the Islamic insurance contract is an act of donation that both parties are bound to honour, is measured by analogy to what is known in *Fiqh* as *Al Nihd*[5], or donation pledge [الإلزام بالتبرع]. It has been narrated that Ali and Ibn Masood said (A gift, if specifically defined, is binding, whether received or not). It has also been narrated that

[5] Al Bukhari in his Sahih (128/15) commented on *Al Nihd* where he said (…. since Muslims did not see any harm in *Al Nihd*, in which the members of the group consume different amounts of the food to which they have equally contributed) and he narrated some sayings of the Prophet (peace be upon him) that support this practice. Ibn Hajar in Fat'hul Bari (129/5) indicated that *Al Nihd* was an ancient practice of Muslim travellers who used to contribute equally to the stock of food they need during their journey, and leave each of them free to consume the portion of the food he needs. At the end of journey, they distribute the food left over among themselves, unless they decide to keep it for another journey. This is quite similar to the treatment of surplus in Islamic Insurance. (AAOIFI, p. 484)

> Abu Bakr and Omar indicated that a gift does not become binding before receipt. Malik however reconciled the two viewpoints by indicating that Ali, Ibn Masood and the others seem to have focused on the fact that the contract as such is binding, while Abu Bakr and Omar seem to have focused on the fact that the receipt of the gift is a prerequisite of finalising the contract. The latter viewpoint was justified by the desire to leave no room for an excuse that Omar explicitly mentioned.[6]

The first of the two constructs is what was known as *al-Nahd* which was a practice that, most likely, originated in a group of travellers making a contribution of provisions towards a collective pot to either be shared out between the travellers equally or to allow the travellers to partake from the collective pot. The contribution itself was known as al-*Nihd*.[7] This practice raised the question as to whether the contribution of the same genus, for example dates, resulted in the incidence of *ribā* if one received a share that was disproportionate to one's contribution.[8] In ʿUmdah al-Qārī, Badr al-Dīn al-ʿEynī explains that this is not a case of *ribā* but rather one of *ibāḥah*. This is also confirmed by many other jurists who have explained the reason why such practice was permitted. Essentially, each contributor permits his co-contributors to receive from or partake in his contribution with ownership transferring upon consumption. It is not a case of exchange which would result in *ribā* if it occurred in unequal amounts in the same genus or if either or both counter-values were deferred. It is also not a case of proprietary transfer through gift, as gift required offer, acceptance and possession. Rather, it was simply a case of retaining ownership of one's contribution and allowing others to benefit therefrom out of compassion and mutual cooperation.

For the benefit of the ʿUlamāʾ (scholars), a discussion in Arabic on *al-Nahd* has been included in the footnotes for ease of reference.[9]

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[6] AAOIFI, Standard No 26, Appendix B, Basis for Shariah Justification.

[7] **ففى لسان العرب:** والنّهْد: العَوْنُ. وطَرَحَ نَهْدَه مع القوم: أَعانهم وخارجهم. وقد تَناهَدوا أَى تَخارَجُوا، يكون ذلك فى الطعام والشراب. وقيل: النَّهْدُ إِخراج القوم نفقاتهم على قدر عدد الرُّفقة. والتناهُدُ إِخراجُ كل واحد من الرفقة نفقة على قدر نفقة صاحبه. يقال: تَناهَدوا وناهَدوا وناهد بعضُهم بعضاً. والمُخْرَجُ يقال له: النِّهْدُ، بالكسر. قال: والعرب تقول: هات نِهدَكَ، مكسورة النون. قال: وحكى عمرو بن عبيد عن الحسن أَنه قال: أَخْرِجوا نِهْدَكم فإِنه أَعظم للبركة وأَحسن لأَخلاقِكم وأَطْيَبُ لنفوسكم. قال ابن الأَثير: النِّهد، بالكسر، ما يُخْرِجُه الرفقة عند المناهدة إِلى العدوِّ وهو أَن يقسموا نفقتهم بينهم بالسوية حتى لا يتغابنوا ولا يكون لأَحدهم على الآخر فضل ومنّة. وتَناهَدَ القومُ الشىء: تناولوه بينهم. (430/3)

[8] Contributions of the same genus from a usurious commodity potentially attract both *ribā al-faḍl* and *ribā al-nasīʾah* whereas contributions of differing genera from usurious commodities potentially attract *ribā al-nasīʾah*.

