

Islamization of Insurance A Religio Legal Experiment in Malaysia
Religion and Law Review, Vol-2, Issue-I, Yr- 1993, Pgs- 16-40.

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Introduction

This paper examines the Malaysian experience of achieving Islamization of insurance through the institution of *takaful*, which is developed as an alternative and not a substitute for the still available conventional insurance. The discussion is made in a broader perspective which briefly touches upon such issues as traces of the idea of insurance in the Islamic history, status of insurance in the Arab world, the attitude of Muslim scholars towards insurance and the objections of Muslims against modern insurance. These issues are discussed briefly as they serve as background material only and have already been dealt with in detail elsewhere.

It may be appropriate to quickly remind ourselves that insurance is:

"A contract whereby one person, called the 'insurer', undertakes in return for the agreed consideration, called the 'premium', to pay to another person, called the 'assured', a sum of money, or its equivalent, on the happening of a specified (uncertain) event.^{i[1]}"

An insurance contract is 'aleatory' because of its inherent uncertainty as to the happening or non-happening of the insured event, or the uncertainty attending to the time of its happening^{ii[2]}. Lord Mansfield, therefore, calls insurance as a "contract upon speculation^{iii[3]}" However, it is regarded as legally enforceable on public-benefit considerations.

II. Insurance in Islamic History

In the Islamic history, the idea of insurance was mainly reflected in the various schemes of mutual help and assistance whenever a calamity or misfortune struck a person. In some cases it was an arrangement of compensating for the evil deeds of a member of group or tribe by all the other members, or by an individual rich member who volunteered to do so, 'Insurance' was therefore, not a business for profit-making but a means to help the needy on a voluntary gratuitous basis.

'*Aqila* was a well-known pre-Islamic notion, which Islam also approved, where all the members of a family or tribe mutually pooled their resources to ransom a member of the family or tribe who had committed a murder. They helped to pay the *diya* (blood-money) to the next-of-kin of the person killed in order to save the culprit from retaliation^{iv}[4].

Merchants of *Makkah* used to have a scheme to compensate business-expedition losses and also those who suffered through natural hazards. Says Afzal-ur-Rahman:

"Even before the Ministry of *Muhammad* the *Makkan* merchants had formed a fund to help the victims or survivors of natural hazards or disasters during their trading journeys to Syria, Iraq and other countries. It so happened that once, when *Muhammad* was engaged in trade in *Makkah*, a whole trading caravan, apart from a few survivors, was lost in the desert. The managing board, composed of the members of the contributory fund, decided to pay the price of the merchandise, including the value of camels and houses destroyed, to the survivors and families of those who perished in the disaster out of the common fund. *Muhammad*, who was trading with the capital of *Khadijah*, had also contributed to that fund from his profits^v[5]."

Daman khatr al-tariq (surety for hazards on highway) is cited by Mustafa al-Zarqa in support of insurance. If one person asks another to take a particular route and says it is safe and he stands surety for any loss, then he would be so liable if some loss is incurred by the second person^{vi}[6].

Some other ways in which the idea of mutual help and amity was realized were:

- (i) *'aqd muwalat* (contract of mutual amity);
- (ii) *hulf* (confederate)—where all mutual help was guaranteed through an agreement between persons; and
- (iii) the acceptance of a person by a tribe or family as one its own class or community for every calamity that might come to him.

It is recorded by Ibn Abidin that during the last century there was a marine insurance known as *sowkrah* practiced in the Ottoman Empire:

"It is customary for merchants that when they hire ships from some *harbi* (a non-Muslim of a non-Muslim country), then in addition to freight charges an additional specified amount is paid to enable the *harbi* to arrange with another *harbi* the safe transportation of the cargo. The *harbi* who peacefully resides in the Islamic country acts as agent responsible for shipping of cargo. If the cargo suffers some loss as a result of fire, ship-wreck, or piracy, then the (*harbi*) agent makes good the loss in lieu of the fees paid (earlier for this purpose)"^{vii}[7].

Later on the Ottoman Maritime Code of 1863 and the Ottoman Law of Insurance 1874 gave statutory shape to the marine and non-life insurance respectively. The recognition given to the non-life insurance was under the belief that only the life-insurance concept clashed with Islamic principles and thus was *haram*^{viii}[8].

III. Insurance in Arab World

Colonization brought modern insurance to the-Islamic world. Gradually in about a century's time insurance became generally available in the whole of the Arab world. It was not due to any popular or general acceptance of modern insurance by the Muslims who continued to reject it but because of the efforts of the western business interests to extend the facility of insurance to the Muslim world in order to cover their various risks. The generality of Muslims continued to remain aloof from insurance.

This fact is borne out by the statistics provided by an Arab insurance expert in a recent studyix[9]. According to him, although insurance business commenced in the Arab world in the late 19th century, yet by 1982 there were only 466 insurance companies (160 domestic and 306 foreign branch offices) in this region compared with 12,723 companies in the rest of the world. Compared with countries in the third world, the 466 of the Arab world are far behind Latin America's 1061 and Asian countries 769. Details may be seen in Tables I and II below:

Table Ix[10]

type of co.	total no.	%	total no. in the	O/Q
domestic cos.	160	34.3	10,146	79.7
foreign branch offices	306	65.7	2,580	20.3
	466		12,726	

Note : The 10,146 private domestic insurance companies operating world-wide have 2,580 foreign branch offices.

