Mudaraba (trust financing)

The principles of *Mudaraba* are based on the bank investing its depositor/investor funds in an enterprise, for which the bank provides the necessary working capital. The management of the enterprise remains independent. The managers receive an agreed percentage of any profit from the venture as a fee. The net profits after deduction of bank and managerial fees is then payable to the depositors/ investors. This dividend may be fixed or may be a percentage of the profits. If no profit is made, the bank is not entitled to a fee (Siddiqi 1985: 112).

Murabaha (cost-plus financing)

In a *Murabaha* transaction the bank acts as an agent for its depositors and investors in the purchase of a commodity. The bank then sells on the commodity to the end user, although the depositors and investors must initially take title to the goods to ensure that they are accepting the risk in the financed commodity. The rate of profit is agreed in advance and represents the difference between the prices at which the bank buys and sells the commodity (Khan and Mirakar 1989: 41).

Musharaka (profit sharing)

This concept is similar to *Mudaraba*, except that the managers of the venture are allowed to contribute to part of the capital. Managers and depositors/ investors share the profits or losses of the enterprise in direct proportion to their initial capital contribution. The bank then receives its fee from the depositors/ investors (ibid.: 43).

Ijara (leasing)

Under an *Ijara* contract the bank uses the funds of its depositors/investors to purchase an asset which is then leased to a third party for a specified amount. The lease income is then passed on to the depositors/investors after deduction of the management fee. Lease payments may be adjusted from time to time in order to remain in line with the prevailing market rates. Lease payments, under an *Ijara* contract, are designed to reflect the cost to the lessor, of funding leased assets and therefore generally approximates payments made under a conventional lease contract (Siddiqi 1985: 109).

Ijara wa Iktina (lease purchase)

An *Ijara* contract does not permit the lessee the option of purchasing the leased asset, because the granting of such an option would involve uncertainty, which is prohibited in Islamic finance. Under *Ijara wa Iktina*, the lessee undertakes to purchase the leased asset, while making payments into an Islamic investment account on top of the regular lease payments. At the end of the lease the investment account funds – together with any accumulated profits – are used to purchase the leased asset (ibid.: 111).

Qard Hassan (interest-free loan)

Islamic institutions are often prepared to grant interest-free loans to clients for humanitarian and welfare reasons. Repayments are made over a period agreed by both parties, with the financing institution making no profit from the transaction (Waqar 1989: 223).

Christian and Islamic views on usury in medieval times

What we can deduce from the pre-Reformation Christian and Islamic viewpoints on usury is that both prohibited usury outright. The only thing that was clearly permissible was a return from a partnership, provided the partner making the investment genuinely shared the risk. That is, both doctrines called for a share of risk between the lender and the borrower with no one party being allowed to acquire extra advantage at the expense of the other. Both rejected deferment as a justification for the payment of interest, and held that when gain is sought from an activity which is not in itself productive (i.e. which does not require labour, expenditure or risk-taking on the part of the lender), it is illegitimate and reprehensible. According to both doctrines, the essence of usury is that whether the borrower gains or loses, it is certain that the lender always takes his pound of flesh. They call, therefore, for an equitable bargain from which both parties might derive fair advantage according to the amount of risk they run.

However, in spite of the fact that the positions of the two religions were almost identical on usury, there was a discrepancy over compensation. Classical Christian thought maintained that the borrower who fails to pay his creditor at the appointed date should submit to a penalty (Taylor and Evans 1987: 20), and that the creditor who loses an opportunity of gain (by laying out his money) should receive compensation. The Islamic view was, and is, that the borrower is not liable for punishment if he fails to pay up on the maturity date. Islam is very emphatic on the point that the lender should postpone the date of payment without taking interest from the borrower or, preferably, cancel the whole amount of debt as gratis.

The discussion on usury has thus far centred on a comparison between Christianity and Islam. There is, however, an extensive economic theory literature which will be examined later.

Riba and *gharar*: fundamental prohibitions

The two prohibitions contained in the *Shari'a* that fundamentally impact on the entirety of Islamic law of contracts are the prohibition of unjustified increase of capital (*riba*) (Moghaizel 1990: 131) and the prohibition of risk (*gharar*). The prohibition of *riba* is certainly the most burdensome ethical prescription imposed by the *Shari'a* on contemporary profit-oriented ventures and enterprises since it prescribes that in all transactions where the exchange of counter-values takes place, no increase must accrue to either party without corresponding compensation (Qurayshi 1982).

Riba

Although the prohibition of *riba* is mentioned in different sections of the Quran, the extent of its definition and the scope of its application were not defined. The whole doctrine of the prohibition of *riba* was subsequently elaborated by Muslim scholars on the basis of the *Hadith* which dealt with *riba*.[2] The ensuing doctrine was to form a considerable impediment to the free development of legal transactions.

Of the two forms of *riba* outlined in this chapter, the first, *Riba al-Fadl*, occurs when goods of similar kinds are exchanged with a disparity between them. The second, *Riba al-Nasi'ah*, arises when there is a delay in performance. The various schools of law have agreed upon the prohibition of *riba* because it is one of the seven prohibitions mentioned by the Prophet.[3] However, each school interpreted the nature of the prohibition inferred from these substances in a different manner. It is with *Riba al-Fadl* that the traditions have been interpreted differently by each school of law (Al-Jaziri 1969: 2:249ff). As regards the second, *Riba al-Nasi'ah*, there is no controversy. All schools agree that delay in payment in an onerous contract is forbidden and time alone does not produce money. Consequently, all interest payments are uncompromisingly prohibited, whether in the form of interest granted on money entrusted to the other party as a deposit, or for investment. The prohibition of *riba* is relevant to the subject of insurance because it bars any disparity between sums of money exchanged and bans all sorts of interest.

The Islamic concepts of equity and fraternity which are binding on those belonging to the Islamic *Umma* in essence and by definition abhor any kind of transaction involving a gain which is not justified by a thing remitted or a service rendered. All transactions which could result in speculative investment and monopoly are thus precluded and rejected (Al-Qardawi 1978). It is stipulations such as these which place stringent and burdensome limits on the freedom of the parties involved in creating contracts.

Gharar

The prohibition of risk (*gharar*) is the second major element in the Islamic law of contracts. To avoid unfair dealing resulting from an ambiguous understanding of the rights and duties, not just of the parties involved, but also of the object of the contract (which must be precisely ascertained and susceptible to immediate delivery), the *Shari'a* requires a clear and certain determination of the rights and obligations of each party to the contract. Many Muslim *jurists* have defined *gharar*, some treating it more strictly than others.

A general definition was offered by the Hanbali *jurist* Ibn Taymiyya, who defined *gharar* as something of unknown outcome or result (Ibn Taymiyya 1970: 29:22).[4] *Gharar* thus resides in the uncertainty affecting the occurrence of the contract or of one of the obligations under it. This is to be seen as separate from *juhala* – ignorance or uncertainty as to the outcome of the contract. The concept of *juhala* means that the commodity or the price to be paid is unknown, whereas in the case of *gharar* the contract and the obligations of the parties under it are certain to take place but one of the elements of the contract is not defined.[5] An example of a sale involving *juhala* is the classical case of a sale of what is hidden up one's sleeve (Al-Qarafi 1927: 3:265). Here the uncertainty affects the subject matter of the contract. Scholars have given numerous examples of contracts involving *gharar* transactions in which the nature or quantity of the commodity and price were unknown (Ibn Rushid 595 AH: 2:147; Ibn Taymiyyah 1985: 29:25).[6]

Not being expressly mentioned or forbidden as such in the Quran, *gharar* is not as strongly and as strictly prohibited as *riba*. However, its prohibition can be deduced from other verses forbidding all unlawful and unfair transfer of wealth between Muslims: 'And eat not up your property among yourselves in vanity' (2:188). The prohibition is repeated in the Quran in verses 4:29,161 and 9:34.[7]

However, prohibition of *gharar* is expressly mentioned in the *Sunna* in a number of sayings attributed to the Prophet where he unequivocally condemns transactions with aspects of *gharar*: 'The Prophet peace be upon him has forbidden sales by throwing stones and sales involving uncertainty' (Muslim 1513: *Hadith* 4).[8] Owing to this condemnation, it is incumbent upon all Muslims to ensure that the subject of the contract be precisely determined and available for immediate delivery. Conditional contracts, because of the uncertainty that they involve, are widely considered invalid as the parties do not know if or when the contract will be concluded (Al-Qarafi 1927: 1:228–9). This prohibition, which initially concerned contracts of sale, was extended by analogy to other contracts in differing degrees by the various schools of law.[9]

The prohibition of conditional contracts led, among other things, to the invalidity of transactions containing two different contracts; for example, if one says, 'I will sell you my house if you sell me yours.' In this case the contract cannot be concluded because it contains two sales. Since the first sale is conditional upon the second one, the deal involves uncertainty. The reported sayings of the Prophet do not limit this prohibition to sales only, but mention transactions in general ('The Prophet peace be upon him prohibited two deals in one' (Ibn Hanbal 1986: 1:398)). Also, transactions cannot involve more than one proposed contract (as in the case of a sale coupled with a lease). The scope of this rule has been differently construed by the various schools. For some, only contracts which are in contradiction cannot be joined together (Ibn al-Qayyim 1972a: 3:142).

The four schools of law acknowledge the prohibition of contracts involving *gharar*, but the scope of *gharar* itself varies from school to school and there are various exceptions to its proscription. The majority of these exemptions are specific rather than general in operation. The Maliki School alone stipulates as a general rule that *gharar* does not affect acts of charity or gratuity. A donation which involves uncertainty or risk is nevertheless valid as it does not lead to prejudice if it fails to take place. Since the donor has not provided anything in this transaction, he will not suffer loss by virtue of any contingency affecting the donation (Ibn Rushid 595 AH: 2:324).[10]

The other schools do not uphold such views (except Ibn Taymiyyah who favours the Maliki position concerning *gharar* (Ibn Taymiyyah 1985: 29:33)) and consider that *gharar* does affect the validity of charitable acts subject to a number of exceptions. One such exception is the validity of wills notwithstanding the undefined nature of their subject matter or their indeterminacy (Al-Khafif 1972: 2:481).

Given the controversy surrounding the issue of *gharar*, it is remarkable that a number of agricultural tenancies contain elements of *gharar* but are nonetheless deemed valid; an example is contracts such as *muzara* and *muswagat*, where one party cultivates the land owned by the other party for a fixed share of the produce and thus for an undetermined remuneration (Ibn Qaduma 1972: 5:382–3,360–1; Ibn Abdin 1966: 6:274–5).

The concept of *Ji'ala* is also worthy of mention in this context as it involves considerable uncertainty. It consists of a reward offered for a service to be rendered, such as the recovery of lost property where the effort involved cannot be ascertained beforehand (Al-Mardawi 1986: 6:389–90).

The long list of exceptions to unlawful transaction where *gharar* is concerned illustrates that *gharar* is not rejected in the same manner as *riba* whose prohibition is undeniably related to the potential harmful consequences that it may have. In a contract of sale, for example its prohibition is motivated by the likelihood that one of the parties has struck an unfair bargain if the uncertainty involved leads to one of them being disadvantaged. G*harar* is particularly relevant in such cases as it can lead to an unjust outcome for one of the parties. The position of the Maliki and Hanbali *jurist*, Ibn Taymiyya, illustrates this point. Ibn Taymiyya expressly said that a sale involving *gharar* leads to injustice, enmity and hatred (Ibn Taymiyyah 1985: 29:23). As a result of his position, *jurists* acknowledge that *gharar* not involving potential inequality (as in the case of gifts) is permitted. G*harar* inherent to the mechanism of a specific contract which does not involve prejudice is also admitted, as in the cases of *Kafala* (guarantee) and *Ji'ala* (reward).

Need (*haja*) alone can justify a departure from the general rule prohibiting *gharar*, as expressed by Ibn Qayyimma in a statement about a contract of *Ijara* containing elements of uncertainty: 'If you plant this piece of land with wheat, I will lease it to you for one hundred; if you plant it with barley, I will lease it to you for fifty' (Ibn al-Qayyim 1968: 3:400).

This opinion is reinforced by the distinction made by scholars between excessive *gharar* and light *gharar*. Only excessive *gharar* can invalidate the act to which the prohibition of *gharar* applies (Al-Qarafi 1927: 3:365–6). The measure of *gharar* necessarily varies from one situation to another and it is impossible to fix a precise criterion for it. What is obvious is that the notion of *gharar* is indeed very relative and does not constitute a general prohibition applicable in all situations quite as *riba* does. The prohibition of *gharar* applies where uncertainty or indeterminacy introduce the possibilities of an unjust outcome.

The concept of Islamic insurance meets a huge stumbling block when it encounters the notion of *gharar*. Theoretically, however, the application of *gharar* to principles of insurance depends on two elements. The first lies in whether the insurance contract amounts to a transaction categorized as *Mu'awada* or whether it corresponds to another class of contract devised by Islamic law, or indeed whether it can be considered to fall in an Islamic scheme of contracts at all. The second determinant element is whether the uncertainty inherent in insurance can be allowed, either by virtue of necessity or the fact that it does not lead to unfair prejudice.

Need (*haja*) and necessity (*darura*) In Islamic law

The *Shari'a* expressly delivers Muslims from hardship as shown by the following verses of the Quran:

> Allah desireth for you ease; He desireth not hardship for you.
> (2:185)

> Allah would make the burden light for you, for man was created weak.
> (4:28)

The interests of Muslims are a prime and determinant concern for Islamic law (Ibn Qayyim 1968: 3:14) and it is on this account that the rule of necessity and need has been invoked. According to this rule it is possible to diverge from a prohibition when a person is in a situation of need, hardship or necessity. The concept of necessity allows departure from prohibitions when the life or entire property of the person concerned would otherwise be lost (Ibn Nujaym 1983: 91–2, 94).

However, these rules of need and necessity cannot be indeterminately and freely applied. The need must be pressing enough and the necessity actual and unavoidable (ibid.). If relief can be obtained by any means other than breaking the prohibition in question, then the principle is not applicable. The role of need and necessity comes into play when there is a genuine problem for which no Islamic alternative is available. The measure of the allowed departure from the rules of prohibition depends upon the extent of the necessity involved, and once the cause of the derogation has lapsed the prohibitions come into force once again (ibid.: 95).

