



Interpretive analysis of the Sharī'ah status of insurance policies, and establishment of the alternative

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Abstract

Purpose: Despite several Fatwas available, the Sharī'ah status of insurance policies continues to be doubtful. This paper aimed to addresses the issues of Sharī'ah compliance in insurance industry. It intends to inform the stakeholders and customers of insurance industry about the insurance policies and their status in Islam. Further, as conventional insurance is not fully aligned with Sharī'ah principles, this paper attempted to explore the alternatives of it which conforms the Islamic principles and fulfill the needs of customers as well. **Design/methodology/approach:** An interpretive approach has been adopted to build the foundations of Sharī'ah compliance in insurance. In addition, secondary sources of authentic Islamic manuscripts have been qualitatively analyzed. The basic factors that have been focused are interest, gambling and uncertainty, because of which insurance policies have been prohibited. **Findings:** The basis and reasons behind the prohibition of insurance have been established and the alternate model Takaful has been proposed. Furthermore, comparative analysis has been established at the end. **Originality/value:** Findings can be applied to understand the dynamics of Shariah compliance issues in insurance industry. Further risk mitigation models can also be developed as an extension of these findings. This research can be applied on a standalone basis or as an extension to the conventional counterparty risk mitigation models.

Keywords: Sharī'ah compliance, risk, Islamic law, insurance contract, Quran, Hadith

Insurance:

Insurance is the process used for the transfer of risk. It is a mechanism that fully or partially compensates when a financial loss occurs as a result of some event which was not otherwise under the control of the party that utilizes insurance. Insurance is basically a contract in which one party covers for the other. The party that covers is called the insurer and the party to whom the coverage is provided is called the insured party. This insured party is provided a cover against the

estimated amount of loss occurred, which have occurred over a specified period. To avail this coverage, the insured party must have paid a certain premium and the event occurred must fulfill some ground conditions for the insurance process to be realized. Generally, the compensation is provided in some decided proportion of the loss occurred. However, in case of life insurance, the compensation is usually fixed. Some forms of insurance are considered mandatory for the management of risk across several countries of the world, like product liability insurance (Ewold, 1991).

Earlier approaches used for the transfer or distribution of risk were mostly introduced by Chinese and Babylonians (Alhumoudi, 2013). Chinese traders who were traveling through rivers used to limit the loss expected due to the boat capsizing from occurring by redistribution of waves across several vessels (Billah, 2007).

It is also said that insurance was first introduced by the Jewish people when they were exiled from France back in 1182 by Philip Augustus. The Talmud is also known to deal with some components of insurance. Per this perspective, insurance was devised as a mechanism to secure the assets and properties, in case any such event takes place again. Later, the applicability and utility of this process were identified by the traders in the northern part of Italy, who then adopted it and worked on extending its use and application (Alhumoudi, 2013).

When it comes to bills of exchange and other financial instruments, they are purely the invention of Jewish people (Clark & Marshall, 1905). In 1836, Ibn Abideen was the first ever Arabic scholar to have come forward to discuss the conventional approach towards insurance process. He put forth that it has been a practice in Arab that a non-Muslim trader while renting out a boat had to pay an extra amount in addition to the basic pay.

This additional amount paid was called "Sokrah"- which is a word derived from French Word 'securite' meaning insurance or guarantee. This amount was received from the traders so that if any damage is caused, like in case of fire or theft, the person who charges this extra amount to the traders keeps this money as a compensation for the loss occurred (ibn Abideen, 1836).