Table Iixi[11]

country group	domestic	%	foreign	%	total	%
Arab world	160	9.9	306	29.2	466	17.5
Latin America	771	47.8	290	27.6	1061	39.9
Asia (minus Arab states)	430	26.7	339	32.3	769	28.9
Africa (minus Arab states)	251	15.6	114	10.9	365	13.7

Though latest figures are not available, yet a fair estimation of the very poor showing of insurance in the Arab world may be had with the help of figures for direct income from premium for the six years 1974 to 1979. The sum total of life insurance, premiums

collected in the whole of Arab world during 1979 came to US \$157.4 million. The corresponding figure for the rest of the world was US \$15,200 billion, that is, a thousand times more than the Arab world.xii[12]

The fastest growth is recorded in marine and motor insurance. but it may be because generally in these areas insurance cover is a statutory requirement. However, "life insurance continues to be the least developed of all classes.xiii[13]"

As already noted above, the reason behind this negative attitude of Muslims towards insurance has been their objection that modern insurance-operation involves *riba*, un-Islamic trading, in things that are *haram*, *gharar* (uncertainty) and *maisir* (speculation).

These issues have occupied the minds of Muslims during the recent past and they took varying stands on these issues.

IV. Muslim Scholars on Insurance

The widely differing attitudes of Muslim scholars on the validity of insurance can be grouped under three broad categoriesxiv[14]:

- (i) those (including *Shia* jurists) that see nothing wrong in the basic principles underlying modern insurance. Notwithstanding ignorance (*jahl*) and uncertainty (*gharar*) provided it is free from *riba* (usury, interest)xv[15];
- (ii) those who find an element of gambling in all kinds of insurance, coupled with *riba* (interest) and *gharar* (uncertainty) and regard it as an unnecessary innovationxvi[16];
- (iii) those that approve general insurance but disapprove life-insurance as it involves gambling and *gharar* (uncertainty and pre-destination)xvii[17].

Some others appear to be inclined towards mutual insurance, or the insurance directly transacted by the Statexviii[18]. The exploitative element in commercial insurance makes it unacceptable to some of the scholarsxix[19]:

"It is possible to regulate commercial insurance in such a manner that it may become free of exploitation^{xx[20]}."

It is to be noted that all of our scholars are arguing in the context of the existing pattern of insurance business without examining the possibility of another alternative. At least in the case of Islamic countries the scholars could have presented to the governments a workable model of Islamic insurance. However, notwithstanding their lapse on this count, their persistence in highlighting certain defects in conventional insurance helped the later efforts towards its reformation.

In view of the fact that the objections of Muslims against insurance in its present form are very well-known, it is proposed to examine this issue very briefly.

The *Fatwa* Committee in Malaysia declared in 1972 that the life insurance as practiced in the country was unlawful as it had the element of *riba*, *gharar* and *maisir*^{xxi[21]}.

Similarly, the First International Conference (1976) on Islamic Economics held at *Makkah* (Saudi Arabia) resolved that:

"Commercial insurance as *presently practiced* does not satisfy the Islamic conditions for it to become acceptable.^{xxii[22]}"

Thus, what is unacceptable to Muslims is the insurance "as presently practiced" and not the idea of insurance as such.

A scanning of the existing literature brings out certain major objections against insurance^{xxiii[23]}.

Riba

Both the Holy *Quran* and the *Sunnah* prohibit *riba*^{xxiv[24]}. It is inherent in insurance contracts. In life insurance, the assured gets far more than he paid as premiums. Both in case he dies after paying only a few premiums, or even after paying all the premiums, he receives interest and dividends in addition to total premiums paid. In case of general insurance too, the amount paid to the assured on the happening of the event insured is far more than the premium amounts paid.

Generally the money collected through premiums is invested by the insurance company in interest-bearing deposits, un-Islamic business or dealings. This clearly attracts the prohibition against *riba* and further alienates Muslims from insurance.

The prohibition of *riba* is accepted by all the Muslim jurists and it is an absolute prohibition which covers simple and compound interest and productive as well as non-productive loans. In the words of the Holy *Quran*:

"Allah permits trading and forbids *riba*" [II: 275].

Even in case of productive loans, guaranteed return on capital is unjust, viewed against the uncertainties surrounding entrepreneurial profits^{xxv}[25].

Sometimes it is suggested that the prohibition of *riba* does not extend to non-Muslim countries, but this is not correct. No matter what may be the position under international law, a Muslim remains within the jurisdiction of Allah irrespective of the place of residence^{xxvi}[26].

Gharar

Gharar literally means risk. In the context of business-contracts it means uncertainty and consequent insufficient knowledge of the details of the contract. This is why *gharar* is mentioned along with *jahl mufdi ila niza* (ignorance likely to cause disputes). There are various Prophetic Traditions prohibiting *al-gharar*^{xxvii}[27]. Islamic jurists therefore insist on a very clear statement of every possible detail affecting each party to a contract. There is *gharar* in insurance as both the parties do not know their respective rights and liabilities till the occurrence of the insured event.

There is difference in juristic opinion on the tolerable level of *gharar*. A distinction is drawn between *gharar yasir* (minor Uncertainty) and *gharar Jahish* (excessive uncertainty). Contemporary Muslim thinkers assert that what the *Sunnah* prohibits is *gharar fahish* which is not present in the contract of Insurance.