The concepts of need and necessity allow for circumstances to be examined and weighed in every case to ascertain whether a rule is applicable or not. The rule of need and necessity has been qualified as being a proper source of law (Abu Solayman and Ali 1992: 25),[11] although one that should only be invoked when circumstances justify it.

Summary of financial activities proscribed by Islam

Riba (charging interest)

The charging of interest associated with the use of money is prohibited. Returns on invested money should be calculated in proportion to the profits (or loss), generated by the enterprise in which it is invested. A pre-determined or guaranteed rate of return is usually prohibited (Wilson 1985: 48).

Gharar (uncertainty)

An element of uncertainty in contractual transactions is forbidden. A contract cannot rely on the future occurrence of an event that is uncertain. Thus, instruments which require one party to insure another or grant another an option to buy or sell an asset are not usually permitted.

Maisir (gambling)

Gambling or speculation is prohibited. This means that futures or options transactions may be unacceptable if undertaken for speculative purposes (Nejatullah 1985: 85).

A recent history of Islamic banking

Since the early 1980s, Islamic banking has developed into a multi-billion dollar business. The Western world is realizing that, even in its own cities, it is no longer a 'fringe' business. The creation of the Islamic Development Bank (IDB) in Jeddah in 1975 was a landmark for Islamic banking. The IDB was the first development institution dedicated to the financial requirements of Muslim countries. The bank's articles of association stipulate that all its business should be conducted in accordance with Islamic *Shari'a* law (Wilson 1985: 39). Its success can be measured by the Saudi government's decision in 1992 to double the subscribed capital of the IDB to $5.7bn, making it the largest inter-government agency in the Muslim world (ibid.: 40).

Commercial Islamic banking took off in the 1970s when a number of new institutions were established in the Gulf, including the Dubai Islamic Bank

(1975), the Kuwait Finance House (1977) and the Bahrain Islamic Bank (1979). However, the most significant developments took place in Saudi Arabia, aided by its huge economic infrastructure. One of the prime movers of such developments was Prince Mohammad Al-Faisal, whose ambition was to create a network of Islamic banks across the Muslim world – a process which saw the founding of the Faisal Islamic Bank in Egypt in 1977 and the Faisal Islamic Bank in Sudan in 1978. But it was Prince Al Faisal's Geneva-based Dar Al Mal Al Islami, founded in 1981, that brought Islamic banking to the attention of those Western bankers who, previously, had little or no knowledge of Islam or Middle Eastern countries. The Geneva office of Dar Al Mal is now the centre of a network of 43 branches in 20 countries with assets under management in excess of $3bn (Shirazi 1990: 85).

The assets of Islamic banks incorporated in the Middle East rose from $4.4bn in 1985 to $15.7bn in 1994, although total assets controlled by Islamic financial institutions, including assets under management and the activities of banks based outside the Middle East, are estimated to be in the order of $80–$100bn (Wilson 1997: 55). Compared with conventional banking this is a relatively small sum, but the overall demand for Islamic banking products is probably much greater than banks have so far been able to tap.

3

PRE-MODERN AND MODERN *JURISTS*' STANDING ON INSURANCE

Introduction

This chapter begins with a brief history of insurance, showing that it has surfaced throughout history and geography in many guises, even if few of them, it must be noted, are not as much profit-oriented as they are measures towards damage limitation. Then, the chapter starts to concentrate on the implications and applications of insurance where the *Shari'a* is concerned, before discussing the views of pre-modern *jurists* who had to form opinions of a type of *Mu'amalat* (dealing) which were known at their time as *Sawkara* (insurance). As we will see, the first scholar to give an opinion was Ibn Abdin, then Sheikh Mohammed Abdu, who was followed by a number of honourable scholars such as Mustafa Al Zarqa, known to approve of all kinds of insurance. Modern *jurists*' opinions were drawn from those of the pre-modern *jurists* in the light of modern *Mu'amalat*, and their arguments are about its permissibility within *Shari'a* law.

A history of insurance

Although the insurance policy as we know it is a relatively recent development, the concept is by no means new. The idea of transferring the risk of loss from an individual to his group began thousands of years ago. When a family's hut burned down, for instance, the entire tribe would rebuild it. Traces of rudimentary insurance practices are still seen among the few primitive tribes that exist today (Raynes 1948: 71).

About 2500 BC, Chinese merchants were using primitive forms of marine insurance (Ibid.: 32). When boat operators reached river rapids they waited for other boats to arrive, before redistributing the cargo so that each boat carried some of the contents of the others. If one boat was lost navigating the rapids, all the operators shared a small loss but nobody had their entire cargo wiped out (Rahman and Gad 1978: 32).

Benevolent societies were developed in Egypt as early as 2500 BC. There is evidence that the ancient Egyptians had writings on the walls of some of the temples in Luxor (Upper Egypt) and that they formed committees for burying the dead. They believed that life after death was inevitable and therefore the body should be preserved for the spirit when they were reunited at the time of reincarnation. That led them to spend prodigiously when death occurred and even before that to build tombs suitable for the preservation of the body. Therefore the committee spent the money needed to preserve the body after death for as long as that person or his relatives paid an annual fee. This annual fee could either be in the form of agricultural produce or manufactured goods and clothes, sufficient to ensure that the body would be preserved in a well-sealed tomb (organized primarily for religious and social purposes in the hereafter). However, members contributed to funds that paid burial expenses and gave aid for those seriously ill or injured by accident (ibid.: 32).

By 1500 BC, these same societies provided fire insurance. The biblical story of the Prophet Yusuf (Joseph) is another early illustration of insurance principles. Around 1700–1500 BC, according to the authorities (ibid.: 33), Yusuf interpreted a dream of the Pharaoh to mean that there would be seven years of plenty and seven years of famine. At Yusuf's suggestion, the Egyptians set aside grain during the years of plenty to prepare for the years of famine. Although this was cooperative (and, owing to Yusuf's certainty, could possibly be described as acting on foreknowledge rather than preparing for risk), it is an indication that human societies have been involved in insurance as far back as the ancient Egyptians. Today, people set aside a little to protect themselves against possible future emergency or loss (ibid.: 35).

The Phoenicians, Greeks and Indians took another major step in laying the foundations for today's insurance industry when they developed insurance against a ship's sinking. When a group of shipowners financed a commercial voyage, they borrowed money from a lender, using the ship as collateral. If the voyage was successful, the shipowner repaid the loan at a high rate of interest. If the ship was lost, the shipowner was free of the debt (Al-Hanis 1979: 66).

Ancient Romans had both life and health insurance. The Collegia, Roman benevolent societies, provided burial insurance and financial help for the sick and aged. Roman guilds issued life insurance contracts for members and by AD 200, the Romans had a rough mortality table. The Roman military also had health and disability plans (ibid.).

When guilds arose in Flanders and Holland, among the services they provided were sickness benefits and burial fees. Some guilds made efforts to reimburse members for fire losses. Although their methods of operation were unsophisticated by today's standards, they popularized insurance (ibid.). During this period, insurance was underwritten mainly by individuals and guilds. Benefits were relatively low; one person or a small group could have enough capital to conduct insurance business. The person selling insurance was called an underwriter, signing his name and the amounts of liability at the bottom of the page (Rahman and Gad 1978: 35).

Ibn-Khaldon, in his *Muqaddimma* (Preface) has written about Arab business ventures which were then known as Winter and Summer Voyages. The voyage members indemnified any member of the group against loss of either their stock or their profit. All members of the voyage paid a percentage either of their profit or capital as compensation for the loss or damage sustained by any member of the voyage.

The objectives of insurance in Islamic law (*Al-Shari'a*)

The idea of insurance (*Ta'min*) in Islam is inexorably bound up with, and must be in harmony with, the objectives (*maqsad*) of the *Shari'a* with regard to securing benefit for the Muslim or preventing him harm, not only in this world but also in the hereafter. These objectives are religion, life, intellect, lineage and property (Al-Atar 1983: 68). It is in this context that we must discuss the idea of insurance and its practice in Islam. To this end, the discussion of insurance will consider both the concept of insurance in Islam and its relationship to the objectives of the *Shari'a*.

The *Fuqaha* (*jurists*) tended to neglect the idea of insurance in Islam, principally because they were concerned with the practical daily conduct of the Muslim in society and not with the uncertainties of insecurity and fear, which are very much bound up with the idea of insurance. Besides, insurance itself has a history that has seen its applications and popularity vary widely over the centuries, and commercial insurance has not always had a part to play.

The general significance of Islamic insurance outlined so far pertains to protection, in this world and in the hereafter, of a person's needs, beliefs, life, wealth and descendants from what is unknown. Such protection also involves the provision of a means of subsistence (material and spiritual), livelihood, nourishment, property, wealth, fortune and, above all, God's blessing during this life, protection from Hell, and the promise of everlasting Heaven.

The important objectives in Islamic law (*Shari'a*) are to provide advantages that bring about security, ward off evil doings and prevent hardship to all people, regardless of their faith. Such advantages have essential benefits for the hereafter, and secondary benefits which are operative in the here and now. The performance of good deeds is both a worldly and a 'hereafter' benefit (Al-Qubaysi 1977).

The worldly and hereafter benefits are essential to the spirit of life. Without spirituality, life is meaningless, and has no purpose. Human life, conceived as created by God, has meaning whether in the present or in the hereafter. In such a scheme of life one's necessities are to protect faith, descendants, life itself and wealth. Islam asserts that this is what protects life and people from defection (Al-Qardawi 1962).

The secondary benefits are mainly worldly ones that are essential for life, such as relationships formed around common interests which hold people together, the authorities and laws of the land, the relationships between people, animals and vegetation – in essence, the interaction between human beings and their environment (Al-Shatbi 1986 (970 AH): 2:176). Islamic law (*Shari'a*) recognizes the importance of these essential and secondary benefits and gives clear guidance on the way to behave, on how to deal with these issues with respect and acceptance in an intelligent manner (ibid.: 178).

Some of the issues on which guidance is given are concerned with the Islamic faith in general (*Ibadat*). Much of this guidance deals with the details of ritual such as the Five Pillars of Islam: shortening prayer when travelling; exemption or postponement of fasting for the sick (or women at a ritually impure period); dry wash (*Tayamum)* before prayers; protecting the genitals; women's adornment (and general women's issues (veil, etc.)); and respect for the elderly, scholastic traditions. The guides also make pronouncements of a less religious and practical nature: eating the necessary foods; enjoying one's life and wealth; looking after relations; common laws to promote justice; security; investing and protecting wealth; punishing wrongdoers; keeping the peace (S*alaam*); borrowing and lending; forgiveness and forgetting; money exchange; contracts; usury (*riba*); negligence; medical care and medicine; caring for the old and young; protecting the wealth of the young until maturity; education and learning; scholars and their responsibilities; duties towards neighbours and the needy; modes of behaviour in private and in public; and the relationship between man and son. All this guidance is to benefit human beings and provide them with happiness. As individuals, or collectively, it is people's duty to protect these benefits (ibid.: 178).

Original objectives

Because mankind has instincts higher than those of animals it is essential for the good of humanity to define and hold to certain guiding principles and objectives, but because of the frailty of human nature these goals can often become confused. The essential objectives as perceived and outlined in the *Shari'a* are: protecting human life; faith; the cultivation of intellect and the spread of knowledge; protecting one's descendants by keeping them from bad deeds which provoke God's wrath; and protecting wealth by avoiding waste.

These are the major requirements, not merely for the livelihood and material needs of the people, but, more importantly, for their spiritual needs and the life hereafter. A Muslim's life will be disorientated and confused in the absence of any one of these main five elements (i.e. the protection of human life; faith; the mind; dependants and wealth) (ibid.: 179).

Sheikh Mohammed Abdu's legitimation of life insurance

A *fatwa* (formal legal prescription) was attributed to *Imam* Mohammed Abdu that allegedly proclaimed the admissibility of life insurance.[1] According to the *fatwa*, life insurance is admissible, as an agreement entered into between the insured and the insurance company, which is considered a legal M*udaraba*.

The US Mutual Life Company's general manager posed the question of the legality of a deal between a contracting party who agreed to give a company a certain amount of money, paid in instalments over a certain period of time, for the purposes of investment. Under the terms of such an agreement, if he remained alive at the end of the period, he would regain his money with any interest accruing from the investment, but if he died before the end of the proposed term of the contract, the money and any interest would go to his successors. The answer to this question in the *fatwa* was as follows:

> [T]he agreement between the man and the company would be a kind of *Mudaraba* which is legal. The man had every right to collect his money at the end of the period with any interest produced by that investment. In the case of the man dying during the term of the deal, his successors would be entitled to receive the benefit of that money in his place.
>
> (Lewaa al-Islam, al-Azahar University, Egypt)

Another *fatwa* published in the magazine *Nor-el-Islam* by Sheikh Ibrahim Elgabbali and attributed to Sheikh Mohammed Abdu, dealt with the question of the legality of someone entering into a contract with a group of people to finance them out of his own resources to trade for a certain period of time, on condition that at the end of that period, if he remained alive, he would have the right for his money to be repaid with an agreed rate of interest added. This raised the question of whether, if he died before the end of the term of the contract, his successors were fully entitled to his stake from the deal. The *fatwa* declared that such a contract was a thoroughly legal act. The man would be fully entitled to collect his money at the end of the contract with the agreed rare of interest. If he died, then his successors would be fully entitled to inherit the capital and proceeds in his place. It is noteworthy that what was published in *Nor-el-Islam* magazine about how a *Mudaraba* differs from that in *Almuhamah* magazine in several aspects.

1 Almuhamah magazine (Vol. 5: 460:563) states that life insurance companies would act legally as though they were *Mudarabas*, which are legal. In accordance with that premise, the life insurance system was also considered to be legal. However, that contradicts the position which Nor-el-Islam put forward, whereby:
2 The successors, or whomsoever authorized, have the ultimate right to benefit from the whole sum of that money, including the interest resulting from the deal.
3 This means that if the insured party died before the end of the payment of instalments he owed to the insurer, the successors would be allowed to collect the total sum of money agreed on, with any interest accruing from the instalments paid by the insured during his lifetime.
4 In *Nor-el-Islam* the position outlined was different. It said:

5 If the insured died before the end of the proposed term, the successors or whomsoever are authorized to benefit from that money after his death, are allowed to collect only the instalments he had paid in practice with the interest resulting from the deal.