[9] **ففى فتح البارى لابن حجر:** وأما النهد فهو بكسر النون وبفتحها إخراج القوم نفقاتهم على قدر عدد الرفقة. يقال: تناهدوا وناهد بعضهم بعضا. قاله الأزهرى. وقال الجوهرى نحوه لكن قال: على قدر نفقة صاحبه. ونحوه لابن فارس. وقال ابن سيده: النهد العون. وطرح نهده مع القوم أعانهم وخارجهم. وذلك يكون فى الطعام والشراب. وقيل: فذكر قول الأزهرى. وقال عياض مثل قول الأزهرى إلا أنه قيده بالسفر والخلط ، ولم يقيده بالعدد. وقال ابن التين: قال جماعة: هو النفقة بالسوية فى السفر وغيره. والذى يظهر أن أصله فى السفر. وقد تتفق رفقة فيضعونه فى الحضر كما سيأتى فى آخر الباب من فعل الأشعريين ، وأنه لا يتقيد بالتسوية إلا فى القسمة. وأما فى الأكل فلا تسوية لاختلاف حال الآكلين. وأحاديث الباب تشهد لكل ذلك. وقال ابن الأثير: هو ما تخرجه الرفقة عند المناهدة إلى الغزو ، وهو أن يقتسموا نفقتهم بينهم بالسوية حتى لا يكون لأحدهم على الآخر فضل. فزاده قيدا آخر وهو سفر الغزو. والمعروف أنه خلط الزاد فى السفر مطلقا. وقد أشار إلى ذلك المصنف فى الترجمة حيث قال: "يأكل هذا بعضا وهذا بعضا" وقال القابسى: هو طعام الصلح بين القبائل. وهذا غير معروف. فإن ثبت فلعله أصله. وذكر محمد بن عبد الملك التاريخى أن أول من أحدث النهد حُضَين - بمهملة ثم معجمة مصغر - الرقاشى. وهو بعيد لثبوته فى زمن النبى صلى الله عليه وسلم ، وحضين لا صحبة له. فإن ثبتت احتملت أوليته فيه فى زمن مخصوص أو فى فئة مخصوصة. قوله: (والعروض) بضم أوله جمع عرض بسكون الراء مقابل النقد. وأما بفتحها فجميع أصناف المال. وما عدا النقد يدخل فيه الطعام ، فهو من الخاص بعد العام ، ويدخل فيه الربويات ، ولكنه اغتفر فى النهد لثبوت الدليل على جوازه. واختلف العلماء فى صحة الشركة كما سيأتى. ... قوله: (لما لم تر المسلمون بالنهد بأسا) هو بكسر اللام وتخفيف الميم. وكأنه أشار إلى أحاديث الباب ، وقد ورد الترغيب فى ذلك. وروى أبو عبيدة فى "الغريب" عن الحسن قال: "أخرجوا نهدكم فإنه أعظم للبركة وأحسن لأخلاقكم". قوله: (وكذلك مجازفة الذهب والفضة) كأنه ألحق النقد بالعرض للجامع بينهما وهو المالية. لكن إنما يتم ذلك فى قسمة الذهب مع الفضة. أما قسمة أحدهما خاصة - حيث يقع الاشتراك فى الاستحقاق - فلا يجوز إجماعا. قاله ابن بطال. وقال ابن المنير: شرط مالك فى منعه أن يكون مصكوكا والتعامل فيه بالعدد. فعلى هذا يجوز بيع ما عداه جزافا ، ومقتضى الأصول منعه. وظاهر كلام البخارى جوازه. ويمكن أن يحتج له بحديث جابر فى مال البحرين. والجواب عن ذلك أن قسمة العطاء ليس على حقيقة القسمة ، لأنه غير مملوك للآخذين قبل التمييز. والله أعلم . (كتاب الشركة ، باب الشركة فى الطعام والنهد والعروض ، 162/5-163)

وفى عمدة القارى: (باب الشركة فى الطعام والنهد والعروض وكيف قسمة ما يكال ويوزن مجازفة أو قبضة قبضة لما لم ير المسلمون فى النهد بأسا أن يأكل هذا بعضا وهذا بعضا وكذلك مجازفة الذهب والفضة والقران فى التمر) أى هذا باب فى بيان حكم الشركة فى الطعام. وقد عقد لهذا باب مفردا مستقلا يأتى بعد أبواب إن شاء الله تعالى. قوله: والنهد بفتح النون وكسرها وسكون الهاء وبدال مهملة. قال الأزهرى فى التهذيب: النهد إخراج القوم نفقاتهم على قدر عدد الرفقة. يقال تناهدوا وقد ناهد بعضهم بعضا. وفى المحكم: النهد العون ، وطرح نهده مع القوم أعانهم وخارجهم ، وقد تناهدوا أى

تخارجوا ، يكون ذلك فى الطعام والشراب. وقيل: النهد إخراج الرفقاء النفقة فى السفر وخلطها ، ويسمى بالمخارجة. وذلك جائز فى جنس واحد وفى الأجناس وإن تفاوتوا فى الأكل. وليس هذا من الربا فى شىء ، وإنما هو من باب الإباحة. وقال ثعلب: هو النهد بالكسر. قال: والعرب تقول: هات نهدك مكسورة النون. وحكى عن عمرو بن عبيد عن الحسن أنه قال: أخرجوا نهدكم فإنه أعظم للبركة وأحسن لأخلاقكم وأطيب لنفوسكم. وفى المطالع أن القابسى فسره بطعام الصلح بين القبائل. وعن قتادة ما أفلس المتلازمان ، يعنى المتناهدان. وذكر محمد بن عبد الملك التاريخى فى كتاب النهد عن المدائنى وابن الكلبى وغيرهما أن أول من وضع النهد الحضين بن المنذر الرقاشى. قلت الحُضَين بضم الحاء المهملة وفتح الضاد المعجمة وسكون الياء آخر الحروف وفى آخره نون ، ابن المنذر بن الحارث بن وعلة بن مجالد بن يثربى بن ريان بن الحارث بن مالك بن شيبان بن ذهل ، أحد بنى رقاش ، شاعر فارسى ، يكنى أبا ساسان. روى عن عثمان وعلى رضى الله تعالى عنهما. وروى عنه الحسن البصرى وعبد الله بن الداناج وعلى بن سويد وابنه يحيى بن حضين. وكان أسيرا عند بنى أمية فقتله أبو مسلم الخراسانى. قوله: والعُروض بضم العين جمع عرْض بسكون الراء ، وهو المتاع ، ويقابل النقد. وأراد به الشركة فى العروض. وفيه خلاف فقال أصحابنا: لا يصح شركة مفاوضة ولا شركة عنان إلا بالنقدين ، وهما الدراهم والدنانير والتبر. وقال مالك: يجوز فى العروض إذا اتحد الجنس. وعند بعض الشافعية يجوز إذا كان عرضا مثليا. وقال محمد: يصح أيضا بالفلوس الرائجة لأنها برواجها يأخذ حكم النقدين. وقال أبو حنيفة وأبو يوسف: لا يصح لأن رواجها عارض. قوله: وكيف قسمة ما يكال ، أى: وفى بيان قسمة ما يدخل تحت الكيل والوزن ، هل يجوز مجازفة أو يجوز قبضة قبضة؟ يعنى متساوية. وقيل: المراد بها مجازفة الذهب بالفضة والعكس لجواز التفاضل فيه. وكذا كل ما جاز بالتفاضل مما يكال أو يوزن من المطعومات ونحوها. هذا إذا كانت المجازفة فى القسمة. وقلنا: القسمة بيع. وقال ابن بطال: قسمة الذهب بالذهب مجازفة والفضة بالفضة مما لا يجوز بالإجماع. وأما قسمة الذهب مع الفضة مجازفة فكرهه مالك وأجازه الكوفيون والشافعى وآخرون. وكذلك لا يجوز قسمة البر مجازفة وكل ما حرم فيه التفاضل. قوله: لما لم ير المسلمون ، اللام فيه مكسورة والميم مخففة. هذا تعليل لعدم جواز قسمة الذهب بالذهب والفضة بالفضة مجازفة أى لأجل عدم رؤية المسلمين بالنهد بأسا جوزوا مجازفة الذهب بالفضة لاختلاف الجنس بخلاف مجازفة الذهب بالذهب والفضة بالفضة لجريان الربا فيه. فكما أن مبنى النهد على الإباحة وإن حصل التفاوت فى الأكل فكذلك مجازفة الذهب بالفضة وإن كان فيه التفاوت بخلاف الذهب بالذهب والفضة بالفضة لما ذكرنا. قوله: أن يأكل هذا بعضا ، تقديره بأن يأكل ، وأشار به إلى أنهم كما جوزوا النهد الذى فيه التفاوت فكذلك جوزوا مجازفة الذهب والفضة مع التفاوت لما ذكرنا. (كتاب الشركة ، باب الشركة فى الطعام والنهد والعروض ، 13/40-41)

