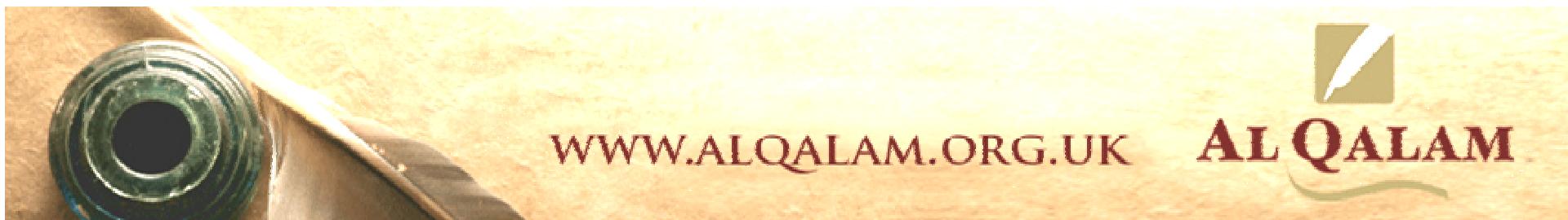


# **SUBSTANCE OVER FORM**

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Chair Al-Qalam Shariah Scholars Panel



# Stratagems

“There is nothing wrong with stratagems in that which is lawful and permissible. Stratagems are a thing with which a person avoids sins and the unlawful and exits therewith to the lawful. Thus, that which is of this or similar so there is nothing wrong. Only such [stratagems] are reprehensible that a person should adopt a stratagem in relation to the right of another to negate it or adopt a strategy in a void thing to beautify it or adopt a strategy in a thing to introduce a doubt therein. As for that which is of the manner we have described there is nothing wrong with it.”

[Khaṣṣāf, Book of Stratagems, p. 4]

# Stratagems

- **First type - impermissible and also does not achieve intended outcome**
  1. No change in essence, change only in apparent appearance
    - “Neither the property of different people may be taken together nor the joint property may be split for fear of (paying more, or receiving less) zakāt.”  
[Bukhārī]
  2. Change in essence but not sufficient to effect intended outcome
    - Gift to wife without possession to avoid zakāt liability
- **Second Type - impermissible but it still achieves intended outcome**
  - Gift to wife with possession to avoid zakāt liability
- **Third type - stratagem is permissible and also achieves intended outcome**
  - Exchange of Janeeb dates with inferior dates using dirhams [Bukhārī]

# Stratagems

- What about stratagems to avoid incidence of *ribā* but achieve same rate of return?
- If a permissible form of contract is employed, is itself intended and not merely artificially contrived, all related conditions and legal requirements are met - this is not a stratagem (حيلة) and its validity is not in dispute. E.g. deferred sale, or deferred murābahah when buyer's purpose is to acquire the object
- If a permissible form of contract is employed, is not itself intended but rather merely artificially contrived, even though all related conditions and legal requirements are met - three basic opinions:

# Stratagems

1. Imām Mālik - not permitted as intent is to achieve consequences of *ribā* through other means
2. Imām Shāfi‘ī - permitted as the contract requirements have been met
3. Ḥanafī School - if the contract gives rise to effect that distinguishes it from *ribā* then it is permitted, otherwise not
  - E.g. buy-back (*‘inah* sale) : Imām Mālik - not permitted, Imām Shaf‘ī - permitted, Ḥanafī School - not permitted if object returns to original seller, permitted if it goes to another party (*tawarruq*)



# **Enforceability of a promise**

- Moral obligation only or legal obligation too?
  1. Moral obligation only - general opinion within the Ḥanafī, Shāfi‘ī and Ḥanbalī schools is that it is preferable. Some Mālikī jurists also hold this opinion.
    - Prohibition is when the promisor has no intention of fulfilling the promise at the onset
  2. Moral and legal obligation - opinion of Samurah b. Jundub, ‘Umar b. ‘Abd al-‘Azīz, Ḥasan al-Baṣrī, Qādī Sa‘īd b. Al-Ashwa‘, Ishāq b. Rāhawayh, Imām Bukhārī, and some Mālikī jurists. Qādī Abū Bakr Ibn al-‘Arabī and Ibn al-Shāṭ have preferred this opinion.

