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Author(s): Renat I. Bekkin

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Islamic Insurance: National Features and Legal Regulation

Renat I. Bekkin, PhD in Law, Senior Research Fellow

Institute for African Studies

Russian Academy of Sciences

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Abstract

The present paper studies Islamic insurance (takaful) as opposed to conventional one. The first part of the paper covers, among other things, such issues as nature and historic roots of Islamic insurance, early forms of Islamic insurance and narrates the disputes among Muslim scholars concerning the compatibility of insurance with Islamic Shariah. The second part deals with history and emergence of Islamic insurance in the modern financial market, as well as the practice of Islamic insurance in different countries. The third part discusses the feasibility of Islamic insurance in Russia in the current legal framework. The paper contains comprehensive glossary of related terms.

Keywords

Islam, Shariah, Islamic law, Islamic finance, Islamic insurance, takaful, riba, Russia

I would like to thank my wife, Julia Prudnikova. She served as my first reader and helped me vastly improve this article.

1. Concept and Sources of Islamic Law

Shariah comprises three categories of injunctions. The first concerns religious matters studied by theology. The second deals with what is generally referred to as internal human conscience, which is studied by Islamic ethics. The third category is composed of rules of conduct that are studied by *fiqh* (Islamic law doctrine, or Islamic law). *Fiqh* governs human relations in various areas of social life, thus, *fiqh* is law in the legal sense, while Shariah is law in the broader canonical sense. Under the Islamic law doctrine,

it is logical to say that the rules concerning Islamic insurance are governed by *fiqh*, but their source is Shariah.

In this article, unless otherwise specified, the term “Shariah” is used as a synonym for Islamic law (*fiqh*), which is a system of rules and principles governing the various aspects of relations between members of the Muslim community (Ummah).¹ Also, it is important to note that, for the purposes of this article, the sources of Islamic law are understood to include legislative acts of Muslim countries adopted by the parliaments in compliance with the rules and principles of Shariah and with the participation of Muslim scholars.

The main sources of Islamic law, according to a majority of scholars, are the following: the Holy Quran, the Sunnah of the Prophet ﷺ, *al-ijma'* (“consensus”), and *al-qiyas* (“analogy”). Furthermore, Islamic law has so-called additional sources. These include *al-istihsan* (“discretion”), *al-istislah* or *al-maslahah al-mursalah* (“public interest” or “absolute exclusive interest”), *al-istishab* (“legal presumption”), *madhab as-sahabah* (“rulings of the Prophet’s Companions”), *as-shariah man qablana* (“Shariah of those before us”), and others.² This article analyses only the main sources of Islamic law, because the additional sources are not recognized by all legal schools and scholars.

The principal and unquestioned “root” (*al-asl*) of *fiqh* is the Holy Quran. According to various sources, of the 6,226 Quranic *ayahs* (verses),³ some 200-500 concern legal matters. Of those, ten to twenty verses deal with commerce and finance (mainly tax matters).⁴ The immutability and eternity of the Holy Quran as a source of Shariah stems from the fact that the universal rules and principles embedded in the Holy Quran on which the

¹ *Islam: Entsiklopedicheskiy Slovar'* [Islam: Encyclopedic Dictionary] (Moscow: Nauka, 1991), 254.

² For the sake of convenience, the names of the sources or roots of Islamic law will appear herein without the article.

³ The number of *ayahs* or verses in the Holy Book differs according to different researchers: 6,204, 6,226, 6,232, or 6,236. See A. Masse, *Islam* (in Russian; Moscow, 1982), 167.

⁴ The number of *ayahs* concerning commercial and financial transactions might exceed the number listed depending on how deeply one looks into the Holy Quran. For example, Quran 12:72 (*surah* Yousef) touches on two issues of commercial transactions, *kafala* and *ju'alah* (see Ibn al-Arabi, *Abkam al-Quran* [Cairo, 1958], 2: 1095-6). Further, the longest *ayah* in the Holy Quran is that regarding debt (Quran 2:282, in *surah* al-Baqara). Hence, the Holy Quran is much richer than it might appear to non-specialists.

lawmaker can rely in his work remain unchanged.⁵ According to Muslim scholars, the Holy Book contains the methodology for finding answers to any, even the most modern, questions, but knowledge and skill are required to be able to find them: "... Nothing have We omitted from the Book..." (Quran 6:38).⁶

Therefore, if the Holy Quran does not appear to contain any provisions directly regulating insurance relations, we should consider other *ayahs*, for they may hold the answer. For instance: "And He has subjected to you, as from Him, all that is in the heavens and on earth: behold, in that are Signs indeed for those who reflect" (Quran 45:13).⁷ On its face it does not refer to insurance matters, but according to a number of Muslim scholars, it can be construed to permit the existence of insurance relations in Muslim society.⁸

The Sunnah of the Prophet ﷺ does not contain any direct mention of insurance, which simply did not exist at the time in its present form. However, a number of rules contained in the Sunnah and concerning such institutions as *diyah* and *zakah* can be categorized as forms of insurance.⁹

Ijma' means consensus among Muslims (de facto, among Muslim scholars) at a particular time regarding a particular matter or problem. Therefore, from the perspective of legal theory, *ijma'* is not a source of law but rather a method of filling gaps in legislation. The *ijma'* of Muslim scholars who decided that cooperative insurance is acceptable from the point of view of Shariah is a good example of using this source in contemporary life.

Qiyas (judgment by analogy) is a practice accepted by all Islamic legal schools as a method of solving legal problems when the Holy Quran and

⁵ The creative nature of the work of the Muslim scholar is not in unjustified formulation of new laws but rather in finding and interpreting the will of Allah contained in the Holy Quran and the Sunnah.

⁶ See *Antologiya mirovoy pravovoy mysli v 5 t.* [Anthology of World Legal Thought in 5 vol.], Vol. 1: *Antiquity. Oriental Civilizations*, ed. L. R. Syukiyaynen (Moscow, 1999), 649.

⁷ Here and below, the text of the Quran is quoted from the following edition: *The Holy Quran (English Translation of the Meanings and Commentary)* (Madina: King Fahd Holy Quran Printing Complex, 1411 A.H.).

⁸ See, for example, Gharib al-Jamal, *at-Ta'amin fi-sh-shari'ah al-islamiyyah wa-l-qanun* [Insurance under Islamic Shariah and the Law] (Cairo, 1975), 234.

⁹ For more information on this subject, see, for example, R. I. Bekkin, *Strakhovanie v musul'manskom prave: teoria i praktika* [Insurance under Islamic Law: Theory and Practice] (Moscow, 2001).

the Sunnah do not contain the relevant provisions and no *ijma'* exists on the matter.

The essence of judgment by analogy is in extending an existing rule to new cases of similar nature. The concept of *qiyas* stems from the fact that at the root of each existing rule of conduct is the cause or reason why it was adopted (known as *aillah*). The task of the scholar is to correctly identify this cause. Therefore, when the *'illah* disappears, the rule itself ceases to exist.

The concept of *qiyas* can be adopted while comparing modern insurance regulation and legal aspects of the institutions of *diyah* and *zakah* in medieval Islamic society.¹⁰

The rebirth of Shariah sciences is occurring across the Islamic world at varying paces. This is due to cultural, ethnic, economic, and other differences among the peoples of the Ummah. Shariah has not retained the status of the only valid legal system in any of the Muslim countries. In no other country except for Turkey, though, has Islamic law completely lost its position, and it continues to function as a set of collected or disparate legal provisions.

Leonid Syukiyaynen's book *Islamic Law* proposes classification of a number of Muslim countries based on the degree of influence of Shariah on their legal systems.¹¹ The role of Islamic law in some of these countries has changed since the publication of his book. In line with his general framework, countries might now be grouped as follows, based on the degree of influence of Shariah on their respective legal systems.

The first group is composed of Saudi Arabia, Iran, Pakistan,¹² Yemen, Sudan, and the northern states of Nigeria, where Islamic law continues to play the most prominent role. The laws and principles of Shariah have a deep influence on their legislation. For instance, the 1979 Constitution of Iran and the 1992 Saudi Basic Law of Government stipulate that all new

¹⁰ The role of other sources of Islamic law are explained as they appear herein.

¹¹ L. R. Syukiyaynen, *Musul'manskoye pravo* [Islamic Law] (Moscow, 1986), 102-7.