وفى عمد القارى: حَدَّثَنَا عَبْدُ اللَّهِ بْنُ يُوسُفَ قال: أَخْبَرَنَا مَالِكٌ عَنْ وَهْبِ بْنِ كَيْسَانَ عَنْ جَابِرِ بْنِ عَبْدِ اللَّهِ رضى الله تعالى عنهما أَنَّهُ قَالَ: بَعَثَ رَسُولُ اللَّهِ صلى الله عليه وسلم بَعْثًا قِبَلَ السَّاحِلِ، فَأَمَّرَ عَلَيْهِمْ أَبَا عُبَيْدَةَ بْنَ الْجَرَّاحِ وَهُمْ ثَلاَثُمِائَةٍ وَأَنَا فِيهِمْ، فَخَرَجْنَا حَتَّى إِذَا كُنَّا بِبَعْضِ الطَّرِيقِ فَنِيَ الزَّادُ، فَأَمَرَ أَبُو عُبَيْدَةَ بِأَزْوَادِ ذَلِكَ الْجَيْشِ فَجُمِعَ ذَلِكَ كُلُّهُ فَكَانَ مِزْوَدَىْ تَمْرٍ، فَكَانَ يُقَوِّتُنَا كُلَّ يَوْمٍ قَلِيلاً قَلِيلاً، حَتَّى فَنِيَ فَلَمْ يَكُنْ يُصِيبُنَا إِلاَّ تَمْرَةٌ تَمْرَةٌ. فَقُلْتُ: وَمَا تُغْنِي تَمْرَةٌ؟ فَقَالَ: لَقَدْ وَجَدْنَا فَقْدَهَا حِينَ فَنِيَتْ. قَالَ: ثُمَّ انْتَهَيْنَا إِلَى الْبَحْرِ فَإِذَا حُوتٌ مِثْلُ الظَّرِبِ، فَأَكَلَ مِنْهُ ذَلِكَ الْجَيْشُ ثَمَانِيَ عَشْرَةَ لَيْلَةً، ثُمَّ أَمَرَ أَبُو عُبَيْدَةَ بِضِلَعَيْنِ مِنْ أَضْلاَعِهِ فَنُصِبَا، ثُمَّ أَمَرَ بِرَاحِلَةٍ فَرُحِلَتْ ثُمَّ مَرَّتْ تَحْتَهُمَا فَلَمْ تُصِبْهُمَا.) مطابقته للترجمة تؤخذ من قوله فأمر أبو عبيدة بأزواد ذلك الجيش فجمع ذلك كله. ولما كان يفرق عليهم كل يوم قليلا قليلا صار فى معنى النهد. واعترض بأنه ليس فيه ذكر المجازفة لأنهم لم يريدوا المبايعة ولا البدل. وأجيب بأن حقوقهم تساوت فيه بعد جمعه فتناولوه مجازفة كما جرت العادة. ... ذكر ما يستفاد منه قال القرطبى: جمع أبى عبيدة الأزواد وقسمتها بالسوية إما إن يكون حكما حكم به لما شاهد من الضرورة وخوفه من تلف من لم يبق معه زاد فظهر له أنه وجب على من معه أن يواسى من ليس له زاد ، أو يكون عن رضا منهم. وقد فعل مثل ذلك غير مرة سيدنا رسول الله. ولذلك قال بعض العلماء: هو سنة. وقال ابن بطال: استدل بعض العلماء بهذا الحديث بأنه لا يقطع سارق فى مجاعة لأن المواساة واجبة للمحتاجين. وخصه أبو عمر بسرقة المأكل. وفيه أن للإمام أن يواسى بين الناس فى الأقوات فى الحضر بثمن وغيره كما فعل ذلك فى السفر. وفيه قوة إيمان هؤلاء البعث إذ لو ضعف والعياذ بالله لما خرجوا وهم ثلاثمائة وليس معهم سوى جراب تمر أو مزودى تمر كما فى الحديث المذكور. قال عياض: ويحتمل أن يكون زودهم الجراب زائدا عما كان معهم من الزاد من أموالهم. ويحتمل أنه لم يكن فى أزوادهم تمر غير هذا الجراب وكان معهم غيره من الزاد. وقيل: يحتمل أن الجراب الذى زودهم الشارع كان على سبيل البركة. فلذا كانوا يأخذونه تمرة تمرة. وفيه فضل أبى عبيدة ، ولهذا سماه الشارع أمين هذه الأمة. وفيه النظر فى القوم والتدبير فيه وفضل الصحابة رضى الله تعالى عنهم على ما كان فيهم من البؤس وقد استجابوا لله وللرسول من بعدما أصابهم القرح. وفيه رضاهم بالقضاء وطاعتهم للأمير وفيه جواز الشركة فى الطعام وخلط الأزواد فى السفر إذا كان ذلك أرفق بهم. (كتاب الشركة ، باب الشركة فى الطعام والنهد والعروض ، 13/41-42)