"To the best of our knowledge, *Sunnah* does not forbid those transactions that fulfill genuine needs and are indispensable for certain desirable ends but which cannot always be altogether freed from indeterminacy or hazard ... In view of their usefulness uncertainties in them are to be tolerated.^{xxviii}[28] "

It is also an accepted principle of *usul al-fiqh* (Islamic jurisprudence) that "necessity" (*darura*) renders prohibited things permissible. *Maslaha* (public interest) may also provide justification for condoning minor uncertainties.

Majallah al-Ahkam-al-Adliyah (Mejelle), the Ottoman Civil Code, in Part II sets out certain rules from the *fiqh*^{xxix}[29];

21. "Necessity (*darura*) makes forbidden things harmless; and necessities are estimated according to their quantity."
22. "Whether a want (*hajat*) be general, or whether it be special, it is reduced to the degree of the necessity (*darura*),"

The legality of *bai' bil-wafa* (mortgage) is of this sort. Transactions of this sort were put in force on account of the then necessity, when debt became extensive amongst the people of Bukhara.

The importance of insurance and its indispensability in the modern life, and the absence of a viable alternative, brings it very near to *darura* (necessity).

However, every possible avenue to eliminate *riba* and to reduce the level of uncertainty and ignorance in an insurance contract must be explored before allowing it under the category of *gharar yasir* (minor uncertainty).

Maisir

The Holy *Quran*—11:219 and V::50 —'prohibits *maisir*. Insurance is sometimes equated with gambling, *maisir* or wagering. But some jurists counter this allegation by arguing:

"The financial motivation of gambling is provided by the gain in the event of winning, while in the case of insurance it consists in the desire to have protection against loss. The amount received by the insured cannot be considered as profit since it only provides him relief from the burden of loss that he has already incurred. The money won by the gambler is in the nature of profit^{xxx}[30]."

Risks can be divided into three categories:

- (i) business risks,
- (ii) pure risks, and
- (iii) optional risks.

Optional risks are undertaken in gambling and games of chance and are prohibited in *Shariah*. The first two necessarily involve risks of the type which are inherent in everyday life. Insurance aims at covering these risksxxxix[31].

Effect of nomination clause on mirath and wasiyah

Nomination clause in conventional life-insurance policy may enable a Muslim to violate rules of *mirath*, and *wasiyah*. The person nominated may be an heir and/or may end up getting more than one-third of the assured's estate. It is so because a nomination is made by the assured during his lifetime but takes effect on his death. As such it amounts to a bequest.

This is a valid objection and needs to be resolved. In a Pakistan case it was held by the Karachi High Court that the status of the nominee in life insurance is nothing more than an agent who receives the benefits on behalf of all the heirsxxxix[32]. A similar inference could be drawn in Malaysia on the basis of a Judgment relating to nomination made by a Malay Muslim *in* favor of his daughter to receive benefit from a society in case of his deathxxxix[33].

However, a Judgment of Suffian, J. has made such an assumption impossible. It was held in *Re Man bin Minhat deceased*xxxix[34] that the nominee (in this case, wife) takes absolutely and exclusively the benefit of insurance, which need not be distributed among the heirs of the deceased life-policy holder. Suffian, J. based his Judgment on section 23 of the Civil Law Act 1956. But this viewpoint is disputed and doubts are cast on the applicability of section 23 to situations like this. The National Council for Muslim Religious Affairs, Malaysia issued a fatwaxxxv[35] that the nominees of the funds in insurance, E.P.F., post office saving accounts, banks, and co-operatives would receive it on behalf of all the heirs. In view of the advisory character of the *fatwa*, the Attorney General's Department advised the state government to make suitable provisions in the relevant laws to carry out the spirit and objective of the fatwa. So far only Malacca

has made suitable amendments in line with the *fatwa*^{xxxvi}[36], but others may follow soon.

V. *Takaful*

In 1982 a Committee on the Setting up of an "Islamic Insurance Company in Malaysia" was set up by the government of Malaysia. It recommended the system of *takaful* based on brotherhood, solidarity and mutual assistance whereby the participants mutually agree to contribute for that purpose and the business of *takaful* is conducted in accordance with the principles of *Shariah*^{xxxvii}[37].

Takaful literally means joint-guarantee, a pact among a group of persons to indemnify a member of this group if he suffers a specified calamity or loss. The amount comes out of a common pool created with the individual contributions of participating members.

Takaful is based on the *Quranic* concept of *taawun* (mutual assistance). Allah enjoins upon Muslims:

"Help you one another unto righteousness and pious duty. Help not one another unto sin and transgression, but keep your duty to Allah."
— [V: 2]

The committee recommended the adoption of *takaful* as an acceptable Islamic form of insurance and suggested broadly the mode of conducting this business. The federal government of Malaysia, accepting the recommendations, enacted the *Takaful* Act 1984 (which came into force on 29th Nov. 1984). The Act established the *Syarikat Takaful* Malaysia Sendirian Berhad on 2nd August, 1985 as a subsidiary Company of Bank Islam Malaysia Berhad, an Islamic bank established on the principle of interest-free banking under the aegis of the Islamic Banking Act 1983. The conventional insurance business is not affected by the enactment of the *Takaful* Act, which only provides an alternative to those, Muslims and non Muslim alike, who wish to have an insurance cover.