What was published in *Nor-el-Islam* does not comply with the modern system of insurance. It was a kind of *Mudaraba* in which the distribution of profit and loss was unclear. What *Almuhamah* magazine published was just the bare outline of insurance in the sense of how to regain the sum of money agreed on, even if the instalments had not been paid in full.

However, there was no clear evidence in the published material of either magazine of the legitimacy of the prevailing insurance system. What was published in *Nor-el-Islam* had no connection with insurance. It was just a *Mudaraba*, which has no similarity with life insurance (as we shall clarify later). On the other hand, what *Almuhamah* showed could be used as evidence of the legitimacy of life insurance as it was proven to be a legal kind of *Mudaraba*. Yet, saying that life insurance is a kind of *Mudaraba* would not be true because the *jurists* have identified it as a profit-sharing contract, if the capital is provided by one of the parties and the effort is provided by the other and both parties can be clearly identified. The most important condition is the determination of the percentage of profit for both parties. In the case of loss, unless proven to be the result of speculator incompetence, the owner of the capital has to be held individually responsible (Al-Khafif 1970: 252).

Following this argument, could the insurance system thus outlined not be a true kind of *Mudaraba*? And should the owner of capital pay the instalments to the speculator to invest, provided they share the profits while bearing the burden of any unforeseen loss separately? It is acknowledged that the company (or capital owner) would provide the speculator with the required money to invest however they chose to. That speculator, in return, should accept all the consequences of any prospected danger that might affect the capital owner's future. If the latter collapsed after the payment of one instalment, then the speculator might be able to keep the rest of the instalments for himself. It could be possible as well that the capital owner might pay all instalments to the speculator without any damage. That would not give a clear picture of the Islamic *Mudaraba* which calls for cooperation and offers the decent honourable life by the exchange of benefits between people.

It seems that Sheikh Mohammed Abdu was the pioneer of (or, at least, was attributed as being the first to acknowledge that life insurance could be a contract of) *Mudaraba*. In fact, the word 'insurance' was never referred to in the *fatwa*, nor was it mentioned in the inquiry by the questioner. However, some modernists have already accepted that viewpoint.

Abdel-Wahab Khallaf[2] has described the life insurance contract as compliant with the terms of *Mudaraba*. He added that if there is an objection that the interest in a *Mudaraba* contract is unlimited, while that in an insurance contract is limited, or that the speculator might invest the money illegally through usury or other unlawful methods, there is an answer to that. There has never been a common judgement that the interest in a *Mudaraba* should not be fixed in advance and would be proportionally divided between the parties. In that case, his views conflicted with those of many diligent scholars. However, borrowing with interest remained outlawed to eliminate any doubts, but the *jurists* admitted that what was forbidden to keep suspicions at bay may be admissible in cases of necessity. So long as insurance can be shown to have become a necessity of daily life, rather than having established cooperation and created savings for the benefit of the community, and does not actively harm anybody, it could be considered legitimate.

Mohammed Kamil el-Banna, Sheikh Abdelhalim Bassioni, Mustafa Zeid and Sheikh Mohammed Abu Zahra made clear their disagreement about treating insurance contracts as equivalent to *Mudaraba*, and continued to consider insurance as a thoroughly illegitimate act.

Mohammed Kamil el-Banna wrote:

> The obvious difference that makes it impossible for *juristic* reasoning to accept the insurance contract as the equivalent of a *Mudaraba* concerns the burden of loss which would be assumed by the owner of capital individually in a *Mudaraba*, while the matter would be different in the case of an insurance contract. Furthermore, if the owner of capital died in the case of a *Mudaraba*, his successors would regain only what their testator had paid, without any excess, while in the case of insurance, if the insurer died, the insured would collect a lot of money, which makes it an absolutely inadmissible risk, as the outcome would depend purely on accident or chance, without reasonable control measures.
>
> (Al-Dasuqi 1976: 79)

Sheikh Abdelhalim Bassioni mentions, however, that the non-determination of the percentage of interest in a *Mudaraba* is derived from the nature of the deal itself as a purely commercial relationship, based on profit and loss. The *jurists* did not determine the ratio of interest simply because they wanted to enhance the nature of *Mudaraba*. Therefore, the insurance contract could not be the same as the *Mudaraba* contract. For that reason, it would not be acceptable to ignore the opinions of the *jurists* in favour of the opinion of Sheikh Mohammed Abdu.

Mustafa Zeid stated that had it not been for two reasons, the insurance contract could have been a form of *Mudaraba* contract. The first concerns the nature of the *Mudaraba* requiring the sharing of both parties in both profit and loss, while the insurance contract does not mention anything about the loss. The second reason demonstrates why the profit in a *Mudaraba* should be proportionally, and not fixedly, rated. He then declared that the insurance companies normally take the necessary precautions to protect their interests, which is why they rarely experience any loss or damage while the insured suffer because of biased laws regarding payment of instalments.

Sheikh Mohammed Abu Zahra adamantly denied any connection between insurance and *Mudaraba*. In his opinion, the benefits of insurance should not be considered as the fruits of usury, but as a kind of deferred or postponed usury. It is referred to as *Riba Al-Nasiaa* or *Riba al-Jahiliya* credit (of the pre-Islamic era). It is absolutely taboo under the unanimous consensus of *Ulama*. Thus, the conclusion had to be that life insurance is totally different from the legal *Mudaraba*.

In his *fatwa*, Sheikh Mohammed Abdu determined the legality of taking all the insurance money including the interest produced during the term of the contract. What evidence did he give? Was it a kind of donation or voluntary contribution of alms? Or the fulfilment of a personal legal commitment? This commitment could not definitely be considered a donation, as insurance companies acted on commercial grounds, aimed only at achieving high profits for their shareholders, without much consideration for the insured, other than keeping to the legal terms of the contract. Then what these companies paid for their customers could not be considered as a form of contribution or donation, or any other kind of help for the needy and disabled, as these good causes did not form part of the company objectives. Moreover, as long as the insurance contract could be described as a 'commutative contract', in which each party ultimately regained an amount of money equal to the effort they had put in, there was no chance of calling what they paid to the insured a donation or cooperation. Hence, if the money paid to the insured were not a donation, then the commitment of repaying the whole premium at the end of the term – despite non-payment of all instalments – was not just illegal, it was a form of gambling. That is because the collection of all the money – without being paid in instalments – would be suspended on the occurrence of an unforeseen incident for both parties, which injects the element of gambling.

The *fatwa* issued by Sheikh Mohammed Abdu has been used by foreign non-Muslim insurance companies to attract Muslim customers on the grounds that life insurance was legal. However, this *fatwa*, with the approval of its perfection, did not provide evidence for the legitimacy of life insurance, which was wrongly considered in the *fatwa* as legal on the same basis as a *Mudaraba*. Although modern insurance is totally different from the *Mudaraba*, some *jurists* have supported Sheikh Mohammed Abdu in his call for approving life insurance, owing to acknowledgement of its benefits and advantages in confronting the complexities of life.

Sheikh Mohammed Bakheit El-Muteiay[3] answered a question from the *Ulama* living in Slanik about the legality of a Muslim's depositing money with an investment company for a fixed commission for a certain period of time, then receiving the capital sum and any interest accruing. Sheikh El-Muteiay answered that 'The only legal paths for a money guarantee are either by pledge, or by voluntary agreement. Otherwise they would be illegal.' The only condition that had to be met was that the money had to be deposited as a proper loan to be returned in full in any case, or it would become a gambling-like action.

In 1917, the *Shari'a* High Court issued a verdict against an heir who claimed the right to obtain a prescribed amount of money from an insurance company, after the pledge of the company manager for a lump sum payment in the case of the insured's death, provided his heir would settle the monthly instalments against the lump sum. The High Court justified that, by saying the claim had contained what should not be claimable (as the insurance money should not count as a part of the deceased's estate), and Sheikh Abdel Rahman Quraa[4] was requested to give a Formal Legal Opinion on how fire insurance companies should perform. He replied that they were not doing their job in compliance with Islamic *Shari'a*. He meticulously discussed the tasks of these companies compared to the methods of legal guarantee outlined in the opinion of Sheikh El-Muteiay, before he finally came to the same conclusion about how unforeseen their action would be. Accordingly, the whole task could not get away from the taboo of gambling (*Al-Muhamah* magazine Vol. 5 (394): 460).

Sheikh Ahmed Ibrahim,[5] some of whose views are summarized here, had his own opinions about life insurance, chiefly surrounding his assertion that no comparison could be drawn between the life insurance contract and the legitimate *Mudaraba*. Accordingly, the insurance contract is illegal because it is open to usury. Furthermore, if the successors received the insurance money before the full settlement of the instalments, it would be risky and therefore a form of gambling. In such a case there would be no return on what the company had, rather than both parties to the deal's abilities to predict future prospects. They would be dealing with each other on an unknown basis, which would contradict the customary and fixed system of dealing (*Al-Shubban al-Muslimoon* (*Muslim Youth*) Magazine 1941 (November): Vol. 13, issue 3: 7).

Sheikh Mohammad El-Molky[6] holds the opinion that the investment of money is not gambling according to the Quran. The gambling that *is* forbidden, is specifically the well-known game in which two parties play against each other, with a certain stake in the pot from each of them, and the winner takes all – not the way investment works. Insurance cannot, by any means, be compared with gambling, particularly when it is taken as a collective cooperative effort of social use to humanity in confronting natural catastrophes. However, the obscurity of gambling would only be evident if it were viewed as a mere commercial contract between two parties.

Ahmed Taha el-Sanousi, a contemporary Islamic scholar, in his comparative research entitled 'The Insurance Contract in Islamic Legitimacy',[7] makes a comparison between insurance contracts from the angle of liability and 'the fidelity'. He came to the conclusion that there was no reason why an Islamic form of insurance should not exist since its components resembled the 'fidelity' of a contract. If they really are alike, we would be able to depend on that similarity for the legitimization of insurance.

The fidelity of contract forms a link between two parties to an optional contract, provided that each party divulges to the other any previous offences regarding money, and that the first of them to die leaves his estate to the other. One of them may be more influential and powerful than the other and should accordingly be responsible for all the other affairs of the weaker party, including the payment of *diyya* (blood money) in the case of committing murder. Eventually, the stronger party would have the right to inherit from the weaker party in cases where no other heir can be found.

This fidelity in *Jahilia* (the pre-Islamic era) was one of the fundamental ways to inherit from someone to whom one was not related. The harsh and hazardous conditions of life during that era facilitated this kind of alliance. When Islam emerged, this situation was acknowledged and allowed to continue for some time until the religion was refined. As a great religion, it outlawed unjust support of one person by another, and called for equality and justice in relationships between all people, as revealed in the Quran:

> O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be [against] rich or poor: For Allah can best protect both. Follow not the lusts [Of your hearts].
>
> (3:135)

The *jurists* and *Imams* hold very diverse opinions about the 'fidelity of contract for the clientele', and whether or not it was a reason to inherit. The Quran states that the next of kin should have the highest priority to inherit over other relatives:

> ... but kindred by blood have prior rights against each other in the Book of Allah. Verily Allah is well acquainted with all things.
>
> (8:75)

Also, the Prophet Mohammed instructed mankind clearly that: 'Fidelity should be for the one who frees a human being from slavery' (*Hadith* 2517).

Insurance of liability is a contract in which the insurer pledges to guarantee indemnity for any loss that might occur to the insured, in the case of any mistake made in his business dealings that are incurred at another's expense. Such a guarantee would only be applicable to civil liability, and has nothing to do with criminal responsibility, even with regard to consequences such as fines.

It does seem, from the formal point of view, that the components of 'fidelity of the contract for the clientele' complies with insurance of liability, or may at least resemble it. On the other hand, the deep and genuine basis of comparison lies in the following two differences between these types of contract:

1 'Fidelity of the contract of clientele' is a contract between two parties. If the insurance of responsibility were considered a dual contract, it would be a form of illegal gambling. Jurists have commonly agreed that the transfer of dangerous liabilities from one individual to another would lead to the erosion of the social fabric. At the same time, the 'fidelity of contract of the clientele' would not be considered to be gambling, even if it were between two parties, because it is based on the links between relatives as well as on moral support. Thus, the financial outcome of this contract would be derived from those values.

2 No connection exists between the two contracts; while the 'fidelity of contract for the clientele' has been based mainly on defending and supporting the weak and oppressed fellow members of a tribe, 'insurance of liability' has been based mainly on the notion of the reciprocal financial exchange on grounds of probabilities, for commercial purposes.

Sheikh Abdel Rahman Issa[8] opines that insurance should be divided into two parts. First, he considered reciprocal insurance to be legal and desirable, being cooperative in nature and useful in confronting social problems and natural disasters, seeing the value of this kind of insurance as a contract between two parties in which the owner of capital paid a wage or commission to the other party. Eventually, however, in view of the fact that the Maliki school of Islamic law ideology contested his argument (supporting the conception of a contract from which the contractor would not gain), he concluded that it would be legal if both parties to reciprocal insurance took commission in the case of a disaster, even if it affected a third party. Second, he judged as legally admissible commercial insurance against risks to property and civil liability, as it would provide many benefits to the public by saving people's financial resources, protecting them from damaging financial ruin, and, more importantly, bringing profits to the insurance company. He treated it as an economic transaction for the benefit of the two parties who voluntarily agreed to contract with one another (Issa, Sheikh Abdul El-Rahman 1996: 90).

However, we can see that the issuing of such an unqualified judgement is not acceptable, as it ignores (or omits) a number of important facts about this kind of insurance. The judgement was made on the basis of non-equality between the contracting parties in a contract based on submission, in which the stronger party dictated the terms and conditions to the weaker party. It would also be a contract based on tempting the insured, which is not permissible, as it would be a potential contract.

Finally, the insurance company would collect the funds from all the insured parties, to invest them in different ways which would produce large profits for the company. This attitude would definitely count – in the opinion of economic *jurists* – as the defence of a monopolistic position and economic risk which could cause a lot of damage to the community. So what is the nature of the commitment to commercial insurance? Would it comply with *Shari'a* rules and general principles? Would the consent of the two parties always be sufficient evidence to judge whether their position was legal? Sheikh Issa also recognized the benefits that would accrue from social and cooperative forms of insurance, as well as showing the disadvantages of being a merely commercial activity.

