

## THE LEGALITY OF THE NATIONAL HEALTH INSURANCE SCHEME FOR NIGERIAN MUSLIMS

Mistura A. Mohammed-Yusuf\* and Moriam O. Ahmad\*\*

### **Abstract**

*Human life faces challenges and health is not left out. It suffices to say that life and health are inseparable twins. Protection of human life should be prioritized by giving special attention to health, this is because if health is challenged, medical attention becomes essential, and as such, requires finances. National Health Insurance Scheme (NHIS) was established to facilitate quality and cost-effective health care services(s). Notwithstanding the importance of this scheme, its legality under the Islamic Law is challenged, and this has militated against its acceptability among some Muslim Scholars, because Muslims' acts and involvements are guided by the Islamic Law and the operation of (NHIS) is partly inconsistent with the Islamic Law. The article investigates the operational aspect of (NHIS) that are in contravention of the Islamic Law, it analyzes the mode of operation of the Islamic Health Insurance (Takaful). It gives insight on Islamic law compliant Health Insurance (Takaful) and creates awareness of the Islamic Health Insurance (Takaful), proposing Tabarru' and waqf as viable Islamic tools to sustain health insurance in Nigeria. To achieve this, the doctrinal research method has been adopted, wherein literatures were consulted and reviewed, the result is to divulge the inconsistency of the National Health Insurance Scheme (NHIS), with Islamic Law, intimate the Muslim majority of the benefits in Islamic Health Insurance (Takaful).*

**Keywords:** Takaful, Tabarru', Waqf, Islamic health, Insurance

### **1. INTRODUCTION**

To every human being, life is a valuable asset upon which every other thing in life is made possible<sup>1</sup>. Therefore, it is right to say that the right to life is supreme and fundamental, it is a right that its absence can render other rights meaningless, thus, it cannot be tampered with<sup>2</sup>. According to Article 6(1); every human being has the inherent right to life. This right shall be protected by

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\*Private Legal Practitioner A.S Oseni &Co, Nassara Chambers, Agric Area, Ilorin Kwara State. [yusmis.ym@gmail.com](mailto:yusmis.ym@gmail.com). 07038940858

\*\* Private Legal Practitioner At M.O Ahmad & Co, olafunmishe Chambers, No. 4, Offa Road, Behind CBN, Ilorin, Kwara State. [moriamolafunmisheahmad@gmail.com](mailto:moriamolafunmisheahmad@gmail.com), 08030637505

<sup>1</sup> M.A Baderin, *International Human Right and Islamic Law* (oxford University Press, 2009) p67

<sup>2</sup> Ibid

law. No one shall be arbitrarily deprived of his life<sup>3</sup>. Which is in perimaterial with the provision of *Shari'ah*, as there area plethora of verses of the *Qur'an* and the *hadith* of the prophet where protection and acknowledgment of sanctity of life is fundamentally emphasized to the extent of it not capable of being denied<sup>4</sup>. Allah (s.w.t) says '... do not kill the soul which Allah has forbidden except for the requirement of justice...' <sup>5</sup>. In another verse, Allah says; And do not kill anyone whom Allah has forbidden, except for a just cause...<sup>6</sup>. The prophet (s.a.w) says; verily your lives and properties are sacred to one another until you meet your lord on the day of resurrection'<sup>7</sup>. In any event of a health challenge, which in most cases creates a threat to life, the National Health Insurance Scheme (NHIS) has been put in place to facilitate quality and cost-effective health care service for the insured and their immediate family member. The present day National Health Insurance Scheme (NHIS) was a reincarnation of the 1962 idea, which was recommended by a committee commissioned by the health Minister in 1988<sup>8</sup>. Owing to the congestion in the administration back then, the Law that established the Scheme did not enjoy prompt attention and so was signed into law sometime in May 1999. Having faced such delay, the law became active in the year 2005<sup>9</sup>.

Research has shown that the mode of operation of the National Health Insurance scheme (NHIS) in Nigeria is contradictory to the principles and practice under Islamic Law, as a result of this, its legality becomes questionable and acceptability by the Muslim population came out so low. Reason for this is that, every aspect of a Muslim life is *Ibadah*, it is guided by a divine Law, *Sharia'h*, hence, he earns reward for doing it and gets punished for it neglect<sup>10</sup>. Therefore, whatever a Muslim must get involved in must be one that is lawful within the context of Islamic Law. Going through the operational guideline of National Health Insurance Scheme (NHIS), it is crystal clear that there is an atom of *riba* (usury), *gharar* (uncertainty), *maysir* (gambling), which

<sup>3</sup> International Covenant on Civil and Political Right 1966

<sup>4</sup> Baderin (n 2)

<sup>5</sup> Surah Al-Imran 6:151

<sup>6</sup> Surah Al-Isra 17:33

<sup>7</sup> Al-Buhari and Muslim

<sup>8</sup> <https://www.healthinsurance.com.ng/history.health-insurance-in-nigeria>. Accessed on, 05/08/21 @12:25pm