¹² In India (which, before 1947, included the territory of today's Pakistan), the arrival of the British subjected Islamic law to a strong common law influence, leading some experts to use the term "Anglo-Islamic or Anglo-Mohammedan law". After the state of Pakistan was established, common law continued to dominate the country's legal system. However, in the late 1970s, Pakistan began a policy of Islamization of various areas of public life, which inevitably resulted in a more prominent role for Shariah in the law. In 1977, Pakistan established the Islamic Ideology Council to develop proposals for bringing the country's laws in line with Shariah. Further steps taken by subsequent national leaders signal their determination to pursue the course of Islamization.

laws must be in compliance with Shariah. The laws of these countries contain the general principles and specific provisions of one of the schools of Muslim legal thought: *Hanbali* in Saudi Arabia, *Maliki* in Sudan and the northern states of Nigeria, *Hanafi* in Pakistan, *Zaidi* and *Shafi' i* in Yemen, and *Jafari* in Iran. Overall, even of this group of countries it can be said that it is actually *nizams* and laws that govern the main aspects of life in these countries,¹³ and Shariah (as Divine Law in the broader sense) serves as the linchpin of the legal system. Completely under the influence of the Holy Quran, the Sunnah, and the legal doctrine are criminal, family, and inheritance law, because the key provisions in these areas are addressed in detail by the main sources of Shariah. The state only needs to codify the legal procedures for enforcing court decisions on these matters.

As for the regulation of economic relations, "modernized" Islamic law is applied. It is based on the writings and *fatwas*¹⁴ of modern scholars, who cannot always reach consensus on a particular matter. The issue of compliance of commercial insurance¹⁵ with Shariah is a case in point for the struggle between two trends among Muslim scholars: those who welcome the adjustment of Shariah laws to the changing conditions of life (including economic ones), and those who oppose any innovations, regarding them as sinful.

The *second group* includes the UAE and Libya. Even though Islamic law does not have as wide scope in these countries as in those of the first group, the role of Shariah is quite important here, even more so in recent times. Thus, Libya in 1977 declared the Holy Quran to be "the law of society" replacing the conventional constitution. Moreover, in both countries belonging to the second group, *fiqh* is central to the legal system as a whole. This is confirmed by the constitution or constitutional acts of Libya and UAE. In both countries of the second group, Islamic law continues to govern all personal status relations and the legal status of *waqfs*, as well as other matters pertaining to the law of torts for which the Holy Quran and the Sunnah contain immutable sanctions. As for issues concerning modern civil and financial institutions, *fiqh* faces here the same problems as in the countries of the first group.

¹³ The equivalent for the word 'act' in Arabic is *qanun*; the term *nizam* is more accurately translated as 'ordinance'.

¹⁴ For more information on *fatwas*, see the glossary at the end of this study.

¹⁵ Islamic law doctrine considers any for-profit insurance operation to be commercial insurance.

The *third group* is formed by a number of Arabian Gulf countries (Qatar, Bahrain, Kuwait), Brunei, and certain states of Malaysia. The statutory nature of Islam and the status of Shariah as the source of legislation are declared in the main legal acts of these countries, but the influence of Islamic law in this group of countries is not as deep as in the two previous groups. The scope of Shariah is mainly confined to the law of torts. As for commercial and financial institutions, they remained until recently virtually unaffected by Islamic law. However, in the last ten to fifteen years these countries have seen significant growth in the popularity of certain institutions of Muslim finance. This is evidenced by the dynamic development of Islamic finance and in particular Islamic insurance (*takaful*) in Southeast Asia.¹⁶ In almost all the countries of this group, the authority of *fuqaha* is very high, and in cases of legal disputes concerning Shariah and related issues, advice of Muslim scholars is often sought. An example can be found in the ruling of the National Fatwa Council (Malaysia) regarding the non-compliance of insurance contracts with the requirements of Islamic law.¹⁷

The *most numerous group* includes the majority of Muslim countries: Egypt, Syria, Iraq, Lebanon, Morocco, Jordan, Algeria, Mauritania etc. The constitutional law of these countries, in most cases, is confined to mentioning a special status of Islam and Islamic law. For instance, the constitutions of many of these countries contain the provision that Shariah is a source of legislation. Private law permits subsidiary application of Islamic law in cases not regulated by the legislation. Thus, the first articles of the civil code of many countries in this group stipulate that in the absence of relevant legislation the judge is to apply the principles of Islamic law.¹⁸ Apart from that, the civil codes of these nations contain many general and specific provisions of Shariah, such as those concerning abuse of right, force majeure, and transfer of debt. However, financial relations are mainly regulated by conventional legislation, without reliance on Islamic law.¹⁹

¹⁶ Malaysia has a special law regulating the status of Islamic insurance in the country, the *Takaful Act of 1984*. All that does not pertain to *takaful* is regulated by the provisions of the *Insurance Act of 1996*.

¹⁷ Apart from that, in the 1970s a number of Malaysian states issued *fatwas* declaring commercial insurance unlawful from the point of view of Shariah.

¹⁸ Syukiyaynen, *Musul'manskoye pravo*, 106.

¹⁹ L. R. Syukiyaynen's classification distinguishes two more groups of countries where the national legislation shows virtually no influence of Islamic law. In one group (India,

Consequently, the following questions arise: Is it appropriate to speak about Islamic law as a legal system in its own right? And is it possible to speak about Islamic law as a unified system, or should we focus on Islamic law of individual countries?

The vast majority of even the most active supporters of Shariah agree that, over centuries, it is gradually losing its importance as a universal legal system.²⁰

Moreover, some contemporary scholars have eventually formed the conclusion that it is not the specific rules of conduct but the general principles contained in the various sources of Shariah or deduced by Muslim scholars that form the fundamental and most stable part of Islamic law, enabling it to meet the needs of social progress.²¹ These scholars refer to such principles as “Rules change with the change of time, place, and conditions”, “Certainty cannot be disproved by doubt”, and “Necessity knows no law”.

As a result, any provision and even an entire area of law can be accepted as valid and compliant with Islamic law if it follows these general principles. For example, the Islamic law of torts gives the legislator full freedom in the choice of punishment for any crime, except for several kinds of offences for which the Holy Quran and the Sunnah impose immutable sanctions.²² Hence, virtually all modern criminal laws are declared to be compliant with Shariah as long as they do not address these crimes and offences.²³

The author believes that such an approach does allow finding compromise solutions in case of a collision between the requirements of Islamic law and legislation based on other legal systems. However, such methods should be used with much caution and very selectively. To do otherwise may lead to an oversimplification and narrowing of possibilities offered by

Philippines, Mali, Chad, Tanzania), Shariah regulates personal status relations between Muslims and legal matters related to *zakah* and *waqf*. The second group is reserved for Tunisia, where marital and family law is slightly influenced by the principles of Islamic law.

²⁰ Only personal status (marital, inheritance, in some cases *waqf* matters) law has remained largely unchanged over the centuries under the influence of Shariah.

²¹ Subhi Mahmasani, *Mukaddima ila ihya' ulum al-shari'a* [Introduction to the Revival of Shariah Science] (Beirut, 1962), 48-9. Quoted from Syukiyaynen, *Musul'manskoye pravo*, 110.

²² These are reflected, for example, in the 1987 Criminal Code of the UAE.

²³ Syukiyaynen, *Musul'manskoye pravo*, 110.

Islamic law or, alternatively, lead to declarations that any institution or relation that did not exist at the time of the Prophet ﷺ could not be prohibited or approved by him and therefore must be permitted. While recognizing the fact that Islamic law is not playing the same role as before, the author believes that the Islamic law doctrine, represented today by many distinguished scholars, is capable of meeting the challenges of modern times without deviating from the word of Allah and the Sunnah of His Messenger ﷺ, for the law doctrine is now the main form of existence of Shariah.²⁴

Only cooperation and interaction of *fugaha* from different countries can help the rebirth of Islamic law. A good example is Islamic insurance. The development of this institution of Islamic finance has involved the leading scholars of the Islamic world. In the course of numerous discussions an acceptable model was worked out, which was later adjusted to the specific conditions of different countries. Thus, any serious work is only possible through cooperation among many Muslim scholars from different countries, for otherwise no *ijma'*—i.e. no consensus of the leading scholars on a particular matter—can be achieved. Therefore, the author believes that, for the sake of Shariah's rebirth, *fiqh* should not be partitioned into Islamic law of individual countries but instead should be viewed in its multifaceted unity, without forgetting, of course, that Shariah, from the day of its inception, was pluralistic in nature. The possibility of coexistence of different opinions on the same matter helped the development of Islamic law over the centuries.

With that in mind, the author will address the question of whether Islamic law permits an independent judgement on the compliance of the institution of insurance with Shariah, and if yes, what should be the nature of relations between the insurer and the insured in order to comply with Islamic law?

