

## **TAKAFUL VIABILITY WITH HINDSIGHT OF UK MARINE INSURANCE: PARADIGM SPLITTING THE ISLAMIC VIEWPOINTS – WILL INSURANCE REALLY EVER BE CONSIDERED HALAL?**

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### **ABSTRACT**

*This presentation considers Islamic laws on traditional insurance, which generally is considered unacceptable due to its nature. An alternative called takaful has been created but so far it is yet to meet its full potential. A comparison with well-known market such as English marine insurance considers the closeness that takaful share with traditional market. However, there is a tsunami raging on insurance validity in Islam. There is a significant gap in both practice and literatures' regarding takaful as it is uprising concept so it has become important to consider its credibility for advancement to avoid interrupting the ethos of takaful and developed markets as English marine insurance. This presentation considers the core ideology of takaful with consideration of background leading to the introduction of takaful. However, it also looks into the various grounds shared between traditional insurance and takaful. However, more importantly, this paper aims to consider the various Islamic scholarly views on the validity of insurance under Islam. Takaful is seen as a lost ugly duckling in the present Islamic law, as would be witnessed from this paper. Whilst some scholars strongly support its execution, others strongly discourage even its existence. This led to the thinking, as this paper aims to handle, whether insurance is ever been viewed halal under Islam, in present era. This aim of this paper is to demonstrate the current turmoil and chaos that insurance analogy is going through in Muslim nations. Prominent scholars from both end appearing to pull their end of justification leading to a circumstance of questioning authority of insurance validity in Islam, if at all. This is unique research as it looks at aims to bring in the arguments of various authorities and scholars in one paper on dilemma of applicability of insurance. These aspects are crucial in considering whether even takaful is considered to be a reliable vehicle under Islam, considering the viewpoints. Muslim population is increasing and demand for financial products, as insurance would only increase with time and this project objects to hit the heart by looking into various authorities. Future views may change overall and could give rise to a new generation of modern types of acceptable halal insurance on bearing points as mentioned in the paper.*

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### **Introduction**

As the title speaks for itself, this paper will look at the present principles and practices that are existent at the moment for the operation of *takaful* in understanding the mechanics of *takaful*. The researcher has talked about the restrictions stopping traditional insurance to be considered *halal* and it is necessary at this stage to discuss about the concept of *takaful* itself.

*Takaful*, is Arabic word which means cooperation between individuals, coming together in the event of a hazard to assist the victim or in very short, mutual assurance. *Takaful* finds its routes to earliest of times when individuals used to come together as a group to assist. The equivalent word in Arabic for *takaful* is “*ta'mein*” and the paradigm was called *aqila*, which means amicable moral support and assistance in the old times, during which times the selected Arabs used to work together until the disasters damage is mitigated.<sup>1</sup> Some prehistoric concepts that would shed light into the past practices leading to the concept of *takaful* in the Islamic society are as follows:

- *Kafala* which means guaranteeing such as standing as surety for someone else undefined matter i.e. in the case of default by the existing owner, the surety provider would step in. This is similar to taking on liability on behalf of someone else in the event of claim by a third party and no more.<sup>2</sup>
- Another concept is *Diyya* which means blood money. This is another moral instrument that is to pay compensation for the death or harm caused to the victim by the crime committing perpetrator.<sup>3</sup>

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<sup>1</sup> Muhammad Ayub, “Understanding Islamic finance”, 1<sup>st</sup> edition, John Wiley & Sons Ltd, 2007, pages – 420 - 421

<sup>2</sup> Aly Khorshid, “Islamic Insurance: A modern approach to Islamic banking”, 1<sup>st</sup> edition, Routledge: Taylor & Francis Group, 2004, pages - 23 - 24

<sup>3</sup> Ibid

- One more concept is *Jiala* which means incentive payment by someone to another unknown person provided a task is successfully carried out. The aim is to give motivation to carry out task and despite controversial views this has been allowed due to need at the time.<sup>4</sup>
- Finally, the concept of *Muwalat* where someone else their estate to another on the condition that the receiver would satisfy any *diyya* that may arise against the transferor.<sup>5</sup>

Some scholars have suggested comparing traditional insurance with the concepts mentioned above such as Muhammad Ayub however, other scholar such as Aly Khorshid feels that these likenesses are just coincidental.<sup>6</sup> Whilst other scholars confers that the such practices of mutuality and compensating for damages are practiced in Mecca and Medina as tribal customs more than 1400 years in Saudi Arabia. In Asia the practice started to highlight around the early second century of Islamic era when the Arabs expanded their international trade with Asian countries including India and Malay Archipelago and noticed that long voyages carried significant risk of losses as such came together to cover each other by mutuality.<sup>7</sup>

Nevertheless, all these are different moral concepts which lack one way or another from being able to function similar to traditional insurance. For example, *kafala* can only provide a third party liability whilst *diyya* can only be in a position if the perpetrators family pays for a criminal act and no more. Similarly, *jiala* can only be used to give a reward if the task is completed and does not provide sufficient room for movement. Additionally, *muwalat* have been considered by Hanbali school of thought to be invalid and only deals with someone else's liability in narrow scopes and no more.<sup>8</sup> With such restrictions, the moral concepts are simply outside the zone of traditional insurance and could not come within the ambit to be used for traditional insurance.

### 1. Ideology of takaful

The whole aspiration of considering *takaful* in place of traditional insurance is because of the presence of *riba*, *gharar* and *maisir*. Oliver Agha states additionally that traditional insurance contravenes the concept of *tawakkul*, as insured is relying on insurer rather than God for assurance,<sup>9</sup> which the researcher is satisfied is breached, in any event, when the other three restrictions are infringed. However, Oliver Agha goes on to justify that *tawakkul* alone is the only cause of insurance is incorrect, as authority exists which confirms that risk reduction is not contrary to God's will and given that *takaful* deals with cooperative risk allocation, which is permissible under *Sharia* law.<sup>10</sup> In this respect, author Aleem Khan Falaki explains nicely that the ideology is that the insured is putting trust in insurer instead of God but both parties are entering a consensual contract for protection and welfare from unforeseen mishaps.<sup>11</sup>

It is relevant to note that for Muslims, there is a strong belief that whatever God has willed, it is not possible to prevent however, the effects of any harsh destiny may be reduced. A brilliant example is provided by *Sheikh Mustafa Azzarqa, Professor of Islamic Law who compared insurance to iron bars put on top of building to divert thunderbolts. The architect's idea is not to avoid thunderbolt taking place but to safeguard the building he structured by diverting the thunderbolt deep inside the ground.*<sup>12</sup> Additionally, even *Imam Abdullah Al-Sheikh in his kutba on 25<sup>th</sup> July 2014 at Bangor Mosque correlated tawakkul i.e. reliance on God, to insurance, with the difference being that whilst the recompense for insurance comes later on after the event, whereas for tawakkul the reward is before the event taking place. Thus, literally it is safe to state that tawakkul itself does not possess a threat to validity of insurance in Islam.*

*Takaful* as hinted above works under the ideology of sharing the responsibility with the aim of common benefit and harmonisation for everyone in that *takaful* union. The word *takaful* itself has been derived from the verb, *kafala*.<sup>13</sup> The Islamic laws which forms the present basis of *takaful* conforms on policyholders working together with liabilities shared so as to limit uncertainty and none are unfairly disadvantaged. There are various relevant Islamic texts emphasising this ideas including *Quranic* verse from *Surah Al-Maidah* (5):3 that: "*Help one another in righteousness and piety, but help ye not one another in sin and rancour*". Also it has been stated in a number of *hadiths* including mentioning "*Allah will always help His servant for as*

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Haemala Thanasegaran, "Growth of Islamic Insurance (*Takaful*) in Malaysia: A model for the region?" 2008 Sing. J. Legal Stud. 143 (2008), 144

<sup>8</sup> Aly Khorshid, supra at pages – 23 - 24

<sup>9</sup> Oliver Agha, "*Tabarru in Takaful: Helpful innovation or unnecessary complication?*" 9 UCLA J. Islamic & Near E. L. 69 2009-2010, Pages – 70 - 71

<sup>10</sup> Oliver Agha, supra at Pages – 72 - 73

<sup>11</sup> Aleem Khan Falaki, "Life insurance and the Muslims", 2<sup>nd</sup> edition, Media Plus Publications, 2007, Chapter 9 Article 3; <<http://li.aleemkhanfalaki.com/chapters/adil-salahis-views-on-insurance/>>; Accessed on 8/2/14 at 13:55

<sup>12</sup> Aleem Khan Falaki, supra at Chapter 3 Article 5; <<http://li.aleemkhanfalaki.com/chapters/adil-salahis-views-on-insurance/>>; Accessed on 6/2/14 at 23:44

<sup>13</sup> Mohd Ma'sum Billah, "Islamic banking and the growth of *takaful*", page – 405 in the Textbook: M. Kabir Hassan & Mervyn K. Lewis (Editors), "Handbook of Islamic Banking", 1<sup>st</sup> edition, 2007, Egward Elgar Publishing Limited

long as he helps others”<sup>14</sup> and “By my life, which is in Allah’s power, nobody will enter Paradise if he does not protect his neighbour who is in distress”.<sup>15</sup>

The basic idea as has been expressed previously is that each participant pay their contribution into a joint pot to cover needs, as may arise. As there are uncertainties involved under Islamic law, the *gharar* concept restricts this contribution to be a commercial payment as each party’s obligations are vague. Therefore, the Islamic jurists have introduced the idea of framing the contributions as donations i.e. *tabarru*, so that each of the participant agrees to waive off their contribution for the greater good, in the event of someone in *takaful* union suffers a loss due to defined calamity. This, in essence, works to show that point of mutual help between each other where each one considers the other to be their brethren. The aim of having a mechanism that would assist individual within the ambits of *Sharia* rulings, is not a concept that is being considered evil especially where the case is one of genuine losses suffered due to calamities outside the control of the loss suffer. Scholars such as Muhammad Ayub and Oliver Agha approve such aims of *takaful* and concentrate on the point of finding appropriate solutions to circumvent *Sharia* restrictions.<sup>16</sup> Hania Masud identifies five different considerations of a *takaful* organisation, the first one the presence of the mutual guarantee as such the existent of solidarity among the participants. The second is that the ownership of the fund belongs to the participants and the *takaful* operator is there for management purposes. The third is the uncertainty eradication by utilisation of *takaful*. The fourth is the *takaful* operator’s determining which rewarding model to utilise for fund management. The fifth is *takaful* operator’s deciding organisation structure on investment conditions.<sup>17</sup>

The ideological basis of *takaful* certainly appears to have gained the public credence as over the past years, it has been reported that *takaful* industry has been growing at a rate of twenty percent every year, with a recorded double digit growth in 2009 at the time of recession.<sup>18</sup> For an industry which is just over 30 years old with the first company beginning in Sudan on 1979, this is notable. As per Oliver Wyman report of 2007, the global *takaful* premium was at least US \$20 billion with 20% income generated from non-Muslim customers.<sup>19</sup> It has been noted that the global *takaful* industry have grown from US \$1.4 billion in 2004 to US \$5.3 billion in 2008 and this has been participated in both Muslim and non-Muslim countries, with GCC countries fund generation being more than half of the market. Malaysia holds the largest volume of *takaful* contribution standing at US \$889 million in 2008 with some financial institutes representing between 50% and 70% to be non-Muslim customer base. There have also been a number of significant correlated ventures between organisations for the advancement of *takaful* such as in November 2008 Zurich Financial Services agreed a joint venture with Abu Dhabi National Takaful. In June 2009, AXA insurance agreed partnership with Salama in the UAE. FWU Group became a stakeholder in Al Ahli Takaful Company and agreed distribution partnership with National Commercial bank, in Saudi Arabia. In November 2009, Allianz Takaful agreed with Standard Chartered Bank for insurance products promotion. In December 2009, Generali, one of the largest Italian insurance companies agreed with Qatar Islamic Bank to enter the GCC *takaful* market.<sup>20</sup>

However, it is necessary to state that despite the above glamorousness, it has become rather an open secret in the *takaful* industry that the *tabarru* models under *mudarabah* and *wakala*, set for conducting *takaful* business, has raised grave concerns among the community, on the ability of working in compliance within remits of *Sharia* rules. It has been debated among the scholars that the models of *mudarabah* and *wakala* and even their hybrids in some way or another leads to breaching of *Sharia* rulings as such leads to the questioning of the workability of the whole *takaful* structure. The researcher opines that to an extent this perplexity may have been contributed to the lack of availability of a rigid working structure of *takaful* and leaving the various jurisdictions to come up with models which they felt appropriate. This caused the absence of analytical consideration of each of the model proposed against a standard scale. Nonetheless, due to the problems by *mudarabah* and *wakala* models, over the recent years, the Islamic jurists have considered mutual help concept with the introduction of *Waqf* instrument rather than simply restricting it to cooperativeness.