<sup>9</sup> Ibid

<sup>10</sup> A. Ab Rahman and S. Mohamad, 'Analysis of *Tabarru* Principle in *Takaful* Contract', Malaysian Experience. Proceeding of 2010, (International Conference on Humanities, Historical and Social Sciences (CHHSS 2010) Singapore, 26-28 February, 2010)

are prohibitory under Islamic Law. Therefore, any actions which have the element of *riba* (usury), *gharar* (uncertainty), *maysir* (gambling) just like the case of conventional Health Insurance Scheme (NHIS) which is not compatible with the Islamic Law, as such, Muslims are prohibited from taking part in it<sup>11</sup>. The majority of Jurists have agreed that the practice of National Health Insurance Scheme (NHIS) is not in line with the business philosophy under *Shari'ah*, therefore not allowed. As I have earlier mentioned, National Health Insurance Scheme (NHIS) by the regulation guiding its operation has the above-mentioned elements, therefore, makes it unacceptable by the Muslim.

By the National Health Insurance (NHIS) Act<sup>12</sup> There are various provisions of the Act required to be complied with by the beneficiaries, which have gross effect on the Muslim faith. These provision ranges from i) Provision of maternity care for not more than four live births; this is an indirect way of compelling adoption of family planning. ii) Registration of only four children of the beneficiary. iii) A condition that the children must be biological children of the beneficiary. Another area of concern is the non-accountability or non-refund of the contribution of the beneficiary over the years in the event that such beneficiary does not receive any medical care for the years that he/she has subscribed to the scheme. Adherence to all these operational guidelines can lead to involvement of Muslims in forbidden elements; *Gharar* (uncertainty), *Riba* (usury) and *Maysir* (gambling). Avoidance of these elements is essential in an insurance system acceptable by Islamic Law<sup>13</sup>. *Takaful* is the boycott set up to avoid the conventional insurance system, it is a system of insurance based on brotherhood and joint risk bearing mechanism among the *Ummah*.<sup>14</sup> Invariably, it is an agreement between a set of persons (s) to shoulder financial losses or the need of any of them by contributing funds.<sup>15</sup> It could also be described as the *Shari'ah* based insurance wherein group of individuals mutually concede to taking up the finances of any of them against any loss or damage in relation to life.<sup>16</sup> The Prophet (S.A.W) was narrated by *Abu Huraira* to have

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<sup>11</sup> M. N. Shafique, N. Ahmad and H. Ahmad, 'A Comparative Study of the Efficiency of Takaful and Conventional Insurance in Pakistan,' IJAR, (Vol2. No. 5, [2015] p2

<sup>12</sup> National Health Insurance Act 2005

<sup>13</sup> Y.A Mu'az, and others, ' Nigerian National Health Insurance Scheme Under the Islamic Respective: A Literature Review', *Journal of Education and Social Science*. Vol. 6 [February 2017] ISSN 2289-1552 .

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> M.A Kasaure, 'Extending the Theory of Planned behavior to explain the Role of awareness in accepting Islamic Health insurance (takaful) by microenterprises in northwestern Nigeria' *JLABR*,. Vol. 10. No.4 [2019]

said; Whosoever removes worldly hardship from a believer, Allah (s.w.t) will remove from him one of his hardships on the Day of Judgment. Whosoever relieve a believer's distress of the distressful aspect of this world, Allah will rescue him from a difficulty of difficulties of the hereafter.<sup>17</sup>.

Islamic Health Insurance policy *Takaful*, embodies the concept of *Tabarru'* (donation) and may also take the form of *Waqf* (endowment), which makes it free from tendencies of involving in *Gharar* (uncertainty), *Riba* (usury) and *Maysir* (gambling). *Tabarru'* is the contribution made by one party voluntarily to deliver goods or services to another without due consideration or returns from the other party<sup>18</sup>. In *Takaful* policy, the participant makes a fund pool to be divided into two accounts. One for participants' saving, to be invested in a *halal* contract, and shall be available for collection, in addition to the profit made from the investment, in the event of termination of membership, or at the maturity stage of the contract. The other account is the *Tabarru'* fund, which on agreement shall be used or spent in rescuing members in case of any health challenges or losses<sup>19</sup>.

## **2. MODUS OPERANDI OF NATIONAL HEALTH INSURANCE SCHEME**

Health Insurance Scheme in Nigeria is put in place to cover the medical and surgical operating cost of an insured individual, based on the brand of health insurance subscribed to by such an individual. Health insurance is a situation where the healthy is rendering care to the sick by creating a periodic contribution of money to cater for the medical need of the sick when the need arises.<sup>20</sup>. The National Health Insurance Scheme pools regular contributions to the health care provider for specific health care services.<sup>21</sup>. It is this contribution that entitled the insured person, spouse, and four biological children under the age of 18 years to health care services.<sup>22</sup>. The overall purpose of establishing the National Health Insurance scheme (NHIS) is to ensure the health status of the citizen through financial protection and customer satisfaction, therefore, the Health Maintenance

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<sup>17</sup>Sahih Muslim, Hadith 36.