Section 2 of the *Takaful* Act defines *takaful* as "a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid an assistance to the participants

in case of need whereby the participants mutually agree to contribute for that purpose", and 'takaful business' as a "business of *takaful* whose aims and operations do not involve any element which is not approved by the *Shariah*." The same resolution to conform to Islamic principles emanates from the *Takaful* Company's Memorandum of Association: The business of the company will be transacted in accordance with Islamic principles, rules and practices." Accordingly, there is a *Shariah* Supervisory Council to make sure that this objective is fully achieved:

Takaful company operates much on the same basis on which mutual insurance companies^{xxxviii}[38] and protection and indemnity [P&I] clubs^{xxxix}[39] operate. In mutual insurance the insured themselves are the insurers. The income from premiums is used to cover the cost of operations and to pay claims. The balance, if any, is returned to the members. The only difference between *takaful* and mutual insurance and P & 1 clubs is that under the *takaful* contributions (premiums) are not invested in interest-earning schemes and un-Islamic businesses.

Takaful differs from conventional insurance in the sense that the company is not the "insurer" insuring the participants. The persons participating in the scheme mutually insure one another. The *takaful* company simply handles the matters of investment, business and administration.

Syarikat *Takaful* Malaysia Sdn. Bhd. is allowed, under section 3, to conduct two types of "insurance" business: family (or life) *takaful* business and general *takaful* business, and is required by section 16. *Takaful* Act 1984 to maintain separate accounts for each of these two businesses.

Nature of takaful contract^{xl}[40]

The business of *takaful* is conducted broadly on the basis of *sharikat al-anan* (un-equal partnership) which allows the partners to evaluate each other's skill and capability to determine the ratio in which they may wish to share profit and loss, even if one contributes a smaller share of the capital, a larger share of the profit may be given to him. The principle of *mudarabah* (sleeping partnership) provides the specific details of the *takaful* contract.

The *takaful* company accepts contribution (*ra's al-mal*) from investor participants (*sahib al-mal*). The contract clearly lays down the ratio in which the company and the participant would share the profit and loss, the mode of payment of the contributions and the mode in which contributions are to be employed by the operator. The contract also states clearly the rights and obligations of both the parties. Presently the profit and loss sharing is in the ratio of 7:3 in case of family *takaful* and 6:4 in case of general *takaful*. The funds collected from the participants are invested only in such ventures which do not contravene any Islamic principle.

A very special feature of the *takaful* contract is the concept of *tabarru'* (lit., to donate, to contribute), whereby the participants agree upon to relinquish as donation a certain portion of their *takaful* installments as contribution to a common pool out of which is paid the compensation as agreed upon in the contract of *takaful*. In this way is realized the goal of assisting and helping the participant who may suffer some loss.

According to section 64 of the *Takaful* Act 1984 a person, under eighteen shall not have the capacity to enter into a *takaful* contract. The adoption of the age of majority as provided under the Age of Majority Act 1971 is to give certainty to the issue of entitlement to enter into *takaful* contract, instead of leaving it to the uncertain age at which a person may be said to have attained the age of *bulugh* (puberty). Though the Act does not provide any maximum age unto which a person may enter into the *takaful* contract, yet in practice the *takaful* company has fixed the maximum at fifty for family *takaful*.

The concern shown in the *takaful* contract to specify clearly every detail is not only Islamic but also a definite improvement on the existing nature of conventional insurance contract:

"The parties in an insurance contract do not know exactly what their obligations and responsibilities are to each other and are not sure how to work for their objectives. The peril may never occur, and if it occurs, how much damage will be covered and what sums of money will have to be paid by the insurer, are all unknown quantities. It is doubtful if these quantities will ever be known to the parties concerned before the happening of an event^{li[41]}."

However, in spite of every effort to spell out details of *takaful* contract, there may still be some uncertainties. For example, how much the *takaful* company has to pay to settle a claim under a third-party motor policy *may* only be known after actual happening. Such uncertainties are inherent in the contract of insurance and are condoned under the doctrines of *darura* (necessity) and *maslahah* (public interest).

Similar to conventional insurance the issues of "insurable interest" and *uberrimae fidei* (of the fullest confidence) are equally valid in *takaful* contract also. The nature of family *takaful* is such that the issue of insurable interest is automatically taken care of; the participant himself is both the insuree and the policy-holder. In case of general *takaful* (fire, accident, motor, etc), although the *Takaful* Act 1984 is silent on insurable interest, yet the general provisions of the Contract Act 1950 against wagering contracts may be applied to these contracts requiring the participant to show sufficient interest in the subject-matter, both at the inception and the time of loss. The principle of *uberrimae fidei* is emphasized equally under the Islamic law of contract and its rules regarding honesty, full disclosure, truthfulness and utmost good faith. Non-compliance of these makes the contract un-enforceable and it applies fully to any *takaful* contract.

As the *Takaful* Act 1984 does not state the whole of the law governing a *takaful* contract, it is presumed that section 5 of the Civil Law Act 1956 applies. This section says *inter alia* that "in all questions or issues with respect to life, and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as in England."

Special features of takaful^[42]

- (i) *Takaful* completely avoids *riba* at every stage of its business. It neither takes nor gives interest. It does not make investments in interest-bearing bonds, deposits nor participates in such businesses which involve interest.
- (ii) No business participation is undertaken directly or indirectly in things prohibited by the *Shariah*,
- (iii) The *takaful* contract attempts the clearest possible determination of the terms of contract so as to minimize ignorance and uncertainty.