*Waqf* has been illustrated as endowment or donation by authors, which relates to the setting of asset for the charitable cause or for the needs of defined groups of individuals such as the members of doner’s family. *Waqf* has been assorted to be of 3 types under the *Sharia* rules as religious *waqf*, philanthropic *waqf* and family *waqf*. The principle of *waqf* is that the *waqf* is considered as a separate legal entity who takes over the title of the property from the creators of the *waqf*.<sup>21</sup> That property

<sup>14</sup> Narrated by Imam Ahmad Ibn Hanbal and Imam Abu Daud; Syed Othman Alhabshi and Shaikh Hamzah Razak, “*Takaful* insurance: concept, history and development challenges”, in the Textbook: Editor: Mohamed Ariff and Munawar Iqbal, “The foundations of Islamic Banking: Theory, Practice and Education”, Edward Elgar Publishing, 2011, pages – 190 - 191

<sup>15</sup> Narrated by Imam Ahmad Ibn Hanbal; Ibid

<sup>16</sup> Hasanuz Zaman, 1991, page - 418, in the Textbook: Muhammad Ayub, “Understanding Islamic finance”, 1<sup>st</sup> edition, 2007, John Wiley & Sons Ltd;

Also: Oliver Agha, supra at pages – 81 to 82

<sup>17</sup> Hania Masud, “*Takaful*: An innovative approach to insurance and Islamic finance”, 32 U. Pa. J. Int'l L. 1133 2010-2011, pages – 1143 - 1144

<sup>18</sup> Oliver Agha, supra at pages – 70 to 71

<sup>19</sup> Syed Othman Alhabshi and Shaikh Hamzah Razak, supra at pages – 204 - 205

<sup>20</sup> Zamir Iqbal and Abbas Mirakhor, “An introduction to Islamic finance: Theory and Practice”, 2<sup>nd</sup> edition, John Wiley & Sons (Asia) Pte. Ltd, 2011, pages - 216 - 219

<sup>21</sup> Unlike companies in UK where a Limited company is considered as a legal entity on itself separate from the directors and shareholders, who may have brought the company into existence.

belongs to *waqf* at all times which can never be sold but named beneficiaries are entitled to use the usufruct of that property.<sup>22</sup> Mohammed Ayub mentions that the doner of the *waqf* are entitled to enjoy the benefits of that *waqf* and goes on to mention that the participants, also being the beneficiaries, of the contribution are providing the funds in a *waqf* relationship with the aim of cooperativeness and loss mitigation.<sup>23</sup>

It is put forward that there are certainly has a number of serious doubts about using *waqf* as an instrument for *takaful*. However, as a minimum point it is worth noting that *waqf* is not even a financial instrument unlike other models instruments such as *mudarabah* and *wakala* and so it is not designed to work effectively in the same manner. Moreover, *waqf* by its nature is a voluntary instrument and subjected to has a number of strict regulations that needs to be adhered to, which are discussed later on and is not simply efficient to be used in a large scale basis of obligating participants to maintain with. It is important to note that, unlike traditional insurance where an insurance model has been established, that is implemented pretty much used everywhere, which is, that insured pays a premium to the insurer for covering of defined risks for defined period. In contrast, in *takaful* there is nothing set as such other than an idea but one has to be careful not to simply disregard *takaful*, in this respect, as the whole concept behind the introduction of *takaful* is for *Sharia* compliance, which in itself is aimed at conforming to the ideas and principles set by Almighty God. This has led to the production of various different models for *takaful* so as to attempt observation of the divine rules. However, one point is no doubt shared among the scholars that there is a need for development of a *takaful* model which will be universally recognised and would attract consumers' confidence for the advancement of communities.<sup>24</sup>

## 2. Comparison features between *takaful* and orthodox marine insurance:

It is not disputed that the aims of *takaful* is to serve the purpose of risk limitation, as in traditional insurance. Well known concepts such as utmost good faith, warranties and contract construction that are present in traditional marine insurance are also present in *takaful*, which brings it along the same line as that of traditional marine insurance, as the operational objectives of both of them are identical. In both cases, the calculations are done in line with the risk faced, loss ratio, claims history and liability evaluation, amongst others.<sup>25</sup> However, without repeating much of what had been mentioned in previous chapters, *takaful* also faces uncertainties as traditional marine insurance. *Takaful* manages retain this to a minimum by keeping the contributions from participants as helping each other out and waiving the participants' rights as funds being provided as charity. Moreover, the *takaful* operator is always put on standby to get into the rescue by providing *quid hasan* i.e. gratuitous interest free loans, when the *takaful* operation hits crisis and participants are faced with liabilities for deficit. This is undoubtedly quite different from orthodox marine insurance as the insurers simply obtains the monies from insured as premium, with the assurance of risk cover and does not involve the insured in any of the joint pot concepts. The cooperativeness of the organisation is more much prevalent in *takaful* than in traditional marine insurance.

Nevertheless, it is worthy to discuss, there are a number of features that makes *takaful* different from the traditional marine insurance existent at present, some of which includes business aims, structure, investment strategy and returns.<sup>26</sup> Firstly, unlike traditional marine insurance, where on the onset it is a buying and selling contract of protection, in *takaful* operation there are at least four parties involved which are: the participant, the *takaful* operator, the insured and the beneficiary. The participant is the one who becomes joins the *takaful* scheme by paying the *tabarru*, the *takaful* operator is the one who is similar to insurer in traditional insurance managing the *takaful* scheme, the insured is the name given the *takaful* cover under the *takaful* scheme and the beneficiary is the one who receives the compensation following the making of a claim.<sup>27</sup> However, like general marine insurance where money is paid by prospective insured into insurers account as premium, in *takaful* the contribution paid by participants are invested and in certain cases such as in family *takaful* these funds are divided and allocated into two separate accounts: one account which follows the profit & loss sharing whilst the other account is considered as donation for charity.<sup>28</sup>

Secondly, author Haemala Thanasegaran emphasizes in her article that one of the differences between traditional insurance and *takaful* is that the participants in *takaful* aim is for religious purposes rather than profit only and that is the driving factor for *takaful* in comparison to traditional insurance.<sup>29</sup> This view appears to have been shared by Mohammed Ayub as well,

<sup>22</sup> The author feels that this is analogous of the use of usufruct as in *ijara* leasing contracts where the title of the property at all times remains to that of the lessor and the lessee only entitles to use the usufruct of that leased property, which must return at the end to the lessor.

<sup>23</sup> Hasanuz Zaman, supra at pages - 421 – 422

<sup>24</sup> Abdul Rahim Abdul Wahab, "Takaful Business Models - Wakalah based on WAQF: Shariah and Actuarial concerns and Proposed Solutions", pages: 1 – 2; <<http://www.baj.com.sa/takaful/Presentations/PanelFour/Takaful%20Models%20Based%20on%20Waqf%20by%20A.%20Rahim%20Abdul%20Wahab.doc>>; Accessed on 4/1/14 at 13:29

<sup>25</sup> Haemala Thanasegaran, supra at page – 107

<sup>26</sup> Muhammad Ayub, supra at pages – 427 - 428

<sup>27</sup> Considering under the specs of straightforward traditional insurance, the participant, the insured and the beneficiary might appear to be the same individual but under the specs of unorthodox insurance e.g. life insurance, the participant can be the person paying the premium, the insured could be the person's spouse and the beneficiary could be the person's children. Even under marine insurance prospective, the participant can be the seller, the insured could be the buyer and the beneficiary could be the buyer's buyer.

<sup>28</sup> Mohd Ma'sum Billah, supra at pages – 405 - 406

<sup>29</sup> Haemala Thanasegaran, supra at pages – 104, 109

who argues that it is premium amounts in traditional insurance are aimed at maximizing profits alone.<sup>30</sup> The researcher whilst agrees in principle with the comments of Haemala Thanasegaran but disagrees that it is not necessarily portraying that profits alone should be viewed in the limelight and seen as an evil. As mentioned earlier, the Holy Quran has allowed as in *Surah Al Baqarah*, Chapter 2, Verses 275 "...That is because they say, "Trade is [just] like interest." But Allah has permitted trade and has forbidden interest."<sup>31</sup> Therefore, the researcher feels that making profit alone certainly should not be considered as a bad influence for the promotion of an instrument as long as it is *Sharia* compliant as well.

Thirdly, one of the important difference and point to note is that *takaful* is not there to protect the participants in the event of a loss. This is not possible to be done so, as then *takaful* operator would be entering the realms of *gharar* and *maisir*, on promising onto cover an unforeseen event, which would take it outside the remits of being considered *halal*. The working terminology of *takaful* instead is cooperative cohesion which warrants financial certainty for member of the group by sharing the responsibilities between the participating members with each participating member bearing the risk, for one another, by providing premiums as donations into the *takaful* fund.<sup>32</sup> This obviously is different then how traditional marine insurance are being set up where premium is paid by the Insured for the unforeseen risks, irrespective of whether that takes place or not. The responsibility of protection of the insured falls squarely on the insurer in such circumstances as the concepts that threaten *takaful* is not a problem in traditional marine insurance.

Fourthly, however, it should be noted that charity aspect of *takaful* has undoubtedly raised concerns among scholars on the viability of the *takaful*. Authors such as Oliver Agha views *tabarru* confusing in *takaful* models, as the concept of the idea behind setting of *tabarru* was that there is no obligation to the payer to get the fund returned as it is a donation and there is no requirement on the insurer to return the fund as it is given as a charity. However, this creates the basic perplex, as then there remains no obligation on the insurer to pay fund out in the event of a loss, as it was given as a charity only.<sup>33</sup> In simple terms, this creates a concern that, when a participant suffers loss, in theory at least, the *takaful* operator is not obliged to pay as it was a charity payment given away by participant with no intention of seeing again. It was a one way payment provided as *tabarru* by the doner (i.e. participant) which does not set a condition on the donee (i.e. *takaful* operator) that payment should be returned on certain condition. Of course, in traditional marine insurance one does not face these issues as conventional insurance works, as mentioned above, on the straightforward basis of getting premiums but breaching the *Sharia* restrictions. Orthodox insurance are not concerned about receipt of charity payment since all funds that reaches from Underwriting are payments which are taken as income for the insurance business.