<sup>18</sup> Ibid (n11)

<sup>19</sup> Ibid

<sup>20</sup> I.E Emelda, and O.O Charles, 'Relationship between enrollees' satisfaction of Health Needs and the Functions of HMOs in the National Health Insurance Scheme: A Case study of FCT, Abuja. KIUIJH [2020] p72

<sup>21</sup> Ibid

<sup>22</sup> Ibid

Organization (HMO) should ensure National Health Insurance scheme (NHIS) subscribers derive satisfaction with the health service delivery and the cost implication is also on the lower side.<sup>23</sup>.

However, it should be noted that high-risk diseases like cancer, hepatitis, heart disease, among others, which have high cost implications are not covered by the scheme. HIV patients are only entitled to counseling, health Education and treatment of simple Opportunistic infections<sup>24</sup>. An insured having been registered under the scheme, will affiliate himself with the NHIS accredited Health Maintenance Organization of his choice, who will provide him with a list of NHIS approved Health care Providers (public and Private). Under which the principal insured will register him/herself and dependants. Having done that, he will be issued with a personal identity number (PIN). In the event of sickness or medical attention is needed, the card will be presented to the chosen primary Health Care Provider for medical treatment. It should be noted that an insured will not be able to access medical attention until after 60 days, which is considered as a waiting period by the (NHIS) operational Guideline. It is said to be a documentation period. This time is unreasonably too long<sup>25</sup>. In practice, the insured will always pay 10% of every service received inclusive of drug dispensations, without which the insured will not be able to access medical attention<sup>26</sup>.

### **3. FACTORS AFFECTING EFFECTIVENESS OF NHIS**

As important and beneficial the scheme is to the masses of beneficiaries, and also overwhelmingly embraced by the majority, research has shown that it has suffered low patronage by the Muslim majority. This is due to a certain portion of the operational guideline of the scheme. One of the guidelines provides that maternity care can only be given to a maximum of four live births. Restricted the dependant beneficiary to the maximum of four, although there is a proviso that allows registration of more dependants upon payment of a prescribed fee, and that the children must be the biological children of the beneficiary<sup>27</sup>. Another area of concern is the non-accountability or non-refund of the contribution of the beneficiary over the years in the event that such beneficiary

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<sup>23</sup> Ibid

<sup>24</sup> National Health Insurance Scheme (NHIS) Operational Guideline (2020)

<sup>25</sup> O. A Ayanleye, 'A Legal Appraisal of National Health Insurance Scheme in Nigeria'. *Journal of public and Private Law*, Faculty of law. Nnamdi Azikwe University, Awka, Vol. 5, [ 2013]. P8

<sup>26</sup> Ibid

<sup>27</sup> Ibid (n25) Para 1.1.1(1.1.1.4),

does not receive any medical care for the year. Furthermore, this scheme houses certain elements which their prohibition is fundamental under the *Shari'ah*, if they exist in any transaction entered into by a Muslim. These are: *Riba* (Usury), *Gharar* (Uncertainty) and *Mysir* (Gambling).

### **3.1 NHIS AND THE REGISTRATION OF ONLY FOUR BIOLOGICAL DEPENDANTS.**

Looking at this from the perspective of the part of the world we belong to, we are African, where children of a brother are seen as that of another brother, children brought in by a woman into another marriage are seen as that of the new husband and so on. From the Islamic perspective, as soon as one assumes the care of any dependants, he/she is obliged to treat them as his/her own. The Prophet (S.A.W) said none of you is a believer until you want for your brother what you want for yourself.<sup>28</sup> Dependants are expected to be given fear and equal treatment by their parent/guardian.<sup>29</sup> This feature of the National Health Insurance scheme is not acceptable under Islamic Law because of its discriminatory feature, the children are expected to be given equal treatment. In this case, any beneficiary that has more than four dependents will have to select just four out of whatever number of dependents he/she has. Islam warns against unequal treatment amongst people, even among one's children/dependants. Reason being that, such an act may amount to hatred amongst the dependants, or even result in ill treatment towards the parents in their old age, hence, it is crystal clear that the aftermath of this may be vital.<sup>30</sup> It is a philosophy in the Islamic jurisprudence which states that, “repelling evil is preferable to securing a benefit. (*al-madarrah muqaddam alajalb al-manafi*).<sup>31</sup>

### **3.2 MATERNITY CARE OF ONLY FOUR LIVING BIRTH**

This part of the operational guideline is a typical measure of advocating family planning. Islam is a religion that encourages massive procreation, if we take provision of means of sustenance as the yardstick for embracing family planning that will automatically render it contradictory to *Shari'ah*. Allah (SWT) says, ‘Do not kill your children for fear of poverty; we give them sustenance and

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<sup>28</sup> Hadith 13, 40 hadith of an-Nawawi

<sup>29</sup> S. Arfat, ‘Islamic Perspectives of Children’s Rights: An Overview’ *ASIAN Journal of Social Sciences and Humanities*, Vol. 2, No. 1, [February 2013]