# Enforceability of a promise

3. Moral and legal obligation if the promisee has incurred considerable expense or liability - the well known opinion of the majority within the Mālikī School.
4. Normally a moral obligation only, but if needed it can be deemed a legal obligation too - Some Ḥanafī jurists have expressly concurred in two situations:
  - I. There is a general need
  - II. The promise is made conditional

# Enforceability of a promise

- General need - e.g. *Bey ‘bi al-wafā’* - sale with right of redemption
- Vendor agrees with the buyer that whenever the vendor shall return the price to the buyer the buyer will sell back the object to the vendor.
- Legal ruse to benefit from a mortgaged object
- Some Ḥanafī jurists allowed the sale and condition of return due to need. Al-Zeyla‘ī has given *fatwā* on this opinion. Ibn ‘Ābidīn has recorded from the author of al-Nahr al-Fā’iq practice on this opinion in his region.
- Most Ḥanafī jurists have not allowed the condition of return in the sale contract. However, a separate promise has been allowed and is considered legally binding.

# Enforceability of a promise

- Conditional promise -
- A asks B to sell something to C with the assurance that if C does not pay B the price A promises to pay it to him. In the event of default A has to pay B.
- Although the wording is general the examples mentioned by jurists refer only to two situations:
  - Security/guarantee - *kafālah*
  - Vow - *nadhar*

# Contract or Promise?

- Is there a difference between a contract, a unilateral promise and a bilateral promise?
  - **Contract** - to physically bring a transaction into existence with all the related rights and responsibilities
    - E.g. On 1<sup>st</sup> November A purchases a BMW 5 Series from B for £15,000 through offer and acceptance; proprietorship of the BMW is immediately transferred to the buyer; vendor can demand the £15000; rights and responsibilities of the contract accrue to both parties
  - **Unilateral promise** - one party unilaterally assures another of an act or omission
    - E.g. On 1<sup>st</sup> November A promises B that he will purchase his BMW 5 Series from him for £15,000 on 1<sup>st</sup> December
    - Sale has not come in to existence; no proprietary transfer; vendor cannot demand the price

# Contract or Promise?

- **Bilateral promise** - both parties assure one another that they will conclude a contract at a known future date.
  - E.g. A promises B that he will purchase his BMW 5 Series from him for £15,000 on 1<sup>st</sup> November, B promises to sell it to A on that date for the stated price
  - Sale has not come into existence; no proprietary transfer; vendor cannot demand the price
- **Contemporary scholars who accept the enforceability of promise:**
  - **Unilateral binding promise** - accepted by all
  - **Bilateral binding promise** - most scholars do not allow it in situations where a contract is not allowed (forward currency contracts), as it amounts to a contract prior to acquisition of the item to be sold. [IFA Resolution NO. 41(3/5), AAOIFI Standard No. 8]

# Combining contracts

- Two mutually contingent contracts have been prohibited by the Holy prophet (pbuh) [Musnad Ahmad]. This refers to:
  1. An agreement that combines two [or more] contracts, whether sale or other, in a manner that the validity of one is contingent on the other. [preferred opinion]
  2. The sale of a single article for a spot or deferred price when one of the prices is not finally stipulated at the time of sale. [Simāk]
- Ḥanafī, Shāfi‘ī and Ḥanbalī schools prohibit all but a few situations [Ṣamdānī, p. 89]
- Mālikis restrict the prohibition to eight contracts that are deemed mutually inconsistent: Ji‘ālah, Ṣarf, Musāqāt, Shirkah, Marriage, Muḍarabah, sale and loan