Mohammed Yursuf Musa[9] acknowledged that insurance of all kinds is based on a cooperative enterprise from which society benefits, and thought that it would be legal if it were free from usury. In his opinion, if the insured lived for the whole term of the life insurance contract, he should be entitled to regain only what he has already paid, without any interest. But if the insured died before the term of the contract was up, his successors should receive the full amount of insurance, as that would be absolutely legitimate (*Alahram aliqtisadi*, issue 132: 20).

It is understandable that insurance as a cooperative enterprise applies to reciprocal insurance. Thus, the illegitimacy of usury should not be an issue. In the case of the death of the insured, Musa cites no evidence as to how the full collection of the insurance premiums would be assured and legal. Writing about life insurance in his book *Al-Islam Wal Hayat* (*Islam and Life*), he maintained that insurance in general is legitimate if conducted by ethical companies, free of usury both in their own investments and in reimbursing the premiums to the insured at the end of the term of the contract (Musa 1986: 216). Hence, in his conclusion on the illegality of insurance he referred only to the relationship between insurance and usury, and can be considered to stop short of declaring the legality of usury-free insurance.

Musa refutes this point by giving the example of insurance which, in some of its particulars, resembled the Cooperative Pilgrimage Society law which imposes 240 points per annual instalment on each member. If the member died before it was his turn to travel, then his successors would regain nothing from the instalments he had paid. If he discontinued payment of his prescribed instalments, he could regain only what he had already paid. Eventually, if he had the chance to travel on a pilgrimage, he would be paid around 40 points by the Society, provided he was responsible for the settlement of the remaining instalments. If he died before fulfilling this commitment, nobody after his death would be obliged to take legal action (Musa 1986: 217).

The comparison between commercial insurance and the Cooperative Pilgrimage Society is not valid as they differ in essence as well as in details. Such subscriptions to non-profit societies are purely benevolent with the main aim of helping their members and the community. They run an ideal financial system which aims neither to make any sort of profit nor to gain from usury. Insurance, on the other hand, is a bare-faced commercial activity, for the express purpose of making profits from customers. The characteristics of the insurance contract are totally different from those of charitable organizations, which are cooperative contracts, rather than ones based on obligation, probability and temptation. As long as it gives wide scope to deceiving and misleading customers (Issa, Sheikh Abdul El-Rahman 1996: 24), the insurance *jurist* admitted that it could not form a part of the group of 'good faith contracts'. Because of this, there is no way of comparing commercial insurance with the operation of the Cooperative Pilgrimage Society.

It is true that insurance, if it were of a cooperative nature, would be different from any kind of gambling or mortgaging, but if it were not, it would be risky, tainted and outlawed. That is mainly because of a lack of equality and proportionality between profit and loss, with the total absence of fairness in the division of profits. The allegation that card-playing is the only act of gambling is ingenuous. The ancient Arabs used to hold raffles (like the Lottery) with their arrows, using them as a source of good fortune in a way that controlled their daily lives. Later, with the spread of enlightenment from Islam, that came to be considered gambling and, along with other practices such as drinking, was banned. The Quran is unequivocal: 'Forbidden also is the division of meat by raffling with arrows: that is impiety' (4:3); and 'O ye who believe! Intoxicants and gambling, sacrificing to stones, and [divination by] arrows, are an abomination – of Satan's handiwork: eschew such [abominations], that ye may prosper' (4:90).

The assessment of compensation in life insurance is based on a forecast of how long the insured will live. It differs in this respect from the assessment of perished goods. Therefore, as long as it is utterly predictable it would be very hard to achieve justice that would give insurance the nature of gambling. Insurance also contains some kind of temptation, which is prohibited, as well as ignorance about how to insure somebody's life, and this ignorance is what makes the contract imperfect, leading as it does to legal disputes and the wasting of people's resources.

It is understandable that life insurance companies normally invest their reserves for usurious purposes. From this angle, it is hard to separate the rules and regulations of the insurance systems which govern the treatment of their customers from the illegal pay-out of consequently tainted money to the insured at the end of the term.

Al-Maliki school of law

Mustafa Ahmed El-Zarqa's views

Mustafa Ahmed El-Zarqa[10] came to the conclusion that the rule of commitment operated if somebody promised another party a loan – which did not form part of their duty – or took on any financial burden on their behalf. The *jurists* of the Maliki school of Islamic law held different conceptions of how obligatory the maintenance of the original promise was. Some of them supported the fulfilment of the promise unequivocally, irrespective of its nature, while others held the opposite view. One group put forward the idea that the lender was obliged by his promise when the purpose for which the money was required was specifically defined, even if the person to whom the promise was made did not achieve the goal. However, some *jurists* did not agree with this latter point, and made it conditional on the person to whom the money had been promised achieving the set task.

El-Zarqa continued to maintain that the insurance contract should be an obligation on the insurer towards the insured, bearing, on his behalf, all the harmful consequences of any dangerous accident to which the insured might be subject. That obligation was inherent in the promise, whatever the possible outcome.

The differences between the *jurists* of the Maliki school of Islamic law on this issue leads us to the core of the dispute about the implementation of obligatory promises. According to this school, the opinion closest to reality is the one that is called for. Thus, the promise should not be obligatory unless there is a reason to let the person who has been promised be actively involved. The lender who makes the promise should not make any promise before being fully confident that he is capable of carrying it out.

The idea of treating the insurance contract – even without a return – as an obligatory promise is not valid as the nature of the contract conflicts with obligatory promises. It would not be possible to accept this idea as evidence for the issuing of an insurance contract, as this contract is not just a promise, but is also a formal commitment by the insured to pay the proposed instalments, in return for repayment of the insurance premiums at the end of the term of the contract. If the insured fails to fulfil his commitment, then the insurer would naturally be absolved of any responsibility towards him.

The Aqila system

The *Aqila* is a clan committed, by an unwritten law of the Bedouins originating in the early stages of Islam, to pay blood money for each of its members. If somebody unintentionally commits a murder (manslaughter), and the granting of blood money became the clan's final verdict, then that blood money would be spread across his *Aqila* (the supportive clan).

The *Imams* and *jurists* have different ideas as to who the members of *Aqila* should be. *Imam* Abu Hanifa suggested they should be the administrators in his area, while *Imam* Malik argued they should be the killer's clan, who normally live with him in the urban centre and not those who live in the rural area. *Imam* Shaf'i stated that they should be the next of kin on the father's side (Ibn Hazm 1980: 11:47). *Imam* Ibn Hazm backed *Imam* Shaf'i's opinion in that the blood money should be collected by the clan members in a cooperative way to maintain good ties with the killer, provided the killing itself happened unintentionally. The *jurists* justified that as a kind of punishment of the clan members for their deficiencies in neglecting their kinsman to the point where he was pushed to kill someone, albeit by accident (Ibn Abdin (repr.) 1966: 5:47).

What, then, are the points of similarity between the insurance system and the *Aqila* system that was basically established on firm foundations of cooperation and mutual support? The delinquent would gain no personal benefit in complying with the *Shari'a*, on grounds of cooperation and family solidarity (Abu Zahra 1989: 517). Comparing *Aquila* with commercial insurance reveals fundamental differences. The latter is a purely commercial activity, based on a bilateral commitment between an investor (the company) and a customer (the insured). These commitments represent the payment of prescribed monthly or annual instalments by the insured against the return of a financial benefit to him at the end of the contractual term. Although El-Zarqa insisted that the dual responsibility in the systems could deem them acceptable, the *jurists* refuted this by pointing to the lack of dual responsibility in commercial insurance.

The *Aqila* system is similar to the pensions scheme for State employees which is founded on cooperation between the State and its employees for their eventual benefit. Under this system, the State deducts from employees' salaries regular monthly amounts which are give as pension payments at the end of their working life. These payments should continue for the rest of their lives and are then passed on to their dependant successors after death until they become independent. On the face of it, the process is similar to the commercial insurance system in respect of paying monthly instalments, but closer examination reveals differences between them. The commercial insurance system is based on certain financial rules, the ultimate goal of which is profit, while State-designed pension schemes exist for the sole benefit of its employees. The State, by so doing, aims to express its appreciation of its employees' lifetimes of public service and show their care and responsibility towards all civil servants, irrespective of their religion or gender, ensuring that they and their families can live a decent and honourable life after retirement. The small percentage, deducted from employees' monthly salaries while in service, is not equivalent to an insurance premium but is a form of tax designed to provide good administration and an appropriate standard of public welfare.

Despite some abuses of pension schemes, it does not signify that a commercial insurance system could act as a legal counterpart.[11] There is a big difference between a cooperative and benevolent social security system under the direct supervision and control of the State and a private system designed by the private sector that aims to profit from the financial resources of the public by exploiting suspicions. Muslims believe that Islam, as a broad-minded and final religion, has been revealed to all mankind and has proven useful for every generation everywhere. As a tolerant religion, it would not reject a foreign or modern system because of its origin, unless it contradicted the provisions of *Shari'a* and the general principles of Islam. However, El-Zarqa's opinion, giving formal approval to commercial insurance by comparing it to 'fidelity of contract for clientele', 'obligatory promise' for the Maliki school of Islamic law, the *Aqila* system, or public employees' pension schemes, is not valid, nor is his opinion about the legality of commercial insurance.

Mohammed Abu Zahra put forward significant opinions about insurance, summed up in three main points:

1 Abu Zahra argued that the *jurists* should not be rigid in trying to interpret modern contracts in the light of the *Shari'a*. That means more flexibility and understanding are required, unless those contracts conflict with the basic rules of Islam. Some understand that the insurance contract has become acceptable according to the beneficence which is taken in some Islamic countries as a considerable argument (particularly in the Hanafi school of Islamic law) regarding issues which used to be proven by discovery and not by the general text. Abu Zahra would agree that the genuine and true beneficence could be an argument. Then he made an inquiry as to whether commercial insurance has become a public or private beneficence; his answer for this inquiry would be that only a very small proportion of people currently use that sort of insurance. At the same time the alleged beneficence would normally confront some issues being derived from the texts.

2 The insurance contract has come to be accepted in some Islamic countries on the basis of its beneficial effects which are considered a substantive argument in its favour, particularly by the Hanafi school of Islamic law. Professor Abu Zahra would agree that the genuine and true beneficence could be an argument in its favour. He inquired into whether commercial insurance is of public or private benefit, concluding that very few people currently benefit from that sort of insurance. At the same time, any alleged benefit would normally have to be measured by its conformity to the texts.

3 Abdel Rahman Issa has pointed out a real benefit from the insurance contract, one that can be considered independently of jurisprudence, namely that the insurance contract has now become an economic necessity and a fact of daily life. However, it is pertinent to ask whether commercial insurance is the only option. Whatever necessity there might be, the doors of cooperative insurance are wide open. If it did not exist, it would have to be invented.[12]

Eventually, he concluded that a cooperative, social insurance scheme is completely legitimate and that non-cooperative insurance is unacceptable because it contains the taints of gambling, temptation and usury that would nullify the contract. It represented a waste of financial resources through payment of money against future receipts and, therefore, such kind of insurance should not be considered an economic necessity.

The importance and impact of insurance upon current daily life in terms of economy and social welfare are quite distinct from its commercial aspects. It has become a daily fact of life as well as a reality affecting everybody. By and large, this effect on daily life has been due to colonial domination of the Islamic world's political and economic affairs, whereby Western laws, traditions and policies were (and are) imposed on Islamic countries, leaving the doors wide open for their companies to arrive and exploit the human and natural resources of Islamic countries. Islamic life needs to be reorganized with its acquired heritage and, most importantly, with the rejection of what is not *Shari'a*. Insurance is definitely one of the legacies we should adjust to, but in accordance with Islamic culture and religion.

Modern *jurists'* standing on insurance

Introduction

Modern Islamic *jurists* have expressed their views on insurance, individually in their own publications, collectively during conferences on the subject, or in papers presented at them. Examining their views adds to the long-standing confusion and difficulties of interpretation. There are several reasons for this confusion but the main one is the lack of any references to insurance in the Quran and *Sunna*. This precluded initiatives by respected scholars and explains the absence of classical Islamic law treatises on the subject (Khalaf 1974: Vol. 11). This has led to opinions being given by scholars who lack understanding of the nature of the insurance contract and its terms, and therefore cannot be objective in assessing the core mechanisms of insurance.

Several opinions have been expressed on the validity and permissibility of insurance and these can be grouped in the following way:

1. A group that prohibits all kinds of insurance without exception.[13]
2. A group that only approves of commercial insurance organized on a mutual or cooperative basis.[14]
3. A group that approves all kinds of insurance.[15]
4. A group that prohibits only life insurance with a commercial or mutual contract.[16]
5. A group that stresses that insurance *per se* is unlawful, although necessity makes it permissible (Khalaf 1974: Vol. 2).
6. A group that allows only some indemnity insurance, such as motor insurance.[17]

It must be noted that these groups often overlap, as some *jurists* approve of certain aspects of insurance but disapprove of certain practices at the present time. An attempt to harmonize and reconcile these views is being made in this work.

The first group's opinion is based on moral, political, religious and economic arguments. The second group's views derive from the legal standpoint of traditional teachings on *gharar* and *riba*. Some of the *jurists* insist on non-legal arguments, whilst others insist on the contractual basis of insurance. Both views are indiscriminately employed and expressed fairly, as far as insurance is concerned. The view of the majority of contemporary Muslim *jurists* and scholars that insurance is prohibited when persons or organizations profit from the misfortune of others has been stated by the Committee of *Ulama' Al-Majma* *al-Fiqhi al Islami*,[18] while insurance is acceptable if conducted on a mutual or cooperative basis.

The legitimate bases of insurance

The application of a number of prohibitions in Islamic law differs according to whether the contract is an onerous one (*mu'awada*) or one without consideration, (*Tabarru*). This distinction is essentially relevant in Maliki law, where the prohibitions of *riba* and *gharar* apply only to *mu'awadah*, but, as noted earlier, similar positions in the Hanbali school of Islamic law were developed by Ibn Taymiyyah.