2. Early Forms of Insurance in Muslim Society

According to most western experts, insurance originated in the fourteenth century C.E., although some scholars hold that insurance did not appear before the eighteenth or nineteenth century.²⁵ A minority (B. Emerigon,

²⁴ See the chapter "Doctrine as the Main Source of Islamic Law", in Syukiyaynen, *Musul'manskoye pravo*, 65-78.

²⁵ See, for example, G. von Schmoller, *Grundriß der allgemeinen Volkswirtschaftslehre* (1904), vol. 2, Aufl. 1-6, 335.

P. Goldschmidt, and others) hold that the insurance contract was already known in Ancient Rome. They refer mainly to trade and religious unions known as *collegia tenniorum* and *collegia funeraticia*. The insurance contract is the key to this dispute: those scholars who deny the existence of insurance in antiquity and early Middle Ages (up to the fourteenth century, when marine insurance began to be widely used in Europe) base their view on the fact that the insurance contract was unknown in those times.²⁶

As for Muslim scholars, many point to the institutions of *diyab* (blood money) and *zakah* (obligatory charity tax) as the precursors of insurance relations in the Muslim world.²⁷

The term *diyab* signifies compensation for murder or injury paid by perpetrators or their relatives to the victims or their relatives. Western legal theory treats this institution as part of the criminal law.²⁸ Islamic legal theory sees it differently and treats *diyab* and *zakah* as early forms of insurance in the Muslim world.²⁹ Unlike European legal systems,

²⁶ For more information, see V. K. Reicher, *Dokapitalisticheskoye strakhovaniye* [Pre-capitalist Insurance], in 4 *Strakhovoye Pravo* [Insurance Law] 65 (1999).

²⁷ Muslim scholars do not deny the tort nature of the institution of *diyab*, or that *zakah* is primarily a tax for the benefit of the needy. However, in their opinion, this did not prevent *diyab* and *zakah* from performing the additional function of mutual insurance.

²⁸ See, for example, *The History of State and Law of Foreign Countries*, ed. N. Krasheninnikova (Moscow: Norma, 2002); and I. Kozochkin et al., *Criminal Law of Foreign Countries*, I (Moscow: IMPE, 2001).

²⁹ See, for example, Ma'sum Billah, "Quantum of Damages in *Takaful*: The Possibilities of Adaptation of the Doctrines of al-Diyah and al-Daman, a Reappraisal", *Journal of Islamic Banking and Finance* 17, no. 1 (2000): 25-52; and M. A. Az-Zarka, *Sistema strakhovaniya: Yeye sushchnost i vzglyad shariata na neye* [System of Insurance: Its Nature and the Shariah Perspective] (Kazan: Iman, 1999). A position similar to that of Muslim scholars with regard to blood money as an early form of insurance may be found in the Russian legal literature: "The emergence of insurance in Russia is linked by researchers with the old Russian code of laws known as *Russkaya Pravda* [Russian Law; tenth-eleventh centuries], which first provided for compensation payable by the commune in case of murder". S. A. Rybnikov, "Ocherki istorii strakhovaniya v Rossii" [Studies in the History of Insurance in Russia], *Vestnik Gosudarstvennogo Strakhovaniya* [Bulletin of State Insurance] (1927), 19-20, quoted from *Finansovoye pravo* [Financial Law], ed. N. I. Khimicheva (Moscow: Yurist, 1998), 378. Moreover, Rybnikov, who compared *dikaya vira* (blood money), paid by a member of the *verv'* (commune) in case of an unpremeditated murder, with contract insurance, finds the former to contain "all the elements of civil liability insurance" (quoted in Reicher, "Dokapitalisticheskoye strakhovaniye", 87). Reicher, on the other hand, believes that *dikaya vira* paid by the entire commune when the murderer was not found has nothing to do with

Islamic law does not divide the subject matter or regulation methods into branches.³⁰

In our opinion, classifying Islamic legal institutions into branches and sub-branches, as is common in European jurisprudence, may lead to an erroneous understanding of Shariah. This is what N. Tornau warned against in the middle of the nineteenth century:

First, the different chapters of Islamic law do not have a logical correlation between them, and it is difficult to correlate the articles of these chapters with new divisions based on principles that do not exist among Muslims without changing the structure within each chapter, and without establishing new ideas that are not in the spirit of the Islamic legal doctrine. For example, the political and military codes [*fiqh* branches, according to Mouradgea d'Ohsson's book]³¹ included many subjects that Muslims regard as religious duties, such as *zakah* and war against the infidel; the chapter on usurpation (*ghasb*) was included by d'Ohsson, based on European categories, in the criminal code, whereas Muslims consider usurpation as a civil act that is not subject to a criminal sanction or correctional measures. Second, Mouradgea d'Ohsson tried to group together subjects that have only an apparent resemblance but are quite different in essence. . . . For instance, the dedication of a *waqf*, a voluntary act, should not be included in a chapter on *zakah*, payment of a share of one's income that is compulsory for every Muslim.³²

For like reasons, the author finds it preferable, when studying various *fiqh* institutions, to follow the Islamic tradition in the classification of legal branches and institutions.

insurance. In his opinion, when the murderer was not found, *dikaya vira* was required by law (or custom) and constituted a common duty of all the members of the *verv'*. In the case of an unpremeditated murder, on the other hand, *dikaya vira* was the result of a preliminary "insurance contract" and was compulsory only for those and for the benefit of those who had joined through that contract a kind of mutual insurance company. Therefore, the term "insurance" can be used only with reference to relations arising from an unpremeditated murder. See Reicher, "Dokapitalisticheskoye strakhovaniye", 89-90.

³⁰ For example, the well-known work of Abu Yusuf, *Kitab al-Kharaj*, which deals with the system of Muslim taxation, contains a chapter entitled "On vicious people and thieves, on crimes and on what punishments are appropriate in each case" and mentions *diyah* several times.

³¹ Ignatius Mouradgea d'Ohsson (1740-1807), diplomat for the Swedish embassy in Istanbul, author of the fundamental *Tableau general de l'Empire Ottoman* [General Picture of the Ottoman Empire].

³² N. Tornau, *Izlozheniye nachal musul'manskogo zakonovedeniya* [The Elements of Islamic Law] (1850; St. Petersburg: Adir, 1991), 5-6.

In pre-Islamic times, the obligation to pay *diyyah* rested on the paternal relatives (*'aqilah*) of the murderer, who pay the blood money to the heirs of the murdered member of the other tribe. If they do not or cannot pay *diyyah*, the relatives of the victim are entitled to vengeance. Therefore, *diyyah* was often paid by the entire tribe from a special fund. Thus, through the support of the tribe, the murderer was exempted from criminal prosecution even if his relatives were unable to provide compensation for murder. The merit of this institution can be fully appreciated if we consider that sometimes entire clans and tribes could perish in a blood feud: the killing of one man entailed the killing of another in retaliation, so that one could not estimate the number of potential victims.

If the crime was committed by a slave, the blood money was paid by his master, who could also sell the slave to repay all or part of the debt. By providing protection to one of its members, the tribe not only guaranteed his safety but also provided the relatives of the victim with his debt.

Islam confirmed the legitimacy of *diyyah*, recognizing its important role in stopping inter-tribal feuds and uniting all the tribes and peoples into a single Muslim community. The Quran says:

Never should a believer kill a believer; except by mistake, and whoever kills a believer by mistake it is ordained that he should free a believing slave, and pay blood-money to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (is enough). If he belonged to a people with whom ye have treaty of mutual alliance, blood-money should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running; by way of repentance to Allah: for Allah hath all knowledge and all wisdom. (Quran 4: 92)

The Prophet himself established specific sums as compensation for various injuries, for example fifteen camels for a skull fracture, and ten for the loss of a toe or a finger. If an injury proved to be fatal, the murderer was obliged to pay one hundred camels or the equivalent to the victim's relatives.

The institution of *diyyah* is mentioned in almost every branch of *fiqh*, but it is principally regulated by the *'uqubat*, which, according to western categories, are part of the criminal law. The terms of the payment of *diyyah* are as follows:

- (1) *Diyah* for murder is paid as an alternative to the law of talion (a soul for a soul, an eye for an eye, a tooth for a tooth), if the victim's relatives agree;³³
- (2) *Diyah* for a wound or injury is intended to avoid an equivalent talion punishment (*qisas*), if the victim and his relatives agree.³⁴

Diyah is reduced by half if the victim is female, or if the crime was committed by a female. If a pregnant woman is killed, double *diyah* is to be paid: for herself and for the fetus.