Fifthly, the responsibility of orthodox marine insured is simply restricted to the payment of premium and even in mutual cover the insured are limited to such payment with surpluses forming reserve funds. As mentioned above, in *takaful* the insured do not make premium payment but provides a donation known as *tabarru* which is used as investment and the returns are allocated depending on the type of *Sharia* approved arrangement e.g. *mudarabah* or *wakala* agreed between the participant and *takaful* operator.<sup>34</sup>

Sixthly, investment of funds in orthodox marine insurance business would be made into any kind of venture whichever will maximum the profit of return including interest based opportunities irrespective of whether the project is *halal* or *haram*. In *takaful*, investments are made into only profitable venture of *halal* opportunities, which is supervised by the *Sharia* supervisory board within the *takaful* organisation and returns are managed, as per prior *takaful* agreement between the parties.<sup>35</sup>

Seventhly, when claims are made with traditional marine insurance, the insurer is responsible to satisfy the claims and when if mutual insurance is there, the insurer's pool of funds is to pay those off. In *takaful* it is the *takaful* operator's responsibility to pay these liabilities but if there is a deficit, the *takaful* operator has to provide an interest free loan to aid the organisation come of negative, according to all of the present *takaful* models.<sup>36</sup>

Eighthly, both in orthodox marine insurance and *takaful* insurer have access to share capital, save with mutual insurance where insurer cannot have access to share capital. However, with debt, orthodox marine insurance and mutual insurance are responsible for satisfaction of debts and liabilities. In *takaful* the participants bear the responsibility for debts although the *takaful* operator may have to pay gratuitous interest free loan, out of their own funds (separate from the *takaful* operation as it made a loss), to keep the *takaful* operation ongoing.

Finally, it is considered that *takaful* operation is much more transparent as the relationship is one of mutual cooperation and avoids participants from being swindled. However, in orthodox marine insurance the insured, even if compensated under a valid

<sup>30</sup> Muhammad Ayub, supra at page - 427

<sup>31</sup> <<http://quran.com/3>>; From the Holy Quran; *Surah Baqarah*, Chapter 2, Verses 275 to 281

<sup>32</sup> Muhammad Ayub, supra at page - 420

<sup>33</sup> Oliver Agha, supra at page - 72

<sup>34</sup> Abdullah Haron and Dawood Taylor, "Risk management in *Takaful*", in the Textbook: Editor: Simon Archer, Rifaat Ahmed Abdel Karim and Volker Nienhaus, "Takaful Islamic insurance: Concepts and Regulatory issues", John Wiley & Sons (Asia) Pte. Ltd, 2009, pages - 172 - 174

<sup>35</sup> Muhammad Ayub, supra at pages - 427 - 428;

And Abdullah Haron and Dawood Taylor, supra at pages - 172 - 174

<sup>36</sup> Abdullah Haron and Dawood Taylor, supra at pages - 172 - 174

claim, the compensation received would reflect only a small fractional percentage of the profit made by insurer on investment returns.<sup>37</sup>

### 3. General structure of a *takaful* company

The basic structure of a *takaful* company, keeping aside the different types of models available for operation, on the onset is relatively straightforward and somewhat similar to traditional insurance.<sup>38</sup> The relationship between *takaful* company and the participants giving the contribution is that of a trust-giver and trustee. The participants give the funds to the *takaful* company in trust, which is put on the *takaful* fund and the latter managing the funds by investing and attempting to make a profit in *halal* ventures.

The *takaful* operator responsibility is handling and management of the funds provided. Liabilities such as claims are compensated from this fund whilst any surplus or deficit in the Underwriting falling on the participants to share or cover up. However, *takaful* operator is always present to give efficacy to the operation by providing *quid hasan* i.e. gratuitous interest free loan, to cover deficits. Depending on the type of model used e.g. *mudarabah* or *wakala* that would determine how the return from the investment of the *takaful* fund would be shared between the participants & *takaful* operator and how the latter would be remunerated. Similarly, depending on the type of model again e.g. *mudarabah* or *wakala* that would determine how the Underwriting surplus would be distributed between the participants and *takaful* operator.<sup>39</sup>

In relation to the organizational structure, there is normally a head general manager and under whose supervision there are four departments in the *takaful* organization. Each of the departments is distinct and operates independently. Firstly, there is the family *takaful* department which as the name suggests deals with family related insurance products. The second is the general *takaful* department which has three separate divisions of Underwriting, claims and *retakaful*. When there is any claims, the claim divisions categorizes between motor and non-motor claims.<sup>40</sup>

The third department is Finance and administration and the fourth department is Marketing. In fact, the finance department plays a major role in the management of the contributions provided by the participants. The finance department is split in two divisions, one of investment and the other of accounts. When the participants pay their contribution this is handled by the accounts division by putting as shareholders funds and set aside for further consideration. As funds come in from the participants under the general *takaful* policies, the funds are treated as *tabarru* i.e. donation and put into Participant's special account (PSA). From there on, the investment division takes on the funds for investment and to generate profit. In the event of a profit from the investment, the surplus is shared on the model agreed between the parties but in the event of a loss, participants are liable for the losses. In the event, the participant has to claim due loss suffered, he / she will still receive compensation, as when the initial *tabarru* was provided he / she had already entered the cooperative scheme. The loss sustained by investment of the fund by the *takaful* operator was a business risk that participant & *takaful* operator took together, in the course of business and any profit or loss from this venture is totally distinct from the loss claim that the participant makes in the event of a defined catastrophe. Whilst the former relationship relates to business risks, the latter relationship relates to cooperative scheme. The following structure appears to be prevalent in Malaysia, Bahrain and Saudi Arabia.<sup>41</sup>

### 4. Relevant reviews and opinions of Islamic scholars about insurance and *takaful*:

The researcher aims to deal in this section on the standing of Islamic *fuqaha* and authors on admissibility of insurance in Islam and the present position of acceptability. It is of no secret that the Islamic *fuqaha* has been in dilemma about the permissibility of traditional insurance under Islamic rules for a long time. This is mainly because there is nothing directly mentioned about either allowing or rejecting insurance in *Quran* or in the *hadiths* or *sunna*. Hence the reason for lack of authoritative literature in this subject matter, which resulted in subjective scholarly views, who themselves lacked requisite knowledge about insurance and terms of relationship.<sup>42</sup> Therefore, it becomes relevant to fall back to secondary sources such as the opinions of *fuqaha* called *fatwas*, acceptable consensus among Muslims called *ijma* and analogies of various relevant authors. It should be noted that scholarly opinions such as *fatwas* does not automatically have legal effect until incorporated into law however, they do form the basis for development of respective jurisdictional law.<sup>43</sup> In this section, the researcher aims to

<sup>37</sup> Aleem Khan Falaki, supra at Chapter 3 Article 5; < <http://li.aleemkhanfalaki.com/chapters/main-difference-between-takaful-and-insurance/>>; Accessed on 8/2/14 at 16:34

<sup>38</sup> This is excluding consideration of *takaful* life policies whose working principles are different than how the remainder of the *takaful* policies works. This is because with other types of *takaful* policies there is always a chance that the covered perils may or may not occur, whilst with life policies, the event will happen for sure i.e. death, the only question being one of time as when the incident will take place. Therefore, the management of *takaful* life policies are set out in different working principle of keeping aside part of contributions even to cover the claims, which as mentioned, will take place for certain. Obviously, keeping into consideration, that the participant maintains the *takaful* life policy at the time of his/her death and didn't close the account i.e. bring the relationship to an end before the ordained event i.e. death. This thesis will not consider dealing with life related *takaful*.

<sup>39</sup> Muhammad Ayub, supra at pages 422 – 423

<sup>40</sup> Mohd Ma'sum Billah, supra at pages – 406 - 408

<sup>41</sup> Ibid

<sup>42</sup> Khalaf 1974: Vol. 11; Aly Khorshid, supra at page - 60

<sup>43</sup> Madzlan Mohamad Hussain, "Legal issues in *Takaful*", in the Textbook: Editor: Simon Archer, Rifaat Ahmed Abdel Karim and Volker Nienhaus, "Takaful Islamic insurance: Concepts and Regulatory issues", John Wiley & Sons (Asia) Pte. Ltd, 2009, pages – 74 - 75

look at well known secondary sources which would assist in understanding the current border grounds of insurance in Islam, which would appear to be similar to literature review in this prospective.

To commence with, the prominent Egyptian scholar Sheikh Mohammed Abu Zahra who lived between 1898 and 1974,<sup>44</sup> considered the issue of insurance in details and deliberated that cooperative insurance is acceptable but discarding the uncooperative insurance. His determination could be summarised in three main points where he mentioned the following:

- i. Mohammed Abu Zahra stated that a flexible and understandable approach to be adopted by Islamic jurists for insurance except where such contract is in violation with Islamic basic laws.<sup>45</sup>
- ii. Mohammed Abu Zahra witnessed that in some Islamic jurisdictions has allowed insurance contracts due to its benefits, which is a positive factor. He mentioned that trying insurance products for true and genuine purpose is acceptable. He went further to consider whether commercial insurance is a public or private beneficence and noted that minor percentage of individuals use the same.<sup>46</sup>
- iii. Abdel Rahman Issa stated that important aspect of insurance nowadays is that it is a necessity and part of daily life. Mohammed Abu Zahra pointed whether commercial insurance is the sole alternative, but considered that existence of necessity shows that cooperative insurance is present otherwise the latter needs to be created.<sup>47</sup>

As a result, as mentioned above, Mohammed Abu Zahra approved cooperative insurance and not the non-cooperative ones. However, he justified this by stating that due to the presence of “*taints of gambling, temptation and usury*” which would void the contract. He viewed that in such circumstances, it appears to be a misuse of resources against warrant and so, could not be considered as a necessity.<sup>48</sup> Aly Khorshid appears to an extent to disagree with Mohammed Abu Zahra as he distinguishes the commercial aspect of insurance from the everyday impact of insurance in daily life. He goes further to argue that restructuring of Islamic lifestyle with allowing adjustment with accepting insurance provided in *halal* manner.<sup>49</sup>

Likewise, the *Fiqh* academy of the Organization of Islamic Conference<sup>50</sup> in their ninth declaration at the second session in Jeddah, Saudi Arabia on 22<sup>nd</sup> – 28<sup>th</sup> December 1985 ruled that commercial insurance is *haram*.<sup>51</sup> On consideration of their ruling, the committee had made some concrete conclusion on the issue of insurance which had been set in three points, which author Mahmoud A. El-Gamal has also cited in his literature that are as follows. The first point decided by the committee, as quoted by Mahmoud A. El-Gamal as well, is that traditional insurance contracts where a set premium is paid is not acceptable because of the presence of excessive *gharar*. This makes the contract ineffective between the parties as under Islamic laws the contract is unlawful.<sup>52</sup> However, the original paper of Organization of Islamic Conference states that they felt that the commercial insurance contract contained “*major elements of deceit, which void the contract*”.<sup>53</sup> This slight discrepancy of the texts can be comprised if the author had attempted to correlate or paraphrase the rulings but for safety purposes, it is best to remain with the original paper that the *Fiqh* academy felt that major presence of deceit in traditional insurance lead to considering it as *haram*.<sup>54</sup>

<sup>44</sup> Ralph H. Salmi, Cesar Adib Majul and George K Tanham, “Islam and Conflict Resolution: Theories and Practices”, University Press of America, 1998, ISBN 9780761810964, page - 90

<sup>45</sup> Aly Khorshid, supra at pages – 58 - 59

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid; This raises question in the mind of researcher that if stated characteristics could be removed then there should not be any reason to consider traditional insurance acceptable.