<sup>30</sup> Ibid

<sup>31</sup> S. Kayadibi, *Istihsan The Doctrin of Juristic Preference in Islamic law*. (Islamic Law Trust , Kuala Lumpur, 2010) p 40

yourselves (too); surely to kill them is a great wrong'<sup>32</sup>. Thinking in this direction will be like ascribing to oneself the power to provide sustenance to the children<sup>33</sup>. Sheikh Al-Azhari said, it is not Islamic to restrict the number of our children in fear of poverty, rather we should work hard and pray for Allah's mercy<sup>34</sup>. Allah (SWT) says; 'But when the prayer is ended, then disperse abroad in the land and seek of Allah's grace, and remember Allah much, that you may be successful<sup>35</sup>. Though family planning is not condemned under the Islamic Law, when it is on the health factor and not on the provision of sustenance<sup>36</sup>. In this regard, the restriction in procreation will be in the target to have a moderate family to fit in for the requirement of the scheme (NHIS), as such it is not a welcome idea under the Islamic Law. Islam is a religion that encourages massive procreation. On the authority of *Anas* from [*Al-Imam Ahamad ibn Hibban* who reported that the Prophet (S.A.W) said; 'marry the loving and productive women, I shall count on your number among the prophets on the Day of Resurrection'<sup>37</sup>

#### 4. CONSTITUENTS OF ISLAMIC LAW VIS A VIS NHIS

##### 4.1 *RIBA* (USURY)

Globally, hardly will any financial transaction be done under the conventional system without it having an atom of *riba*, for this reason, it is described as the blood in the body economy and development<sup>38</sup>. *Riba* is derived from the Arabic word *riba-wa* which means, to grow, to increase, to exceed, to be more than. *Riba* is defined as an undue increment in capital, for a kind of proceed which was not worked for. It is notoriously referred to as usury/interest, which has no corresponding value<sup>39</sup>. Further, it could be defined as the excess on the principal sum in the light of Islam<sup>40</sup>. From the perspective of another author, *Riba* in *fiqh* means an accumulation of excess

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<sup>32</sup> Surah Al-Isra 17:31

<sup>33</sup> M.A Ambali, *The Practice Muslim Family Law In Nigeria*. (3<sup>rd</sup>edn, Princeton 2014) p 260

<sup>34</sup> Ibid

<sup>35</sup> Surah Jumua 62:10

<sup>36</sup> M.A Ambali *The practice of Muslim Family Law in Nigeria*, (3<sup>rd</sup>edn, Princeton 2014) p 260

<sup>37</sup> Ash- Shawkani, *A Comprehensive Islamic jurisprudence, Book of Nikah*, (Dakwah Corner Bookstore 2019) p 309 at 311.

<sup>38</sup> H.J Razali, *Islamic Law on Commercial Transaction*, (CERT publication 2009. Kuala Lumpur, Malaysia) p 149

<sup>39</sup> Ibid

<sup>40</sup> M. Semir, ' prohibition of Riba (Interest) and Insurance in the light of Islam', Vol. 21. No. 2, Islamic Research Institute, International Islamic University Islamabad available on <https://www.jstor.org/stable/20847200>. Accessed on 12/11/2021.

in the transaction or exchange of an asset<sup>41</sup>. In the *Shari'ah* legal terminology, it is defined as the excess, surplus, or increase<sup>42</sup>. In Law, this is obtainable in all economic sectors; Agric, trade, and commerce, and health have not been left out<sup>43</sup>. Under no circumstance will *Riba* be accommodated in any transaction under Islamic Law, this signifies that *Riba* is prohibited in all ramifications under the Islamic Law by the *Qur'an* and *hadith* of the noble Prophet (saw)<sup>44</sup>. Allah (s.w.t) in His glorious book admonished the believers to fear Him and neglect *Riba* if they are true believers<sup>45</sup>. Also, the prophet (S.A.W) in his farewell sermon said to the Ummah that all the *Riba* of *Al-Jailiyyah* has been annulled, and the first *Riba* that was annulled is our *Riba*. He further mentioned that *Riba* is prohibited because it is thought to have a bad impact on society<sup>46</sup>. It was also reported on the authority of Abdullah Ibn Mas'ud that the messenger of Allah said; Any community where usury and adultery become their way of life, the punishment of Allah is justified against them<sup>47</sup>.

#### **4.1.1 Relationship Between *Riba* (Usury) And Health Insurance**

Conventional Insurance being the first to be introduced to the world has gained embrace by the most people, Muslim inclusive<sup>48</sup>. However, with the study of the Islamic scholars, it is revealed that conventional insurance involves *Riba*. Therefore, it is not allowed under the Islamic Law. Conventional insurance houses *Ribaa-fadl* in the sense that the insured does not get back exactly what has been contributed, he either gets more or less. This means that the insurance company will pay more than the insured has contributed in the event of catering for the medical expenses. Adversely, the company may not pay anything if the insured does not have any medical challenge. In this case, all the contributions made by the insured in anticipation of any medical challenge will now go to the pocket of the insurance company.

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<sup>41</sup> E, Erdem, 'Analyzing Gradual Revelation and wording of *Riba* (interest) in the Holy Qur'an, considering the commerce, Finance & Infaq System of Islam'. *Turkish Journal of Islamic Economics*, August, 2017.