The principle of compensation and group responsibility is also reflected in the accord concluded between the *muhajirin* and the *ansar* after the Prophet's arrival in Medina. Under this accord, all Medinan Muslims, regardless of their tribe or clan, became a single community. A special fund (*al-kanz*) was set up to which the members of the Ummah made yearly contributions. This fund was used to pay *diyah* for Muslims, including cases in which the murderer was not identified but it was known that he was a member of the Muslim community.³⁵ If an enemy captured a Muslim and made him a prisoner of war, the prisoner's paternal relatives were required to pay ransom (*fidya*) to free him.³⁶

³³ The *diyah* for a murder is inherited and shared by the relatives of the deceased.

³⁴ In cases of unpremeditated murder, wound, or injury, a talion punishment is completely ruled out, and *diyah*, along with sanctions imposed by the authorities, remains the only liability borne by the culprit. The relatives of the victim, or the victim himself or herself, if alive, may pardon the culprit, which is the best solution according to the Quran, 2:178.

³⁵ *Islam: Entsiklopedichesky Slovar'*, 25.

³⁶ Interestingly, similar insurance-like relations are found in Muscovite Russia in the sixteenth to seventeenth centuries. Suffering from constant incursions of belligerent neighbors and losing precious human resources on its outskirts, the Muscovite state was interested in devising a system that would bring prisoners back. Initially, the money paid from the czar's coffers to ransom prisoners was recovered by taxing the population based on the fiscal units of the time, known as *sokhas* (wooden ploughs). Later, according to the Muscovite Law Code (*Sobornoe Ulozhenie*) of 1649, a special fund was established to pay ransom for prisoners: a special tax was levied to secure the funds for ransoms. Contributions to the ransom fund varied depending on the social rank of the taxpayer. The social status of the prisoner also corresponded to a specific level of ransom (with the exception of the highest dignitaries). According to Reicher, this scheme of financing ransom for prisoners, despite its fiscal form, contained all the essential elements of government insurance against imprisonment. It should be noted that a similar evolution, from a system of post-factum allocation to regular payments, marked the development of insurance in the world. See Reicher, "Dokapitalisticheskoye strakhvaniye", 89-90.

In Muslim countries, the transition from *diyah* (blood money paid through subsequent allocation among the members of the community or tribe) to *zakah* (a compulsory tax used, among other things, to ransom Muslims from captivity) during the rule of *al-khulafa' ar-rashidun* (the four rightly guided caliphs [632-661]), confirms the validity of this statement.

The institution of *zakah* is an immense subject, and we will consider only those aspects that the majority of Muslim scholars directly link to insurance.

Like *diyah*, *zakah* was known to Bedouin tribes before the emergence of Islam and was related to the custom of sharing the booty, when a special fund was set up to help the tribe as a whole and its individual members.³⁷

Islam treats *zakah* as a regular tax for the benefit of needy members of the Ummah (Quran 2: 215, 219, 51:15-19, and others), though in the first years of the Islamic state its payment was irregular and often voluntary.³⁸

The obligation to pay *zakah* rests upon Muslims who are adult, free, and legally capable. Those who are entitled to receive *zakah*, as mentioned in Quran 9:60, are as follows:

Alms are for the poor and the needy, and those employed to administer the (funds): for those whose hearts have been (recently) reconciled (to Truth); for those in bondage and in debt; in the cause of Allah; and for the wayfarer: (thus is it) ordained by Allah.

Students living far from home also have the right to receive aid from the *zakah* fund.

The Arabic language has a special term for someone who suffers a loss: *gharim*. Some scholars hold that in case of a loss, the *gharim* has the right to full compensation for all his losses, however large, from the *zakah* fund.³⁹

Thus, *zakah*, among other things, performed and continues to perform the functions of social security and insurance against loss.

If a Muslim dies without having paid *zakah*, the amount that he owes is taken out of his estate. The majority of the Muslim population did not know anything about insurance in its modern form up to the beginning of the nineteenth century.

The development of insurance in its modern form in the Muslim world is connected with the name of Hanafi scholar Ibn 'Abidin (1784-1836). In

³⁷ *Islam: Entsiklopedichesky Slovar'*, 74.

³⁸ *Ibid.*

³⁹ See Tornau, *Izlozheniye nachal musul'manskogo zakonovedeniya*, 37.

his "Answer to the Perplexed: A Commentary on 'The Chosen Pearl'", Ibn 'Abidin describes the case of a merchant who leased a ship from the shipowner. In addition to the freight, the merchant paid a sum known as *sukra* (premium).⁴⁰ In case of an accident during the voyage, the shipowner used this sum to pay reasonable compensation for the damage suffered by the owner of the cargo.⁴¹

According to Ibn 'Abidin, the merchant does not have the right to claim compensation for the value of the property, even if the shipowner (carrier) agrees to that, if the carrier was not at fault. However, if the insurance contract was concluded in a non-Muslim country, the Muslim cargo owner has the right to claim compensation for the value of any property that was lost or damaged.⁴²

Beginning in the early nineteenth century, the Muslims began to use foreign insurance companies and also established their own, which, however, did not always comply with Shariah principles. This gave rise to doubts as to the validity of insurance under Islamic law. In 1906, the mufti of Egypt, Muhammad Baqit, approved the idea of insurance as described by Ibn 'Abidin.⁴³

Until the second half of the twentieth century, some Muslim scholars held that the recognition of insurance is inevitable in the modern world, while others have criticized the commercial insurance contract for non-compliance with the provisions of Shariah. Regular scientific publications dedicated to *takaful* (mutual assistance)⁴⁴ as an alternative to the conventional insurance system started to appear only in the late 1980s and early 1990s. These were primarily the works by Ma'sum Billah, Ahmad Ibrahim, Azman Ismail, Kamaruddin Sharif, and others.⁴⁵

⁴⁰ This root is also used for *sikurtah*, the Arabic translation of the word 'insurance'.

⁴¹ Az-Zarka, *Sistema strakhovaniya*, 8.

⁴² Ibid., 8-9.

⁴³ S. Mankabady, *Insurance and Islamic Law*, 4 Arab Law Quarterly 21 (1989).

⁴⁴ *Takaful* (Arabic 'guaranteeing each other'): Islamic insurance. A system based on the principles of solidarity and mutual assistance, under which the parties to the contract support each other when any of them suffers a loss (which means primarily a monetary compensation). According to Muslim scholars, the Islamic insurance (*takaful*) contract, as opposed to the conventional insurance contract, does not contain the elements of *gharar* (uncertainty) and *riba* (usury).

⁴⁵ See M. N. Siddiqi, *Insurance in an Islamic Economy* (Leicester: Islamic Foundation, 1985); A. Ibrahim, *The Administration of Islamic Financial Institutions*, 7 Syariah Law Journal 15-20 (1991); M. Billah, *Life Insurance? An Islamic View*, 4 Arab Law Quarterly 315-24

In the Middle Ages the institution of *diyah* largely ensured the safety and security of each individual member of the community and the order and stability of society as a whole. The Ummah ensured redistribution of accumulated capital, on a non-profit basis, in favor of those who had suffered material loss. Therefore, it comes as no surprise that mutual insurance⁴⁶ would develop in the Muslim world, where trust between partners is of utmost importance.

As for *zakah*, apart from its general function as a social tax supporting the needy, it also played the role of mutual insurance against loss:⁴⁷ the debt of an insolvent debtor was repaid from the *zakah* fund, and the debtor himself, if imprisoned, was ransomed from the same fund.

Of course, it would be a mistake to argue that *diyah* or *zakah* anticipated or epitomized the insurance system in its modern form. However, we should not underestimate the importance of these institutions in providing social assistance to the needy, especially considering that western countries first started developing the notion of a social tax (of which *zakah* is one) only in the middle of the nineteenth century.

In the modern world, Muslim scholars do not object to mutual (cooperative)⁴⁸ insurance on the grounds of its non-compliance with Shariah

(1993); *Kamus Insurans* [Insurance Dictionary], Kamaruddin Sharif, Yahaya Besah, Zuriah Abdul Rahman; ed. Yulis Haji Alwi (1995).

⁴⁶ Mutual insurance is a form of insurance protection for members of a mutual insurance society. Each member of a mutual insurance society is both insurer and insured. All members of such a society in certain cases have to compensate losses to the members.

⁴⁷ According to Muslim scholars, *zakah* is no longer able to perform the many functions of insurance in today's world: "The existence of *zakah* funds does not mean that people should not take care of themselves. On the contrary, they should make every effort to avoid using funds intended for the needy and the downtrodden. There is no doubt that damage from modern plane, car, and railway accidents in any country may greatly exceed the amount of *zakah* funds. Therefore, we need insurance, which will allow to use *zakah* funds for their original purpose". See Az-Zarka, *Sistema strakhovaniya*, 56.