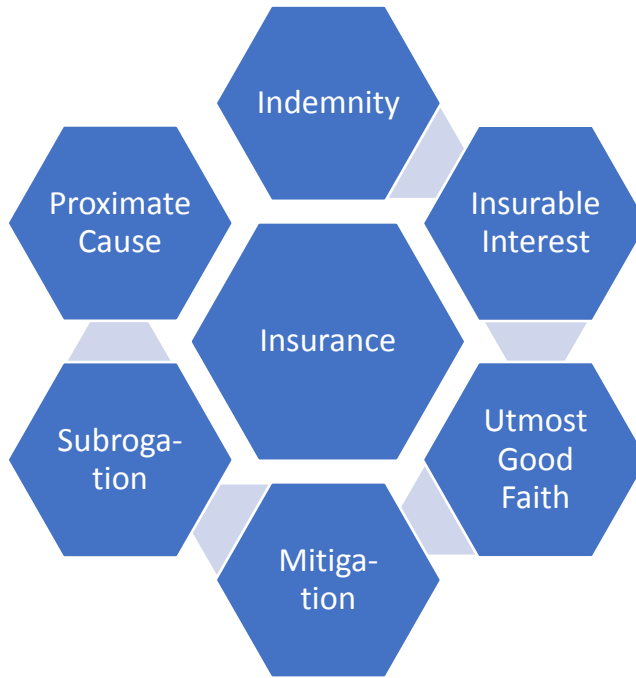
Abideen (1836) also stated that the traders do not have the right to be compensated for the damage caused. Hence insurance is like a formal contract between the policyholder and the insurance company. According to these contracts, the company that provides insurance is to compensate for the loss of the policyholder, only if the policyholder fulfills all the stated terms and conditions in the contract. For this, the policyholder i.e.

the insured party must pay a certain premium to avail compensation for the loss. When this insured party experiences an unexpected loss, it then applies to the insurer to be compensated for the loss, which is a kind of reimbursement of the premium that he or she paid basically. From the total amount to be paid to the insured party, the insurer deducts a decided amount as a fee.

Principles of Insurance

As far as Insurance is concerned, it is the most significant tool, used in the financial world and is known to support the entire economic system. It is because of the fact that insurance provides financial liquidity to those at a loss which boosts the economy at large and supports the parameters of it. The insurance process gives confidence to the insured, especially in the cases of higher expected risks, like when sea or air traveling is involved, or where the crime rate has a prominent influence on a country's economic condition.

However, the practical application of insurance mechanism has met with certain religious criticism, primarily from the Christian Church. This criticism was then extended by the Muslims after the advent of Islam. It has been stated by Ahmed Ben Majid (1436), that any "Guarantee for stolen or sunken objects is null void" This claim applies to the insurance perspective. Similarly, for developing a foundation for insurance and to give it a shape, it was argued by Holdsworth (1922) that models of insurance were based on maritime loans, which were then elaborated into Bottomry contracts. In case of a maritime loan, the insurer has to affirm that an advanced amount has been received, and must commit to reimbursing this amount when the shipped goods reach safely. Here, the insurer is the debtor as he was paid a certain amount as insurance of the shipped goods. The insurer must repay the accumulation of this amount in case of any loss caused to the goods (Holdsworth, 1922).

Figure: Principles of Insurance (Author).

- **Indemnity**

Insurance is principally an agreement of guarantee in which the insurance company provides a guarantee or a security to the policy bearer (the insured) to compensate for the risks involved in case of any losses occurred. This security is given against a consideration that is regarded as premium (Mehr & Cammack, 1972).

- **Insurable Interest**

It basically indicates the risk of damage involved, which if realized may directly affect the person who has purchased the insurance i.e. the insured. (ibid)

- **Utmost Good Faith**

This involves both the insurer as well as the insured, where they agree to share every minor detail among themselves (ibid)

- **Mitigation**

Mitigation refers to the sense of responsibility that must be exhibited by the insured that he or she will take care to minimize the chances of occurrence of risk (ibid)

• Subrogation

The acquisition of the legal right of the insurance company to be able to act on behalf of the buyer of the policy (the insured) is regarded as subrogation (ibid)

• Proximate cause

It is the approach through which the reasons behind the event caused are established and listed to analyze whether the event falls under the conditions of the stated contract (ibid).

Crux of the conventional insurance

By summing up we can say that insurance has several characteristics, three major characteristics are risk transfer, pooling technique, and risk mitigation. Means participants and company mutually makes a contract to transfer the risk of an individual to the company and then company uses pooling technique to mitigate those risks and spread them on many individuals. In this way, insurance company purchases the risk of individuals and gets the premium for that, and promises to pay claims in future.