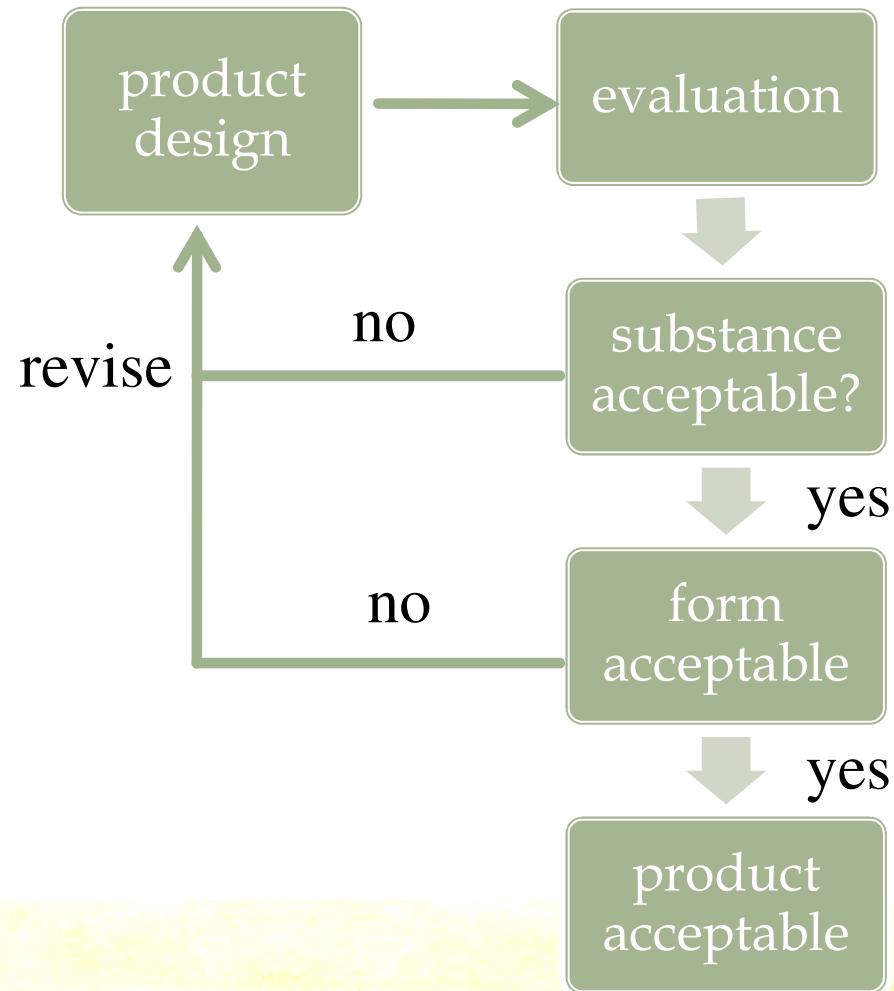
# Combining contracts

- If two or more contracts are combined through the use of promises but are not mutually contingent then whilst the form is generally deemed valid the substance is debatable
- The underlying problem is arguably:
  - A Sharī‘ah based system in both form and substance has never been pursued
  - Conventional products with all the inherent philosophy of risk transfer and guaranteed return has merely been copied
  - Link of expected/acceptable return to an exploitative system of the interest rate [LIBOR] defines all expectations and notions of return and quashes any moves towards an equitable profit and loss sharing based system



# Consistency of substance and form

1. Evaluate the substance or the end result of the product. If acceptable, go to step 2. Otherwise, go to step 3.
2. Evaluate the form of the product. If acceptable, the product is acceptable. Otherwise, go to step 3.
3. Revise the product, then go to step 1.



# **Strategies of product development**

## **1. Imitation - start from conventional products**

- Easiest strategy to develop products but its drawbacks could effect the Islamic industry in the long term
  - 1. Persistent precedence of form over substance, visionless observance of Shariah rules, and little confidence in economic value
  - 2. Islamic industry emulates conventional industry by design and restricts creativity
  - 3. Implies same objective of conventional products but with additional constraints [Shariah] resulting in an inferior product
  - 4. Conventional products solve the problems of the conventional industry - replication brings susceptibility to the same problems conventional products intend to solve



# **Strategies of product development**

## **2. Mutation - start from acceptable Islamic products.**

- Try different variations and modifications on them, and see how the resulting products could be used.
- Existing products will be subjected to mutations and superior products are retained and poor ones dropped
- Process is repeated until further improvements become minimal
- Possibility to generate infinite number of products with a substantial portion of evolved products meeting acceptability

# **Strategies of product development**

## **3. Satisfaction - start from the actual needs of customers**

- See which products or designs could serve these needs
- Works in opposite direction to the mutation strategy and the two are mutually complementary
- Natural process of market evolution and customers determine direction of industry
- Economic progress is measured by ability to satisfy needs
- Bank does not advance a loan but finances the real need of the customer
- If the customer needs to pay off a debt the bank finances the needs of the customer's creditor

[http://www.kantakji.com/fiqh/Files/Finance/Financial\\_Engineering\\_1-4\\_DrSami\\_Suwailam.pdf](http://www.kantakji.com/fiqh/Files/Finance/Financial_Engineering_1-4_DrSami_Suwailam.pdf)

# Practicing usury out of necessity

- What are necessity (*darūrah*), need (*hājah*) and embellishment (*tahsīn*)?
- Conditions for availing of the principle of necessity:
  - The lesser of two tribulations
  - Harm is not borne by another person
  - There is no permissible alternative available
  - Availing of the dispensation is limited to the degree of actual necessity
  - The necessity is actual and not merely speculative

# Practicing usury out of necessity

- October 1999 Fatwā of European Council for Fatwā and Research permitted interest-based mortgages subject to conditions and caveats
- Fatwā was based on:
  - the rule of necessity and that need sometimes was elevated to necessity
  - The opinion of some jurists on the permissibility of [receiving] *ribā* in the ‘land of war’
- The Fatwā was welcomed by some, refuted by others and misinterpreted and misused by many. [El Diwānī, p. 85]
- Some classical Ḥanafī jurists allowed a needy person to acquire a loan with an increment. See:

<http://www.alqalam.org.uk/UserFiles/File/The%20doctrine%20of%20necessity%20and%20riba%20based%20loans%20in%20the%20current%20economic%20climate%20of%20the%20credit%20crunch.pdf>