وفى عمدة القارى: حَدَّثَنَا مُحَمَّدُ بْنُ الْعَلاَءِ حَدَّثَنَا حَمَّادُ بْنُ أُسَامَةَ عَنْ بُرَيْدٍ عَنْ أَبِى بُرْدَةَ عَنْ أَبِى مُوسَى قَالَ قَالَ النَّبِىُّ صلى الله عليه وسلم: « إِنَّ الأَشْعَرِيِّينَ إِذَا أَرْمَلُوا فِى الْغَزْوِ، أَوْ قَلَّ طَعَامُ عِيَالِهِمْ بِالْمَدِينَةِ جَمَعُوا مَا كَانَ عِنْدَهُمْ فِى ثَوْبٍ وَاحِدٍ ، ثُمَّ اقْتَسَمُوهُ بَيْنَهُمْ فِى إِنَاءٍ وَاحِدٍ بِالسَّوِيَّةِ ، فَهُمْ مِنِّى وَأَنَا مِنْهُمْ ». مطابقته للترجمة تؤخذ من قوله جمعوا ما كان عندهم فى ثوب واحد ثم اقتسموه بينهم ، ولا يخفى على المتأمل ذلك. ... وفيه منقبة عظيمة للأشعريين من إيثارهم ومواساتهم بشهادة سيدنا رسول الله. وأعظم ما شرفوا به كونه أضافهم إليه. وفيه استحباب خلط الزاد فى 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 شىء فى 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 فى موضعها. (كتاب الشركة ، باب الشركة فى الطعام والنهد والعروض ، 13/44)

وفى شرح صحيح البخارى لابن بطال: النهد: ما يجمعه الرفقاء من مال أو طعام على قدر فى الرفقة ، ينفقونه بينهم ، وقد تناهدوا ، عن صاحب العين. وقال ابن دريد: يقال من ذلك: ناهد القوم الشىء ، تناولوه بينهم. وقال المُهَلَّب: هذه القسمة لاتصلح إلا فيما جعل للأكل خاصة لأن طعام النهد / وشبهه لم يوضع للآكلين على أنهم يأكلون بالسواء ، وإنما يأكل كل واحد على قدر نَهْمَته ، وقد يأكل الرجل أكثر من غيره ، وهذه القسمة موضوعة بالمعروف ، وعلى طريقة بين الآكلين. ألا ترى جمع أبى عبيدة بقية أزواد الناس ثم شركهم فيها بأن قسم لكل واحد منهم ، وقد كان فيهم من لم يكن له بقية طعام ، وقد أعطى بعضهم أقل مما كان بقى له ولآخر أكثر. وكذلك فى حديث سلم قسم النبى - صلى الله عليه وسلم - بينهم بالاحتثاء ، وهو غير متساو. وهذا الفعل للنبى - صلى الله عليه وسلم - هو الذى امتثل أبو عبيدة فى جمعه للأزواد. وإنما يكون هذا عند شدة المجاعة. فللسلطان أن يأمر الناس [بالمواساة] ويجبرهم على ذلك ، ويشركهم فيما بقى من أزوادهم إحياء لإرماقهم وإبقاء لنفوسهم. وفيه أن للإمام أن يواسى بين الناس فى الأقوات فى الحضر بثمن وبغير ثمن ، كما له فعل ذلك فى السفر. وقد استدل بعض العلماء بهذا الحديث وقال: إنه أصل فى ألايقطع سارق فى مجاعة لأن المواساة واجبة للمحتاجين. وقد تقدم كثير من معانى هذا الحديث فى باب حمل الزاد فى الغزو فى كتاب الجهاد. وفى حديث رافع: قسمة اللحم بالتحرى بغير ميزان لأن ذلك من باب المعروف ، وهو موضوع للأكل. وأما قسمة الذهب والفضة مجازفة فلاتجوز بإجماع الأمة لتحريم التفاضل فى كل واحد منهما. وإنما اختلف العلماء فى قسمة الذهب مع الفضة مجازفة ، أو بيع ذلك مجازفة. فكرهه مالك ورآه من بيع الغرر والقمار ، ولم يجزه. وأما الكوفيون والشافعى وجماعة من العلماء ، فأجازوا ذلك لأن الأصل فى الذهب بالفضة جواز التفاضل ، فلا حرج فى بيع الجزاف [من ذلك] وقسمته. وكذلك قسمة البر مجازفة لاتجوز ، كما لايجوز بيع جزاف بُر ببر ونحوه مما حرم فيه التفاضل ، [وما يجوز فيه التفاضل] فإنما الربا فيه فى النسيئة خاصة. (كتاب الشركة ، 7/6-7)

وفى المغنى لابن قدامه: فصل: وسئل أحمد عن الرجلين يشتريان الفرس بينهما ، يغزوان عليه ، يركب هذا عُقبة وهذا عقبة: ما سمعتُ فيه بشىء ، وأرجو أن لا يكون به بأس. قيل له: أيما أحب إليك؟ يعتزل الرجل فى الطعام أو يرافق؟ قال: يرافق ، هذا أرفق ، يتعاونون. وإذا كنت وحدك لم يمكنك الطبخ ولا غيره. ولا بأس بالنهد. قد تناهد الصالحون. وكان الحسن إذا سافر ألقى معهم ويزيد أيضا بعدما يلقى. ومعنى النهد أن يخرج كل واحد من