Insurance from Islamic Perspective

Most of the religious schools have their opinion that conventional insurance is forbidden and prohibited in Islam, they make the base of their opinion on three major elements which are clearly unlawful in Islamic Jurisprudence. They are as follows:

- Uncertainty
- Gambling
- Interest

These three elements will be discussed in detail in the light of Sharia, with several Islamic manuscript references.

• Uncertainty:

Uncertainty is prohibited by the following Hadith:

"وَحَدَّثَنَا أَبُو بَكْرِ بْنُ أَبِي شَيْبَةَ، حَدَّثَنَا عَبْدُ اللَّهِ بْنُ إِدْرِيسَ، وَيَحْيَى بْنُ سَعِيدٍ، وَأَبُو أُسَامَةَ عَنْ عُبَيْدِ اللَّهِ، ح وَحَدَّثَنِي زُهَيْرُ بْنُ حَرْبٍ، - وَاللَّفْظُ لَهُ - حَدَّثَنَا يَحْيَى بْنُ سَعِيدٍ، عَنْ عُبَيْدِ اللَّهِ، حَدَّثَنِي أَبُو الزِّنَادِ، عَنِ الْأَعْرَجِ، عَنْ أَبِي هُرَيْرَةَ، قَالَ نَهَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ بَيْعِ الْحَصَاةِ وَعَنْ بَيْعِ الْغَرَرِ"

“Abu Huraira (Allah be pleased with him) reported that Allah's Messenger (May peace be upon him) forbade a transaction determined by throwing stones, and the type which involves some

uncertainty" (Muslim). This Hadith is vital for the contracts which are based on uncertain elements, especially in financial exchange contracts.

Definition of Uncertainty:

The most damaging element of insurance which is prohibited in Islamic law is uncertainty, which is considered as the major element in insurance and some scholars defined it as "**Transactions with unknown consequences, where participants are unsure whether a point will, or will not be achieved**" Al-Zailaa'i (1313 H). Whereas some other scholars defined it as "**The transaction that in doubt in achievement- some or most - by any of its offset**" (Al Razi).

Concluding the abovementioned definitions, which are presented by authentic Islamic Scholars of different schools, one can extract the true meaning of uncertainty. Further, it is elaborated by brief analysis of Islamic jurisprudence, and Al-Qora Daghi (2006) has stated that "**uncertainty is influential in relation to financial indemnification contracts**". Din (1835) stated that there are three major areas in insurance contract where uncertainty is significantly influence the structure of the contract.

Uncertainty in the Existence of Risk:

It is true that uncertainty exists in insurance contracts because of the risk prevailing. Long, R. H., & Rhodes, M. S. (1966) refers that risk is the subject matter of an insurance policy, in Islamic terminology subject matter is called Mahalul-Aqd which should be identified and certain (Burhanuddin, 1850). In the insurance contract danger is probable and unconfirmed, the amount of insurance which is negotiated to the company is not guaranteed or confirmed until or unless loss happened, once the loss occurs the amount of loss became due. Conversely, if the event of loss does not occur or peril did not take place nothing will be paid by the insurance company (El quora Daghi. A., 2006).

Uncertainty in Obtaining Compensation

When the subject matter of insurance is a risk, and that is uncertain. Thus, regardless of its occurrence the frequency of loss compensation always be on probability and remains on chance. On inception of contract one side compensation, which is from insured is known and other sides are unknown, so against premium, no one can assure his/her compensation (ibid).

Amount of Compensation is also uncertain:

The agreed amount of compensation in every contract of sale and reimbursement is compulsory and a basic condition. In Islamic manuscripts or law of jurisprudence, the amount of compensation should always be known and specific.

A Hanafi renowned scholar Ibn Abideen (1836), stated that "**to know the price is conditional in regard with validating any sale**". In a Shafa'ee school of thought, it is further added that "**Ignorance of price or appraising, invalidates the contract**" (Al Rafiee, 1226). Ibn Rushd Alhafaed (1999).