<sup>49</sup> Aly Khorshid, supra at pages – 59 - 60

<sup>50</sup> Organization of Islamic Conference is the second largest inter-governmental organization after UN, whose aim is to safeguarding and protecting Muslims interest in the world. There are at present 57 state members. <[http://www.oic-oci.org/oicv2/page/?p\\_id=52&p\\_ref=26&lan=en](http://www.oic-oci.org/oicv2/page/?p_id=52&p_ref=26&lan=en)>; Accessed on 4/2/14 at 16:38

<sup>51</sup> Primary texts in Arabic: <<http://www.fiqhacademy.org.sa/qarat/2-9.htm>>; Accessed on 6/2/14 at 13:52. English translation from secondary text: “Resolutions and Recommendations of the Second session of the Council of the Islamic Fiqh Academy: Jeddah (Kingdom of Saudi Arabia) 10-16 Rabiul Thani 1406 h/22-28 December 1985”, Resolution No 9 (9/2): Concerning insurance and reinsurance, in the Text: “Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985 – 2000”, 1<sup>st</sup> edition, Islamic research and training institute: Islamic Development Bank, 2000, pages – 13 – 14; <<http://www.irtipms.org/PubText/73.pdf>>; Accessed on 4/2/14 at 17:49

<sup>52</sup> Mahmoud A. El-Gamal, “Islamic Finance: Law, Economics and Practice”, 1<sup>st</sup> edition, 2009, Cambridge University Press, Page – 147

<sup>53</sup> “Resolutions and Recommendations of the Second session of the Council of the Islamic Fiqh Academy: Jeddah (Kingdom of Saudi Arabia) 10-16 Rabiul Thani 1406 h/22-28 December 1985”, Resolution No 9 (9/2): Concerning insurance and reinsurance, supra at page - 13

<sup>54</sup> It is of quite clear that the texts have a discrepancy with explanation, which although not within the ambit of this thesis to consider book reviews but it is relevant to mention and deal with the appropriate texts and consider the correct meanings for the advancement of the final proposed model of the researcher. As the researcher has pointed out, it is possible that the author, Mahmoud A. El-Gamal wanted to summarise the rulings hence the version as mentioned use. Or the other alternative could be that the author meant “*gharar*” to have the equivalence of “*deceit*”. This is because *gharar* means uncertainty and *deceit* in Islamic law refers to the concept of *Ghabn*, an example of which is *bay’ al-najash* which means a fraudulent action sale where

The second point that the committee went further to confirm that they consider cooperative insurance to be the substitute to the traditional insurance as they view the former as being set on the beliefs of cooperation and voluntary contributions and went ahead to set similar ideologies for reinsurance as well.<sup>55</sup> Additionally, the third point the committee proposed Islamic countries to work harder for promotion of cooperative insurance and reinsurance so as to avoid reliance on traditional insurance which, they proposed is practiced contrary to God's commandments.<sup>56</sup>

However, late Professor Mustafa Al-Zarqa dissented on that conference in line with his published paper from 1961, where he opined that he considers traditional insurance of all types acceptable subject to insurers changing their investment part of the business to avoid *riba* aspects. These various opinions were later considered by Dr. Ali Jumah, Grand Mufti of Egypt in September 2004, who argued differently that conventional insurance is permissible with some small changes and passed a *fatwa*, in this respect.<sup>57</sup> Dr. Ali Jumah mainly compared insurance with other financial concepts such as banking, for which there is nothing explicit mentioned in Islamic canonical texts. However, he pointed out to the Holy *Quran* verse 4:1, that stated "*O people of faith, fulfill your contracts*", which he argued referred to all types of contracts including insurance contracts. Also, he referred to the last speech of Prophet Mohammed (pbuh) in Mina where he mentioned that "*It is not permitted for anyone to take the property of his brother except with his consent*" and argues that if mutually parties decides to deal on agreed terms as in insurance contracts, there is no objections. Dr. Ali Jumah felt that *mudarabah* and customary rules are acceptable and see no reason why authorisation should be withheld for commercial insurance when cooperative insurance is allowed. He expressed that life insurance is considered to have excessive *gharar*, which does not affect parties on contractual obligation and neither should be commercial insurance where parties knows in advance amount paid and would receive, so there should not be any arguments of excess *gharar*.<sup>58</sup>

The committee of the Council of Islamic *Fiqh* academy again sat recently to discuss once more on commercial insurance. In their Resolution 187 at the twentieth session in Oran, Algeria on 13<sup>th</sup> – 18<sup>th</sup> September 2012 reaffirmed the committee's previous decision of Resolution 9/2 (above), that commercial insurers practice of charging fixed premium, is a contract of exchanging, which contains extensive *gharar* and is not considered *halal*. However, the committee acknowledged that the *takaful* is facing severe statutory and regulatory issues and recommended for a remodelling of cooperative insurance and be considered further for draft resolution on the matter in the next meeting.<sup>59</sup>

Nonetheless, prior to this, on the fifth ruling of the first session of the *Fiqh* academy of the Muslim World League<sup>60</sup> that took place on 10<sup>th</sup> – 17<sup>th</sup> Sha'ban 1398H<sup>61</sup> determined that commercial insurance is unacceptable and only acceptable form is cooperative insurance. They based their decision which is broken into six main points, which are summarised as follows. The first being that commercial insurance has severe uncertainties and parties does not know at the time of contract what will be paid and what will be received by each party respectively. The second point is that they opined that commercial insurance activities have the likes of gambling, where for payment of premium, the insured might not get any monies in return or get substantial amount of monies, more than premium amount, in compensation. The third is that the payment is considered *riba* as the exchange of payment is unequal and paid later. The fourth aspect being that the commercial insurance is compared to betting and does not fall under the permitted betting category.<sup>62</sup> The fifth point mentioned is that monies of insureds are taken in return for nothing and this is contrary to one of provisions in the *Quran*.<sup>63</sup> The final issue is that the insurer is entering a contract to oblige

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price increased by fake buyer tactics so that real buyers bid more. Although a far fetched description, it may be considered that a *bay' al-najash* can be considered to be *gharar*.

<sup>55</sup> "Resolutions and Recommendations of the Second session of the Council of the Islamic Fiqh Academy: Jeddah (Kingdom of Saudi Arabia) 10-16 Rabiul Thani 1406 h/22-28 December 1985", Resolution No 9 (9/2): Concerning insurance and reinsurance, supra at page - 13

<sup>56</sup> Ibid

<sup>57</sup> Mahmoud A. El-Gamal, supra at page – 147

<sup>58</sup> Mahmoud A. El-Gamal, supra at pages – 149 - 151

<sup>59</sup> "Resolution No.187 (2/ 20) on: Cooperative Insurance: Sharah Rules and Regulations", Islamic Economic Studies, Vol. 21, No. 1, June 2013, pages – 104 – 106; <[http://www.irti.org/irj/go/km/docs/documents/IDBDevelopments/Internet/English/IRTI/CM/downloads/IES\\_Articles/Vol\\_21\\_No\\_1/Resolution\\_of\\_OIC\\_Fiqh\\_Academy.pdf](http://www.irti.org/irj/go/km/docs/documents/IDBDevelopments/Internet/English/IRTI/CM/downloads/IES_Articles/Vol_21_No_1/Resolution_of_OIC_Fiqh_Academy.pdf)>; Accessed on 6/2/14 at 12:32;

It does not appear that the next committee meeting and the decisions has been published yet according to the Council of Islamic *Fiqh* academy official website; <<http://www.fiqhacademy.org.sa/>>; Accessed on 6/2/14 at 13:39

<sup>60</sup> The Muslim World League is an organization which is based in Makkah Al Mukarramah, Kingdom of Saudi Arabia whose primary aim appears to assist in the practicing of Islam in the correct manner within the ambits of Islamic law; <<http://en.themwl.org/taxonomy/term/19>>; Accessed on 5/2/14 at 12:37

<sup>61</sup> Islamic calendar dates are different from the traditional Georgian dates that are used everywhere. 10<sup>th</sup> – 17<sup>th</sup> Sha'ban 1398H translates to between 16<sup>th</sup> – 22<sup>nd</sup> July 1978; <<http://www.islamicfinder.org/Hcal/index.php?lang=english>>; Accessed on 5/2/14 at 14:29

<sup>62</sup> It is mentioned in the resolution that Prophet Mohammed (pbuh) has allowed betting in three permitted activities in the saying that: "There is no competition except in camel race, horse race and arrow contest" and it is considered that commercial insurance does not fall under any of these categories; <<http://en.themwl.org/content/fifth-resolution-insurance-its-various-kinds-and-forms>>; Accessed on 5/2/14 at 12:55

<sup>63</sup> The resolution makes reference to Holy Quran in *Surah An – Nisa* (Chapter 4), Verse 29, that:

payment as a guarantor on an uncontrolled uncertain event and takes monies from the insured for this but does no work in return.<sup>64</sup>

The committee considered various arguments put forward for approving of insurance in Islam but disregarded the arguments are for benefit, necessity, applicability unless prohibited, customs, blood money, payment as security provider, deposit payment and cooperative cloth merchant deals. The committee made clear that *mudarabah* contract cannot be in the realms of insurance contract as, unlike *mudarabah* in insurance monies paid i.e. premium, ownership changes along with the fact that on insured's death inheritance is to any compensation not the premium and unlike sharing in *mudarabah* does not take place from the premium. As mentioned they approved cooperative insurance, on four basics namely that it works on donation principle by sharing responsibilities cooperatively with no aim of profits from others monies. The second in cooperative insurance, *riba* is absent as there is unequal or delayed payment issue. The third is that uncertainty is not an issue in cooperative insurance as it is not considered to be financial transaction. The fourth being that cooperative insurance combined funds can be used to do the necessity as required.<sup>65</sup>

Akin decision was reached by the committee of *Ulama Al-Majma al-Fiqh al Islami*, where they decided that insurance is disallowed since someone is making profits from the misfortune of another and so, only acceptable concept is on mutual or cooperative basis.<sup>66</sup> Author, Mahmoud A. El-Gamal opined that cooperative insurance should not be the same as mutual insurance but one where claims payments finds it way from the *tabarru*, so to avoid the trap of *gharar* as by not entering a two way contract. Funds in *takaful* companies are invested in *halal* activities avoiding the problems of *riba* which is one of the scholarly opinions of proposed *takaful* operations as alternative to insurance.<sup>67</sup>

On the mentioned committee meeting of the *Fiqh* academy of the Muslim World League, late Dr. Mustafa Al-Zarqa who was present was the only one who dissented. He argued that he did not consider and found there to be any basis that commercial insurance is any different than from cooperative insurance, as proposed by the committee. In any insurance, the idea is of safeguarding and insureds contribute to insurer funds anyways, which grows bigger and require additional employees, as more and more insureds join in the scheme. He continued that the premium charged by insurer should be on the appropriate analysis of the risk, which is the same in both existent and proposed insurance. In addition, Dr. Mustafa Al-Zarqa noted that on this committee meeting when the resolution was passed considering insurance as *haram*, half of the committee members were not present. He emphasised that declaring a motion as grave as insurance needs to be confirmed by at least a majority, if at all members of the committee. Also, he suggested that academic views of unrelated scholars need to be obtained and considered before declaring a prohibition on a necessity such as insurance. However, Dr. Mustafa Al-Zarqa was strict in his view that where insurers involve in monopoly to unjustly charge higher premium or unfair terms, *Sharia* enforcement should take place to avoid exploitation.<sup>68</sup>

Author Mahmoud A. El-Gamal has also considered some of these aspects in his literature and quoted some of the important views of Dr. Mustafa Al-Zarqa during his lifetime. Dr. Mustafa Al-Zarqa stated that he found no evidence in Islamic texts which confirmed that insurance is prohibited but instead noted that the overriding ideology in Islam "...to point jointly toward its permissibility and approbation, as a means of eliminating risk and loss".<sup>69</sup> Dr. Mustafa Al-Zarqa further commented those who argued to the contrary have unnecessarily raised hesitation in the community and portrayed a dim view of insurance. He continued that "...Some of those who raise such doubts are driven by obstinate desire to defend earlier opinions that they had issued in haste, and find it psychologically difficult to admit their faults, and others for various other reasons but without belief in what they say".<sup>70</sup>

A similar decision was also been received by Dr. Rafiq Yunus Al-Misri, who determined that insurance in general is acceptable and he mentioned about *Sharia* scholars approach at times to dealing with controversial matters. He mentioned that by approving cooperative insurance, in principle they have accepted that insurance is allowed without concurring on details. He further stated that, "...I prefer permissibility of insurance, without *hiyal* (legal stratagems, or ruses); for these are jurists who forbid one thing, and then return to permit by various legal stratagems and means of circumvention, without worry or shame..."<sup>71</sup>

Correspondingly, writer Adil Salahi who was a regular article commentator in Saudi Arabia newspaper "Arab News" initially was against insurance by following ruling of the *Fiqh* academy of the Muslim World League. However, he later changed

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- "O you who believe! Eat not up your property among yourselves in vanities; but let there be amongst you traffic and trade by mutual goodwill."