The second of the two constructs is a pledge to donate which is based on a principle of the Mālikī School: 'One who imposes upon himself a good deed it becomes incumbent upon him as long as he does not become insolvent or die.'[10] However, this principle of the Mālikī School is applicable only if the pledge is a unilateral pledge from one party only and there is no conditional counter pledge from the other party. If there is a conditional counter pledge from the other party, then this principle is not applicable. E.g. if the Takāful fund pledges to the participant to make an award to the participant in the event of a qualifying event on the condition that the participant donates a defined amount to the Takāful fund, then this principle of the Mālikī School is not applicable. Rather, this then becomes a case of what is known as *hibah al-thawāb* otherwise referred to as *al-hibah bi sharṭ al-ʿiwaḍ* - gift with the condition of compensation.[11] Such gift then becomes a commutative contract of sale with the return of the prohibitions of *ribā*, *gharar*, *qimār* and possibly the exchange of mutually deferred counter values. The preponderance of Ḥanafī jurists consider such gift to begin as a gift but conclude as a contract of sale.[12] Jurist of the three remaining jurisprudential schools and Imām Zufar of the Ḥanafī School consider such gift to be a contract of sale from the onset.[13] All agree that the attendant rules of a sale contract apply. Thus:

الرفقة شيئا من النفقة ، يدفعونه إلى رجل ينفق عليهم منه ويأكلون جميعا. وكان الحسن البصرى يدفع إلى وكيلهم مثل واحد منهم ثم يعود فيأتى سرا بمثل ذلك يدفعه إليه. (كتاب الجهاد ، 37/13)

وفى كشاف القناع عن متن الإقناع: (ولا بأس بالنِهدة) بكسر النون ، وهو المناهدة (فى السفر) فعله الصالحون. كان الحسن إذا سافر ألقى معهم ويزيد أيضا بعد ما يلقى. وفيه أيضا رفق. (ومعناه) أى: النهد (أن يخرج كل واحد من الرفقة شيئا من النفقة يدفعونه إلى رجل منهم ينفق عليهم ويأكلون منه جميعا ، ولو أكل بعضهم أكثر من بعض) لجريان العادة بالمسامحة فى مثل ذلك. (كتاب الجهاد ، باب ما يلزم الإمام والجيش ، 118/7)

وفى الإنصاف: ولا بأس بالمناهدة. نقل أبو داود: لا بأس أن يتناهد فى الطعام ويتصدق منه. لم يزل الناس يفعلون هذا. قال فى الفروع: ويتوجه رواية: لا يتصدق بلا إذن ونحوه. انتهى. ومعنى (النهد) أن يخرج كل واحد من الرفقة شيئا من النفقة ويدفعونه إلى رجل ينفق عليهم منه ويأكلون جميعا. وإن أكل بعضهم أكثر من بعض فلا بأس. (كتاب الصداق ، باب الوليمة ، 334/8)

وفى مطالب أولى النهى فى شرح غاية المنتهى: (وتباح المناهدة) ويقال: النهد بكسر النون (وهى أن يخرج كل واحد من رفقة شيئا من النفقة) وإن لم يتساووا (ويدفعونه إلى من ينفق عليهم منه ويأكلون جميعا. فلو أكل بعضهم) من رفيقه (أو تصدق) بعضهم (منه فلا بأس.) لم يزل الناس يفعلونه نصا. (كتاب الصداق ، باب الوليمة وآداب الأكل والشرب وما يتعلق بذلك ، 251/5)

وفى روضة الطالبين وعمدة المفتين: وأما مسألة المناهدة ، وهى خلط المسافرين نفقتهم واشتراكهم فى الأكل من المختلط ، ففيها نظر لأنها فى معنى المعاوضة وإلا فيخرج على مسألة الضيف. والله أعلم. (كتاب الخلع ، كتاب الطلاق ، باب فى تعليق الطلاق ، 185/6)

وفى كفاية الأخيار فى حل غاية الإختصار: حلف لا يأكل من طعام فلان فتناهدا. قال البوشنجي: حنث. وأقره الرافعى. قال النووى: هذا مشكل لأن المناهدة فى معنى المعاوضة. وإن لم تكن فى معنى المعاوضة فتتخرج على مسألة الضيف. والله أعلم. والمناهدة خلط المسافرين نفقتهم واشتراكهم فى الأكل من المختلط. ثم أعاد الرافعى المسألة فى آخر كتاب الأيمان وفسرها بتفسير هو أعم مما فسره النووى وذكر ما ذكره النووى من التخريج على مسألة الضيف. والله أعلم. (كتاب النكاح ، وما يتعلق به من الأحكام والقضايا ، ص 604)

وفى الأشباه والنظائر للسيوطى: ومنها: الصحيح: أن الضيف يملك ما يأكله. وهل يملك بالوضع بين يديه أو فى الفم أو بالأخذ أو بازدراد يتبين حصول الملك قبيله؟ أوجه. ... وأما مسألة الضيف: فينبغى أن يعبر عنها بالإباحة لتدخل هى وغيرها من الإباحات التى ليست بهبة ولا صدقة. (الكتاب الرابع فى أحكام يكثر دورها ويقبح بالفقيه جهلها ، القول فى الملك ، ص 317)

[10] **ففى تحرير الكلام فى مسائل الالتزام:** مسألة: من التزم الانفاق على شخص مدة معينة ، أو مدة حياة المنفق أو المنفق عليه ، أو حتى يقدم زيد ، أو إلى أجل مجهول ، لزمه ذلك ما لم يفلس أو يمت ، لأنه قد تقدم فى كلام ابن رشد أن المعروف على مذهب مالك وأصحابه لازم لمن أوجبه على نفسه ما لم يفلس أو يمت. ... والفروع الآتية كلها صريحة فى القضاء بذلك. (ص 4)

وفى مواهب الجليل شرح لمختصر خليل: والمعروف على مذهب مالك وجميع أصحابه لازم لمن أوجبه على نفسه يحكم به عليه ما لم يمت أو يفلس. (باب الهبة ، 13/8)