- (iv) The business is conducted on the basis of *mudarabah*.
- (v) There is no forfeiture of premiums in case of surrender of lapse of participation contract (policy).
- (vi) Nomination is good for purposes of identifying the person (nominee) who would take the benefit on behalf of all the heirs. The nominee cannot retain the benefit for his own use.
- (vii) A *Shariah* Advisory Council keeps close watch on the activities of the *takaful* company to ensure its adherence to *Shariah*.
- (viii) The company pays *Zakat* on the total profit before distributing it. During 1991 it paid \$20,559 as *zakat* ^{xliii}[43].
- (ix) *Takaful* business is not conducted through either the agencies or agents, but directly by the employees of the company through "*Takaful* Desks" (totaling 37 in 1991. 21 at Bank Islam branches and 16 at Tabung Haji offices).

Re-insurance or *re-takaful* is an issue which, for the time being, is posing some problem. For obvious reasons, the *takaful* company needs *re-takaful* facility to protect itself from unforeseen excessive losses. In case of conventional insurance, such a facility is available locally and internationally. But not so in the case of *takaful*. Presently, *re-takaful* is provided to the Malaysian Company by the Islamic *Takaful* and Re-Takaful Co., Bahamas (5%), and the Islamic Insurance and Re-insurance Co., Manama. (5%). while 90% cover is provided by the conventional re-insurers of Europe. It is hoped that a *re-takaful* company in Malaysia may soon start providing re-takaful facilities to fulfill its needs as well as the needs of the *takaful* companies in Brunei and Indonesia which are now in an advanced stage of planning^{xliv}[44].

The *Takaful* Act 1984 itself fully recognized the importance of *re-takaful* and provides in section 23 that:

"An operator (of *takaful* business) shall have arrangements consistent with sound *takaful* principles for *re-takaful* of liabilities in respect of risks undertaken or to be undertaken by the operator in the course of his carrying on *takaful* business."

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Though presently the above legislative requirement could not be attained in actual practice, yet since the present practice comes under *darura* (necessity), this deviation comes within the limits condoned by the *Shariah*.

Types of *takaful* contracts xlv[45]

(i) Family *takaful* business:

- (a) with maturity periods of 10, 15 and 20 years :
- (b) family *takaful* mortgage plan
- (c) family *takaful* plan for education
- (d) group family *takaful* plan

(ii) General *takaful* business

(a) fire *takaful* scheme :

To cover losses suffered by house owners and or householders against fire.

(b) motor *takaful* scheme:

to cover comprehensive and third-party claims and losses for motor cars and motor cycles

(c) marine *takaful* scheme:

to provide cover on goods or cargo while in transit

(d) personal accident *takaful* scheme

to cover injuries or loss suffered by those going on *Haj* or other pilgrimages, Muslim or non-Muslim__

(e) accident/miscellaneous *takaful* scheme

to cover all risks connected with accident, workmen's compensation, public liability, equipments, business interruption etc.

Family *takaful* schemes

A person who wishes to participate in any of the schemes offered under family *takaful* applies in writing to the *takaful* company. This he does:

- (a) to get the protection in case of his untimely death so that *takaful* benefits may be paid to his heirs;
- (b) to make regular savings: and

- (c) to make his savings earn some profits which are earned in accordance with the principles of *Shariah*

(i) Family *takaful* with specified maturity period^{xlvi}[46]:—

The ten, fifteen and twenty years maturity period schemes may only be participated in by individuals between the age of 18 and 50 years subject to the condition that the chosen period of participation must expire on or before the participant attains the age of 60.

The *takaful* contract spells out clearly the rights and obligations of the parties to the contract.

The participant is required to pay regularly the *takaful* installments in consideration for his participation in the *takaful* plan. He himself decides the amount of *takaful* installments that he wishes to pay, but such amount shall be subject to the minimum sum as determined by the company, and at intervals and in a manner as decided by the participant at the time of signing the contract or later on if agreed upon mutually.

Each *takaful* installment paid by the participant shall be divided and credited by the *takaful* company into two separate accounts, namely, Participant's Account (PA) and Participant's Special Account (PSA). A substantial proportion of this installment is credited into his PA solely for the purpose of his savings and investment. The balance is credited into his PSA as *tabarru*, for

— the company to pay *takaful* benefits to fellow-participants who have been struck with catastrophe or disaster. This is made clear to the participant in the contract he signs.

The proportion of the installments which a participant is presently required to relinquish as *tabarru* into PSA varies in accordance with age of the participant at the time of entry. Presently the rates are as follows:

age of the participant	Term of the plan (yrs)		
18-30	2.0%	3.5%	5.0%
31-35	2.5%	4.5%	6.5%
36-40	3.5%	6.0%	9.0%
41-45	5.0%	8.5%	-
46-50	7.0%	--	-

The *takaful* installments credited into these two accounts are then pooled as a single fund for the purpose of investment. The investment activities undertaken by the *takaful* company are in a manner permitted by the *Shariah*. Any profit generated from the investment is shared between the participant and the company in a ratio mutually agreed between the participant and the company in accordance with the principle of *mudarabah*. For instance, if the ratio agreed is 7:3, the participant shall be entitled to 70% of the profits whilst the company shall be entitled to 30%.

The participant's share of the profits is credited into his PA. With the accumulation of such profits, the balance in the PA increases over a period of time.

In the event a participant dies before the maturity of his family *takaful* plan, the following *takaful* benefits are paid to his heirs either directly or through the nominee appointed by the participant:

- (i) The total amount of the *takaful* installments paid by the deceased participant from the date of inception of his *takaful* plan to the due date of payment of the installment prior to his death and his share of the profits from the investment of the installments which have been credited into his PA;
- (ii) The outstanding *takaful* installments which would have been paid by the deceased participant should he have survived. This outstanding amount is calculated from

the date of his death to the date of maturity of his *takaful* plan. It is paid from the PSA as agreed upon by all the participants in accordance with the *takaful* contract.