<sup>42</sup> Y.Y Banbale *Islamic Law of Commercial and Industrial Transaction*, (Malthouse Law Books, 1<sup>st</sup> Publish 2007) p161

<sup>43</sup> Ibid

<sup>44</sup> R. A Abdurrahman, *The Philosophy of Islamic law of Transactions*, (CERT publication, Kuala Lumpur, Malaysia, 2009) p124

<sup>45</sup> Surah Baqarah Ch2:278

<sup>46</sup> R. A Abdurrahman, *The Philosophy of Islamic law of Transactions*, (CERT publication, Kuala Lumpur, Malaysia, 2009) p124

<sup>47</sup> Sahih Ibn Hibban, Hadith 4202

<sup>48</sup> KMZH Salim, 'Juristic View on *Riba*, *Gharar* and *Qimar* in Life Insurance'. *ICR Journal* [2016]. Available on [icrjournal.org](http://icrjournal.org). p 206



## **4.2. MYSIR (GAMBLING)**

This is referred to as a game of chance: it is derived from the Anglo-Saxon *gamen* and *gama* meaning sport or play<sup>49</sup>. This generally denotes the execution of a decision based on risk and uncertainty; it is playing a game of chance for money or taking risk for some unknown advantage. Gambling is best described in the economic as an activity which involves gain, loss, risk, and uncertainty<sup>50</sup>. However, these definitions are so narrow to the extent that it reveals that gambling is not only limited to game playing, but also relates to certain commercial activities<sup>51</sup>. So is its relationship with the subject matter of this research. Allah explicitly prohibits any form of gambling in the following words of His: They ask you about intoxicants and game of chance. Say: in both of them there is a great sin and means of profit for men, and their sins are greater than their profit. And they ask you as to what they should spend. Say: what you can spare. Thus does Allah make clear to you the communications that you may ponder<sup>52</sup>. The Shaitan only desires to cause enmity and hatred to spring in your midst by means of intoxicants and game of chance, and to keep you off from the remembrance of Allah and from prayer. Will you then desist<sup>53</sup>. A typical example of gambling is the uncertainty of the timing of the benefit of a pure life insurance<sup>54</sup>.

### **4.2.1 NEXUS BETWEEN MYSIR (GAMBLING) AND HEALTH INSURANCE**

*Mysir*, which means gambling as explained earlier, is a game of chance which both the insured and the insurance company are into. It often happens that one of the parties will benefit in the loss of another<sup>55</sup>. In the case of Health Insurance, the insured who has been contributing to the insurance company's pocket in preparation for medical peril, may not need medical attention, which is cost-impacting, they will lose to the insurance company as there will be no reimbursement of such fund by the insurance company<sup>56</sup>. On the other hand, if the insured needs medical attention, the

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<sup>49</sup> H. Bin Salamon & others, 'Speculation: The Islamic Perspective; A Study on Al-Maisir (Gambling), Mediterranean' *Journal of Social Science*, Vol. 6 No. 1 MCSR Publishing January, [2015] p 4

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Surah Al-Baqarah 2:219

<sup>53</sup> Surah maeda. 5:91

<sup>54</sup> Uddin Md Akther *Islamic Finance: Prohibition of Riba, Ghara and mysir*. (INCEIF, Kuala Lumpur, Malaysia. October 2015). P5

<sup>55</sup> KMZH Salim, 'Juristic View on Riba, Gharar and Qimar in Life Insurance'. *ICR Journal* [2016]. Available on [icrjournal.org](http://icrjournal.org). p 206

<sup>56</sup> Ibid p 210

insurance company will be the one to bear the huge cost, in addition to the token which the insured has been contributing to clear the medical cost implication, which makes a gain to the insured as against the insurance company<sup>57</sup>. However, in most cases, health challenges that have huge financial implications are not covered by the scheme, which means the insured rarely gain an edge over the insurance company. This invariably means that both parties are looking forward to a benefit which is far more than their various commitments/contribution. The implication is nothing but gambling and this is prohibited under the Islamic Law<sup>58</sup>.

#### **4.3 GHARAR (UNCERTAINTY)**

In Islamic jurisprudence, Gharar is recognized as uncertainty<sup>59</sup>. It means uncertainty, risk, hazard, deception or misrepresentation. It includes exposing oneself or another, or one's property or another to jeopardy<sup>60</sup>. In proper definition, it means a state of being near to destruction or wreckage resulting from getting oneself involved in risk<sup>61</sup>. Scholars have proffered different definitions for *Gharar* based on their perception. According to Hanafi and Shafi' schools of thought, *Gharar* is defined as uncertainty over the existence of the subject matter of sale, further; it is viewed to mean doubtfulness or uncertainty, i.e not knowing the probability of occurrence of something<sup>62</sup>. In the opinion of scholars in the Zahiri School of thought, *Gharar* means ignorance of the unknown subject matter<sup>63</sup>. Al-Sarakhsi defines *Gharar* as a situation where the consequence of a thing is concealed<sup>64</sup>. *Gharar* and *Mysir* are two similar elements prohibited under Islamic transaction, both are nothing but hoping in the uncertainty. Therefore, it lies that the legality of prohibition of *Gharar* can be deduced from the words of Allah that say, 'O you who believe! Intoxicant and game of chance and (sacrificing to) stone set up and (dividing by) arrows are only an uncleanness, the Shaitan's work; shun it therefore that you may be successful<sup>65</sup>, 'The Shaitan only desires to cause enmity and hatred to spring in your midst by means of intoxicants and game of chance, and to keep