As the researcher would like to point out and the readers would note that according to *Quran* exchange of properties can take place where trading is involved.; <<http://en.themwl.org/content/fifth-resolution-insurance-its-various-kinds-and-forms>>; Accessed on 5/2/14 at 13:01

<sup>64</sup> <<http://en.themwl.org/content/fifth-resolution-insurance-its-various-kinds-and-forms>>; Accessed on 5/2/14 at 13:06

<sup>65</sup> Ibid

<sup>66</sup> Aly Khorshid, supra at pages – 60 - 61

<sup>67</sup> Mahmoud A. El-Gamal, supra at page - 148

<sup>68</sup> <<http://en.themwl.org/content/dissent-dr-mustafa-al-zarqa>>; Accessed on 5/2/14 at 14:32

<sup>69</sup> Al-Zarqa (1994, p. 8); Mahmoud A. El-Gamal, supra at pages – 147 - 148

<sup>70</sup> Al-Zarqa (1994, p. 9); Ibid

<sup>71</sup> Al-Misri (2001, p. 6); Ibid



they have in one lot and divide it all equally among themselves. They belong to me and I belong to them". He stated that this showed that it is acceptable in Islam that schemes to help mutually in need are allowed. Dr. M. Haitham Al Khayyal on the same newspaper goes on further to discredit arguments that ignorance is present in insurance as he expressed that law of large numbers<sup>80</sup> which forms actuarial mathematics shows that is incorrect. He stated that insurance has no relationship with betting and gambling and usury is inexistent in insurance. He sums up by stating that insurer do work in return of premium, by investing to maximise the funds and that expansion of insurance can have a higher public benefit.<sup>81</sup>

However, author Sayid Abul A'la Mawdudi remains strict that insurance is *haram* and points out three main proscriptions against traditional insurance by *Sharia*, which is that investment by insurance companies in *haram* activities. Also, that excessive payment as compensation is considered containing elements of *gharar* and inheritance distribution, in the event of death, is not in line with *Sharia* law rather on nominated individual as in the policy. He opined that *haram* cannot become *halal* simply that insurance is crucial nowadays. However, Sayid Abul A'la Mawdudi goes on to mention that to make an insurance operation *Sharia* compliant, investment can be made on partnership basis on *halal* activities and sharing returns on proportionate basis; in life insurance inheritance would be distributed as per *Sharia* laws and only the actual funds contributed but if surplus is considered that parties enter partnership agreement to invest and make returns, which is to be shared proportionally.<sup>82</sup> On similar note is another key academic, Dr. Mohammad Hashim Kamali, Professor of Law at International Islamic University of Malaysia, stated that *gharar* remains present in *takaful*, like in traditional insurance but the extent of this is reduced in the former. This is because the *takaful* is set on cooperativeness and mutuality which lacks the competing interests among insurer and insured, as present in traditional insurance.<sup>83</sup>

Other thinkers such as Syed Ahmed Urooj Qadri Rahimahullah have strong views that insurance is just a combination of *riba*, *gharar* and gambling, where like bankers the insurers entice prospective insureds with the "bait" of compensation. However, worse than bankers the paid premiums are lost if insureds default in payment of further premium and the culture of investment and compensation packages falls under *riba*.<sup>84</sup> Alongside him, Sheikh Al Azher, Al Sheikh Jadal Haq Ali Jadal Haq in Egypt on July 1995 issued a *fatwa* about illegitimacy about life insurance but emphasised that in *Sharia* ensuring of ones property is allowed in cases of "fear of unjust enrichment, losses or destruction". He made his determination based on presence of unacceptable *gharar* and absence of contact of mutual cooperation.<sup>85</sup>

Joined with above, are two intellectuals of Saudi Arabia, Sheikh Mohammad Saleh Al Munajjid and Sheikh Faisal Mawlawi who passed *fatwa* against admissibility of insurance in Islam. They based this as there was no mention of insurance at time of Prophet Mohammed (pbuh) and nothing had been noted by his companions. Also, they determined that insurance consists of restrictions of *riba*, gambling, ambiguity & *gharar* and insurance practice is parlour act to trick individuals of their monies, which they based on the information as per a German expert who stated that payout is less 2.9% of the premiums paid into. However, they did approve cooperative and mutual western insurance but expressed reluctance for traditional insurance but only in time of need and even then to take the minimum cover required only.<sup>86</sup>

Interesting, author Aleem Khan Falaki refers in his literature, two *fatwas* where the intellectuals concurred that all insurance contracts are *haram* due to the presence of *gambling and gharar*. Rather strangely, they determined that the compensation received by the victim of defined casualty from the insurer is *halal* because the victim has a right to pursue and obtain his entitled compensation for the tort, irrespective of whoever is required to make the payment as the latter is not the victim's responsibility. The thinkers made a distinction between the contractual relationship between the insurer and insured, from the tortious relationship between the insurer and victim. Aleem Khan Falaki raised severe concerns on the justification of these *fatwas* as it is turning a blind eye on the necessity of taking an insurance cover but proactive in approving the compensation element. He doubted that without taking an insurance cover at the first place, there is no compensation to claim and the *fatwas* contradict as if taking insurance is *haram*, it fails to justify how the outcome of a *haram* instrument can be *halal*. Aleem Khan Falaki does not appear to approve the thinkers' stance and encouraged that for the fairness of the society, insurance to be acceptable in Islam.<sup>87</sup>

<sup>80</sup> The Law of Large Numbers (LLN) is an arithmetic theorem which manages on matters that takes place a significant number of times and is used by actuaries in insurance companies in calculating the risk factors, which in essence deceases as the number of happenings increases. See Aleem Khan Falaki, supra at Chapter 5 Article 3; <<http://li.aleemkhanfalaki.com/chapters/what-is-risk-and-law-of-large-numbers/>>; Accessed on 6/2/14 at 00:15

<sup>81</sup> Aleem Khan Falaki, supra at Chapter 3 Article 7; <<http://li.aleemkhanfalaki.com/chapters/haitham-khayyal-views-on-insurance/>>; Accessed on 6/2/14 at 00:06

<sup>82</sup> Sayid Abul A'la Mawdudi, "First Principles of Islamic Economics", The Islamic Foundation, 2011, pages – 252 - 254

<sup>83</sup> Mohammad Hashim Kamali, "Islamic Commercial Law: An analysis of futures and options", 1<sup>st</sup> edition, Islamic Texts Society, 2010 (5<sup>th</sup> reprint), pages – 93 - 94

<sup>84</sup> Aleem Khan Falaki, supra at Chapter 4 Article 1; <<http://li.aleemkhanfalaki.com/chapters/syed-ahmed-urooj-qadri/>>; Accessed on 7/2/14 at 9:48

<sup>85</sup> Aleem Khan Falaki, supra at Chapter 4 Article 2; <<http://li.aleemkhanfalaki.com/chapters/sheikh-al-azher-egypt/>>; Accessed on 7/2/14 at 9:56

<sup>86</sup> Aleem Khan Falaki, supra at Chapter 4 Article 3; <<http://li.aleemkhanfalaki.com/chapters/saleh-al-munajjid-faisal-mawlawi-saudi-arabia/>>; Accessed on 7/2/14 at 12:32

<sup>87</sup> The author refers to an interesting example of theft, which is prohibited in Islam. He explains that when a man steals monies, it is *haram* but if the family knows about the stolen monies and yet uses it, the author is perplexed, how it can be rationalized to be *halal*. He highlights an analogous point that if under the *fatwa* the source of compensation is unnecessary, then it could very well be argued that a blind eye be turned to how the insurers deal and invest their funds and concentrate only on compensation.

Additionally, Aleem Khan Falaki refers to an article from The Milli Gazette (dated 1 - 15 April 2002) which made reference to an important *hadith* of Prophet Mohammed (pbuh) about doing ones best and then relying on God, which supports the acceptability of insurance in Islam. The *hadith* quoted that: "Anas Bin Malik reported that one day a Bedouin came to the Prophet on a camel and asked him: "Can I leave the camel alone (without tying it to any tree) and trust in Allah?" the Prophet said: "Tie your camel first, then put your trust in Allah" (Tirmizi)."<sup>88</sup> Comparably, Syed Othman Alhabshi and Shaikh Hamzah Razak also related the same *hadith* in their article and exemplify the need to make arrangement to avoid risks.<sup>89</sup> Also, The Milli Gazette cited authority of Imam Ibn Rajab who confirmed that putting trust in God does not reflect that avoiding doing the basics as God ordained but to do the same, following God's laws and trusting in Him alone.<sup>90</sup>

They went further to state that Prophet Mohammed (pbuh) have taken steps in his lifetime to avoid risks as well, which included when he hid in cave initially to avoid conflict during his migration from Makkah to Medina, when he split his companions in separate battalions than whole one big troop and when he used to wear body armour during wars for protection. Also, citation was made from Dr. M. Najatullah Siddiqui who commented that Muslims are required to have patience and submit to God alone but that does not reflect that they should not take steps to avoid disasters. He continued that it is well compliant within Sharia rules that actions be taken "to avoid risks and financial losses individually as well as collectively. It is obligatory on him to take precautions against every kind of risk..." As the above commentaries suggests, it has been encouraged that steps be taken to avoid risks in this lifetime in *halal* manner either solo or as a group.<sup>91</sup>

Also, scholar such as Syed Khalid Rashid noted that Muslim scholars had diverging views with some approving insurance, others did not and reminder approving limited insurances. Interesting he points out that famous *Shi'a* jurist, Ayatollah Khomeini has approved insurance as sufficing of simple offer and acceptance, on the basis that the necessary contract basics are satisfied such as subject, parties, risk, premium, payment.<sup>92</sup> Similar view was shared by another well known *Shi'a* jurist, Ayatollah Muhammad Vahidi who supported the sanctity of insurance contract.<sup>93</sup> However, the *fatwa* Committee in Malaysia 1972 declared that way life insurance conducted then in Malaysia was non-Islamic as it had *riba*, *gharar* and *maisir* in it. Syed Khalid Rashid maintained a neutral ground on his argument and emphasized that insurance is an essential for daily life and the alternative *takaful* created may influence other jurisdictions to consider Islamising the insurance sector.<sup>94</sup>