[11] **ففى تحرير الكلام فى مسائل الالتزام:** النوع الخامس: الالتزام المعلق الذى فيه منفعة للملتزِم بكسر الزاى وهو على أربعة أوجه: الوجه الأول: أن يكون الفعل المعلق عليه إعطاء الملتزَم له للملتزِم أو لغيره شيئاً وتمليكه إياه ، نحو أن أعطيتنى عبدك أو دارك أو فرسك فقد إلتزمت لك بكذا. ... فهذا من باب هبة الثواب. وقد صرحوا بأنه إذا سمى فيها الثواب أنها جائزة ، ولم يحك فى ذلك خلافاً ، وأنها حينئذ بيع من البيوع ، فيشترط فى كل من الملتزَم به والملتزَم عليه ما يشترط فى الثمن والمثمون من انتفاء الجهل والغرر ، إلا ما يجوز فى هبة الثواب مما سيأتى ذكره فى التنبيه الرابع. ويشترط فيها أيضاً كون كل منهما طاهراً منتفعاً به مقدوراً على تسليمه ... ولا يجوز أن يكون طعامين كقوله إن أعطيتنى أردباً من القمر فلك عندى قنطاران من السمن إلا أن يكون ذلك فى مجلس واحد والطعامان حاضران. (ص 52)

[12] **ففى البحر الرائق:** (قوله: والهبة بشرط العوض هبة ابتداء ، فيشترط فيها التقابض فى العوضين وتبطل فى الشيوع ، بيع انتهاء ، فترد بالعيب وخيار الرؤية وتؤخذ بالشفعة.) لاشتمالها على جهتين فيجمع بينهما ما أمكن عملا بالشبهين ، وقد أمكن ، لأن الهبة من حكمها تأخر الملك إلى القبض ، وقد يتراخى عن البيع الفاسد ، والبيع من حكمه اللزوم ، وقد تنقلب الهبة لازمة بالتعويض فجمعنا بينهما. وقال زفر: هو بيع ابتداء وانتهاء. ... وقال الناصحى فى الجمع بين وقفى هلال والخصاف فى باب ما يجوز من الوقف وما لا يجوز: ولو وهب الواقف الأرض التى شرط الاستبدال به ولم يشترط عوضا لم يجز. ولو شرط عوضا فهو كالبيع. اهـ. (كتاب الهبة ، باب الرجوع فى الهبة ، 295/7) راجع أيضا: رد المحتار ، كتاب الهبة ، 5-705-706)

[13] **ففى مواهب الجليل شرح لمختصر خليل:** (وجاز شرط الثواب) ش: يعنى أن الهبة تجوز بشرط الثواب ، وسواء عين الواهب الثواب الذى يريد أم لا. أما إذا عينه فقالوا: إنها جائزة ، وهى حينئذ من البيوع. قال فى التوضيح: كما لو قال: أهبها لك بمائة دينار. ويشترط فى ذلك شروط البيع. (باب الهبة ، 29/8-30)

- Such gift returns the construct to a commutative contract which was the very reason for seeking an alternative!
- Furthermore, if the counter values are in the form of currency [as is also the case under the proposed student loan model] then the prohibitions of *ribā al-faḍl* and *ribā al-nasīʾah* also materialise.
- If either of the counter values entails uncertainty the contract becomes void according to the Shāfiʿī and Ḥanbalī schools whilst the Ḥanafī and Mālikī schools consider the gift to be valid and the condition of compensation to be void.

Consequently, a Wakālah-based Takāful model with the peculiarities explained above, retains prohibited elements of the conventional model of insurance.

There are other anomalies that arise as a result of a structuring of this kind in relation to ownership of the premiums paid, and the entitlement to a return of surpluses, etc. but for the current discussion the above details are more than sufficient.

However, for the purposes of Takāful, if the model is structured in a manner that:

- The Takāful Fund is a separate legal not-for-profit entity with the objective of assisting those participants who have suffered a loss
- The donations are pure unconditional donations made unilaterally by the donor
- With immediate proprietary transfer to the Takāful Fund
- Such that the Takāful Fund has total discretion to utilise the donation according to its own governing rules and regulations
- With entitlement to recover a loss accruing solely on **the basis of the governing rules and regulations of the Takāful Fund and not on any agreement between the donor and the Takāful Fund,**

then this can be a valid structure to achieve the objective of Takāful. The critical difference here is that there is no reciprocating pledge from the Takāful Fund to the participant to make an award if there is a qualifying event. Rather, any such award is made exclusively on the basis of the governing rules and regulations of the Takāful Fund. To this end, a Waqf-based model is possibly a better model to achieve the desired outcome.

وفى مغنى المحتاج: (ولو وهب) شخصا شيئا (بشرط ثواب معلوم) عليه ، كوهبتك هذا على أن تثيبنى كذا ، (فالأظهر صحة) هذا (العقد) نظرا للمعنى فإنه معاوضة بمال معلوم فصح ، كما لو قال بعتك. والثانى بطلانه نظرا إلى اللفظ لتناقضه ، فإن لفظ الهبة يقتضى التبرع. (ويكون بيعا على الصحيح) نظرا إلى المعنى. فعلى هذا تثبت فيه أحكام البيع من الشفعة والخيارين وغيرهما. قال فى التنقيح: بلا خلاف ، وغلّط الغزالى فى إشارته إلى خلاف فيه. (كتاب الهبة ، 522/2)

وفى كشاف القناع عن متن الإقناع: (وإن شرط) الواهب (فيها) أى الهبة (عوضا معلوما صارت) الهبة (بيعا. فيثبت فيها خيار) مجلس ونحوه. (و) يثبت فيها (شفعة) إن كان الموهوب شقصا مشفوعا (ونحوهما) كالرد بالعيب واللزوم قبل التقابض ، وضمان الدرك ووجوب التساوى مع التقابض قبل التفرق فى الربوى المتحد لأنه تمليك بعوض معلوم. أشبه ما لو قال: بعتك أو ملكتك هذا بهذا. (كتاب الوقف ، باب الهبة والعطية ، 497/3)

4. Some Concluding Remarks

For many Muslims, the issue at hand is a matter of faith and so it is important for them to know who has developed and sanctioned the proposed model. Most Muslims do not understand the workings of Islamic finance models and are unable to appreciate the differences, where they do exist, from conventional interest based models. This remains the case to date with Islamic mortgages. Most Muslims require the advice, guidance and reassurance of a religious authority in which they have trust. Therefore it is important to identify which experts in Islamic finance have proposed and developed the model. To this end, Al-Qalam has been able to confirm that whilst the original author is an employee of the Islamic Bank of Britain he has worked on this model in his personal capacity. The original author then consulted with the Shariah Supervisory Committee of the Islamic Bank of Britain and with some members of AAOIFI. Al-Qalam is informed that they have advised that there are no Sharīʿāh concerns with the basic structure of the model.