This is the situation in insurance contracts, that the amount of compensation is unknown until the insured perils occur. Two parties came into the contract and eventually both are uninformed of the amount of loss or the amount which may be due in case of loss. Insured himself does not even the idea of total premiums which could be accumulated before the incident.

Payment time of compensation is unknown and uncertain:

In insurance contract time of the payment is also unknown, which makes it void and null, El Nawawi (1997) confirms that scholars are agree upon that ignoring time specification makes the contract null and void. However, in insurance time period of payment is always unspecified and undetermined. Although the exception is always there in some cases, but they are rare.

- **Gambling:**

Prohibition of insurance contract does not restrict to the uncertainty but it also carries the element of wagering and gambling, which is strictly prohibited in Islam and is also considered as a sin in Europe (Holsworth, 1925). In respect of gambling, El Sanhoury (1964) refers that "**gambling is an agreement**" between two or more parties with the consent to pay, to the other gambler if they losses and they undertake this clause. Payment sometimes in form of money or sometimes in any other mode of payment which is mutually agreed between gamblers. Though, wagering is an initiate, means a contract in which two or more gamblers decided to pay if their chosen event is unrealized, one party gain something and other will lose.

Gambling is strictly prohibited in Islamic law as ALLAH (SWT) said in Holy Quran Surah 5, Ayah 90:

سُورَةُ الْمَائِدَةِ (٩٠)

"يَا أَيُّهَا الَّذِينَ ءَامَنُوا إِنَّمَا الْخَمْرُ وَالْأَنصَابُ وَالْأَزْلَمُ رِجْسٌ مِّنْ عَمَلِ الشَّيْطَانِ فَأَجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ"

“O ye who believe! Intoxicant (all kinds of alcoholic drink) and gambling, and Al-ansab, and al-zlam (arrows to seek luck or decision) are an abomination of Shaitan’s handiwork. So, avoid (strictly all) that (abomination) in order that you may be successful”

As far as the existence of gambling in an insurance contract, El Quora Daghi (2006) has claimed that all the characteristics of the contract are present in an insurance contract so the definition of gambling and betting does apply to the insurance contract. The situation of gambling arises when two parties agreed to win/loss condition if an insured event happens the compensation is due from the insurance company, and if does not happen the premium will either be paid to the company. It is stated that **“the contract of insurance contains the element of gambling and betting”** in other words, win/loss condition El Sanhoury (1964).

- **Interest (Riba):**

Interest is a major sin in Islamic law and forbidden in Holy Quran as:

سُورَةُ الْبَقَرَةِ (٢٧٨) (٢٧٩)

يَا أَيُّهَا الَّذِينَ ءَامَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنْتُمْ مُؤْمِنِينَ. فَإِن لَّمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِّنَ اللَّهِ وَرَسُولِهِ وَإِن تُبْتِغُوا فَكُتُومًا كُفْرًا مِّنْ أَفْوَاهٍ لَا تَعْلَمُونَ وَلَا تَعْلَمُونَ

"O ye who believe, be afraid of Allah and give up what remains (due to you) from Riba (usury) if you are (really) a believer. And if you do not do this, then take a notice of war from Allah and his messenger. But if you repent, you shall have your capital sums. Deal not unjustly (asking for more capital sums), and you shall not be dealt with unjustly" In Islamic law, there are two major kinds of Riba (Interest):

Riba-ul-Fadl:

There are some commodities which should be equal in the amount at the time of trade and deferment is not allowed in these items, simultaneous exchange by both parties is compulsory (Khan. Muhammed S. H., 1996). Prophet Mohammed (PBUH) stated that **"exchange of gold with gold, silver with silver, wheat with wheat, barley with barley, dates with dates and salt with salt should be of equal quantities and spot. Anyone who varies the quantities or allows one side of the exchange to be deferred indulges in riba for which both buyer and seller are equally responsible"** (Sahih Imam Bukhari and Muslim).