If a participant should live until the date of maturity of his *takaful* plan, the following *takaful* benefits are payable to him:

- (i) The total amount of *takaful* installments paid by the participant during the period of his participation plus his share of profits from the investment of the *takaful* installments credited into his PA.
- (ii) The net surplus allocated to his PSA as shown in the last volution of the PSA.

In the event a participant is compelled to surrender or withdraw from the *takaful* plan that he has participated in before the maturity of the period of his participation, he is entitled to the surrender benefits as agreed under the family *takaful* contract. He receives the proportion of his *takaful* installments which had been credited into his PA together with his share of profits from the investment of the installments as credited into the same account. The proportion of his installments as credited into his PSA however, is not refunded, as these were donations (*tabarru*).

These terms are far better compared to the forfeiture and surrender benefits provided by the conventional insurance industry^{xlvi}[47]; Muslehuddin writes that in the U.S.A.:

"Out of a total of 23,500,000 policies subscribed in 1929. 2,441,000 were surrendered and 6,523,000 lapsed policy holders lost over 100,000,000 dollars. This sort of exploitation has been termed as 'the organized swindle' of the insurance companies^{xlvi}[48]."

(iii) Family *takaful* mortgage plan:—

Everything in this plan is similar to the scheme discussed above, except that the *takaful* benefit is paid to the mortgagee if the participant (mortgagor) dies before the payment of debt.

Family *takaful* plan for education:—

This plan is also similar to the first plan in matters of details, except that the *takaful* benefit is paid to the nominee to be spent

on the education of the persons as desired by the participant if he dies before collecting the amount he planned to spend on the education of his dependants.

(iv) Group family *takaful* plan

This is similar to employees' insurance scheme. The participants are employees of corporate bodies who wish to cover themselves against injuries or loss suffered during the course of employment. The contributions are wholly made by the employees without any monetary assistance from the employers. Details of this plan are similar to family *takaful* scheme.

General *takaful* scheme

In this scheme the whole amount contributed by the participant who signs a *mudarabah* contract with the company is treated as *tabarru'*. The company, acting as entrepreneur, collects the *takaful* contribution as determined by it. It is clearly stated in the contract that if there is profit, it would be mutually shared in the ratio (e.g. 60:40) agreed upon, provided the participant has not been paid any claims. General *takaful* scheme operates on the basis of one-year participation.

The company pools up all the contributions paid into the General *Takaful* Fund. This fund is invested by the company in accordance with the requirements of the *Shariah*. All the profits are credited to the fund.

The participants agree that the company shall pay from the General *Takaful* Fund compensation or indemnity to fellow -participants who might suffer the specified losses. The fund is also used to pay for operational costs. Whatever be profit, if any, credited to the PA is distributed among the participants as bonus. Losses are likewise mutually shared, but this may just be theoretical because of *re-takaful* coverage.

***Shariah* council**

There is a *Shariah* Supervisory Council to ensure that the *takaful* company is transacting its business on *Shariah*

principles. The Council was constituted as required by section 8 (5) (b) of the *Takaful Act* 1984.

Section 8 deals with the registration of takaful operators by the Director General of Takaful appointed under section 54 by Yang di Pertuan Agong. The Director shall refuse to register an applicant unless he is satisfied:

“that there is in the Articles of Association of the *takaful* operator concerned provision for the establishment of a *Shariah* Supervisory Council to advise an operator on the operation of its *takaful* business in order to ensure that it does not involve in any element which is not approved by the *Shariah*”

It is commendable that the Act requires conformity with the *Shariah* instead of any particular school. The sub-section also, by implication, covers any such provision of conventional insurance which does not come within the “not approved by the *Shariah*” category and which may be adopted or proposed to be adopted by the company in its working.

A minor objection raised against section 8(5)(b) is that it requires every *takaful* company to establish a *Shariah* supervisory council, resulting into a multiplication of such councils with the attendant problems of finding qualified persons and possible contradiction in their advices on similar questions. It is therefore suggested to have a single council for the country^{xlix}[49].

In case the takaful company may, for any reason, depart from the *Shariah* principles and or disregards the advice of the *Shariah* council, presumably the Director General of *Takaful* under section 11 (1) (a) of the *Takaful Act* 1984 may cancel the registration of the company.

There is no one identified in the Act whose advice the Director-General of *Takaful* may seek if he so needs:

“Presumably he can refer questions relating to the *Shariah* to one of the numerous existing government -approved bodies which advise the government on such matters, such as the, National Fatwa Committee, the National council for Islamic Affairs, or the Islamic Affairs division of the Prime Minister’s Department^[50]”

VI. Conclusion

The necessity of insurance as a fact of modern life is fully appreciated by Muslims. However, their less-than-receptive attitude towards insurance has been due to the un-Islamic manner in which it is presently conducted. A workable alternative is provided by *takaful*. It is suggested that the Malaysian model may provide a useful basis for further action by such of the Islamic countries which may decide to islamise the insurance business, or to make available an Islamic alternative.

The *takaful* insurance in Malaysia is only in its sixth year of operation. The level of business is still low^[51], compared with conventional insurance and may improve "with the increasing awareness and familiarity of *takaful* service among Malaysians and product diversification^[52]."