One of the core objectives of this consultation is to gauge the views on the Muslim community as to the Sharīʿah acceptability of the proposed model. It is thus important that any Sharīʿah supervisory committee for the proposed fund includes competent representative British Muslim scholars in whom the British Muslim community broadly has confidence, and also that such scholars are also specifically involved in the development of any proposed model. We would not consider it advisable to have foreign scholars appointed to this role.

The underlying principle of the model is identified as 'one of communal interest and transparent sharing benefit and obligation'. Whilst the stated underlying principle is noble, it is the **application** of the stated principle that must critically conform to Sharīʿah dictates.

The BIS consultation document advises that 'the contract will be based upon a unilateral promise guaranteeing that they will repay a Takaful contribution – which is perceived as a charitable donation'. Notwithstanding the debate about the legal enforceability of a unilateral promise in Sharīʿah, the promise to 'repay a Takaful contribution, and an enormous one at that, is, in the manner described in the document, anything but unilateral. It is a legally enforceable promise to repay, yes **repay**, as expressly stated in the BIS consultation document, the money released upon signing the document but with an increment based on a benchmark. The release of funds, which is essentially a loan, appears, as far as we can tell, to be conditional upon signing the contract to donate a large unspecified sum to the fund in the future. Thus, this is a commutative contract and the prohibited elements of *ribā al-faḍl* and *ribā al-nasīʾah* both materialise and any perception of being a charitable contribution is quashed. Whilst there is no lending/borrowing relationship resulting in a payment of interest by the student to the SLC, there is a lending/borrowing relationship resulting in a payment of interest by the student to what is termed the Takaful fund.

In a conventional Takāful structure, participants invariably make a donation and a pay-out is made if a specified event occurs. In the current structure, the roles are reversed. The Takāful fund invariable releases funds and repayment is made if a specified event occurs. This inverse application of the Takāful structure needs further analysis.

Furthermore, the proposed model incorporates the concept of the value of money over time which has been demonstrated to be at odds with most past and present Muslim juristic thought. This is further exacerbated by the fact the benchmark does not even reflect RPI but rather RPI +

a percentage increment relative to the traditional loan system. The BIS consultation document states:

> 'Under the terms of the alternative finance product the amount owed to the fund by the student would increase by the same amount over time as for a traditional loan. However, no rate of interest would be applied to the student's obligation to the fund. The principles of Sharia law recognise the value of money over time. Given the long period over which most students would make repayments into the fund, the total contribution they would be obligated to make would be based on a benchmark. This benchmark would be set relative to the traditional loan system and would ensure that students who made use of either the alternative finance product or traditional loans would be treated the same.'

After some discussion and reflection, Al-Qalam is of the opinion that the manner in which the proposed model is being envisaged in the BIS consultation document does not remove it from being a commutative contract as the purported unilateral promise and the award to the student are mutually conditional. The wording of the BIS consultation document also confirms the commutative nature of the contract. Thus, the prohibitions of *ribā*, *gharar*, *qimār* and the exchange of mutually deferred counter values remain. This is further compounded by the incorporation of the concept of Time Value of Money.

However, it is also the opinion of Al-Qalam that if the commutative nature of the mode proposed in the BIS consultation document is removed then there is scope for accepting a revised version of this model based on the position of the Mālikī School. To this end it is proposed that the student makes a unilateral promise to make donations to the fund according to a payment schedule reflective of the conventional student loan model without any counter pledge from the Takaful Fund. Then, any award made to the student is made exclusively on the basis of the governing rules and regulations of the Takaful Fund and **NOT** on the basis of an agreement between the student and the Takaful Fund. As a gratuitous contract, this will then obviate the prohibitions of *ribā*, *qimār* and the exchange of mutually deferred counter values and also allow the tolerance of *gharar*. Additionally, the concept of Time Value of Money will also then not have a negative impact. If a Waqf-based structure can be used to achieve this, then this will be all the more satisfying.

We recognise that a simple unilateral promise of gratuitous nature is being substituted for a ribā based contract that is the conventional student loan. We also recognise that the Mālikī School is not adhered to by the overwhelming majority of UK Muslims. However, due to the absence of any viable alternative to date and the real need for such an alternative, it is the tentative opinion of Al-Qalam that an amended version of the proposed model, as described in the consultation document, may possibly form the basis of an acceptable alternative. Of course, this is subject to the finer details, which have yet to be developed, supporting the initial outline basis of the model. To this end, it is critical that the model remains gratuitous and does NOT end up being commutative.

The above is an attempt to bring some depth to the discussion on the proposed alternative finance model and to provide a Sharīʿah analysis on the assumptions, statements and the brief details of the proposed model with a possible amended alternative so that concerned parties are able to respond to the BIS consultation in an informed manner.

I pray that Allāh, Most High, guides me in this endeavour and makes it a source of deliverance in the Hereafter. For indeed, He is All-Hearing, All-Seeing, All-Knowing.