Insurance falls within the category of *mu'awadah*, as both the insurer and insured conclude the contract knowing that it involves mutual obligations and is subject to the conditions contained in the policy, namely that the insurer is not bound to pay the sum insured if the insured fails to pay the due premiums.[19]

Prohibition of gharar and the validity of insurance

The prohibition of *gharar* in Islamic law has been the major argument put forward against the validity of insurance. Those who argue that insurance cannot be accepted under Islamic law argue that uncertainty is a prominent feature of insurance. Firstly, these proponents argue that there is uncertainty as to the payment of the sum insured. The insured pays periodical premiums without knowing whether the sum insured will ever be received, as its payment is dependent upon the occurrence of a contingent event (Al Masri 1987b).

Additionally, when payment is made, there is uncertainty as to the amount payable to the insured as such payment is measured according to loss sustained, at least as far as indemnity insurance is concerned. Therefore, insurance manifestly involves uncertainty, and this uncertainty is equivalent to the element of *gharar* expressly prohibited in sales contracts in Islamic law (as mentioned in the *Sunna* and in the Quran (2:188)) and, by analogy, other contracts. Thus, insurance in Islamic terms cannot be permissible (Al-Hafiz 1984: 2: 426–31).

The position of the *Shari'a* towards conditional and uncertain sales is that risk, where it is involved, is forbidden because of the likelihood that it will result in disadvantage to some party (Khater 1985). However, such an interpretation of the *Shari'a* is far from being an accurate reflection of its position in this regard. There are various elements which form the basis of different views. One view considers the existence in Islamic law of a category of contract involving uncertainty, which includes wills, guarantees, and other similar contracts. Another viewpoint, supported by Ibn Taymiyyah, accepts the Maliki doctrine which confines *gharar* to circumstances where uncertainty may have prejudicial effects and upset the balance between the mutual rights and duties of the contracting parties (Shalaby 1960). Apart from this, there is the fact that *gharar* is, itself, applicable to contracts involving an actual exchange of counter-values and is subject to the requirement of equivalence rather than being a transaction containing a binding promise of financial assistance through a contribution to a fund created for the purpose.

For this reason the sale of unripe fruit was forbidden by the Prophet. If the fruit did not ripen, the calculated equivalence would be upset and the result would be an unjustified increase of capital to the benefit of the seller.[20] Though the insurance contract has incorrectly been compared to the sale contract, it is not a conventional contract whereby goods or services are exchanged for money, in which case the comparison would have been well-founded. Each insurance transaction containing risk has to be considered fully to evaluate the eventual prejudice it entails. As for insurance, it has been specifically designed in order to counter the effects of risk and this function cannot be set aside when studying its legitimacy within Islamic law. It must be the determinant in this respect.

Uncertainty is inherent to insurance. It aims to provide financial security in exchange for a premium which is appropriately justified, as no one would expect to receive financial assistance from a fund without contributing to it. Insurance without uncertainty is inconceivable, as is the case with other such contracts containing a functional contingency, such as wills, guarantees and *Mudaraba*. The performance of the obligation of a surety is necessarily uncertain, as it is deemed to materialize only in case of default of the principal debtor, which is a contingent event. The same principle occurs in insurance where the uncertainty is fully justified and legitimate. It should be noted that the concepts of State pension schemes and mutual insurance are not refuted when commercial insurance is rejected because of the existence of *gharar*, as the same principle of functional contingency applies.

Uncertainty is present in mutual and State insurance schemes as much as in commercial insurance and the argument that *gharar* does not invalidate mutual and State schemes because the premium is deemed to be a donation is unconvincing (El-Atar 1978: 112). In fact the Islamic opinion supporting such an argument implicitly admits that *gharar* is not by itself prohibited *per se*, and is only deemed to invalidate insurance when there is a possibility of unjust advantage, as is the case in commercial insurance. Therefore insurance contains *gharar* because its aim is to cater for prejudicial uncertainty. It is not, as is the case with some Islamic contracts, rendered invalid by it. As required by the *Shari'a*, the rights and obligations of the parties are, to a great extent, precisely determined. The contract stipulates exactly what each party is enjoined to do or abstain from. What remains undetermined in indemnity insurance is the sum insured, as it will be measured according to the loss sustained and covered under the policy's terms.

This factor (along with the indeterminacy of the date of payment of the indemnity) is dependent upon the occurrence of the risk covered and does not fall within the arena of the prohibition of *gharar*, which forbids functional uncertainties pertaining to the essence and role of the contract. It is considered by Mustafa Al Zarqa that insurance falls not within the scope of the application of the prohibition of *gharar* by *Shari'a* but within the kind that is acceptable: '. . . and for those who say that peace [*Ammn*] has no value, I [Mustafa al-Zarqa] say that peace [*Ammn*] is the greatest life gain as that peace God has gifted *Quraysh* with it. "Let them adore the Lord of this house [House indicate the *Ka'ba*]"' (106:3). All people work hard, collect wealth, build houses or palaces, invest and trade all these for gaining peace and security for themselves and their families for their present and future, and there is no evidence in the Sorat that obtaining peace does not have a price, and any claim that peace does not have a price contradicts to God's principles (Al-Zarqa 1984: 47). Therefore, insurance does not fall within the scope of the prohibition of *gharar*, as it is a collective scheme which cannot be reduced to a one-off bilateral contract: *gharar* invalidates a contract when it results in unfair profit to one party, as in the case of the sale of unripened fruit. The prohibition of *gharar* is founded either on *riba* or on gambling, as expressed by Ibn Qayyim (1972b) (*Al Tariq al hukmya fi al Syasa al Ta-Shri'iya*: 2:7).

Similarly, the *Sorat* contract of hiring guards is a contract of employing guard to protect one's properties or goods of any kind. The guard employed is paid wages for the service provided, which amounts to paying fees for peace of mind.

Insurance contracts have no such unjust profit because, with the exception of life insurance, if the event insured against occurs, the insured will not make a profit but will simply be indemnified from the collective fund set up and administered by the insuring body. If the event insured against does not take place, the premiums do not become the property of the insured. The transfer of the premium occurs only once they have been paid, and is independent of the occurrence of an uncertain event. Therefore *gharar* does not arise in this case. In addition to this it should be specified again that insurance lessens social and economic risks (Shouki 1984).

Invalid bases of insurance

Implication of riba in insurance

Under a conventional insurance contract the insured pays to the insurer a sum, usually by instalment, in exchange for the insurer's undertaking to pay, on the occurrence of a specific event defined in the policy, a sum which is normally largely superior to the premiums paid. The insured (or the beneficiary) may consequently obtain a sum much higher than the one he has paid. This difference has been seen by Muslim *jurists* as amounting to an unjustified increase of capital, resulting in *riba*. *Riba* would also be involved when the risk insured against does not take place, only this time to the benefit of the insurer. The premiums paid are seen as a 'mere loss' to the insured and an unqualified profit for the insurer, which amounts to an unjustified increase of capital prohibited by the *Shari'a* (Qadi 1984: 2:499). This concept of *riba* has been introduced into the argument on the invalidity of Islamic insurance as a result of an unfounded analogy made between insurance and a number of contracts sanctioned by Islamic law. One such example is the analogy made between insurance and *sarf* (Muslehuddin 1966: 177). When the insurance contract is seen as *sarf*, the difference between the premiums paid and the sum insured cannot but be described as *riba* as the insured receives a sum exceeding by far the instalments that he paid (Al-Dasuqi 1967: 177).

On examination of its lawfulness, the insurance contract cannot be reduced to, or made to fit into, one of the Islamic nominate contracts. The sum insured paid to the policyholder is not the repayment or refund of the premiums paid by him increased by a certain amount, as is alleged by those who oppose insurance (Al-Hafiz 1984: 2:499). It is true that the premium paid by the insured varies with the amount and extent of the cover required. This is necessary for the common fund to provide sufficient cover for the risks transferred from the insured to the insurer. Insurance is the participation in a common scheme, aimed at providing financial assistance according to the terms of the contract entered into between the insured and the body to which the risk is transferred. The premium paid represents the necessary contribution to the common fund, without which no reserves could be formed to provide assistance, and no remuneration for the service provided by the insuring body could be made (Moghaizel 1990: 202).[21]

Gambling versus insurance

It has been claimed by many that insurance should be rejected because it is a form of gambling. The payment of the sum insured depends upon pure chance, as is the case with gambling profits (Uways 1970: 98). But as we have already established in detail (Uthman 1969), the requirement of insurable interest removes insurance from the ambit of gambling and the argument disqualifying insurance on this ground is invalid.

Another view is that bidding is another kind of risk which is not a necessary part of everyday living and working; on the contrary, it is a voluntary choice. Regardless of whether one is the bidding process's initiator or someone who joins in, it is volitional. Such a process entails both loss and gain. The hope of gain motivates the taking of risk which is a game involving money stakes. This is considered gambling and insurance does not differ from this (Nejatullah 1985: 15).

Other arguments on the invalidity of insurance

In addition to the arguments citing the existence of *gharar* and *riba*, other grounds have been put forward for the rejection of insurance by those who argue insurance's invalidity:

1 The insurance contract is not recognized by the *Sharï'a*. According to this argument, insurance should be rejected because it does not correspond with the nominated contracts regulated and expressly validated by the *Sharï'a*. The counter-argument is that Islamic law does not reject all contracts that do not comply with established nominate contracts. It recognizes the concept of contractual freedom and allows the introduction of new transactions, provided that they do not violate Islamic contractual public policy.

2 The 'inheritance rules and insurance' argument concerns life insurance, where the sum insured is paid to a beneficiary designated by the insured, and is not passed on at the death of the insured to his legal heirs. It is said that this constitutes a breach of Islamic inheritance rules concerning the distribution of the deceased's estate among his legal heirs. This argument has its origins in a distorted view of the insurance contract, as the sum insured paid to the beneficiary does not originate from the estate of the life insured, but from the fund constituted and administered by the insurer. As a result it is not subject to the inheritance rules applicable to the estate of the life insured. It might be argued that by its means life insurance allows the life insured to defraud the inheritance rules, and takes advantage of heirs to the detriment of the others. In fact, according to the *Sharï'a*, a Muslim may donate freely during his lifetime to any person he wishes,[22] so he does not need to resort to life insurance for this purpose.

3 The third party contract is illegal in Islamic law. Contracts for the benefit of third parties would not be allowed in Islamic law, because the clause stipulating that the benefit from the contract is to be given to a third party would amount to an additional clause in the contract prohibited by the *Sharï'a* (Al-Sanhuri 1934: 2:159–61). As a result, given that insurance is often a contract for the benefit of a third party (Issa 1978), it should be rejected. While this statement might be pertinent in Hanafi law, the position of Hanbali law in this respect is very different. This latter doctrine allows additional stipulations to the contract, provided that they do not contravene the provisions of the *Sharï'a*, so that contracts for the benefit of third parties are valid and do not constitute an impediment for the permissibility of insurance under the *Sharï'a*.

4 According to views on the will of God, man's destiny is decided by God, and insurance and life insurance contracts would upset the course, because it aims to change the natural consequences of adverse events. This extra-legal argument was refuted very early on (Uthman 1969: 478; Mahmoud (n.d.): 159). It is obvious that the *Sharï'a*, which has Muslim interests in mind at all times, is not violated by measures of precaution and security which are aimed at providing financial assistance in the event of prejudicial events.

5 Regarding reinvestment of the insurance premium, the investment policy of the insurer is important since, while it is not properly part of it, it has a consistent bearing on the insurance contract, forbidding as it does elements

such as *riba*. It is evident that insurance companies invest the funds raised in ventures involving interest in violation of the *Shari'a*, but the invalidity is due to the investment behaviour of the insurer, not to an inherent defect in the insurance contract. It disqualifies the insurance contract only inasmuch as it is inconsistent with Islamic law, and there is a considerable latitude for manoeuvre in this respect.

6 Insurance is not based on genuine cooperation. The supporters of the validity of insurance quote in its favour the verse of the Quran calling for mutual help and cooperation among Muslims: 'And the believers, men and women, are protecting friends of one and another; they enjoin the right and forbid the wrong, and they pay the poor-due and they obey Allah and His messenger' (9:71). Such arguments must be refuted on the grounds that there is no intention of cooperation and mutual help among the group of the insured. Whether the intention of mutual help exists or not among those insured in commercial insurance, the fact is that the loss sustained by one of them is borne by the others collectively, since the sum insured is paid from a fund constituted by the collection of premiums from all those insured. Consequently, the mutual help enjoined by the Quran is in force on a *de facto* basis, but, as will be submitted later, mutual insurance does not embody genuine cooperation among the insured any more than commercial insurance does. However, even if the insurance contract is not a realization of the principles prescribed by the *Shari'a*, it is, nevertheless, valid so long as it does not contravene the rules of Islamic law.

7 Besides the arguments rejecting commercial insurance cited above, there are many other arguments that fall into two main categories:

a The first concerns stipulations in the insurance contract, often seen as draconian clauses towards the insured, such as charging interest for a delay in payment of the premium (al-Mammal: 354). Here the blame is directed at the stipulations, which are in themselves too burdensome and contrary to the *Shari'a*. It is not the insurance contract *per se* that is subject to controversy, but certain terms contained within it which are judged unfair. The issue here is how these clauses can be modified to make them acceptable to Islamic law.

b The second category of positions includes extra-legal arguments which are entirely subjective and unfounded. Amongst such arguments are allegations that insurance leads to negligence, as insurance companies strive solely to make profits at the expense of the community (Khorshid 1994), and to exert control of governments (Issa 1978: 118–19). This undermines all legal reasoning as it demonstrates a preconceived hostility towards insurance, which proceeds from a profound misconception and limited understanding of its mechanisms. These arguments reveal the underlying reasons for the rejection of insurance by the majority of its proponents which will be explained

> later. One remarkable example is the allegation that insurance leads to negligence because the insured, knowing that he will be indemnified by the insurer in case of damage to or loss of his property or in case of liability incurred, will act recklessly and without prudence. It is also said that the insured will intentionally commit acts causing him to be indemnified under the insurance contract (ibid.: 12). While insurance is subject to abuses and fraud, as any other contract, effective measures have been taken to counter this. Insurance policies generally contain a deductible or excess clause making the insured liable to contribute a certain proportion of the loss sustained. In addition, policies often impose on the insured the adoption of preventive measures to minimize the occurrence of an insured risk. These are promissory warranties to maintain alarms or sprinkler systems in commercial fire policies or to install new locks or maintain new brakes in motor policies.[23] As far as intentional acts committed by the insured are concerned, there is a standard practice whereby policies do not cover losses intentionally caused by the insured.