From this Hadith, a new kind of riba recognized which is called Riba-ul-Hadith or Riba-ul-Fadl. Some scholars, Shafi. M, Usmani M (1997) have the opinion as Riba-ul-Fadl is not restricted up to these commodities, but it may present in every trade which is going to be held between same or homogeneous commodities.

Riba Alnaseiaa:

It is the debt of currency, means **Dirham** and **Dinar** (actual currency) taken as loan for some specific time period, “**proportional to increases in the amount of the loan and accordingly, increases in debt, as well as duration**” (Alsalihi. M., 2004). This is the actual form of Usury which is prohibited in Holy Quran as:

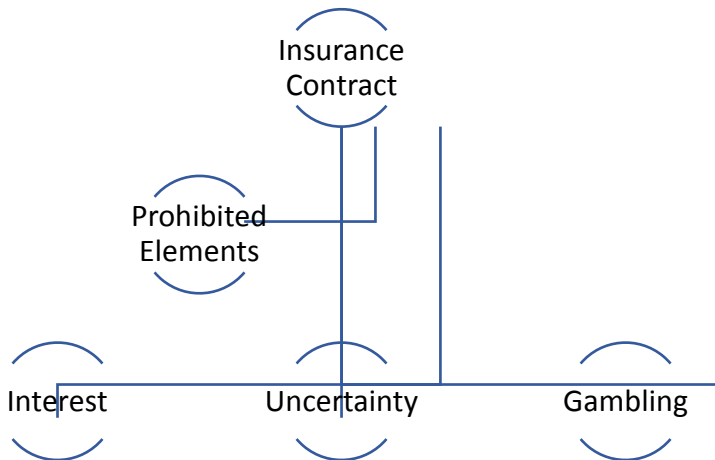
سُورَةُ الْبَقَرَةِ (٢٧٥)

"الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِنْ رَبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَٰئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ"

“Those who swallow usury cannot rise up save as he ariseth whom the devil hath prostrated by (his) touch. That is because they say: Trade is just like usury; whereas Allah permits the trading and forbiddeth usury. He unto whom an admonition from his Lord cometh, and (he) refraineth (in obedience thereto), he shall keep (the profits of) that which is past, and his affair (henceforth) is with Allah. As for him who returneth (to usury) - Such are rightful owners of the Fire. They will abide therein”

So, it also called Riba-ul-Quran, due to the clear phrase of Quran in respect of prohibition of this type.

Figure: Prohibited elements in Insurance (Author).



Alternative of Insurance

Islam is a universal phenomenon and undoubtedly influence on every facet of our lives. We have stringent guidelines of Islamic law that emphasizes, how to operate a business entity or how to manage daily lives, among others, equal distribution of means and cooperative system of human life in all business transactions. Islamic manuscripts always discourage the predetermined gains from business transactions and restrict communities from all those activities which are prohibited even if they are beneficial in monetary terms. When it is sure and confirm that conventional insurance is forbidden in Islam so, what is the right way to mitigate our risk, principles of Islam are quite different from conventional maxims, those who are not educated enough about the Islamic infrastructure may falsely assume that Islam discourages the profit-oriented financial transaction, but it is not true. In fact, Islamic law allows to mitigate risk with cooperative pooling system and one can earn profits from that pool management. Along with the speedy development in industries, this encouragement of profit-making and risk mitigation goes stronger.

Currently, it looks far difficult that Muslims will accept the conventional system of insurance as their preferred risk mitigation mechanism, because it does not compliant with Islamic edifice, and confront several basic principles. So that, in some Muslim majority countries there is an alternate system of risk mitigation which is known as takaful insurance, and by and large it is compliant with Shariah (Alajmi, S., 2011).

Takaful got huge publicity and grown not only as a financial tool or risk mitigation technique but accepted as Islamic alternative of conventional insurance (Kwon, W. J., 2007). It possesses some exceptional characteristics that warrant examination. In this research, we are not going to analyze the takaful structure but restricted just up to the analysis of two different models of Takaful, which are a cooperative model and Waqf model.

What is Takaful?