References

1. Ivarny, *General Principles of Insurance Law*. (3rd ed., London. 1975) 3.
2. "Aleatory" Is derived from the Latin "alea" and means "dependent on the throw of a dice: hence, dependent on uncertain contingencies." See *Oxford English Dictionary*; also, Raoul Colinvaux. *The Law of Insurance* (5th ed. London. 1984) 3.
3. *Carter v. Boehm* (1966) 3 Burr. 1905.
4. 'Aqila, in Marghinani, Eurhanuddin, *Hidaya*, (kitab *al-Ma'aqil*); Schacht. Joseph. *An Introduction to Islamic Law*, (Oxford, 1964) p. 186, Nawawi. *Minhaj al-Talibin*. (Eng. tr. by E.C. Howard. (London 1914) 420-28.
5. Afzal-ur- Rahman. *Banking and Insurance (Economic Doctrines of Islam)*. Vol. IV (London, 1979) 32.
6. Mustafa Zarqa. *'Aqd al Tamin*. pp. 32ff (Damascus. 1962). cited in Muslehuddin, *Insurance and Islamic Law* (New Delhi 1982)"
7. See *Hidaya*. p. 517 (Eng tr.): Muhammad Taqi Amini. *Maqalat-i-Amini*. (Aligarh Muslim University, 1970) 209-215.
- 7a. *Radd al-Muhtar*: 199.
8. Amin. S.H *Islamic Law in the Contemporary World* (Glasgow, 1985) 71-84.

9. Abdul Zahra Abdullah. All Insurance Development in the Arab World (London 1985) 1

10. Id. at 4.
11. Id. at 5.
12. Id, at 12 for Table III und III A.
13. Id. at 43.
14. See Muhammad Nejatullah Siddiqi. "Muslim Economic Thinking: A Survey of Contemporary Literature", in *Studies in Islamic Economics*, ed. by Khurshid Ahmad (International Centre for Research in Islamic Economics, KAAU. Jeddah and Islamic Foundation. U.K., 1980) 216.
15. This is the view of Mustafa Ahmad Zarqa, Yusuf Moosa, Ali al-Khafeef, Mohammad al-Bahy, Ahmad Taha al-Sanusi. Sayyid Muhammad Sadiq al- Ruhani, Ibrahim al-Tahawi, Muhammad Taqi Amini, Sheikh Mahmud Ahmad, M.A. Mannan, Muhammad Nejatullah Siddiqi, Jafar Shaheedi and Ali Jamaluddln Awad (for detailed citation of sources, see pp. 265-315 of supran. 14).
Ayatollah Khomeini, regarded Insurance as any other contract, which is valid if the necessary elements that are required in a contract — subject matter, description of parties, risk covered, amount of premium & mode of payment and period of risk coverage — are there. If so, then simple offer and acceptance with payment of premium would complete the contract. (Presumably he may not be said to be approving riba or trade in *haram* things.). Ayatollah Khomeini, *Tawzih al-Masayil* (1979) (Problem No. 5. 2863 to 2865) cited in S, H. Amin, *Islamic Law in the Contemporary World* (Glasgow, 1985). p. 79: also see on p. 80 for similar views of another Shia Jurist, Ayatollah Muhammad Vahidi in *al-Masayil al-Mustasdaha*, (1978) 11-13, who invokes Sanctity of contract in defense of Insurance contract.
16. These are the views of Abdullah al-Qalqeeli, Mustafa Zaid. Mufti Muhamad Shafi', Jalal Mustafa al-Sayyad and Showkat Ali Khan. See p. 216 in supran. 14 for citation.
17. This view is taken by Mufti Muhammad Bakheet, Muhammad Abu Zahrah, Muhammad Musa, Ahmad Ibrahim, Sheikh Shaukat Ali Khan. Muhammad Yusuf Musa, Ahmad Taha Sanusi, 'Abdur Rahman Isa, Ali Khafeef, (supra n. 14 at 216), and see the resolutions passed at the 1965 conference of World Muslim League held at Cairo (supra n. 1 at 198-99).
18. See, for examples. S.H. Amin supra n. 8 at 44-70, Muhammad Muslehuddin. *Insurance and Islamic LAW* (New Delhi 1982).
19. This is the view of Abu Zahrah, Isa Abdouh, Muslehuddin, Dasooqi and Ahmad Fahim Abu Sunnah (supra n. 14 at 216 for citations).
20. See the views of Sheikh Ali al-Khafeef, Mustafa Ahmad Zarqa, Nejatullah Siddiqi, Ibrahim al-Tahawi and Abul Ala Mawdudi. (supra n. 14 at 217 for citations).
21. Report of the Committee on the Setting-up of an Islamic Insurance Company in Malaysia. (Kuala Lumpur, 1984) 1.