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<sup>57</sup> Ibid

<sup>58</sup> M.M Billah, 'Islamic insurance (Takaful)', Selangor; Ilmiah Publishers Sdn. Bhd., [2003], p 63

<sup>59</sup> A. Al-Saati, 'The Permissible Gharar (Risk) in Classical Jurisprudence, *J.K.AU: Islamic Econ*, Vol. 16 No. 2 [2003], p6

<sup>60</sup> Ibid

<sup>61</sup> Ibid

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Surah Maeda. 5:90

you off from the remembrance of Allah and from prayer. Will you then desist? Furthermore, some scholars have also deduced the prohibition of *Gharar* buy liking it with *Al-Batil* (vanity) as mention in the *Qur'an*; ‘And do not swallow up your property among yourselves by false means, neither sees to gain access thereby to the judges, so that you may swallow up part of the property of men wrongly while you know<sup>66</sup>’. In addition, the Prophet (SAW) does forbid many transactions during his lifetime, when he sees that there is an atom of uncertainty, it. E.g. purchase of an unborn animal in the mother’s womb, the sale of milk in the udder without measurement, the sale of war booties before sharing<sup>67</sup>.

#### **4.3.1 RELATIONSHIP BETWEEN *GHARAR* (UNCERTAINTY) AND HEALTH INSURANCE**

*Gharar* being essentially a means of benefit based on risk and uncertainty, it is an element prohibited by Islamic Law. Though human life is full of risk and uncertainty, notwithstanding, it is not a yardstick to make lawful what has been prohibited under the Islamic Law<sup>68</sup>. Partaking in the conventional Health Insurance will subject one to involvement in *Gharar*, because the scheme is designed to cater for an unknown event, an event whose occurrence is not certain. Notwithstanding its uncertain feature, the beneficiary, who is the insured, will be made to make contribution of a certain sum of his earnings in the preparation for the occurrence of an event which is not certain. In the event that the insured or any of his dependents needs medical attention that falls on a high financial cost implication, the insured will only pay a certain percentage and the company will bear the huge part of it, and that brings a gain to the insured as against the insurance company.<sup>69</sup> In the reverse, if there occurs neither the insured nor the dependants need medical attention, the insured will be losing to the company, because there will be no make up for the sum he has been contributing.<sup>70</sup> Though human beings are prone to one kind of sickness of the order, notwithstanding that, no one can say this is the time it can occur, and this uncertainty renders the scheme to be inconsistent with the Islamic Law.<sup>71</sup>

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<sup>66</sup> Surah Al-Baqarah. 2:188

<sup>67</sup> Ibid (n55) P4

<sup>68</sup> Ibid (n56) 208

<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> M.M Billah *Islamic insurance (Takaful)*, Selangor; (Ilmiah Publishers Sdn. Bhd, 2003), p 45

## 5. MEANING AND DEFINITION OF *TAKAFUL* (ISLAMIC INSURANCE)

The term *Takaful* is an infinity noun which is derived from the Arabic root verb *Kafala*, *Kafaala*, or *Akfal*<sup>72</sup>. Meaning ‘to guarantee’ or to support’. *Takaful* is also Arabic word meaning ‘guaranteeing each other’ or ‘joint guarantee’<sup>73</sup>. In the same vein, *Takaful* is define as a shared-responsibility, joint-guarantee, mutual security, joint indemnity, mutual assurance or surety and cooperative assurance. Looking at the *Takaful* concept from the literal point, it means mutual assurance or taking joint responsibility<sup>74</sup>.

### 5.1. ORIGIN AND LEGALITY OF *TAKAFUL* UNDER *SHARI’AH*

The concept of *Takaful* Islamic insurance has been in existence since ancient times before the advent of Islam among the people of the past<sup>75</sup>, and has gotten its justification from the glorious *Qur’an* as a concept of cooperation, brotherhood, solidarity and cooperative help, ‘...Cooperate in righteousness and piety...’ are the words of the glorious *Qur’an*<sup>76</sup>. Also the prophet (S.A.W) approved of it. It was referred to as the *Aqila* system. It is a system practiced among the Muslims of Mecca and Madinah which involved mutually helping and sharing in the financial burden of another. This is done without seeking any contractual payment and it is not commercial<sup>77</sup>. This system is practiced based on brotherhood and mutual responsibility to contribute to the interest of the needy as the need arises. An example of it can be deduced from the contributions made by the paternal relative of an accused person to pay the *Diya* (blood money) to the relatives of the victim in case of unintentional killing involving two different tribes<sup>78</sup>. This has been the practice amongst the companions of the prophet (S.A.W). In the modern world, *Takaful* has gone beyond relatives helping or sharing one another’s responsibility, but has grown to cooperate with social work, to help friends and neighbors in big financial difficulties<sup>79</sup>. Islam, being an advocate of charity and mutual assistance, shows that *Takaful* is not

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<sup>72</sup> Y.Y Bambale , *Islamic Law of Commercial and Industrial Transaction*, (Malthouse Law Book 2007).