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Mufti Mohammed Zubair Butt (Chair)
On behalf of the Al-Qalam Shariah Scholars Panel

Appendix I

It is the consensus opinion in Islamic law that the loan of fungibles must be returned with the equivalent (المثل). However, the question arises as to whether this equivalence is in terms of amount (القدر) or in terms of value (القيمة والمالية)? The correct and preponderant opinion is that the equivalence is in terms of amount and not in terms of value due to the following proofs:

1. If A loans 10kg of wheat [which is a usurious commodity] from B and then returns the amount loaned when the price of wheat has fallen by half, for example, A will have to return the same **amount** (10kg) to B and not its current value (20kg) of wheat. This is by the consensus of Muslim jurists, both past and present.
2. The requirement of mutual equivalence (التماثل) is, again by consensus, to avoid the incidence of *ribā*. The Holy Prophet pbuh explained this in detail in the numerous *aḥādīth* on *ribā al-faḍl*[14] and required that the **amount** exchanged be returned even if there was a difference in value. Examples include the prohibition of exchanging one *ṣāʿ* (unit of measure) with two *ṣāʿ* of the same usurious commodity, the prohibition of exchanging *jamʿ* (an inferior quality of) dates with *janīb* (a superior quality of) dates in unequal measure, and the statements of the Holy Prophet: "So, one who increases or demands an increase, so it is *ribā*"[15], "like for like"[16], "equal for equal"[17], "hand to hand"[18], etc.
3. The Holy Prophet pbuh permitted Ibn ʿUmar to substitute a deferred price in gold with a price in silver for the price of the gold on the day of payment.[19] If the equivalence required had been in terms of value as opposed to in terms of amount then the value of the gold incurred on the day of contract would have been payable.
4. It is a settled opinion amongst the jurists that the exact amount must be returned and it is not permitted to return an estimated amount as estimation in the exchange of usurious commodities is prohibited. The Holy Prophet pbuh forbade the *al-Muzābanah* sale (بيع المزابنة) which was the sale of dates still on the trees for dates that had been picked as the dates still on the trees could only be estimated. The purported equivalence in linking the student loan with RPI or other similar measure is simply estimation through and through. Not only will the rate of RPI or other similar measure be unknown at the time of payment, identifying the appropriate goods to go in to the 'basket', assigning a weight to each individual good, determining the price of each individual good are all based on estimation and average. The RPI is simply a product of estimation with weighted averages for each item in the basket of goods. Therefore, as the exchange of usurious commodities does not allow estimation, this is a further reason why the use of RPI as a benchmark is incorrect.

Some Muslim economists and a limited number of contemporary Muslim jurists have tried to argue the permissibility of using the rate of inflation as a method of determining equivalence on the basis of what is reported as the latter opinion of Imām Abū Yūsuf from the Ḥanafī School in relation to *fulūs* (copper money). It is reported of Imām Abū Yūsuf that he held the position that

[14] These *aḥādīth* are well known and in the interest of relative brevity need not be mentioned here.

[15] فمن زاد أو استزاد فهو ربا [مسلم]

[16] مثلا بمثل [مسلم]

[17] سواء بسواء [مسلم]

[18] يدا بيد [مسلم]

[19] Abū Dāwūd.

if the value of *fulūs* appreciated or depreciated then the value thereof on the day of contract and possession was payable in equivalent dirhams (a silver currency). However, the reality is that this bears no relation to the issue at hand as the concept of inflation linked returns is a modern concept and did not exist at the time of Imām Abū Yūsuf. Rather, *fulūs* were linked to the gold dinar and silver dirham and valued therewith and were considered as change to the gold and silver currencies. The face value of one *fals* was considered to represent one tenth of a dirham by popular convention and this was different from its real value. It was always possible that this convention would change and one *fals* would be considered, for example, to represent one twentieth of a dirham according to the new convention and, in this manner the value of the *fals* would depreciate. Equally, it remained possible that one *fals* would be considered, for example, to represent one fifth of a dirham and, in this manner, the value of a *fals* would appreciate. Imām Abū Ḥanīfah opined, and this is also the well-known (مشهور) opinion of the Mālikī, Shāfiʿī and Ḥanbalī schools, that the actual number of *fals* incurred at the time of contract will be payable and the value thereof is immaterial. This was also the reported earlier opinion of Imām Abū Yūsuf. However, he is reported to have later opined that the value of the *fals* in relation to dirhams incurred at the time of the contract was payable as *fulūs* were, in reality, simply change for the dirham. It is possible that the reason for the difference between the preponderance of jurists and Imām Abū Yūsuf was due to the manner in which each viewed *fulūs*. The preponderance of jurists viewed *fals* as a currency by convention in its own right and which was not perpetually linked to the dirham or the dinar whilst Imām Abū Yūsuf viewed *fals* to be fractions by convention used as change to the dirham. Thus, the real purpose behind the loan of *fulūs* was not the amount of *fulūs* but rather the loan of a fraction of a dirham that those *fulūs* represented. Therefore, Imām Abū Yūsuf held that the fraction of the dirham loaned in the form of *fulūs* had to be returned even if the number of *fulūs* that now represented that same fraction of the dirham had now increased or decreased. In contrast, modern paper currencies are not linked to another currency nor considered as fractions of and change for another currency. Rather, they are currencies in their own right. Furthermore, it was possible to accurately determine the value of *fulūs* according to the opinion of Imām Abū Yūsuf as they were linked to a defined measure of currency in the form of the dirham. In contrast, it is not possible to accurately determine the true value of modern paper currencies by linking them to RPI. Rather, such linking will only result in an estimated value.

Some Muslim economists have tried to argue that the meaning of equivalence should be determined on the basis of popular convention (*ʿurf*) and this, today, is by linking it to RPI or other such measure. However, this argument is totally baseless as a resort to popular convention is only warranted in the absence of textual evidence. Textual evidence has clearly identified the meaning of equivalence which is equivalence in terms of **amount** and not in terms of value as discussed earlier.

The simple reality is that the concept of time value for money and inflation linked returns has a function in a system that is based on *ribā*. As for a system that aims to avoid *ribā* the errant nature of such concept becomes clear and does not stand against the proofs of Sharīʿah. Therefore, there remains no doubt that the statement "The principles of Sharia law recognise the value of money over time." is grossly at odds with the preponderance of past and present Muslim juristic thought.