⁴⁸ Sometimes, Muslim scholars use the adjectives 'mutual' (*tabaduli*) and 'cooperative' (*ta'awuni*) in connection with insurance. For example, cooperative insurance is opposed to commercial insurance, which seeks to generate profit. However, a number of Muslim scholars distinguish 'cooperative' and 'mutual' in reference to Islamic insurance. In their opinion, cooperative insurance does not rule out for-profit orientation. For example, the incorporation documents of all Islamic insurance companies stipulate the cooperative basis of their operations. Thus, all Islamic insurance companies in Saudi Arabia are considered to be cooperative, for example National Company for Co-operative Insurance (NCCI), Saudi Insurance Company (Methaq), and others; in fact their operations have little to do with mutual insurance.

principles.⁴⁹ The situation is different with commercial, or for-profit insurance. Muslim scholars have many reasons to question it.

3. The Commercial Insurance Contract from the Point of View of the Islamic Law Doctrine

Both legal and illegal things are obvious, and in between them are (suspicious) doubtful matters. So who-ever forsakes those doubtful things lest he may commit a sin, will definitely avoid what is clearly illegal; and who-ever indulges in these (suspicious) doubtful things bravely, is likely to commit what is clearly illegal. Sins are Allah's *hima* (i.e. private pasture) and whoever pastures (his sheep) near it, is likely to get in it at any moment. (Sahih Bukhari, no. 1929, narrated by An-Nu'man bin Bashir)

Muslim jurisprudence uses the term "commercial insurance" to refer to all for-profit insurance operations. Therefore, both voluntary and compulsory insurance is categorized as commercial, because in either case the insurer is generally a company whose operations are aimed at generating profit. In this situation, it is not important who pays insurance premiums, the insured himself or the employer.

The Holy Quran and the Sunnah do not contain a specific verdict on commercial insurance contracts.⁵⁰ Therefore, the decision lies entirely with Muslim scholars.

Some Shariah experts advocate a moderate position that does not rule out the existence of commercial insurance in the Muslim world, subject to observance of a number of requirements. For example, 'Abd-ar-Rahman 'Isa maintains that life assurance, and even limb insurance, may be allowed⁵¹ if the installments paid by the insured will not be used in

⁴⁹ See, for example, the resolution on compliance of mutual (cooperative) insurance and reinsurance with the Shariah principles, adopted by the Islamic Fiqh Academy (the Organization of the Islamic Conference) at its second session held in Jeddah from 22 October to 28 December 1985 (see Resolution No. 9 (9/2) Concerning Insurance and Reinsurance).

⁵⁰ More precisely, it does not address the validity of the commercial insurance contract, as it is first and foremost the contract that gives rise to objections, and then the transaction made in accordance with its terms.

⁵¹ Some Muslim scholars ascribe to conventional insurance certain qualities it does not possess. For example, Sheikh Jadd al-Haqq 'Ali Jadd al-Haqq's printed articles contain affirmations that the purpose of a life insurance contract is to try to protect oneself from sudden death, rather than to provide compensation to the insured's heirs in the event of his death.

interest-involving transactions, or in any other type of commercial activity prohibited by Islam.⁵² This is also the opinion of Ahmad al-Sharbasī: since insurance is necessary to society, it should be rid of the elements of *riba*,⁵³ and then widely applied.⁵⁴ Such Islamic scholars have permitted conventional insurance in this circumstance on the basis of *darurah* (necessity).

Much less numerous are those who unconditionally accept conventional insurance as compliant with the principles of Islamic law. However, the majority of scholars believe that Shariah prohibits any type of commercial insurance.⁵⁵ The resolution on insurance and re-insurance of the Islamic Fiqh Academy, which represents the entire Muslim world, summarized these views.⁵⁶

Lately, more and more numerous are those Muslim scholars who advocate an insurance system that serves as an alternative to the one used in most western countries. This system is called *takaful*. "Our observation", writes Yusuf al-Qaradawi in his book *The Lawful and the Prohibited in Islam*, "that the modern form of insurance companies and their current practices are objectionable Islamically does not mean that Islam is against the concept of insurance itself; not in the least—it only opposes the means and methods. If other insurance practices are employed which do not conflict with Islamic forms of business transactions, Islam will welcome them."⁵⁷

A somewhat unusual opinion was formulated by 'Abd al-Wahhab Hallaf, who compared the conventional life insurance contract with the Islamic *mudharabah* contract.⁵⁸ He maintains that under an insurance contract, as under a *mudharabah* contract, the insured contributes capital and the insurance company contributes its work.⁵⁹ Unfortunately, the

⁵² Gharib al-Jamal, *at-Ta'amin*, 235.

⁵³ For more information on *riba*, see the glossary at the end of this study.

⁵⁴ Gharib al-Jamal, *at-Ta'amin*, 214.

⁵⁵ Muslim scholars object in particular to life insurance. Some scholars consider insurance to be prohibited (*haram*) because they believe that it encroaches on the rights of Allah. However, the majority prohibit it because of excessive *gharar*.

⁵⁶ See the resolution on compliance of mutual (cooperative) insurance and reinsurance with Shariah principles, adopted by the Islamic Fiqh Academy under the Organization of the Islamic Conference at its second session held in Jeddah (Saudi Arabia) from 22 October to 28 December 1985 (see Resolution No. 9 (9/2) Concerning Insurance and Reinsurance).

⁵⁷ Yusuf al-Qaradawi, *al-Halal wa-l-haram fi-l-islam* [The Lawful and the Prohibited in Islam], www.qaradawi.net.

⁵⁸ For more information on *mudharabah*, see the glossary at the end of this study.

⁵⁹ Gharib al-Jamal, *at-Ta'amin*, 213.

ongoing years-long debate on this issue does not permit agreement with this opinion.

The issue of compliance of life insurance with Shariah was also considered at the government level. On 15 June 1972, the National Fatwa Committee (Malaysia) made the following ruling:

After a long and detailed discussion, the conference have decided by consensus that life insurance as presently practiced by insurance companies is a void (*fasid*) transaction as it is contrary to the Shariah's principles of contract, because it contains the following elements:

- (1) *gharar* (uncertainty),
- (2) *maisir* (gambling),
- (3) *riba* (usury).

As such, from the Shariah point of view, (life) insurance is prohibited (*haram*).⁶⁰

Later, Malaysian scholar Ahmad Ibrahim wrote about commercial insurance as a whole:

Insurance in its current form does not comply with Islam. The practices of the insurance business follow the Western style of management and are contrary to the Islamic faith in a number of ways:

- (1) Many insurance contracts contain usury, as they promise to pay a higher compensation than the amount of the premium paid by the insured to the insurer;
- (2) Insurance companies invest the installments they have collected into projects involving the payment of interest;
- (3) The Western method of insurance is akin to gambling, as the insured 'loses' the installments he has paid to the insurance company if the peril does not occur;
- (4) The Western insurance model contains the element of *gharar*, which introduces uncertainty into the subject matter of the contract;
- (5) Western insurance companies may earn profits or losses as a result of death or accident or risk to people.⁶¹

The appendix to the report submitted to the Badan Petugas Khas committee⁶² contains the following conclusion: because the commercial insurance

⁶⁰ Mohammad Tarmidzi, *What Some Muslim Scholars Object to about Insurance*, www.insurance.com.my.

⁶¹ Ibid.

⁶² Special committee created by the government of Malaysia in 1982 to study the possibility of establishing an Islamic insurance company in the country.

contract in its current form is void (*fasid*), it is prohibited (*haram*).⁶³ The main reason is that the insurance contract contains objectionable elements such as *riba* and *gharar*. However, it should be stressed that the prohibition does not apply to the goals and objectives of insurance but rather to the way the contract is formulated.

So what are *gharar*, *maisir*, and *riba* in an insurance contract?

Gharar

Gharar translates from literary Arabic as “danger”. Due to the absence of a clear explanation as to what is *gharar* in the two main sources of Shariah, scholars have formulated their opinion through *ijtihad*, based on the Holy Quran and the Sunnah.

Ibn Rushd believes that *gharar* refers to the lack of objective and complete information regarding an object, or uncertainty as to the existence of the object itself.⁶⁴ According to Ibn Taymiyyah, *gharar* is present in any type of contract where at least one of the parties does not know what it will obtain as a result of the deal.⁶⁵ In the opinion of Hashim Kamali, the word *gharar* can have many meanings, depending on the type of deal.⁶⁶

Saiful Azhar Rosly defines *gharar* as a contract that involves risk and uncertainty and results in undesirable consequences for a party that is dependent on the other party. The insurance contract contains *gharar* because one of the parties (for example the insurer) may get all the profit, while the other one (the insured) runs the risk of losing the installments he has paid.⁶⁷

This means that any sale or exchange agreement that does not contain sufficient information regarding its essential terms can be categorized as containing *gharar*.