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> M. B Aliyu and I. M Ahmad ‘*Shari’ah Compliant insurance Product: An Appraisal of Problems and prospect of Takaful-insurance in Nigeria*’, *UnilorinShari’ah Journal*, Vol.2 No.1 [June 2014]

<sup>76</sup> surah Maaidah vs 2

<sup>77</sup> S. Zainuddin and I.N Md Noh, *An Overview of the Emergence of Takaful: An Islamic type of Insurance Policy*, *Journal of Business and Economics Research* 2013, P112. Available on (<http://www.sciencepublishinggroup.com/ijber>) accessed on 1/1/24

<sup>78</sup> Ibid

<sup>79</sup> Ibid

strange and not in any way conflict with *Shari'ah*. Allah says help yourself in righteousness and piety but not in sin and rancor, so fear Allah for He is strict in punishment<sup>80</sup>. Therefore, *Takaful* scheme (relying on the principles of cooperation) aims at undertaking a joint-responsibility towards material safeguarding for the widow, orphans, helpless ones in the society, and the ones who face unexpected losses or damage to property resulting from unpredicted happenings<sup>81</sup>. Allah (s.w.t) in His word has indeed encouraged us to seek a better life in this world and the life after<sup>82</sup>. The Qur'an says '... our Lord has given us comfortable life in both this world and the hereafter...' <sup>83</sup>. It suffices to say that having an insurance policy will promote cooperation, build brotherhood and very strong solidarity<sup>84</sup>. The *Takaful* Act 1984 (Malaysia) in trying to analyze the rationale behind establishment of *Takaful* provides; 'it is a scheme based on brotherhood, solidarity and mutual assistance, which provide for mutual financial aid and assistance to the participants in case of need, whereby the participant mutually agreed to contribute for the purpose'<sup>85</sup>.

## 5.2. OPERATION OF TAKAFUL

*Takaful* Islamic Insurance operates with the use of *Tabarru'* (donation) method. *Tabarru'* is the equivalent of premium; the amount payable by a participant to an operator under a *Takaful* contract.<sup>86</sup> This method is more apparent in the general *Takaful*. The participant will contribute to be managed by the *Takaful* operator.<sup>87</sup> These contributions (pool of funds) will be divided into two separate accounts, one will be the participant account (savings account), and the other will be the participant special account (*Tabarru'* account)<sup>88</sup>. The sum in the participant's *Tabarru'* account as undertaken by the participants is normally regarded as a donation to fellow participants in the event of any loss.<sup>89</sup> However, if at the end of the specified period there was no need for the donated sum or it was not exhausted, the *Takaful* operator will share the surplus with the participant.<sup>90</sup>

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<sup>80</sup> Surah Maeda 5:2

<sup>81</sup> Ibid (n77)

<sup>82</sup> Ibid p 43

<sup>83</sup> Surah Al-baqarah 2:201

<sup>84</sup> Ibid (n77)

<sup>85</sup> Section 2 of *Takaful* Act 1984 (*Malaysia*)

<sup>86</sup> Sec. 3.0 *Takaful* Operational and Registration Guideline 2015

<sup>87</sup> Ibid (n79)

<sup>88</sup> Ibid

<sup>89</sup> Ibid

<sup>90</sup> Ibid

However, if the *Tabarru'* fund is not sufficient to cater for the claim of any participant, no recourse will be made to the participant's saving account, but the *Takaful* operator will grant a temporary interest free loan (*Qard Hasan*) to cover the deficiency, and this will be paid back in the future surplus.<sup>91</sup> This serves as an incentive for the operator to properly manage the fund. The *Tabarru'* account is to meet the loss of the fellow participant in any event of loss or peril; the participant will be compensated based on the pre-agreed formula. If the death of the participant occurs before the specified term or period of the *Takaful* contract, the family of the deceased will get the amount in the participant's account as if he continued contribution until the end of the *Takaful* contract.<sup>92</sup> However, if the participant withdraws before the end of the specified period, they only get the amount in the participant account.<sup>93</sup>

## 6. *TABARRU' AND WAQF AS A TOOL FOR OPERATING TAKAFUL*

*Tabarru'* (donation) is the equivalent of premium; the amount payable by a participant to an operator under a *Takaful* contract.<sup>94</sup> This method is more apparent in the general *Takaful*. The participant will contribute to be managed by the *Takaful* operator.<sup>95</sup> These contributions (pool of funds) will be divided into two separate accounts, one will be the participant account (savings account), and the other will be the participant special account (*Tabarru'* account)<sup>96</sup>. The sum in the participant's *Tabarru'* account as undertaken by the participants is normally regarded as a donation to fellow participants in the event of any loss.<sup>97</sup> However, if at the end of the specified period there was no need for the donated sum or it was not exhausted, the *Takaful* operator will share the surplus with the participant.<sup>98</sup> However, if the *Tabarru'* fund is not sufficient to cater for the claim of any participant, no recourse will be made to the participant's saving account, but the *Takaful* operator will grant a temporary interest free loan (*Qard Hasan*) to cover the deficiency, and this will be paid back in the future surplus.<sup>99</sup> This serves as an incentive for the operator to

<sup>91</sup>Safder Jaffer and others 'Takaful (Islamic Insurance): Concept, Challenges, and opportunities'. (Milliman, November, 2010) p13.