It is widely agreed among Islamic scholars and *jurists* that the insurance contract can never be free of gambling, temptation and usury. As long as there is no compelling economic necessity, it should be replaced by a lawful, cooperative insurance system, which is free from usury and any other taint. With regard to the criticism that the insurance contract is a waste of resources, it is important to qualify this. It is not necessarily the case, as sometimes the insured party may not receive the full insurance entitlement owing to the non-occurrence of the accident covered by the transaction. In such a case, the insured party might pay their money without any return. In many cases, the insurance companies may also prefer to repair the damage without paying the insured any actual money. That mostly happens in cases of insured objects which can be repaired or replaced.

Sheikh Abdullah El-Galgeily's *The Mufti of Jordan* already set out his judgement of all kinds of insurance as illegal according to *Sharī'a* for several reasons, specifically that insurance:

1. is incompatible with natural and familiar methods of earning money, such as buying and selling;
2. is not free of the taint of gambling;
3. is not free of temptation and cheating; and
4. involves an element of usury.

In addition, the insurance companies issue the terms and conditions in their contracts in an ambiguous, unclear way that protects only their own interests, while ignoring those of their customers, a situation with the potential to lead to corruption.

Muslim *jurist* Siddik Mohammed El-Amin El-Dareir, author of *Hokm Aqd Al-Ta'min fi al-Shari'a al-Islamiya*, was of the opinion that the current insurance system is not legal, as it is not appropriate to decide on the basis of necessity unless there are no other alternatives. In the case of insurance, it would be possible to take the essence of the insurance contract and make the best of it, while firmly upholding the doctrines of Islamic jurisprudence. That could be achieved by moving from commutative to contributory insurance contracts. It would be possible to remove the intermediaries who solely make profits from insurance and convert to a cooperative insurance system. That kind of insurance could be run by the participants themselves or under government supervision. El-Darir came to his conclusions mainly because the current insurance contract contains an element of temptation which is utterly unlawful.

Other views on insurance

It is now clear that a distinction has to be made between life and non-life insurance. Life insurance contracts do not have the indemnity character of other policies, and are not considered as compensation for a loss suffered. The sum insured is paid without reference to any financial prejudice sustained, although the idea of compensation may be inferred if the sum insured is paid to the breadwinner's dependant after the insured's death, something that is not the case when the sum insured is paid to the insured himself at the maturity date of an endowment policy. In the latter, and in spite of the insurable interest requirement, it remains, from an Islamic point of view, immoral gambling. This is why positions towards life insurance generally differ and are extremely restrictive. Therefore, life insurance must be considered separately in any insurance scheme, and as being not in harmony with the *Shari'a*.

Inconsistencies in arguments prohibiting insurance

Insurance is criticized for involving elements forbidden by Islamic law, such as *riba* and *gharar*. Other non-legal considerations are cited incidentally (Al-Hafiz 1984: 2:365–6). On the other hand, the insurance schemes accepted by Islamic opinion, such as mutual insurance, do not necessarily eliminate the forbidden elements that exist in commercial insurance. A contract which, on the one hand, is rejected for contravening the Islamic law of contracts is accepted; on the other hand, in a different context and while still containing the principal causes of its rejection, a contradiction advises that weakens the reasoning of the arguments against commercial insurance. Amongst those opposing the validity of commercial insurance, there is almost unanimity that mutual insurance is the only acceptable insurance scheme under the *Shari'a*, with the exception of State insurance. The argument is that the mutual structure does not involve forbidden elements (Sha'ban 1978: 13; Al-Hafiz 1984: 2:508–9; Rahman 1979: 228), and that mutual insurance embodies the Islamic conception of solidarity and mutual help, as premiums paid are donated by the insured who are free of any profit-making intention (Al-Darir 1987: 646). According to this view, the only aim of the participants in the scheme is to provide relief for its other members in the event of financial loss. The premiums and the sum insured are seen as gifts and therefore exempted from the prohibitions of *riba* and *gharar* as there is no exchange of counter-values (Al-Hafiz 1984: 2:504).[24]

Armed with the above opinions, the mutual scheme can be considered valid for the following reasons:[25]

1 the intention of the members is to help each other and to bear one another's burdens;
2 the intention of the members is to donate the premium and not to pay a contribution in return for financial cover;
3 the insuring body is owned by all those insured;
4 the company is managed by the insured and not by a distinct entity; and
5 the profits are distributed to the members and not to shareholders owning the business.

It should be pointed out that the members of a mutual insurance company do not have to know each other, and deal solely with the business of the company in matters relating to their policy.

In commercial insurance the intentions of the policyholders cannot be guessed at, and would not affect the judgement of the promoters of, and participants in, the scheme. It is more than evident that the incentives of the insured are to seek the best financial cover with the most favourable terms available. All policyholders pay a premium in exchange for cover. That is the promise of the insurer: to secure them financial assistance according to the conditions of the policy. There is no doubt that in the mind of the insured, were his intentions revealed, the idea of interdependent and mutual obligations between him and the insuring body would always be manifest.

We conclude that if *riba*, prejudicial *gharar* and gambling exist in commercial insurance, they will not be present in mutual insurance, because mutual insurance eradicates the alleged causes of the forbidden elements, according to the reasoning of the opinion which invalidates insurance on the grounds of *gharar*. Therefore, mutual insurance should be strongly recommended and the insured may, at least theoretically, be asked to pay an additional premium to enable the company to meet its financial obligations towards members entitled to an indemnity. This additional premium cannot be pre-determined, so that excessive uncertainty is involved in this operation. Advocates of mutual insurance often fail to mention this point. As far as ownership and management of the mutual insurance company is concerned, actual practice demonstrates that the policyholders own and manage the company only in formal terms. Evidence of this is that in a case of insolvency, the policyholder will lose only his premium as would any other insured person who had contracted with a commercial insurer. The control of the directors by the members is virtually imaginary, due *inter alia* to the extremely low rate of participation in the election of directors and owing to the quorum requirement and proxy system.[26]

The policyholder in a mutual insurance company is buying a service like any other insured person. He does not play the role of owner, even were he given the opportunity to do so. The main feature of mutual insurance is that policyholders have a proprietary right to profits. The insured have, in this case, a proportional interest in the surpluses while, in commercial insurance, the surpluses go to the owners of the enterprise who are the shareholders. This is the only relevant difference between commercial and mutual insurance. In commercial insurance, a mutual company might contravene the *Shari'a* by adopting an investment plan involving forbidden elements. On the other hand, a proprietary company may be following an investment programme in compliance with Islamic law. Many large proprietary companies compete successfully with mutual companies in that they pay benefits to policyholders and still pay dividends to their shareholders.[27] The large volume of business transacted by some proprietary companies results in considerable savings in administrative costs to policyholders and the larger investment income generated from greater reserves allows them to pay out part of those benefits to policyholders. In reality, the issue is determined by how equitable the company's policy and practices are rather than in the form the company takes, or in the supposed altruistic intentions of the insured.

If the insurance market were not subject to restriction and regulation, it would certainly be open to abuse and wrongful practices, whatever form the insurance companies, whether proprietary or mutual, took if the management were unprofessional. The attitude and expectations of the insured are the same in each case. A commercial insurer may or may not be of greater benefit to the insured than a mutual entity depending upon the company's policy, the terms of the contracts issued and other considerations such as State supervision and investment strategy (Carter 1973). Even if, in terms of lower premiums or higher bonuses, mutual insurance were to prove more profitable for the insured, this would not imply that commercial insurance is invalid under Islamic law (Al-Fangari 1984: 55).

This prospective advantage, which might render the bargain struck with a mutual insurance company more profitable and rewarding to the policyholder, does not invalidate commercial insurance as a lawful business activity from an Islamic point of view. The fact that the persons who set up and run an insurance enterprise make gains out of the service rendered does not invalidate insurance. Criteria other than the company's structure determine whether it is permissible or not under Islamic law.

Main reasons for Muslim **jurists'** *prohibition of insurance*

The mutual structure does not eliminate from insurance the elements that were put forward as reasons for disallowing commercial insurance. It does not transform the contract into a gratuitous act (*Tabarru'*) as has been claimed. It is claimed that the contract of insurance was rejected because its subject matter and constitutive elements were unlawful, whereas mutual insurance is allowed because it is based on genuine solidarity (Sha'ban 1978: 13). The only difference between mutual and commercial insurance is in the structure of the insuring body, a consequence of which surpluses, if any, are apportioned among policyholders instead of shareholders. This might be more advantageous to the insured and appears more equitable since the mutual structure does not present itself as an exploitative entity. The contractual obstacles put forward against the validity of insurance in fact constitute a means to support and strengthen the real causes for commercial insurance, and the decisive evidence in this concern is precisely the acceptance of mutual insurance and State insurance. Those real causes are of origins alien to the concept of insurance in Islam and the Islamically unlawful practices of insurers.

The insurance concept was originally an alien idea introduced by foreign companies (Al-Fangari 1984). Seen as such, it aroused the mistrust of Muslim *jurists*, especially at a time when no legislation existed which could regulate the practice of insurers to guarantee to the insured fairness of transactions.[28] The insurer appeared to be a foreign capitalistic entity exploiting Muslims by selling them a then unknown, and somewhat elusive, service. The fact that the majority of insurance business was effected by foreign companies had, and still has, a substantial influence on the prohibition of commercial insurance, as insurance has been perceived as a means to extract money unjustly from Muslims for the benefit of Western exploitative interests.

The opposition to insurance was a reaction to the introduction of a foreign concept which was totally new. Maxine Rodinson describes the reluctance of Muslim entrepreneurs to engage in modern industrial undertakings as a 'normal reaction at that period of transition towards the sudden introduction by foreigners of an economic behaviour which was radically new and heterogeneous to the network of traditional social relations and to the attitudes and behaviour which were correlative to them' (Rodinson 1988: 181).[29]

Another fundamental consideration that led to the prohibition of commercial insurance was the investment of funds by insurance entities in interest-bearing activities. Such considerations have always been associated with commercial insurance despite the fact that they are unrelated to the proprietary or mutual structure of the insuring body. In addition to this, the terms of insurance policies have frequently been judged as unfair towards the insured, even in Western jurisdictions where contractual public policy is less stringent than that laid down in the *Shari'a* and where the legislation is less paternalistic and protective of the individual's interests. Such would be the case, for example, of ambiguous exclusions which can be construed in different ways, thus allowing the insurer to adopt the most convenient interpretation in order to avoid payment (Al-Dasuqi 1976). Another example of a clause which could be seen as unfair is the stipulation, under which interest is charged for delay in the remittance of the premium. As a result, Muslim *jurists* regard commercial insurance as an enterprise which aims to exploit people in need of security and out of this need to maximize profits without reference to the interests of the insured (Moghaizel 1990). It is viewed as a tool in the hands of the rich who get richer by making those in need of financial security poorer (Akhafif 1967).

These positions obviously do not reflect reality and betray their proponents' philosophical stances, since they normally lead to the conclusion that any insurance scheme, even if commercial, would be acceptable if subjected to adequate safeguards to free it from forbidden elements. That is why mutual insurance was advocated by Muslim *jurists*.

Another factor which fuelled opposition to insurance is that Muslim *jurists* wrongly viewed insurance as a charitable institution designed to help the needy (Al-Jammal 1978: 343).[30] While this might be the case for social security and *Zakat*, it is not the case for insurance. Insurance was initially devised to meet the requirements of international commerce and, as David M. Walter (1986) maintains, insurance 'developed first as a means of spreading the huge risks attendant on early maritime enterprises'.

Principally, insurance is linked to business activity, and to view insurance companies as relief organizations, as a number of Muslim *jurists* did, is a fundamental misconception. The result will inevitably be the rejection of insurance because it fails to satisfy the conditions required from a charitable establishment. This groundless view contributed to the rejection of insurance by those who held that insurance was used as a profit-oriented activity.

It should be emphasized that the majority of arguments submitted against the validity of insurance are based on a misapprehension of its nature and mechanisms, as well as on a restrictive construction placed on Islamic contractual freedom. The opinion condemning commercial insurance puts forward two sets of impediments. The first pertains to the contractual mechanism itself, the second to accompanying terms and practices. Insurance is purportedly dismissed because it radically offends the Islamic law of contracts, although other forms of insurance are endorsed and even recommended.

In the second conference of the Islamic Research Forum held in Cairo at *Muharram* 1385 *Hijri* (1961), Sheikh Ali el-Khafif launched a detailed research on insurance. He stressed the need for the establishment of an Islamic insurance scheme based on *Shari'a*. He mentioned the differing opinions of the *Ulama* and *jurists* about its validity. He concluded by defending commercial insurance as a humane cooperative system, describing it as one of the fundamental components of current life which produces social stability. Moreover, he argued it was a modern contract unaffected by any text either banning or permitting it, and was devoid of any sort of temptation or usury. It would bring benefits to both parties and establish a tradition of supporting the public interest that would help it acquire the power of necessity so that everybody would get used to it. It produces a stronger commitment than the obligatory promise which the Maliki school of Islamic law defined as a duty to fulfil.

Later, the conference members who held different views, the majority of whom were lawyers, discussed the research. They acknowledged that commercial insurance was a lawful process as a precautionary necessity based on cooperation. Others did not agree with that view. They stood firmly by the view that Islam would not admit such transactions that are based on temptation and usury. However, the conference did not come to any definite decisions, except that:

1 cooperative insurance run by benevolent societies and groups, for the provision of social and financial services to their members, was a lawful form of insurance;
2 the pension scheme and other social security systems established in some countries under government control were lawful and desirable;
3 other kinds of commercial insurance should be subject to further study and extensive discussion by a committee comprised of the *Shari'a Ulama*, lawyers and economic and social experts. It was recommended that the committee should study the different opinions and views of economists, lawyers and social security specialists to reach an understanding and, as far as possible, enlighten the *Shari'a Ulama* worldwide (*Al-Azhar* Magazine, Muharram 1385 Hijri: 125).