The term “**Kafalah**” is an Arabic terminology, which means “**guaranteeing each other**” or “**Joint Guarantee**” becomes “**Takaful**” when it comes to the practical risk mitigation tool (Ismatullah, 2010). Takaful is based on the principle of shared responsibility, spread the risk on large number and compensation to the loss. As we consider the history we came to know that Takaful is not a new concept of risk sharing to

mitigation, it originated within the Arab tribes at ancient times as a shared pooling system that obliged the person who commits an offense against some other tribe, to pay the compensation (Al Zuhaili, 1997). Takaful is an Islamic mechanism to mitigate your financial risks, and referred sometimes as Islamic Insurance. Islamic jurisprudence emphasizes on that insurance in Islam should be based on mutuality, joint indemnity, common interest and responsibility principles (Ismatullah, 2010). In this concept of Islamic insurance normally policyholders are the investors in the company with their "**Kafeel**" (agent or Takaful operator), Takaful operator acts as the working partner "**Mudarib**" (Manager or an entrepreneur). In Takaful, initially, Waqf fund created to spread or share the risks of all policyholders and portion of premium invested in a sharia-compliant portfolio (Al Zuhaili, 1997). At a side, Waqf pool assures to compensate the losses of the policyholder while, on the other side investment fund gives healthy sharia-compliant returns, which are not fixed or guaranteed (Ismatullah, 2010).

Waqf

In the Arabic language, the word Waqf means "**Hold**" "**Confinement**" or "**Prohibition**" (Usmani, 1992). Epistemologically Waqf is used in the meaning of holding a certain property for the predetermined objective, retained for the specific purpose and confined for specific objectives of the society. It is an Islamic endowment system, regulated by Islamic laws and generating revenues or benefits for the specific range of people, the position of Waqf is same as the class of "**Sadaqah**" or "**Tabarru**" (Al Zuhaili, 1997). Basically, there are two major conditions in the definition of Waqf one of them is the dedication of one's property ownership to ALLAH (SWT) and dedicate its benefits to the public interest, the other one is the perpetuity of this dedication (Kwon, W. J., 2007).

We are not concerned to define the details of Waqf as a legal instrument and its status in Islamic law, but for the comparative analysis, we must look in the basic knowledge. Waqf property must be tangible, real asset and should has the meaning of perpetuity (Ibn Abideen, 1836). Further Ibn Abideen stated in his book that property should be given on the permanent basis, in Hanafi school of thought Waqf property may not be on a temporary basis. There are some conflicts on the said issue of permanent property clause but majority of Hanafi jurists are in the same opinion

Table: Comparison of Takaful and Conventional Insurance (Al Zuhaili, 1997).

Basis	Conventional Insurance	Takaful-Islamic Insurance
Base of the contract	Sale (معاوضه)	Donation (تبرع)
Purpose	Security and Profit	Security & Co-Operation (help one another)
Activity	Buying and Selling a Product	Co-Operation
Payment	Premium (Cost of buying insurance/security)	Donation and investment
Ownership of Fund	With Insurance Company	With the Members/Participants
Role	Seller of Insurance Products	Manage participants fund
Investment	Any financial product	Only Shariah-compliant products
Sharing surplus	No sharing with insured/policyholders	Surplus money is shared among the members/participants

Conclusion

We can easily sum up the arguments, there are three elements which make insurance unlawful and forbidden in Islamic law if we remove all those elements we can make a contract like an insurance contract. In Takaful at first, we change the nature of contract from compensatory contract to philanthropic contract, after that investment goes only in Shariah-compliant portfolios. This is the simplest two conclusions, which we have made from the above-mentioned quotes and manuscripts.

In Islam, accumulation of wealth and its management is not only allowed but encouraged also. Similarly, wealth accumulation and spreading it to poor of the society is encouraged in Islam and wealth should be managed accordingly with in the parameters of Islamic law, either it is related to risk mitigation or any other facet of life.

In the current scenario, Takaful is the best option to manage your risk under the umbrella of Islamic maxims, so that you can protect your Shariah edifice. it is needless to say that there are some critical issues in the current system of Takaful, but they can be eradicated and removed by doing more research on shariah compliance of risk management.

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