<sup>92</sup> Ibid (n79)

<sup>93</sup> Ibid

<sup>94</sup> Ibid (n88)

<sup>95</sup> Ibid (n79)

<sup>96</sup> Ibid

<sup>97</sup> Ibid

<sup>98</sup> Ibid

<sup>99</sup> Ibid (n101)

properly manage the fund. The *Tabarru'* account is to meet the need of the fellow participant in any event of loss or peril; the participant will be compensated based on the pre-agreed formula. If the death of the participant occurs before the specified term or period of the *Takaful* contract, the family of the deceased will get the amount in the participant's account as if he continued his contribution until the end of the *Takaful*.<sup>100</sup> However, if the participant withdraws before the end of the specified period, they only get the amount in the participant account.<sup>101</sup> This is how *Takaful* is being operated under the *Shari'ah*, however, Waqf could also be adopted, which to some scholars, is the best method that can completely remove *Gharar* in the *Takaful* operations<sup>102</sup>.

## 7. DEFINITION OF *WAQF* (ENDOWMENT)

*Waqf* (endowment) is generated from the root word *wa-qa-fa*, it is literally defined to mean, to stop, to put to rest, to suspend, to retain or to detain something<sup>103</sup>. Technically, according to Ibn *Qudamah* of the *Ambali* school of thought, *waqf* is defined to mean the retention of a thing which itself is the origin, and donate its usufruct for the benefit of others<sup>104</sup>. In the *Maliki* school of thought, it is the act of donating the usufruct of a thing for the benefit of another while the thing itself still exists, and the ownership of it remains with the owner even if it is virtual<sup>105</sup>. The *Shafi'* school definition of *waqf* is different from that of other schools. It is defined to be detention of property which might be used, but its corpus remains by withdrawing the right of disposition on it, delivered to an existing and permissible objection<sup>106</sup>. For the *Hanafis*, *waqf* means the retention of a particular property by the owner still having the title, but only to the profit or usufruct of such property for charitable purpose<sup>107</sup>. According to *Ibn' Arafah*, it is the donation of accumulated benefit or usufruct of a property of a person, whose ownership of such property is not actual<sup>108</sup>. In the view of Sayyid Sabiq it is the retention of the proceeds of a property and devoting it to the

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<sup>100</sup> Ibid (n79)

<sup>101</sup> Ibid

<sup>102</sup> Ibid (n101) p15.

<sup>103</sup> M,A Adam, 'Towards an effective Investment in Properties in Nigeria', Proceeding of the (International Conference on Masjid, Zakat and Waqf , Kuala Lumpur, Malaysia IMAF2014). P116

<sup>104</sup> R. A. H Abdurrahman, *philosophy of Islamic law of Transactions* (CERT publication 2009. Kuala Lumpur, Malaysia) p177

<sup>105</sup> Ibid

<sup>106</sup> Ibid

<sup>107</sup> Ibid

<sup>108</sup> Ibid (37) p 412

course of Allah<sup>109</sup>. *AbubakarJibrilAl-Jazairi* defined it as the withholding of proceeds of a property, the property which ceases to be subject of inheritance or being sold. The proceeds of such property are to be solely expended on the course upon which it is endowed<sup>110</sup>.

From the above definition of the various schools of thought, it implies that *Waqf* is the setting aside of a property in perpetuity by the owner, without giving it to a particular person, but to use the usufruct of such property as charity for another. The property ceases to be part of the donor's other properties, subject to inheritance after his demise; as such, it can neither be sold nor be inherited by his heirs.<sup>111</sup> In *Waqf*, title/ownership of property involved is not transferred to any human being but the Almighty.

## 8. CONCLUSION

This paper elucidates on the operational mode of Health Insurance Scheme (NHIS) under the conventional system as it operates in Nigeria, *vis a vis* its inconsistency with the provision of Islamic Law. It has been established that the scheme is neither acceptable nor condemned; this is due to its involvement in *riba* (usury), *Gharar* (uncertainty, and *Mysir* (gambling). All these were explained *vis a vis* their relationship with the NHIS. However, the scheme haven not been entirely condemned, Islamic Law has put in place mechanism through *Tabarru'* and *Waqf*, to serve the same purpose that to serve, which is to mitigate hardship on people when it comes to financial expenses incurred through loss and medical care assessment, through a method or mechanism devoid of any prohibitory element as contained in the conventional insurance. Therefore, if *Tabarru'* and *Waqf* are adopted as a method of operating Health Insurance, it will benefit the masses generally, because the foundation benefit of *Waqf* is meant to benefit anyone in need and not necessarily the rich or poor. It goes down to the grass root, to serve people who are seriously in need. Under the conventional Insurance practice, what is obtainable in operation is sales and purchase which account for its involvement in *riba* (usury), *Gharar* (uncertainty, and *Mysir* (gambling). From the effort of this research, it is hereby recommended that the sale and purchase

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<sup>109</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> Ibid



contract policy, which accounts for the prohibition of the conventional Insurance practice, be substituted with *Tabarru'* (donation) and *waqf* (endowment).