The Al-Majma' al-Fiqhi (Egypt) view of insurance

In addition to the various structures put in place to provide an insurance scheme in compliance with Islamic law, many other projects have been suggested. One of them is outlined in the decision of *Al-Majma' al-Fiqhi* (part of *Rabetat Ulama' al-Islamyah*, Headquarters in Mecca, Saudi Arabia), which rejected commercial insurance and presented mutual insurance (cooperative insurance) as the only acceptable scheme under the *Shari'a*, on the basis that this latter form constitutes a gratuitous act, free from *gharar* and *riba*.[31] While important points are stressed by *Al-Majma' al-Fiqhi*, such as the investment of the premiums in activities Islamically permissible, as well as the necessity of the establishment of a supervisory body in the company, the scheme presented raises serious doubts about its feasibility, since it recommends the application of elusive requirements such as 'the true co-operative insurance doctrine by virtue of which the participants alone manage the whole scheme' and 'the training of people to engage in cooperative insurance' (see Appendix 1).

In addition to the fact that, practically speaking, such dispositions have no real significance, the non-feasibility of such projects has best been illustrated by the dual structure of the Saudi National Co-operative Insurance Company (Lasheen 1981), which was supposed to embody the view advocated by *Al-Majma' al-Fiqhi* and others, who see in mutual or cooperative insurance a solution to the problem of insurance under Islamic law. As demonstrated earlier, the cooperative character remains purely formal in this insurance company, which contains, in reality, just a single mutual insurance principle – the eventual redistribution of surpluses to the insured – and which operates neither as a fully cooperative entity nor as a mutual insurance company.

Another practical scheme, regulating re-insurance companies,[32] is worthy of mention as, unlike many other schemes, it consists of operative principles of 'Islamic' re-insurance devised by a committee of experts and considered as being functional and in conformity with the *Shari'a*. As in 'Islamic' insurance schemes, the drafters applied mutual insurance principles (distribution of surpluses to the insured) to an entity with a proprietary structure (a joint stock company). Again, the same device, which consists of setting up two different funds, is used. The first one, called the Participating Companies Fund, is used for the running of the re-insurance business proper and the expenses related to it (Al-Hakim 1969: 79). Premiums paid by participating companies are allocated to that fund and claims paid to them come from it. The second fund, called the Shareholders' Fund, comprises the paid-up capital, in addition to profits made on its investment, plus a proportion of the profits generated by the investment of the first fund. This last operation is designated as *Mudaraba*, whereby the re-insurance company is deemed to be the agent and the ceding companies the investors.

As in the case of insurance, *Mudaraba* mechanisms are not appropriate as a vehicle for a re-insurance agreement and, although the same arguments apply in this regard, an important point as to the ownership of the Participating Companies Fund, should be stressed here. According to conventional re-insurance principles (Wilson 1997: 49), such a fund should be the re-insurer's property. But under the project in question, and by application of *Mudaraba* principles invoked by the drafters, this fund is supposedly owned by the ceding companies acting as investor and the fund is deemed to represent the capital entrusted to the agent (*Mudarib*) to trade with. Leaving aside the 'enigmatic' status of indemnities received by the re-insurer from the retrocessionaire and allocated to the Participating Companies Fund, the right of the investors (here the ceding companies) to terminate the contract and recover their funds when they wish is excluded from the re-insurance scheme since, if put into effect, it would undermine the whole system.

As a result, the *Mudaraba* contract is simply formulated to legitimize the proportion of profits on investments of the Participating Companies Fund given to the shareholders. Without it, there would be no incentive for those shareholders to form a re-insurance company if the only returns to which they were entitled were profits generated by the investment of capital.

The contention that the assets of the Participating Companies Fund are the property of the re-insurer and thus cannot be invested in the context of a *Mudaraba* is strengthened by Clause 1 of Paragraph III of the draft which stipulates (applying conventional re-insurance practices relating to premium reserve deposits) that part of the premiums payable to the re-insurer may be retained by the ceding companies and are then considered as free loans made to them by the re-insurer. This clause indicates that the premiums payable are the property of the re-insurer, especially since the same provision, Clause 1 (ii), states that the retained sums are, in their turn, invested by the ceding companies acting as agent on the basis of *Mudaraba*. Thus it is irrefutable that the premiums paid cannot be considered as the capital of a *Mudaraba* contract whereby the ceding company is the investor and the re-insurer is the agent (*Mudarib*) as it is provided by Clause 8 (b) of Paragraph IV.

As for the distribution of surpluses meant to render the scheme 'cooperative', it should be noted that these distributions are made at the discretion of the re-insurance company's Board of Directors and General Assembly, which is entitled to allocate the surplus to reserve funds 'as may be deemed necessary in the interest of the participating companies'. This eventual and much-qualified distribution of surpluses is not, in reality, any more Islamic than the commonly used profit commission stipulated in re-insurance treatises, whereby a percentage of the profit made by the re-insurer out of the treaty is refunded to the re-insured at the end of each treaty year, and which can as well be termed *Mudaraba* if one applies the ill-founded and modern opinions seeing a *Mudaraba* in all operations involving a proportional profit-sharing arrangement.

When considering all the evidence, one is justified in stating that the truly relevant issue in insurance, from the Islamic point of view, is the question of the existence of interest-bearing operations, as the main differences between the proposed scheme and the conventional one relate to points where interest is involved (for example, investment of funds in sources Islamically, with no interest on retained premiums).

Shari'a jurists and insurance

This section deals with an elaboration of the position taken by Muslim *jurists* on insurance in general, and on commercial insurance in particular. It will also outline a proposal for the development of an insurance system that will function in compliance with Islamic law.

It does seem from the argument reviewed earlier that the insurance *jurists* consider commercial insurance as a humane cooperative system that would achieve security and peace of mind of the public, rather than offer a raft of services in the field of economics without being suspected of any sort of gambling. Insurance has become an essential matter in view of today's complications of life. Thus, it has imposed itself as a daily life issue that is unavoidable by any developing nation.

Shari'a jurists hold diverse conceptions about insurance, taking it not as a humane, cooperative and social idea, but as a commercial business and a modern kind of contract. Some of them have agreed that such a business is a cooperative deal, as Islam encourages this sort of activity that produces many benefits to individuals and to society as a whole. Wherever there is a benefit, it should be sustained by *Shari'a*. Others have denied that principle. They consider insurance as noting more than an illegitimate deal based on the understanding that it is founded on something unknown, which is against *Shari'a*'s provisions that admit any dealing should be dependent on a specific well-known matter. Moreover, it contains suspicions that it is risky and unpredictable. The Prophet Mohammed was reported as saying: 'Leave that which cause you to doubt, and betake yourself to that which will not cause you to doubt' (Ibn Hanbal 1986: 3:153).

Although the *Shari'a jurists* have disagreed about commercial insurance, they virtually agree that this kind of insurance has been wrapped up by suspicions, doubts and deeds that were considered taboo by *Shari'a*. Those who support the legitimacy of insurance admit their denial of how the insurance companies invest their funds and how they pay the insurance money to their customers. Other *jurists* see no economic emergency that would necessitate this kind of insurance, but the majority of them would agree that insurance has currently become one of the most important requirements of life. That naturally would need in-depth consideration, but on different new bases and rules that stay within the spirit and overall principles of the *Shari'a*.

An opinion on commercial insurance

Confirming that the commercial insurance contract has been based on cooperative ideas, and talking about the benefits and characterization of the insurance contract to society, insurance *jurists* actually contradict themselves. They claim that if the contract was profitable for the insurer, it would be of loss to the insured, and vice versa. They also confirm that it is a financially competitive contract in which every instalment is like the monthly rent in the normal rental contract, or that it appears to be a direct selling and buying deal. Eventually they call it a cooperative humane contract. To take both notions at the same time in the same contract is contradictory. It is becoming obvious that the insurance contract has nothing to do with cooperation. More evidence for this is shown in the legislative interference of some countries for the protection of the insured interests (the submissive party) against the exploitation of the insurer (the stronger party).

As Islamic *Shari'a* encourages and calls for cooperation of all kinds, the *jurists* in general would naturally believe in every cooperative relationship. It is revealed in the Holy Quran: 'Help ye one another in righteousness and piety, but help ye not another in sin and rancour' (5:2). Nu'man Bin Bashir reported Allah's Messenger as saying, 'The similitude of believers in regard to mutual love, affection and fellow feeling is that of one body; when any limb of it aches, the whole body aches, because of sleeplessness and fever (*Sahih Muslim* part 4). Despite the Divine call for cooperation in general, it would seem that both the insurance *jurists* and the *Shari'a* scholars have understood differently this meaning. According to the Conventional Law Cogitation (Murad: 112), cooperation is the reciprocal of assistance between members of the society, without exploitation by an individual to another, or a group of another. To review the history of the cooperative movements in the world, it would be noticeable that all leaders of those movements were highly concerned about the exploitation of mankind, and hence adopted the necessary campaigns for freeing human beings from any type of abuse, blackmailing or exploitation. However, the concept of cooperation in Islam is even deeper, and is comprehensively honourable. It is based on the understanding of brotherhood in the Faith. It is revealed in the Holy Quran: 'The believers are but a single Brotherhood: so make peace and reconciliation between your two [contending] brothers . . .' (49:10).

The declaration of brotherhood between members of any society is just an assurance of the solidarity and collaboration between the members of that society in the daily routine of life: in the feelings, the needs, the social status and dignity (Al-Sibaai: 109). Cooperation in Islam is material as well as spiritual, as the Muslim individual is supposed to be not only linked with his Muslim brother by a material tie and interest, but by the bond of faith which is stronger and more exalted than the family relationship.

Muslim individuals in their society believe beyond doubt that money in their hands does not morally belong to them, and that ultimately it belongs to Allah. Relying on this understanding, they consider themselves merely trustees to take care of that money. Thus they do not know avarice, greed or any kind of money loving. They live in a self-contented situation. They would spend their wealth and money on the help of the needy and poor in obedience of what they have been instructed in the Holy Quran and the *Sunna*. These are the real features of solidarity, collaboration and support that characterize ideal Muslim society.

Insurance *jurists* have not taken the right interpretation of cooperation in the Foreign Conventional Beneficence when they claim that insurance is a cooperative contract. This beneficence would totally contradict the idea of the cooperative nature of insurance, as the insurance companies normally utilize and invest the insured money from which they would make profit without giving the insured any significant portion of these gains.

Insurance *jurists* consider the insured as a group of people seeking the cooperation of the insurers to keep them from risks and dangers they might be subject to. Unfortunately, this betrays a misunderstanding of the precise meaning of cooperation. The condition for any task to become cooperative is that the business itself should be owned by the group to which all the benefits and revenues would return. In the case of commercial insurance, which is a profit-making business, the revenues go to the real beneficiary (the insurers) and the services go to the group of insured. That could never be called a cooperative project. It is accepted that insurance did start as a cooperative service before being converted to a commercial system by Jewish traders and currency merchants. It is very likely that Jewish propaganda and international capitalism have used the media to promote commercial insurance as cooperative and humanitarian. With passing time, that idea has become well established in people's minds, supported by elaboration from law experts, and has been carried into Muslim countries on waves of foreign rule and systems early in the twentieth century.

On the other hand, *Shari'a jurists* have got their understanding of cooperation from the Holy Quran and the *Sunna* of the Prophet Mohammed. However, if some of them have supported the insurance *jurists* in their allegation about the cooperative nature of commercial insurance, that might be attributed to their incompetence in understanding of the hidden reality of commercial insurance. Having previously referred to the fact of Muslim insurance *jurists* have been affected by foreign thoughts, I should declare that our *jurists*, when they write about insurance, only differ in quantity rather than quality. Another point that I have noticed is their collective agreement about specific cases prohibited by the *Shari'a*, such as 'insurance for the benefit of a girl friend'. This would confirm that our insurance jurisprudence could not be the same as the foreign one, particularly the French system. It should not be a problem to acquire other experience and knowledge, provided that we have desperate need for what we take, and that there is no conflict with our Islamic *Shari'a*. I have also noticed that the *jurists* of law and economy – including insurance *jurists* – may believe in the foreign economic systems more than they do in the Islamic *Shari'a*. They think that the *Shari'a* should be more flexible towards compatibility with prevailing trends, as if they want to yield the *Shari'a* for imported modern notions (*Liwaa Al-Islam* Magazine, Vol. 8, issue 11: 720).

Any development in life should take place under the power of the Holy Quran and *Sunna*, as the Islamic *Shari'a* is the real overlord of the system, and should never be submissive to any other power. Therefore, the economists and the law *jurists* should do their utmost to surrender every modern imported issue to the *Shari'a* instead of trying to implement otherwise. It would be a shame within a Muslim nation to undermine the *Shari'a* by applying some conventional or man-made laws.

A proposal of an insurance system in compliance with Islamic Shari'a

All Islamic *jurists*, whether in favour of or opposed to commercial insurance, naturally abide by the provisions of the *Shari'a*. Nonetheless, it would be admissible to adopt different opinions and conceptions about modern issues as long as they were not originally stipulated, each scenario becoming subject to theoretical research and independent judgement in a legal or theological sense. Each *jurist* has his own views to believe in, based on sufficient and relevant evidence. However, the main point, which has been abandoned by the *jurists* in their assessment of insurance legitimacy, has always been the economic point of view and how much effect would it have on the general economy of the State. The insurance system from this viewpoint would cause greater economic danger to the general economy as a group of individuals control huge amounts of money, and then utilize and invest that money in an uneconomical way which might damage the public interest. That is exactly what economic *jurists* have confirmed. Hence, some provident countries would go for the nationalization of the banking system and the major influential companies that have a direct impact upon the financial and productive systems of the State.

Shari'a jurists from both sides of the argument have been endeavouring to give insurance-related examples of financial dealings that appeared in Islamic jurisprudence. Those who admitted the legality of the insurance contract have relied on its similarity to the Islamic contract of *Mudaraba* or, perhaps, the contract of 'Fidelity Contract of Clientele', for example. This is an indirect judgement that no modern dealing would be accepted unless a counterpart was found in the Islamic *Shari'a*, as if we should have to stick only within the limits of the *Shari'a*'s contents without giving ourselves any chance of flexibility to manoeuvre. This would inflict us with rigidity and petrifaction. Yet, by any means, adherence to *Shari'a* should never mean that our juridical heritage, in terms of financial dealings, is rigidly confined to a specific period of time. It is a great scripture highly enriched with statutory theories and unparalleled legislative provisions and principles, many of which guide the modern legislator in the making of conventional laws.