Likewise, author Muhammad Anwar explains the historical basis that the 1972 meeting of Islamic Studies Conference (ISC) considered 80 opinions on insurance but remained deadlock with a decision about legitimising insurance. He noted that the Council of Islamic Ideology Pakistan (CIIP) decided insurance illegitimacy in Islam but intellectual, Abdul Malik Irfani disagreed with others in this decision.<sup>95</sup> Muhammad Anwar pointed out that insurance is rejected under *gharar* due to event uncertainty, claimed amount uncertainty and time of claim uncertainty. Yet, uncertainty exists in individual level but not at collectively, as per law of large numbers and should be allowed under *darura* i.e. necessity and *masalahah* i.e. public interest. *Maisir* is another reason for discrediting insurance as like gambling as insured is betting on event occurrence to claim. However, it is counter argued that in gambling either party win or lose but in insurance there is uncertainty whether the event will happen at the first place, so there is nothing to lose. Also, with compensation capped to the amount of loss, unlike gambling, there is nothing extra to win. Gambling creates new risks which one willingly takes on but with insurance it is management of existent risks which one cannot avoid.<sup>96</sup>

Muhammad Anwar goes further to state that *riba* is a reason for insurance unacceptability as premium & compensation (if claimed) are never the same amount so there is an increase without doing any labour and insurer investment of funds in *haram*

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The author explains further that until the compensation is paid off, it could be very well possible that the tortfeasor will be in prison (of course this depends on which jurisdiction but in most Islamic jurisdictions such as in Saudi Arabia, the tortfeasor would face sentence until the penalty is paid off). This in essence makes not only the innocent victim's family to suffer from unable to obtain the requisite compensation in the right time but also, the tortfeasor's family, who are innocent as well, suffer. This cannot be in good conscience being just & fair and to restrict a scheme which would have allowed such injustice and unfairness to take place cannot be accurate. Aleem Khan Falaki, supra at Chapter 4 Article 5; <<http://li.aleemkhanfalaki.com/chapters/arab-website/>>; Accessed on 7/2/14 at 15:32

<sup>88</sup> Aleem Khan Falaki, supra at Chapter 9 Article 3; <<http://li.aleemkhanfalaki.com/chapters/adil-salahis-views-on-insurance/>>; Accessed on 8/2/14 at 14:08

<sup>89</sup> Syed Othman Alhabshi and Shaikh Hamzah Razak, supra at pages – 191- 193

<sup>90</sup> Aleem Khan Falaki, supra at Chapter 9 Article 3; <<http://li.aleemkhanfalaki.com/chapters/adil-salahis-views-on-insurance/>>; Accessed on 8/2/14 at 14:08

<sup>91</sup> Ibid

<sup>92</sup> Ayatollah Khomeini, *Tawzih al-Masayd* (1979), (Problem No. 5, 2863 to 2865) cited in S.H.Amin, "Islamic Law in the Contemporary World", (Glasgow, 1985), p. 79 mentioned in Syed Khalid Rashid, "Islamization of Insurance – A Religio-Legal Experiment in Malaysia", in the Textbook: Editors: M.Kabir Hassan and Mervyn K.Lewis, "Islamic Finance", Edward Elgar Publishing, 2007, pages – 408, 419

<sup>93</sup> Ayatollah Muhammad Vahidi, *Al-Masayil al-Mustasdaha* (1978), 11-13 cited in S.H.Amin, "Islamic Law in the Contemporary World", (Glasgow, 1985), p. 80 mentioned in Syed Khalid Rashid, supra at page - 419

<sup>94</sup> Syed Khalid Rashid, supra at page - 418

<sup>95</sup> Muhammad Anwar, "Comparative Study of Insurance and *Takaful* (Islamic Insurance)", in the Textbook: Editors: M.Kabir Hassan and Mervyn K.Lewis, "Islamic Finance", Edward Elgar Publishing, 2007, The Pakistan Development Review, 33:4 Part II (Winter 1994) pp. 1315 – 1330, page – 423

<sup>96</sup> Muhammad Anwar, supra at page – 424; Also see footnotes 47, 68, 75 and 80

activities. However, it is responded that compensation claimed is on the loss sustained and the intention of premium payment is not to increase with time alone but for cover. He cites Omar Farukh who commented that insurance is similar to contract of guarantee between the parties but he pointed that Afzalur Rahman mentioned that insurer's motivation of making "profit out of the weakness of individual insurees" damages insurance credibility in Islam. Hence, mutual insurance is approved but Muhammad Anwar argued that making profit in Islam is acceptable and opined that insurer duty is similar to *zakat* managers for the sake of public security.<sup>97</sup>

Muhammad Anwar concludes that assurance aspect of *takaful* needs to be amended and recommended that where compensation is received the insured and his heirs, in event of fatality, should continue making added payments, net of contributions paid, until the balance is cleared off. This extra payment received by insured from compensation would be treated as *quad hasan*, with the aim to avoid claims exaggeration, risk transferring incentives and bypassing *gharar*. In cases where it is not possible to clear off this debt, relief could be provided from the *tabarru* fund or even cover the remainder from insurer's *zakat* fund, the former which can also be used to cover needy non-participants as well.<sup>98</sup> The researcher differs with this recommendation of the author as whilst, it may appear to be a well moral dogma but it is not commercially viable particularly from insurance business prospective. Whereas avoiding incentive for fruitless claims is certainly needed but asking insured to continue paying as if it is a debt goes contrary to the idea of having insurance / *takaful* in the first place. If insured is going to be liable to pay it off as debts, it seems meaningless to waste costs to obtain cover, as he / she would have a better management of funds, if used that fund for investment oneself and made returns. Added that willingness to waive off the debt would become a norm rather than an exception on implementation of such approach and assisting even non-participants from the *tabarru* fund clearly goes contrary to business and legal ethics of insurance, as non-parties are taking share of funds on which they have no claims at all.

Muhammad Anwar gives his second recommendation that indemnity on actual losses suffered not on monetary set indemnity limit. This he argues that to avoid *riba* by indemnifying with same kind rather than exchanging premium money for compensation money and reduces effect of inflation. This will also reduce *gharar* and *maisir* as indemnification is on real terms other than on set insurance limits.<sup>99</sup> The researcher, once more, disagrees with the author as without set limit the insurer would not be able to analyse risks and to set premium amount. With such approach, the insurers faces unlimited risks and on occasions the insured goods lost will be not possible to replace like for like, perhaps of its value, rarity etc.

Alternatively, modern day author Aly Khorshid, stated that *gharar* is the central argument against validity of insurance in Islam as he considered insurance contract is an onerous contract (*muawada*) since parties have strict obligations, rather than voluntary contract. He pointed the various cons of insurance by scholars, that the uncertainty of insureds paying without knowing whether defined peril will ever occur has *gharar* existent.<sup>100</sup> Also, the compensation is determined on the level of damage, as and when and if such event takes place, which goes contrary to prohibition of *gharar* in sales contract in Islam, so has *gharar* present.<sup>101</sup> Islam is strict against conditional and uncertain transactions to avoid disadvantage to any party.<sup>102</sup> Yet, Aly Khorshid counter argues that this is a far fetched interpretation of *Sharia* as in Islamic law validity is provided to some uncertain activities e.g. wills, guarantees etc. He agrees that insurance have uncertainties but insurance provides the financial security in return for a premium, as such uncertainties are acceptable for other Islamic instruments, it should be no different for insurance. He refers to the well known scholar Ibn Taymiyyah who concurred that *gharar* is applicable to situations where uncertainty has prejudicial adverse effects on a contract by disturbing the balance of parties rights and duties.<sup>103</sup>

Aly Khorshid goes along with the pros for insurance that *gharar* is pertinent in exact counter value exchanges rather than to a promissory financial cover from contributed fund situation alone. He goes on to argue that insurance contract is dealing with risks and so does not fit in with goods or services sales contract in Islamic law. Before disregarding insurance, it is relevant to consider its functions of risk dealings and the prejudice it creates. He examines the *hadith* of Prophet Mohammed (pbuh)<sup>104</sup> and explains that the *hadith* referred to the aim of *gharar* which is to avoid upsetting the parties' relation by any unjust capital enrichment. He mentioned that State and mutual insurance also has *gharar* but those are still considered as valid since the insureds funds are considered as donation, a fact which is approved by *Sharia*.<sup>105</sup> He goes on to state that the reason that *gharar* is present is to avoid prejudice and other than the amount of compensation to be paid, which would depend on the level of losses, the parties obligations are clear from the onset. The uncertainty is dependant on occurrence of an insured defined peril which is not the functional uncertainty *gharar* as indicated. He refers to established scholar, Mustafa Al Zarqa who stated that security

<sup>97</sup> *Zakat* is the compulsory charity of 2.5% that every Muslim is required to give each year (as long as they meet the minimum possession criteria) to assist the poor and needy, so as to allow wealth distribution among society rather than funds remaining only with the rich. *Zakat* are generally provided to set up Islamic organization who collects the funds and manages the charity for appropriate allocation and for their management services it is natural that they charge a fee. Muhammad Anwar, supra at pages – 425 - 427

<sup>98</sup> Muhammad Anwar, supra at pages – 432 - 435

<sup>99</sup> Ibid

<sup>100</sup> Al Masri 1987b; Aly Khorshid, supra at page – 61

<sup>101</sup> Al-Hafiz 1984: 2: 426-31; Ibid

<sup>102</sup> Khater 1985; Ibid

<sup>103</sup> Shalaby 1960; Ibid

<sup>104</sup> Aly Khorshid refers to the *hadith* of Prophet Mohammed (pbuh) in Book 9, Hadith 3675 of Sahih Muslim where Prophet Mohammed (pbuh) mentioned that:

○ "Do not sell the fruit until their good condition becomes evident"

<sup>105</sup> El-Atar 1978: 112; Aly Khorshid, supra at page – 62

and peace has a price of pay<sup>106</sup> and it could be very well that insurance gives the peace of mind which calls for a payment of price, the premium. In insurance, Aly Khorshid opines that there are no unjust profits as compensation is only to cover for the losses sustained and if there is no claim, then insureds does not get any funds, which should demonstrate that *gharar* is inapplicable to insurance.<sup>107</sup>

Aly Khorshid goes further to point out various scholars have disapproved insurance on the grounds of *riba* stating that the fund difference between premium and compensation is unjustified increase.<sup>108</sup> Others scholars have attempted to compare insurance with *sarf* (currency exchange)<sup>109</sup> and to show that *riba* exists in insurance as instalment paid and compensation return is much higher.<sup>110</sup> Also, he pointed that some scholars tried to argue under *maisir* that insurance is just like gambling which depends on pure chance<sup>111</sup> and others see taking insurance as a unnecessary voluntary act which is taken to enter a game of risk to make yields.<sup>112</sup> He mentioned various other reasons that different scholars have stated over time, justification of which does not hold to scrutiny.<sup>113</sup> He stated that The Mufti of Jordan, Sheikh Abdullah El-Galgeily decided that all types of insurance are invalid on his judgment that insurance is unlike traditional sales and not without gambling, usury or temptation & cheating along with insurers tendency to put own favourable terms and conditions. Equally, author Siddik Mohammed El-Amin El-Dareir argued that necessity of insurance did not make it illegal under *Sharia* but supported cooperative insurance so as to avoid temptations can be avoided.<sup>114</sup>

Aly Khorshid concludes by attempting to keep a neutral view but did not approve the arguments discarding insurance. He opined that whilst most *Sharia* scholars disapprove traditional insurance but they encourage mutual insurance even though the same elements are present in the latter, by covering it in a different analogy of cooperativeness. He goes on to argue that the operational concept between traditional and mutual insurance is hardly any different at all except with the argument of cooperativeness. He points that even if mutual insurance is considered to be more acceptable or profitable it does not mean that commercial insurance is not allowed in *Sharia*.<sup>115</sup>

Consequently, author such as Mohamed Akoob recognises that under the concept of *ikhtiar* i.e. preventative steps for the avoidance of possible hazards are allowed in *Sharia*. However, he cited that in conventional insurance, risk handling by risk transfer takes place which is seen as an exchange transaction and the insured obtains his uncertainty of events security by paying a premium, which is unacceptable in Islam. He mentions about the presence of *riba*, *gharar* and *maisir* presence in insurance contracts as exchange of monies takes place but for different amounts, with presence of uncertainties of event occurrence and the insurer trying is business fortune on insureds luck. Mohamed Akoob confers about the alterative as *takaful* which works on cooperativeness so as to avoid *dulum* i.e. injustice, one of the important aspect of Islam.<sup>116</sup>

Additionally, some scholars have raised concerns about the rigidity of the arguments of *Sharia* restrictions of *gharar* and *maisir* that are suspected to hinder traditional insurance being considered *Sharia* acceptable. Author such as Oliver Agha mentions, in a similar mindset as other scholars that he does not opine that *gharar* has been interpreted in the correct manner and should not be applicable in the case of traditional insurance.<sup>117</sup> He argues that *gharar* relates to subject matter but in the case of traditional insurance the aspect is clear that the insurer would have to pay if there is an accident. The only issue that is on doubt is whether the accident will happen or not and it is undisputed that the insurer paying in the event of the incident.<sup>118</sup> Oliver Agha further argued that uncertainty in terms of the compensation payment is not within the remits of concern of *Sharia* restrictions, as the insurer is always there to make the payment in case of losses under insured perils, so in context there is no uncertainty as to the insurance contract itself.<sup>119</sup> However, the researcher would state that the uncertainty of whether a payment needs to be made or not, depending on whether defined perils takes place or not, leaving *gharar* within the scholarly debate ambit. In essence, the uncertainty in traditional insurance contracts relates to the subject matter itself on the ambiguity of occurrence of insured perils, which brings on the *Sharia* restrictions.