According to Muslim scholars, *gharar* in an insurance contract can be of at least three types:

1. *Uncertainty regarding the consequences of making the contract*

When the contract is made, neither the insurer nor the insured knows all the circumstances that will ensue. The insured does not know whether

⁶³ Tarmidzi, *Some Muslim Scholars*.

⁶⁴ Tarmidzi, *Some Muslim Scholars*.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Saiful Azhar Rosly, “Economic Principles in Islam”, *IIUM Journal of Economics and Management* 5:2 (1997), www.wponline.com.

he will receive any compensation for the money he will pay as insurance installments, and the insurer does not know the amount of his future profits. Sometimes, the insurance company receives installments only once, sometimes, several times, and in some cases it must pay out a sum that is many times higher than the amount of installments received from the insured.

2. *Uncertainty as to whether, when peril occurs, the insurer will possess the sum required to pay out the compensation*

Often, the insured does not know whether the insurer actually has the money necessary to pay out the compensation, since the payment only takes place after the peril occurs, which may or may not occur.

3. *Uncertainty regarding the term of the contract*

According to the principles of civil transactions in Islamic law, the term of a contract must be known by the parties thereto.

If any of the above types of *gharar* is present, the insurance contract will be considered void. This list coincides with the requirements of Islamic law regarding the subject matter of a contract:

1. The subject matter of the contract must be clearly stated;
2. The quantitative characteristics of the subject matter of the contract must be specified;
3. The place of transfer of the subject matter of the contract must be clearly stated;
4. The subject matter of the contract must not include any items prohibited (barred from trade) by Shariah.⁶⁸

But is it possible to make an agreement that is totally free from *gharar*? With some reservations, many scholars admit that it is impossible to completely avoid uncertainty in a contract. Therefore, it is necessary to agree on the degree and extent of acceptable *gharar*. Likely, experts will be guided in their

⁶⁸ Quoted from R. I. Bekkin, "Problema sootvetstviya sushchnosti kommercheskogo strakhovaniya normam musul'manskogo prava" [Problem of Compliance of Essence of Commercial Insurance with the Principles of Islamic Law], *Vostokovednyy sbornik* [Bulletin of Oriental Studies] 2 (Moscow, 2001): 108.

decisions by different and mainly subjective factors, such as, for instance, their understanding of public benefit and of the interests of progress.

Most Muslim scholars agree that *gharar* invalidates a contract when it (*gharar*) is essential in nature, that is, when it is inherent to the contract.⁶⁹

Hashim Kamali divided *gharar* into three categories: excessive *gharar* (*al-gharar al-kathir*), which invalidates the agreement; trifling *gharar* (*al-gharar al-yasir*), which is acceptable; and average *gharar* (*al-gharar al-mutawassit*), which falls between the two.⁷⁰

Kamali's classifications can be applied not only to the insurance contract but also to all other contracts. It should be stressed, however, that scholars object primarily against *gharar* in the subject matter of the contract, not against uncertainty in business as a whole.⁷¹ This difference was pointed out by Muhammad Sahri 'Abd ar-Rahman: "Therefore we can say that there are permissible *gharar* or elements of uncertainty in a business venture or investment and there are also forbidden *gharar*".⁷²

Islamic law has precedents where contractual risk is transferred from one party to the other. For example, under a contract known as *salam* (*bai' as-salam*),⁷³ one party (the merchant) takes a loan from the other party (for example, a bank) and undertakes to supply a specified quantity of goods within a specified period of time. The bank (the buyer) runs the risk that the price of the goods will subsequently fall and he will have given the borrower more money than he would if the price of the goods had been lower. The parties to *bai' as-salam* run risks, even though they expect to earn a profit on the difference between the contract price and the price of the goods at the time of delivery. As a rule, the goods under such contracts are agricultural products. Obviously, *bai' as-salam* contains an element of uncertainty.

⁶⁹ Gharib al-Jamal, *at-Ta'amin*, 201.

⁷⁰ Mohammad Hashim Kamali, *Islamic Commercial Law* (Cambridge, 1991), 165.

⁷¹ This is why some lawyers maintain that it is not important whether the deal is made under commercial or non-commercial insurance, because in either case *gharar* is insignificant. In their opinion, the uncertainty prohibited by the Prophet together with *maisir* and *riba* is of a different nature than what we find in the commercial insurance contract. Both commercial and non-commercial (e.g. mutual) insurance performs the same function, the only difference being that the former is by far less costly and yields profit. And whereas the difference in income (and consequently in costs) is not very significant at the individual level, at the level of society (Ummah) the difference is more important.

⁷² Muhammad Sahri Abdul Rahman, *The Gharar Sale in Share Trading* (London, 1994), 7.

⁷³ See the glossary at the end of this study.

Hence the question: why does Islamic law accept *salam* and have doubts as to the validity of commercial insurance?

The article "From Prophetic Actions to Constitutional Theory", by Sherman Jackson, presents a view, widespread (especially recently) among Muslim scholars, according to which rules governing everyday situations should be distinguished from religious rules. Jackson argues that, when studying the Sunnah of the Prophet ﷺ, it is preferable to rely on the underlying causes, that is, on the conditions and circumstances that gave rise to an action or saying, rather than on formal signs based on the common understanding of the actions and sayings of the Messenger of Allah, as handed down in the tradition.⁷⁴ Indeed, such an approach would allow for better understanding of the meaning of prohibitions in Islam and the legalization of things that are unlawful only from a formal point of view. It is important, however, not to introduce an element of personal bias into the interpretation of the actions and sayings of the Prophet ﷺ, and not to try to squeeze available data into preconceived schemes.

A classical example, cited in many sources discussing *gharar*, involves the manufacture of cheese. Milk is categorized by the Malikites as a *ribawi* product.⁷⁵ Consequently, it can only be exchanged for the same quantity of milk. The same applies to cheese. Uncertainty as to the equivalence of the products in an exchange is similar, in the opinion of some Muslim scholars, to certainty of their non-equivalence.⁷⁶ If each of the two partners who set up a cheese-producing partnership invested ten litres of milk in the business, this does not mean that the ten litres contributed by the first participant will yield the same quantity of cheese as the ten litres contributed by the second one. According to scholars, this deal contains an element of *riba* (usury). Later, *fatwas* of Malikiite *fuyaha* ruled that such a partnership is lawful, despite the presence of *gharar* and *riba*, if both partners produce cheese in small quantities for their own needs.⁷⁷

⁷⁴ Sherman Jackson, "From Prophetic Actions to Constitutional Theory: A Novel Chapter in Medieval Muslim Jurisprudence", *International Journal of Middle East Studies* 25 (1993): 87.

⁷⁵ *Ribawi* goods are those that can only be exchanged in equal proportion and simultaneously, from hand to hand.

⁷⁶ "Al-Gharar, Risk and Insurance", *International Journal of Islamic Financial Services* 1, no. 1 (1999), www.islamic-finance.net/journals/journal1.

⁷⁷ *Ibid.*

Abu Ishaq as-Shatibi considers a situation where many people join efforts to produce cheese in quantities exceeding their need for this product. According to the scholar, the surplus should not be destroyed but rather should be sold.⁷⁸ And in a sales contract, if the goods are measured by a measure that is unknown to one of the parties, the presence of *gharar* is a material part of the contract. Consequently, a deal made under such a contract may be considered void.⁷⁹

It is hard to imagine human life without exchange. It would be difficult to live if everybody produced only for himself, without trading. And one of the main principles of Islamic law states: "If the circumstances make it difficult (to strictly follow the rule), excuse is granted (for a departure from the rule)".⁸⁰

The conclusion reached by the Malikite scholars regarding the above cheese production case is also based on the statement of the founder and eponym of the Malikite *madhab*, Malik bin Anas, who said that people should receive what increases their share and improves their wealth and is fully in line with the above-mentioned principle of Islamic law.⁸¹

Maisir

Maisir literally means "gambling". Unlike *gharar*, *maisir* is completely banned by Islam: "O ye who believe! Intoxicants and gambling, sacrificing to stones, and (divination by) arrows, are an abomination,—of Satan's handiwork: eschew such (abomination), that ye may prosper" (Quran 5:90). The Holy Quran provides an explanation for the prohibition of gambling: "They ask thee concerning wine and gambling. Say: 'In them is great sin, and some profit, for men; but the sin is greater than the profit'" (Quran 2:219); and "Satan's plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer: will ye not then abstain?" (Quran 5:91).

⁷⁸ Jackson, "Prophetic Actions", 88.