22. Supra n. 14 at 217 (General Recommendation No. 6).
23. A very good summary may be found in Mohammad Muslehuddin. *Insurance and Islamic Law* (New Delhi 1982) 109. and Nik Ramlah Mahmood, "Takaful: The Islamic System of Mutual Insurance: the Malaysian Experience," *Arab Law Quarterly*. Vol. VI: Part 3 (1991) 281-286.
24. *Quran* (II: 275-76, 278-80; III: 130; IV: 161] and the numerous references on *al-riba* in the various compilations of *ahadith*. See *miftah Kuruz al-Sunnah*, under "*al-riba*". Arabic tr. by Muhammad Fuwad "Abdul Baql (Delhi, n.d.) p, 205. There is a lot of literature on this, reference may be found in "Ala Eddin Kharofa, *al-Riba wa'l Faida* (Baghdad 1962) and his "*Aqd al-Qard Ft al-Sharlah al Islamiyah* (Beirut 1982). See Nabil A. Salleh. *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (Cambridge 1986). See also a very lengthy judgment of the (Pakistan) *Federal Shariah Court* in *Dr. Mahmood ur-Rahman Faisal v. Secy... Minister of Law. etc...* PLD (1992) FSC where the court cited several authorities against *riba*, and ordered the govt. of Pakistan to expunge all the traces of *riba* from the various laws by 30th June, 1992. In an appeal to the Supreme Court, the govt. sought extension of time.
25. Muhammad Muslehuddin, *Insurance and Islamic Law* (New Delhi 1982) pp. 96-97; Nejatullah Siddiqui. supra n. 14 at 253.
26. Muslehuddin. loc. *Cit.* at 101-106.
27. See Muhammad Nejatullah Siddiqui, *Insurance in An Islamic Economy* (Islamic Foundation. 1985) 40-41.
28. *Ibid*; see also Nabil A. Salleh. supra n. 24 at 57 where he discusses *Gharar, fahish. mutawassit* (moderate) and *yasir*.
29. *The Mejelle*. Eng. tr. of *Majallah al-Ahkam-i-Adliyyah*. tr. by CR Tyser. G.Demetrlades and Ismail Haqql Effendl (Lahore 1980), reprint of 1901 ed.
30. Supra n. 27 at 34.
31. *Id.* at 27-34.
32. *Karim v. Hanifa*. PLD (1970) Karachi 683.
33. *In Re Ismail bin Rentah deceased* (1940) 9 MLJ 98. A member of the Malay Public Servants Co-operative Society Ltd. nominated his daughter to receive his share in the event of his death. The nomination was held to be a will. whereas its validity depended on the consent of other heirs.
34. (1965) 2 MLJ 1.

35. *Fatwa on Succession and Wills*, 1974. 1 *Malayan Law Journal*, p.x.
36. Ahmad Ibrahim *Family Law in Malaysia & Singapore*, 2nd ed. (Singapore 1984) 305,306.
37. *Report of the Committee on the Setting-up of an Islamic Insurance Company in Malaysia* (Kuala Lumpur 1984) and also definitions of "takaful and takaful business" in section 2 of the *Takaful Act* 1984.
38. For details see Muslehuddin. supra n. 6 at 138-145. and Barou. H., *Co-operative Insurance* (London 1936).
39. These clubs are of ship owners who mutually agree to insure each other against liabilities not generally covered by marine insurers. See Coghlln, T.G.. "Protection and Indemnity Clubs"(1984) *Lloyd's Maritime and Commercial Law Quarterly*, 403.
40. Generally based on the Information collected from *Takaful Desk In Bank Islam Malaysia*: Interview with Tan Sri Datuk Ahmad Ibrahim, Chairman. *Shariah Supervisory Council*, Bank Islam Malaysia and Syed Wasim Ahmad, "Islamic Insurance in Malaysia," in the *Muslim Private Sector in South East Asia* (ed). Mohammad Ariff (Singapore 1991) 187-216.
41. Afzalur Rahman, *Banking and Insurance* (London 1979) 125.
42. Personal enquiries at Syarikat Takaful Malaysia Sdn. Bhd. Kuala Lumpur.
43. *Annual Report 1991: Syarikat Takaful Malaysia Sdn. Bhd.* (Kuala Lumpur 1991) 34.
44. Information obtained from the *Syarikat Takaful (M) Sdn. Bhd.*, Kuala Lumpur.
45. See *Annual Report 1991: Syarikat Takaful Malaysia Sdn. Bhd.* (Kuala Lumpur 1991)32-33.
46. Based on personal enquiries at *Takaful .Co.* and information given in *Perlindungan Takaful : Takaful Cover*, a booklet issued by the *Syarikat Takaful Malaysia Sdn. Bhd.* (Kuala Lumpur, n.d.).
47. Syed Waseem Ahmad. "Islamic Insurance in Malaysia." In Mohammad Ariff (ed). *The Muslim Private Sector in South East Asia* (Singapore 1991) 196.
48. Muslehuddin. supra n. 25 at 52. 53.
49. See. Nik Ramlah Mahmood. Takaful: The Islamic System of Mutual Insurance: The Malaysian Experience." *Arab Law Quarterly*. Vol. VI. Part 3 (1991) 291.
50. *Id.* at 296.

51. See, for example, the figures given in the 1991 Annual Report of the Takaful Company:

	1986	1987	1988	1989	1990	1991
family:	584.999	1.092.566	2.118,272	5,181,673	6.324.511	6.636.04b
general:	1.406.765	4.464,755	9.723.184	16.516.474	20.320.930	25.657.356

(Gross *Takaful* Contributions in M \$)

The figures for conventional general Insurance business in Malaysia are too big. Compared even with the annual premiums paid to the conventional Insurance companies for life Insurance policies shows a big gap between *takaful* and life insurance.

Premiums paid for life Insurance (In million M \$):					
1970	1980	1989	1990	1991	
185	80.0	35.0	423.1	536.5	

See Annual *Report of the Director General of Insurance. Malaysia* (Kuala Lumpur 1991

52. -Supra n. 43 at 34.