Oliver Agha, also, mentions of different *Sharia* scholars concern about presence of *maisir* in insurance and states that *maisir* relates to making money without labour by speculation. However, in case of insurance, it is necessary to consider the mental element which deals with the intention for protection rather than speculative fund maximisation and the business purpose

<sup>106</sup> Al-Zarqa 1984: 47; Aly Khorshid, supra at page – 63

<sup>107</sup> Aly Khorshid, supra at pages – 61 to 63

<sup>108</sup> Qadi 1984: 2:499; Aly Khorshid, supra at pages – 63 - 64

<sup>109</sup> Muslehuddin 1966: 177; Aly Khorshid, supra at page – 64

<sup>110</sup> Al-Dasuqi 1967: 177; Ibid

<sup>111</sup> Uways 1970: 98; Ibid

<sup>112</sup> Nejatullah 1985: 15; Ibid

<sup>113</sup> Aly Khorshid, supra at pages – 64 - 67

<sup>114</sup> Aly Khorshid, supra at pages – 67 - 68

<sup>115</sup> Al-Fangari 1984: 55; Aly Khorshid, supra at pages – 68 - 70

<sup>116</sup> Mohamed Akoob, “Reinsurance and *Retakaful*”, in the Textbook: Editor: Simon Archer, Rifaat Ahmed Abdel Karim and Volker Nienhaus, “Takaful Islamic insurance: Concepts and Regulatory issues”, John Wiley & Sons (Asia) Pte. Ltd, 2009, pages – 151 - 154

<sup>117</sup> See footnote 107

<sup>118</sup> Oliver Agha, supra at pages – 72 - 73

<sup>119</sup> Oliver Agha, supra at pages – 83 - 84

of having insurance at the first place. He strongly disagree that blanket denial of insurance without full consideration of all factors is unacceptable and opines that insurance does not have *maisir* element existent.<sup>120</sup>

Nevertheless, before concluding this section on various reviews, the researcher feels that it is necessary that he has the opportunity to put his own views to argue back on some of the concerns raised by the scholars, to demonstrate a different picture. The researcher would state that as some scholars have already mentioned that they do not opine *takaful* contracts attracts the restriction of *maisir*,<sup>121</sup> as unlike in games of chances such as gambling, where the probability of getting the hand is uncertain, the chances of having a defined peril taking place are not the same. It can also be viewed that in *takaful* the risks taken are that of business risks, which is allowed in *Sharia* law as opposed to considering this equal to games of chance. The parties in *takaful* contracts are simply unaware to whether the insured perils would take place or not and it is a risk that both parties are taking on their assets i.e. in the case of insured his funds and in the case of insurer their efforts. Whilst the above analogy may appear to be similar to game of chance argument but, if *maisir* is simply viewed alone objectively that it can also be construed that the outcome unpredictability is equal to the various business venture risks that are taken with transactions e.g. as in the event of general *mudarabah* contract.

Additionally, *maisir* applies to games of chance rather than serious business such as in *takaful* and possibly could be argued that the hypothesis should not be applicable in such cases. However, this argument might not be very forceful as the application of the hypothesis may well be applicable in all analogous matters irrespective of strict elucidation of the same. Nevertheless, it could also be possibly argued that this paradigm can only work when *maisir* is viewed on its own but when taken together with the restrictions of *riba* and *gharar*, taking *takaful* as a whole, the argument fails as then it stands to show that the parties are in fact entering a transaction where they have no clue who comes out with what at the end of the day.

The researcher feels it is appropriate in this section to put in his analogy on own views of the current *takaful* of utilizing cooperativeness as the concept. Almost all scholars unanimously opines that cooperative theme, in principle, is the acceptable way forward for structuring of a traditional insurance alternative however most of them debate on whether, beside the cooperative concept, the reminder of the workings are set appropriately at all, in the existent *takaful* models.<sup>122</sup> The researcher also shares the same view with the various scholars about different existent *takaful* models possessing a number of issues. However, the researcher also opines that the cooperative concept in itself can be the cause of severe concern to be used in insurance prospective. The way it stands at the moment, cooperativeness used in *takaful* with the principle aim that all the participants would contribute in a pot and as different participants suffers specified perils (as may be the case), he / she can resort to the joint pot where the collective funds are all there to compensate them. So far, the idea is amazing with everyone working together on a common notion which is no different then mutual insurance that exists in the western community or from marine insurance prospective, similar to P & I insurance clubs.<sup>123</sup> However, Muslim society cannot consider mutual insurance or P & I insurance as they view that the operations of these organisations are in contravention of the restrictions of *riba*, *gharar* and *maisir*, as discussed earlier.<sup>124</sup> To differentiate *takaful* from falling under the same problematic restrictions, the funds provided to *takaful* operator is considered as *tabarru* i.e. charity.<sup>125</sup>

However, the crucial aspect that the researcher is concerned is that in both cases the insureds / participants are putting funds in one pot with the aim of pulling out the funds as required. With P & I insurance in western community, at least it can be much more regulated as the fund provided is actually a premium from the insured with legal obligations and consequences but in *takaful* it is simply a donation which has hardly any legal or even *Sharia* standing for operation. Once provided, the giver of the donation has pretty much lost all rights of control over the fund. As a moral scheme, this can be fascinating but it does not stand strong as a commercial venture. A commercial venture needs to have well-built foundations with control. To make matters

<sup>120</sup> Oliver Agha, supra at pages – 72 - 73

<sup>121</sup> See footnote 80

<sup>122</sup> Restrictions of *riba*, *gharar* and *maisir* are the principle blockers. As would be witnessed in the next chapter where the researcher talks about the various existent *takaful* models on how they themselves are in contradiction of certain *Sharia* restrictions.

<sup>123</sup> P & I insurance stands for Protection and Indemnity Insurance which is similar to traditional mutual insurance where different ship owners, operators and charters come together to insure their trade mutually by putting funds in one joint pot. Where there is a loss by an insured perils to one of the insured ship owners, he / she can take the funds out of the joint pot to cover up for his losses i.e. compensate him / her for the damages suffered due to the insured perils. As per Professor Rhidian Thomas on a short seminar on 20/11/13 at Bangor University he opines that more than 90% of the world's international trading risks are covered nowadays by way of P & I insurance clubs.

<sup>124</sup> With the risk of repeating any of the points that the researcher has mentioned previously, the Muslim society sees that traditional insurance companies may be it orthodox insurance, mutual insurance or P & I insurance, all takes the funds of various insureds and invest in different projects to maximise the funds and get a good return. In the course of doing so, they would invest in projects which they think would make the highest return and this could include gambling, wines, swine meat etc., things which are prohibited in Islam under *Sharia*. At times, the insurers may even provide the finance as loans with mandatory returns, which in itself breaks the *riba* restrictions, as explained in details in previous chapters. Additionally, the insurer and insureds are entering contract which is *gharar* i.e. uncertain and even be considered *maisir* i.e. game of chance, which brings back to the same restrictions as mentioned earlier, why traditional insurance cannot be considered to be compliant with Islamic principles.

<sup>125</sup> There are some significant issues about considering the payment from participants as *tabarru* i.e. charity which has been discussed later in grave details.

worse, this *tabarru* when provided to the *takaful* operator by the participants are then intended to increase the funds as such is then considered as an investment with only a portion going to fulfil the actually intended destiny of cooperativeness.<sup>126</sup>

Even worse, the researcher following his analysis opines that existent *takaful* models are advancing some of the *Sharia* contraventions which were intended to be avoided in the first place, as shall be witnessed in this section. For the sake of argument, if consideration is provided briefly on the working structure of lottery (which is a form of gambling) would give more insight into the analogy. In lottery, various individuals purchase lottery tickets with different numbers, all of whom have one common intention of winning the funds from the jackpot. The total jackpot is determined on estimated regular sales by the lottery company and winning numbers are selected at random. Subsequently, the chances of winning are uncertain and individual purchaser enters into a number of uncertain pacts with the lottery company. For example, the individuals simply does not know whether they will win or not, or even how much they will win, or whether part of their monies which they have used to purchase the lottery tickets would go to good cause and if so, how much of that. Subsequently, the lottery company announces the winners and uses the reminder of funds to invest and increase the funds with only a portion of that possibly going to good cause.<sup>127</sup>

As per the researcher's perspective, he seems hardly any differences between how the *takaful* companies operate and working mechanism of general lottery companies. Both of them have a common pot from where the final withdrawals take place and this common pot was wholly filled by funds from various individuals who came together. Both of them are providing funds to individuals depending on uncertain events and happenings. Both of them are investing monies obtained from various individuals / participants to increase the accumulated funds and both of them provides only a portion of the monies that comes in, for good causes.<sup>128</sup> The only difference that can be witnessed between the *takaful* operation and lottery business is that the *takaful* operation masks the monies that are initially coming in from the participants stating them as charity but once it reaches to the *takaful* operator by some unexplainable phenomenon portion of it then becomes an investment fund, which is simply farcical.

If the above analogy is considered then the most distressing part of this all, is that *takaful* operation on the facade of cooperativeness have been conducting transactions containing significant amounts of *gharar* and *maisir*, the exact restrictions which were initially intended to be eliminated in the first place and the main reasons for discrediting traditional insurance. If the restrictions cannot be eliminated, then the researcher opines that either traditional insurance be embraced or a model be created distinct of cooperativeness so that these precincts can be overcome as it is neither in the interest of law nor commerce to perform such unwarranted gymnastics with insurance structures. Having argued the above point, the researcher wants to make it clear that without a doubt, it can be set explicitly that cooperativeness is certainly a great ideology and certainly is extremely beneficial in community and social building. The underlying principles of having a *halal* insurance product under Islamic law, needs to be based on two concrete ideologies, one that for business practice mainly of Islamic insurance and finance, emphasis on social welfare is necessary. The second, Islamic law encourages on fair distribution of wealth among parties. As Professor Tom Baker explicates that the theoretical difference between traditional insurance and Islamic insurance is that the former is for individual risk abolition where the latter is for risk abolition of defined social group.<sup>129</sup> However, it is questionable whether the existent *takaful* models actually meet the requisite demands as expected.