⁷⁹ *Ibid.*, 89.

⁸⁰ "Obshchiye printsipy musul'manskogo prava" [General Principles of Islamic Law], in Syukiyaynen, *Antologiya*, 1:684.

⁸¹ "Al-Gharar, Risk and Insurance".

The Prophet ﷺ prohibited all types of deals where material gain depends on chance or speculation, rather than on contributed work (or capital, on certain conditions).

In the business of western insurance companies, according to some scholars, profits largely depend on chance.⁸² If the total amount of installments collected from the insured and the profit from the investments exceed the costs related to insurance claims and other costs, the insurer earns a profit.⁸³ If the total amount of installments is less than the total amount of insurance claims, the insurer suffers a loss. We can also view insurance relations as a game that depends on the occurrence of a peril. If the peril occurs, the “wager” is lost by the insurer who pays out a certain sum to the insured or to third parties. If the peril does not occur, the insurer wins.

Obviously, gambling contains uncertainty as to whether the gambler will win or lose. But the question is different: is the similarity between insurance and gambling superficial, or is the element of gambling inherent to the insurance business? Or, in other words, does the presence of *gharar* in the insurance contract make the relations between the insurer and the insured similar to gambling?

Actually, any *qimar* (game of chance) contains a certain degree of uncertainty and therefore can be considered as *gharar*. But all *gharar* is not *qimar*! *Gharar* is a general term encompassing all forms of uncertainty, whereas *qimar* refers to a special type of luck-based human activity. Therefore, we can distinguish between acceptable *gharar* (element of uncertainty) in business and investment activities, and prohibited *gharar*. The latter includes *gharar* containing the element of *qimar* (which primarily depends on chance).

When does *gharar* become gambling? Or, more exactly, what properties must *gharar* possess so that the relations in question, or the agreement governing such relations, may be regarded as similar to gambling?

There are different opinions on the matter among scholars. According to Ibn Taymiyyah, gambling is present when *gharar* allows one party to “unlawfully devour the property of others”.⁸⁴ Ibn Taymiyyah also maintained that if one of the parties in a deal receives what lawfully belongs to

⁸² Tarmidzi, *Some Muslim Scholars*.

⁸³ As is well known, the majority of the insured pay premiums without getting at least an equal compensation.

⁸⁴ “Al-Gharar, Risk and Insurance”.

it while the other party is unable to exercise its right to an equivalent compensation, the contract between such parties contains both *gharar* and *maisir*.⁸⁵ In this case, the first party is guilty of unlawful appropriation of the property of its partner.

In the case of insurance companies, we are talking about non-performance of obligations. They may take their due, but they do not always (in accordance with the terms of contract) provide the insured with an equivalent compensation: if the peril has not occurred, the insured 'loses' the installments he has paid. Based on that, some scholars find *gharar* contained in the insurance contract sufficient to conclude that such contract allows unlawful appropriation of the property of one of the parties in the deal.

The opposite point of view completely rejects the analogy between insurance and *maisir* because the latter, unlike *gharar*, cannot be contained in a contract, even in minimum form. The advocates of this position maintain that installments paid by the insured cannot be regarded as 'lost', as they constitute a payment for the provision of a guarantee of financial security. The basis of such guarantee is in the promise made by the insurer to pay money to the insured on the occurrence of a peril. Therefore, insurance relations cannot be considered as an unlawful appropriation.

The author agrees with the opinion of scholars who believe that gambling and insurance are not the same.⁸⁶ They may be similar in some aspects, but only superficially, while the differences between them are significant:

1. The insured is trying to minimize the consequences of possible risks, while the gambler acts in a way that creates these risks. When a gambler is betting, he is helping to create a risk that did not exist before. He could have avoided the risk altogether if he wished it and had abstained from gambling. The occurrence of many insurance risks does not depend on whether the insured pays installments or not.
2. The gambler is motivated by the desire for material gain, while the insured expects to receive financial protection in case of a loss.⁸⁷

⁸⁵ Ibid.

⁸⁶ Many classical works of Western researchers dealing with insurance law begin with establishing the difference between insurance and gambling. See, for example, V. R. Idelson, *Strakhovoye pravo* [Insurance Law] (Moscow, 1993); V. P. Kryukov, *Strakhovoye pravo (ocherki)* [Insurance Law (Studies)] (Moscow, 1992); and others.

⁸⁷ Thus the motive, an important subjective factor, is different in gambling and in insurance.

3. The money won by a gambler increases his wealth, while the sum received by the insured does not increase his wealth but only covers his losses.
4. The win befalls only a small number of *lucky* gamblers, while the compensation is paid out to a few number of the insured who suffered damage or loss.
5. When concluding an insurance contract, the insured must have a proprietary interest in the object being insured. This requirement does not exist in gambling.

All these arguments, however, are not aimed at denying the fact that *gharar* and *maisir* are close to each other. The presence of excessive *gharar* may lead to the appearance of an element of *maisir* in an insurance contract. At the same time, *maisir* cannot be present if there is no *gharar*. As a result, the question of a connection between insurance and gambling can only be raised if a particular contract contains *al-gharar al-kathir* (excessive *gharar*). In the end, all depends on the degree of *gharar*.

Riba

Riba is translated from literary Arabic as “accretion”. Shariah prohibits the lending of money for profit because this may be devastating for the borrower, and it makes the lender cruel and greedy. Islam is against exploitation of man by man in any form, and lending money under the obligation to pay interest is, according to all Muslim scholars, a form of exploitation.

The Holy Quran and the Sunnah talk a lot about the prohibition of usury (Quran 2:275-8, 3:130, and others). The main criteria for identifying *riba* are time and quantity of the subject matter of the contract. Thus, gold can only be sold for gold of the same weight, and both parties must transfer the goods to each other simultaneously (lending is not allowed). Otherwise, this will be considered as *riba*. The same applies to such goods as silver, wheat, barley, dates, and salt. *Mujtahidun* through *qiyas* apply this list to money.

Obviously, an insurance contract involves a difference in the amount of money paid and received by the insured and in the times when the money is paid and received. Also, in the case of endowment insurance, the insurer pays to the insured or the insured’s beneficiaries interest on the install-

ments paid, which leads to discussion of the presence of signs of *riba* in the relations between the insurer and the insured.

As is well known, insurance companies in their daily practice perform investment operations involving the payment of interest, and payment of interest on some of their services. Apart from that, the factor of interest is used by insurance companies in calculating insurance premiums.

Some scholars believe that the element of *riba* in the above operations is secondary, and not primary. Hence the conclusion: all insurance business is not considered *haram*. For example, the use of the interest-based method in calculating the insurance premium is not the same as charging interest. This is just a unit of measurement used to keep the premium rate as low as possible, taking into account the estimate of future benefits. Moreover, premiums rates collected are fixed in advance.

As to investments involving the payment of interest, according to a number of researchers, there are no grounds for considering deals under such contracts to be prohibited (*haram*), because the interest relations are not essential to them, as in the work of commercial banks. This practice can be easily excluded through attracting the investments of the insurers into various Islamic financial institutions (as is the case in Malaysia). Then the functioning of insurance companies will not contradict Shariah.

So, the question of the presence of the element of *riba* in an insurance contract depends on whether the installments paid by the insured are considered as a loan, because it is loan interest that is prohibited by Shariah.

The author does not agree with the opinion of those scholars who believe that the essence of the insurance contract is in exchanging money for money (with difference in time and amount).⁸⁸ The main purpose of an insurance contract is to receive compensation from the insurer in the event of a specified peril. The installments paid by the insured cannot be considered as a loan in part, at least, because such a "loan" is not always paid back (for example, in property insurance if the event insured against does not occur).

Things are different if the installments paid by the insured will be used in financial operations involving the charging or payment of interest. In this case, the insurance contract may definitely be found void from the

⁸⁸ 'Abd an-Nasir Taufik al-'Attar, *Hukm at-ta'amin fi-l-shari'a al-islamiyyah* (Cairo, 1983), 49.

point of view of Shariah. A similar situation exists with regards to endowment insurance. By providing funds to the insurer, the insured expects that he or his beneficiaries will receive a sum that will include interest accrued over the term specified in the contract.

In some cases, when studying prohibitions made by Islam on the charging of interest, one may come to the conclusion that it is not *riba* as such that is prohibited but rather *compulsory* interest when repaying the debt. As narrated by Abu Rafi'i: "Once the Prophet ﷺ borrowed from a man a young camel. And when he came by a camel that was given to him as a charity, he ordered to give it to the lender in repaying of the debt. He said: 'I could only find an adult camel. Give it to him. Verily, the most noble of men is he who pays his debts in the best way'".⁸⁹ Subsequently, many financiers began to agree beforehand on the acceptability of receiving interest on capital, which gave an impetus to the development of national banks in Egypt and other countries. But an advance promise of reward for lending goods or money can hardly change what is prohibited into what is allowed, if there is a clear reference in the Holy Quran and the Sunnah. Also, the Prophet ﷺ, as is clear from the above-mentioned *hadith*, gave the reward on his own accord and without advance agreement.