Some *Shari'a jurists* have set opinions that represent a specific historical era, opinions that can not be applicable to the current system of commercial insurance with its modern applications. One example is that of Ibn Abdin, who declared his opinion about insurance when colonizers were dominating Muslim lands, when there were no specific rules for running an insurance system. Ibn Abdin lodged his opinion in the chapter 'The Insured' in his book *Aljihad*. He wrote about the rights and duties of the insured in the Islamic countries at that ancient time, which are hardly appropriate or executable today.

If insurance is a new system or a modern kind of contract, then the *Shari'a* has no determined limit to contracts between people in specific committing issues, as there is nothing in its provisions and conditions to do with the limitation of contracts or the confinement of their subjects, unless there is a clear contradiction to the *Shari'a*'s provisions and rules (*The Islamic Jurisprudence* 1981: 1:584).

The Islamic *Shari'a* is considered the final revelation, which is valid and useful anywhere, and for every generation. It is also designed to exist suitably and compatibly with any further human development that might occur in life. It will remain qualified to provide Mankind with any legislation that will help all people to live in peace and prosperity. This was acknowledged and confirmed by 'The International Conference for the Comparative Law of Islamic *Shari'a*' held in Paris on 17 July 1951.

The *Shari'a* creates solidarity between Muslim individuals as a duty for everyone. It should be applied as much within small family units as within the regions and the whole Islamic nation.

The family

In the family arena, the *Shari'a* has decreed the statutory portion for a wife and her children. It is also a responsibility for every financially able person to offer his or her help to the disabled and needy (Musa 1960: 126). The *Shari'a* also decreed the *Aqila* system. Also, 'The Will' that has to be issued by the testator should not be accepted for one inheritor without the approval and consent of the rest of the inheritors, and should not cover more than one-third of the estate inheritance.

The region

As far as the region is concerned, the *Shari'a* declares that it is the duty of everybody to care for others who need help within the network of the locality. It is narrated that Allah's Messenger said, '. . . and any residents of a quarter have among them a hungry person by reason of poverty, Allah is quit of any obligation towards them' (Ibn Hanbal 1986: 2:33). This *Hadith* is a clear order for every Muslim to be helpful to his or her fellow member of the nation to the extent that the entire region should be as one unit.

The Muslim nation

Solidarity within the whole nation is dealt with through a system of *Zakat* that has to be taken at the rate of 2.5 per cent annually from:

1 the saved funds in the country;
2 the circulated commercial capital;
3 the agricultural production at 5 or 10 per cent;
4 the mining production at the rate of 20 per cent; and
5 the cattle at a special percentage in special conditions.

This *Zakat* is not an individual act of benevolence according to their discretional payment, but it is the right of the State to collect it by the power of law, provided that it in turn distributes the proceeds to the needy in accordance with the *Shari'a*. It is only one base of many social solidarity bases (Al-Sibaai: 126). The *Imam* (head of State) has the right through the *Shoura* (consultative council) to impose the levy of a specific share of money from the rich to support the poor and needy, in terms of feeding, clothing and shelter. It is revealed in the Holy Quran that Muslims must '. . . render to the kindred their due rights, as [also] to those in want, and to the wayfarer' (17:26), and that they should '. . . do good to parents, kinsfolk, orphans, those in need, neighbours who are strangers, the companion by your side, the wayfarer [ye meet] . . .' (4:36).

The Islamic economy has shown great concern for the welfare of illegitimate babies and children in general. Islam established a pioneering social security system 14 centuries ago, when Caliph Omar Bin El-Khattab (the second successor of the Prophet Mohammed) ensured the payment of 100 Dirham (the currency unit in early Islam) for every new-born child, and if he grew up the money would be doubled. Also, every illegitimate baby had to be paid

100 Dirham, with a monthly income support for his guardian. If he grew up, then he would be made equal to his contemporaries. Islam also offered orphans a considerable level of care, a policy revealed in the Holy Quran: 'Seest thou one who denies the judgement [to come]? Then such is the one who repulses the orphan, and encourages not the feeding of the indigent' (107:1,2,3); also, 'Those who unjustly eat up the property of orphans eat up a fire into their own bodies: they will soon be enduring a blazing fire' (4:10). There are more verses about caring for the orphan.

Islam has never excluded other categories of society in its offer of the chance to live a good life, irrespective of status or religion. There is no doubt that Islam has arranged every possible facility to offer all the citizens an honourable life with full peace of mind. The presence of the fair *Imam* and the availability of all causes of perfect solidarity should create a life of good quality. That remains one of Islam's fundamental principles, one with a genuine base in *Shari'a*.

A number of Islamic economists call for commercial insurance to be under the control of government, structured according to Islamic principals. These insurance companies should practise and offer services to people for a period of time to establish credibility, to provide jobs and prosperity and to help the economy flourish. After it is well established, commercial insurance should be implemented nationwide, and any insurance business should be regulated according to the experiences gained.

Although this opinion seems genuine and acceptable, assuming that the application of Islamic laws would lead to the perfect and healthy society with rigid solidarity and cooperation, some still believe in the establishment of insurance companies on new bases, but with an Islamic foundation. These Islamic companies would definitely be a part of the means to achieve complete social solidarity in Islamic society. Moreover, the current social conditions make the establishment of such companies inevitable.

Having said that, the conclusions of the arguments for commercial insurance are as follows:

1 unlike the allegations of insurance *jurists* supported by a few *Shari'a jurists*, commercial insurance has never been established on cooperative bases;
2 the commercial insurance contract is one based on impermissible temptation, which would make it a potentially illegitimate contract;
3 the doubt of gambling and risk would be inherent in this contract, as meeting the commitment would be indefinite rather than predictable for both parties;
4 usury is part of the fabric of the insurance contract, either in the settlement of the insured instalments or in the way the insurance companies reinvest their money;
5 some economists believe that commercial insurance would represent an economic hazard upon the State as few people possess sufficient wealth collectively to avoid its domination of all means of production in the State.

That is why necessary laws and rules, which could limit the power of such companies, would need to be set. Despite the effort governments make for the protection of their economies, the major companies still perform tricks to avoid penalization. For that reason, some States have opted for the nationalization plan against insurance and other similar companies for the sake of the welfare of society and to protect the economy; and

6 in commercial insurance, the participating companies do not consider that there is equality between the insurer and the insured. They have set their rules for their own favour, caring little for the insured. These companies make enormous profits at the expense of the insured, which can be interpreted as being usury.

Aside from commercial insurance, there are other kinds of insurance, such as social security and reciprocal insurance. Not only are they legal, they are also highly desirable and often required. The idea that there are similarities between individual insurance and social security, that they have allegedly been established on the same base and under similar conditions (exception that the State plays the role of the insurer in case of the social security) is not true. However, social security is not a contract in the same sense as that of the commercial insurance contract; it is a system set by the State to help certain individuals and groups whose financial resources are not sufficient for the confrontation of daily life risks. The beneficiary of this type of insurance would not normally pay the instalments themselves; indeed, they often pay nothing, at least until the situation improves and a payment threshold is reached. Thus, the gap is very wide between social collaborative systems and commercial profit-making systems, with the latter's oppressive conditions.

In view of that, we believe beyond doubt that the cooperative system should replace the commercial system, as the cooperative system is the one that complies with Muslim teachings. Additionally, it would achieve the genuine purpose of insurance, the protection of society's weak and unfortunate. Some researchers have tried to create a new system of insurance that replaces the current system and complies with the spirit and principles of Islamic *Shari'a*. One of these scholars was Zaki M. Shibana, Professor of Agricultural Economies at Alexandria University, in his article, 'Fundamental Islamic economic features to encounter the current economic problems' (*Al-Shubban al-Muslimoon*, Magazine, Issues 2–6, Vol. 3). He proposed the establishment of a proper governmental insurance company funded by *Zakat*, which then takes responsibility of every aspect of general social solidarity for the whole nation. Such a company, if established with decentralization of its activities, would achieve the correct aim of social solidarity, provided that it functions to secure the living of those mentioned as beneficiary in the verses of *Zakat* are met.

Another suggestion from Sheikh Mohib El-Din El-Khatib,[33] who called for the formation, by working groups and other categories in their place of work, of insurance cooperative societies on similar bases. Every society should collect monthly contributions from each member according to his or her salary, and the sum should be invested in ways prescribed legal by Islamic law and kept for the help of any member afflicted with disability, sickness or death, or even to help in cases such as bearing the costs of children's marriages. This could prove the most provident idea for cooperative insurance if it was well controlled by an official body in the State.

In the light of the above arguments and proposals, the following suggestions are compatible with the overall spirit of Islamic *Shari'l*:

1 A public institution for *Zakat*, with different branches nationwide, has to be established. Every branch should be responsible for both the collection of the *Zakat* within its jurisdiction and the distribution of its proceeds to those who are entitled in the same area. The overseeing institution should control the collection, distribution and investment process, and it should be responsible for saving the surplus funds for emergencies. A part of these funds will be used for insurance.
2 A public institution for cooperative insurance has to be established with the main function of overseeing cooperative societies' activities around the country. Those societies should be established according to a binding law, made and enforced by the government.
3 A public institution for the insurance of government utilities should be established, in a way that every department has to pay a monthly or annual contribution in instalments. The main institution should be in charge of investing these funds, and saving them for any risks that might occur, or for damages to the government departments.

Some insurance *jurists* still have the conception of keeping insurance companies even after the nationalization, on the grounds that benefits could be found from re-insurance in terms of hard currency revenues from foreign companies, for overstaffing of employees, and the availability of the well-maintained technical equipment. However, we see that these justifications are not sufficient for the existence of commercial insurance, as staffing and technical equipment could be dealt with in the cooperative insurance system. As far as hard currency is concerned, it would be very risky, since we might not be sure of earning the expected revenue in the light of bilateral business forecasts and currency exchange fluctuations.

The meaning of 'insurance' to Muslims

This chapter opened with examples of insurance that have replenished people through hard times and provided them with peace of mind in times of stability (an ever-retrospective State if ever there was one). An average Westerner, asked what is meant by insurance, will probably respond with something to do with motoring, life/holiday insurance or National/medical Insurance. In other words, commercial insurance, or the buying of security. To a Muslim, insurance has particular connotations. Since everything is provided by God, they look to God for their insurance and, just like worldly insurance, it surfaces in many guises.

Faith as insurance – *Al-Ta'min Al Imani*

In common with other monotheistic religions, faith is the basis of the Muslim's sense of well-being – the source of his peace of mind (*itmanan*). With faith the Muslim is cherished and lives a fulfilled life; without faith he feels lowly and defeated. With faith the Muslim feels contented; without faith the Muslim feels uneasy. With faith, the Muslim feels secure (*ammana*); without faith Muslim experiences fear, sadness and pain. To be without faith is to experience oppression and loss of guidance, but the true Muslim is guided along the right path and is rewarded for his loyalty to God, both in this world and in the next.

The man without faith meets only with indignation and wretchedness and, ultimately, chastisement from God. Faith, in short, is insurance against the negative values which are attributed to the faithless (Ibn al-Arabi 1972: 2:917).

With this in mind, God reprimands those who turn away from His religion:

> If the people of the towns had but believed (*ammana*) and feared God,[34] we should indeed have opened out to them all kinds of blessings from heaven and earth, but they rejected the truth and We brought them to book for their misdeeds.
>
> (7:96)

> Did the people of the town feel secure (*ammana*) against the coming of our Wrath by night, while they were asleep? Or else did they feel secure against the plan of God? But no one can feel secure against the plan of God, except those doomed to ruin.
>
> (7:96–9)

The above verses chastise those who, despite the revelation of Islam and the manifest blessings bestowed upon them, refuse to believe in God (*Al-Naysaburi* 1967: 9: 111).

Religion is thus seen as the gift of faith (*iman*) securing the Muslim's happiness in this world and in the next:

> Whosoever works righteousness, man or woman, and has faith, verily to him We will give a new life, a life that is good and pure, and We will bestow on such their reward, according to the best of their actions.
>
> (16:97)

God, through his messenger Mohammed, established a contract of religion with the Muslim, whereby the latter, for the reward of security and a livelihood bestowed on him by God, must perform his religious duties as laid down in the Quran (and the *Sunna* of the Prophet). Should he deviate from these duties then in place of God's blessings he will be visited with punishment and afflicted by strife (*Al-Manar* 1980: 6:346).

As for the believers, they will (continue to) receive the blessings and benefaction of God, experiencing unalloyed joy, avoiding evil and degradation, enjoying peace and comfort in this world and recompense in the next (ibid.: 347).

In an aside to the people of Mecca who spurned the message of God and who abandoned themselves to frivolous pastimes, bringing down upon themselves the chastisement of God (ibid.: 9:24–5), God asked if they felt secure in their existence (Al-Tabari 1978: 9:8).

> There were those who were able to know the warnings from God and took refuge under His wing and as a consequence received His blessing, and there were those who ignored it and as a consequence were divested for their unbelief.
>
> (*Al-Manar* 1980: 17:27).

Thus, if the Muslim does not keep to the terms of the contract laid down by God, God will forfeit His protection (insurance) against fear, poverty, sadness and ill health:

> God has promised to those among you who believe and work righteous deeds, that He will, of surety, grant them in the land inheritance of power as He granted it to those before them; that He will establish in authority their religion – the one which He has chosen for them; and that He will change [their state] after the fear in which they lived, to one of security and peace [*aminan*].
>
> (24:55)

In an address of one of the Prophet's companions to Him on the question of security in exchange for fear, he asked:

> 'When will the time come when we feel so secure we can lay down our arms?' And the Prophet replied 'Security is now upon us [because God has granted it to us] so that all the traveller has to fear now, as he guides his sheep from one place to another, is the ravenous wolf.'
>
> (Muslim, Al Bukhari 1966)

Again it is made clear in the Quran that the continuance of this security is conditional on the people (of Mecca) performing good works:

> God sets forth a parable, a city enjoying security [*aminatun*] and quiet, abundantly supplied with sustenance from every place. Yet it was