Therefore, perhaps it becomes arguable whether existent *takaful* is the best paradigm to be used to create an alternative to traditional insurance, to take the place as a commercial venture. The researcher feels that if there is to be expectation for improvement for *halal* variety in economical advancement, it needs to start with modification from the core i.e. with some modification on how cooperativeness is structured with elements more advanced for commercial use. Nevertheless, as the current position stands among Muslims, it has become an acceptable norm that they consider that traditional insurance is objectionable. The researcher opines whilst there are arguments both, for and against traditional insurance as witnessed above, it is most probable case that Muslims community want to head along to a safer analogy by denying the whole traditional insurance as *halal*. It could be well being the case in reflection of one the *hadith* of the Prophet Mohammed (pbuh) where it is mentioned in Book 34, Hadiths 267 of Sahih Bukhari that:

- "Narrated An-Nu'man bin Bashir: The Prophet said "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

<sup>126</sup> The researcher talks about this dilemma in more details in the next chapter as it doesn't make any sense that a charity contribution can be considered as an investment fund, which as such follows the investment principles of sharing and while a part of the fund is actually used for the principle aim of cooperativeness.

<sup>127</sup> <<http://www.national-lottery.co.uk/player/p/lotterydrawgames/lotto.ftl>>; Accessed on 22/11/13 at 12:20

<sup>128</sup> The concept of good cause would no doubt be argued by *takaful* operators that it is for good causes that as participants are covering each other for good cause out of kindness in their hearts. This, the researcher opines is a similar analogy of good cause stated by lottery companies as well of setting aside part of the monies obtained. Of course, even on a far fetched argument, it can be argued that in *takaful* companies, the good cause i.e. the cooperativeness, is the primary concern of *takaful* whereas in lottery companies, the good cause e.g. assisting of poor individuals and /or projects is a secondary concern. However, for a moment, if both the whole concepts are looked at objectively, in lottery case it can be stated to an extent that the good cause is secondary objective but it is not possible to state that the good cause is primary in *takaful* operation, as there is no legal or *Sharia* standing of *tabarru* when that *tabarru* turns to investment fund. There is no way to determine what portion is for cooperative assistance and what fund is for investment, when the initial payments are coming in as donations only.

<sup>129</sup> Hania Masud, supra at page – 1141 - 1142

*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.*"<sup>130</sup>

As it is quite apparent from the above *hadith*, Muslims are being warned of keeping safe distance from things which can be considered mixture of *halal* and *haram* as per *Sharia* laws and guidelines. Islamic scholars are considered to be the authority in determining permissibility for concepts which is a combination of *halal* and *haram* and it is considered orthodox that Muslims stay away from such things to keep their faith clean.<sup>131</sup> Without criticising scholars who are against insurance, as some has stated, as mentioned above,<sup>132</sup> it could be very well that Islamic society considers insurance as a mixture of components of both *halal* and *haram*. Since although it is recognised well that insurance is a necessity e.g. international trade marine insurance, is obligatory which in essence makes it a *halal* requirement to have for trade advancement but the way traditional insurance is structured it contains a number of *haram* components, as mentioned earlier. This may have discouraged and even considering that *halal* substitute replica can be created. The researcher also like to point out to another important *hadith* of the Prophet Mohammed (pbuh) which is mentioned in Book 40, Hadiths 4590 of Sunan Abu-Dawud where the Prophet Mohammed (pbuh) mentioned that:

- "...I enjoin you to fear Allah, and to hear and obey even if it be an Abyssinian slave, for those of you who live after me will see great disagreement. You must then follow my sunnah and that of the rightly-guided caliphs. Hold to it and stick fast to it. Avoid novelties, for every novelty is an innovation, and every innovation is an error."<sup>133</sup>

The part to focus is the Prophet Mohammed's (pbuh) warning to avoid creating new practices which would distract from the original religion of Islam. The researcher opines that this could be another reason why the Muslim community startled to make any major development and this has led to the society even unable to comprehend models which could have well within the usual acceptable norms. There is no doubt all these are creating significant problems as it impedes economic advancement of Islamic community with the rest of the world. A clearer alternative which would be more obvious as complying with the *Sharia* principles would, no doubt bring confidence in the Islamic society in accommodating insurance as acceptable within the religious boundaries. However, a view which the researcher shares with scholar, Hania Masud that advancement of Islamic finance principles to ongoing economics presents exceptional challenges.<sup>134</sup>

## Conclusion

The main countries to welcome *takaful* includes Malaysia, Pakistan and the Gulf States with expansion opening in other South east Asia and with surging in the West, possibly due to Muslim population expansion.<sup>135</sup> Although *takaful* industry has been expanding, its growth has not been to the expectation mainly due to lack of investments and regulatory requirements hindering competition. There is a market to be tapped into as Muslims with strong beliefs should instantly be interested in purchasing of this service in comparison to traditional insurance. However, for some reason or another, Islamic financial institutes have not proactively pursuing this cause well,<sup>136</sup> which could be attributed to the attractiveness of the *takaful* models as operations.

The core concept that the relationship is by cooperativeness is not hazy among the scholars' minds but the models of cooperativeness needs upgrading and perhaps even amending to an extent.<sup>137</sup> The reason for which is being the way the existent models are structured have a significant number of flaws present in them. One of the central part of all the *takaful* models that are in use today use the concept of *tabarru* i.e. contribution provided by the participants counted as charity, to work alongside the cooperativeness paradigm. Problem is that the concept of *tabarru*, at least in the researcher's view is considerably bungled which simply does not fit in with the big picture. It is commonly agreed between the various scholars that one of the main reason that traditional insurance are not even considered to be *Sharia* compliant is because of the restrictions of *gharar* and *maisir*,<sup>138</sup> in terms of the fact that the insured is paying premium for events which no one knows may or may not happen and for how much monies, as such the outcome is unknown at the time of conclusion of the contract between the parties. *Sharia* scholars have, as mentioned earlier, have introduced *tabarru* concept with the fund payment as with charitable arguments are inapplicable. However, it becomes very dubious whether that is sufficient.

In summary, as can be witnessed from the paragraphs above, Islamic scholars have aimed to devise an instrument i.e. *takaful*, which is geared at doing similar action as traditional insurance. It is relevant to note during the way of such structuring an alternative to traditional insurance, may it be a rash decisions or neglected errors, the *takaful* models have been inflicted with a number of lacking. It is not possible or relevant to dwell on the cause of the same but as concerns, which have been echoed by

<sup>130</sup> <[http://www.searchtruth.com/book\\_display.php?book=34&translator=1&start=0&number=0](http://www.searchtruth.com/book_display.php?book=34&translator=1&start=0&number=0)>; Accessed on 23/11/13 at 14:17

<sup>131</sup> <<http://40hadithnawawi.com/index.php/the-hadiths/hadith-6>>; Accessed on 23/11/13 at 15:29

<sup>132</sup> See footnotes 42, 70 and 71

<sup>133</sup> <[http://www.searchtruth.com/book\\_display.php?book=40&translator=3&start=0&number=4590#4590](http://www.searchtruth.com/book_display.php?book=40&translator=3&start=0&number=4590#4590)>; Accessed on 6/2/14 at 18:02

<sup>134</sup> Hania Masud, supra at page - 1133

<sup>135</sup> Haemala Thanasegaran, supra, Pages – 104 to 106

<sup>136</sup> Muhammad Ayub, supra at pages - 428 - 431

<sup>137</sup> Ibid

<sup>138</sup> These restrictions have been talked in significant details in the previous chapters.

other authors as well, with Islamic finance running to grasp up with traditional finance to make like for like products, this is risking bigger and bigger hazards.<sup>139</sup> Dressing up Islamic products like traditional products might not be the best solution but then again, the researcher do not feel that there is any harm in doing so as long as the *Sharia* rules are well complied and clangers can be reduced to the minimum as much as possible.

In conclusion, the researcher would like to cite from Aleem Khan Falaki author of “*Life insurance and the Muslims*”, where he highlights his opinion on reasons of contradictions among Muslims about insurance. One of major points is that authors of most of the literatures are predominantly from Islamic states e.g. Pakistan, Egypt, Saudi Arabia, who lack the experience of multi-religious, multicultural societies and therefore, lack the application knowledge of providing a practical solution in such cases that would cater everyone’s needs. As circumstances are different, the application of any Islamic opinions would be different as well. Islamic states such as Saudi Arabia have strict laws and citizens follow the law well otherwise the punishments are severe but the same is not applicable in mixed societies. Application of Islamic opinions of important concepts such as insurance is not simple aspect, particularly where Muslims may be the minorities in a multicultural community.<sup>140</sup>

He goes on further to mention that at present there is no simple Islamic insurance texts out there, which gives a straightforward answer to whether insurance is acceptable in *Sharia*. Majority of books starts with Islamic models without much justification of its authenticity lineage and readers meets dead ends, making them more confused than when initially started and their questions remains unanswered. Most scholars have adopted a theoretical approach to these perplexities in complex wording, without providing a practical solution which resulted in “*Islam’s real teachings remain on the dusty shelves next to the antiques*”<sup>141</sup>

The researcher agrees strongly with the comments of Aleem Khan Falaki and opines that any proposed model need to comply with *Sharia* rules but at the same time must have the flexibility adopting to different environmental circumstances. It is correct that land to land, residents are different and whilst in Country A most individuals may not concern about insurance much but it could be in Country B most individuals have iniquitous attitude of making various insurance scams. Models needs to be created which needs to meet at least the minimum requisite of both worlds. In this respect, a proposed *takaful* model needs to configure and include the vital elements of premium, risks, excess and compensation, which forms the contract construction framework of insurance. These elements needs to be designed to work in proposed *takaful* model in their right characteristic rather than disguising them into something else e.g. as in present day *takaful* camouflaging premium as a donation payment. Present of relevant elements and in their correct working manner in a new *takaful* model could pave the way forward.

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<sup>139</sup> Oliver Agha, *supra* at pages – 69 to 70

<sup>140</sup> The author gives an interesting example about Muslims celebration of Eid, when the date of Eid is determined on the sighting of the crescent shaped moon. As an instance, although a crescent shaped moon may be seen in Saudi Arabia at night configuring that Eid is determined to be celebrated on the next day at Saudi Arabia that does not mean that Muslims in India would also follow the crescent moon sighting of Saudi Arabia. The latter would want to wait until the crescent moon is seen on their land before determining the Eid celebration date. The point that the author attempted to make is that, it is not possible to have Universal application of Islamic law opinion, just basing the conditions of Islamic dominant state but rather an open minded approach needs to be adopted to make a suitable and flexible model.

Another example, the author gives which is quite distinctive in Islamic dominant countries and multicultural countries, where to get daughter married in Saudi Arabia, the father does not have to worry about finance and knows that the prospective son-in-law would take care of such expenses. Whereas, countries such as India and Bangladesh, the father of an unmarried daughter faces significant hurdles as without finance he will not be able to secure a good hand in marriage for his daughter. Although under Islamic law, the men is supposed to protect and provide, but, may be cultural or otherwise, a different trend had emerged and that is how the system is following differently in multicultural country. The aspect once more is that, it simply does not make sense to make *fatwas* and apply universally without considering the circumstances fully. Aleem Khan Falaki, *supra* at Chapter 10 Article 5; <<http://li.aleemkhanfalaki.com/chapters/vague-literature-on-insurance-issue/>>; Accessed on 6/2/14 at 12:01

<sup>141</sup> Aleem Khan Falaki, *supra* at Chapter 10 Article 6; <<http://li.aleemkhanfalaki.com/chapters/if-but-can-and-should-philosophy/>>; Accessed on 7/2/14 at 16:28

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