An important argument in the eyes of the advocates of legalization of commercial insurance in Islamic law is the need of society for this institution. With all objections to insurance on the part of the *fuqaha*, the usefulness of insurance relations in increasing (or preservation) of property is beyond doubt.⁹⁰ Apart from the fact that the insured obtains a guarantee of financial security, and the insurer makes a profit, society as a whole benefits from the investment of insurance companies. By allocating the received amounts to, for example, manufacturing, the insurer pursues the aim of making an even larger profit, but at the same time other people also benefit from it (through the creation of additional investment resources and increase of public wealth).

⁸⁹ www.qibla.dhs.org.

⁹⁰ All scholars agree that social insurance is necessary for society and permissible from the point of view of Islamic law, provided that it complies with the requirements of Shariah. Such insurance is viewed as the state's duty to protect its citizens (subjects). A *hadith* found in both Sahihis relates the words of the Prophet: "I am closer to the believers than their own selves, so whoever (among them) dies leaving some inheritance, his inheritance will be given to his 'Asaba, and whoever dies leaving a debt or dependents or destitute children, then I am their supporter".

In the polemic with their opponents, the advocates of usefulness of insurance for the society refer to the activities of righteous caliphs who often introduced new rules and institutions that did not exist before them. For example, caliph 'Umar bin al-Hattab, among other things, introduced the new *hijra* calendar, approved stoning as a punishment for adultery committed by a married person, established the fixed amount of *diyah* for bodily injuries, and so on. Obviously, these decisions contributed to stability in the society, as well as mitigating the punishment of thieves who stole only to feed themselves and their family.⁹¹ The same applies to insurance. Insurance relations in their modern form did not exist at the time of the Prophet ﷺ. However, insurance is necessary for the well-being of society.

The position of the opponents of the above point of view is less well-argued. Thus, according to the former mufti of the Hashemite Kingdom of Jordan, 'Abdallah al-Qalkili, believers should not try their fate but should rely on the wisdom contained in Shariah. Only faith will save them from doubt in preservation of their property and life. Consequently, Muslims should not need insurance.⁹² In connection therewith, it is absolutely necessary to remember one *hadith*. As narrated by Anas bin Malik: "Once the Prophet ﷺ saw a Bedouin who had lost his camel, and asked him: 'Why did not you tie up your camel?' The Bedouin replied: 'I trusted it to Allah'. Then the Prophet ﷺ replied: 'First tie up your camel, and then trust it to Allah'".⁹³

The author agrees with those scholars who believe that *gharar* in a commercial insurance agreement exceeds the level allowed by Shariah, because the uncertainty as regards the terms of the contract (term, subject matter, and others) remains if not for the insurer then for the insured (the insurer can at least, thanks to financial analysis based on statistical data, calculate the amount of profit).

In an insurance contract, the insured receives a guarantee of financial security based on the obligation of the insurer to pay the compensation. However, if the event insured against has not occurred, the insured loses the money he paid. The insured does not know when he will receive the compensation (time) and in what amount (volume), because, for example, in the case of double, or concurrent, insurance, the sum of compensation

⁹¹ Gharib al-Jamal, *at-Ta'amin*, 233.

⁹² *Ibid.*, 225.

⁹³ Cited by at-Tirmizi and Ibn Maja.

may be changed. Policyholders are also in the dark as to when the insurer will invest the installments paid. From the point of view of Islam, it is unacceptable that the funds of Muslims be used in operations prohibited by Shariah. Moreover, the representatives of some schools say that the source itself of the compensation paid by the insurer is uncertain.⁹⁴

The similarity between insurance relations and gambling is superficial. As to the element of *riba*, it may be present in the relations between the insurer and the insured when interest is paid on certain services provided by the insurance company, and also in the case of participation of the sums collected as installments in operations prohibited by Shariah (including the case when this investment is accompanied by the charging or payment of interest).

Based on these conclusions, we can characterize the insurance contract as *fasid*.⁹⁵ This means that, providing that drawbacks that are significant from a Shariah point of view are overcome, this contract can be recognized as valid. It would hardly be correct to consider the insurance contract as *batil*,⁹⁶ because under this category fall actions that constitute a clear violation of a law, religious injunctions, or actions aimed at encroaching on other people's rights. The Holy Quran and the Sunnah do not contain any clear definition of the insurance contract or, consequently, any provision that it is definitely prohibited. Also, nobody's rights are violated (at least formally, on paper) under the terms of an insurance contract.

Among modern scholars there are many who believe that a commercial insurance contract is *fasid*, meaning that it is not completely prohibited by Islamic law.⁹⁷ Thus, if the owner of an olive tree hires somebody to harvest, and then to produce oil from it which will be used later to pay the worker, such a contract will be found void due to the presence of excessive *gharar*, because there may be no harvest at all, and then the worker will receive nothing. At the same time, this situation may be viewed from the position of mutual obligations of the parties. In this case, the owner of the olive tree

⁹⁴ Gharib al-Jamal, *at-Ta'amin*, 226.

⁹⁵ *Fasid* are actions which are lawful in their substance but unlawful in their description. These actions' consequences may be found legally valid if the violations are eliminated (for example, seizure of property that is subsequently bought from the owner upon his consent).

⁹⁶ *Batil* are strictly prohibited actions involving violations of law or religious duties, or the consequences of such actions (including contracts).

⁹⁷ "Al-Gharar, Risk and Insurance".

must pay the fixed remuneration to the worker as soon as he starts work. A *hadith* narrated by al-ʿAskalani says: “Give to the hired worker the payment for his work before his sweat dries”.⁹⁸ The worker, however, retains the right to stop work at any time.

Thus, making such a contract is unlawful, but this does not mean that the relations between the farmhand and the owner of the olive tree are prohibited, and even less so, the obligation of the latter to pay the work that has been done.

A similar argument is used by the opponents of commercial insurance, who draw an analogy between the insurance contract and marriage. If all the necessary formalities for concluding a marriage have not been observed, such marriage will be invalid, despite the fact that the couple may have the same relations as they would have had in a lawful marriage.⁹⁹ The same applies to the insurance contract. In fact, insurance relations may exist, but this does not mean that they are lawful from the point of view of Islamic law.

Shariah is full of *prima facie* mutually exclusive provisions. For example, it is prohibited to charge for teaching to read the Holy Quran, but this takes place, because work must be paid. The understanding of such legal technique comes with experience.

Among the most active advocates of the legalization of commercial insurance by Shariah, there are few who categorize this contract as *halal*.¹⁰⁰ The dominant view is that of scholars who categorize the insurance contract as *fasid* or *sahih*. *Sahih* are those acts and deeds (contracts) which are impeccable in form but doubtful in action. And ‘doubtful’ acts, as the Sunnah—the second most important source of Shariah—warns, are to be avoided: “Al-Hasan bin ‘Ali bin Abi Talib reports the words of the Prophet ﷺ: ‘Leave what makes you doubt and turn to what does not make you doubt’”.¹⁰¹ The same was said by ‘Umar bin al-Hattab: “Leave *riba* and doubt!”.¹⁰²

⁹⁸ Al-Hafiz bin Hajar al-ʿAskalani, “Polucheniye zhelayemogo”, 670.

⁹⁹ By the same logic, if the marriage is invalid, it does not matter whether the marriage contract is *batil* or *fasid*. See Ahmad Ibrahim Bik, *Kitab al-muʿamalat al-sharʿiyah al-maliyah* (n.p., 1936), 94.

¹⁰⁰ *Halal* (Arabic ‘free, unbound’): in this context, actions permissible or acceptable from the point of view of Shariah, falling under the categories of *fard*, *mandub*, and *mubah*.

¹⁰¹ Cited by at-Tirmizi and an-Nasai

¹⁰² In Arabic, the words ‘usury’ (*riba*) and ‘doubt’ (*riba*) are spelled differently but are read in the same way.

Thus, categorizing the insurance contract as *fasid* allows one to consider it as valid if the corresponding defects are eliminated, the uncertainties for the insured as to the subject matter of the agreement are overcome, and the conditions are set out that the installments paid will not be used by the insurer in operations involving the charging or payment of interest. It is with the aim of overcoming these defects that an alternative insurance system known as *takaful* has been developing.