

The Question of Insurance (Part 1)

Introduction

All praises are due to Allah. We praise Him, seek His Help, and ask for His forgiveness. We seek refuge in Allah from the evil in our souls and from our sinful deeds. Whoever Allah guides, no one can mislead. Whoever Allah leads astray, no one can guide. I bear witness that there is no one worthy of worship except Allah. I also bear witness that Muhammad is His servant and messenger.

Without a doubt, one issue that is often on the minds of Muslims in the West is that of insurance. Indeed, one could argue that it is easy for a Muslim living in a non-Islamic society, like that of the United States where the Islamic community is not very strong and the social welfare system is virtually absent, to feel that he is driven by necessity to accept the concept of commercial insurance. However, such a feeling is no excuse for not seeking the Shareeah ruling concerning insurance and abiding by what the Shareeah decrees.

The space limitations of this paper are quite restrictive. Thus, many important issues will have to be dealt with briefly or not at all. However, the core points regarding insurance are discussed. Beyond that, this paper attempts to deal with the question of insurance within the specific social environment of the United States. The author hopes to shed some light on issues that he has not found discussed in detail in any of the relevant literature concerning insurance.

Insurance is a relatively modern phenomenon. For this reason, it is not directly dealt with in the texts of the Quran or Sunnah. In fact, many authors note that ibn Abideen, the famous Hanafi scholar of greater Syria who died in 1252 A.H./1836 C.E., was the first to discuss a version of the modern form of insurance, concluding that it is not permissible. Since his time, the question of insurance has been taken up by a number of scholars. Since there are no direct texts concerning it, insurance is a matter of ijtihaad (juristic reasoning). Hence, it is expected that there may be some differences of opinion on this issue. However, that does not mean that a clear conclusion and ruling cannot be made, concerning which the Muslim will feel truly at rest with what he has found.

Definition

In this researcher's view, the beginning point in the fiqhi analysis of insurance is to clearly conceptualize the nature of insurance and to identify what type of contract an insurance contract is. Indeed, it has been the lack of clarity on this point that has led to much confusion concerning the legality of insurance. In fact, Abu al-Basl noted that the entire difference of opinion concerning insurance revolves around the question concerning the nature of the insurance contract and industry. Explicitly he stated, "The jurists differ concerning the description and make-up of the

insurance contract. The difference in description and make-up leads, obviously, to the difference in the ruling.”

In the books of fiqh, one can find rules for up to thirty specific types of contracts. These include the following basic and essential nominate contracts: sale, rent, commissioned manufacture, gift, loan, endowment, guarantee, partnership and so on. Note that these contracts may be also divided into mutually onerous contracts, contracts of charity or gratuitous benefits, contracts of investment and so on. The default and most important type of contract is that of “the sale” or al-bai, in whose light many of the rules of other types of contracts are judged. This bai or “sale transaction” is defined in the Mejlle as “to exchange property for property.”

Concerning the definition of insurance, for the purpose of analysis here, Miller and Jentz’s definition should suffice. They define insurance as, “A contract in which, for a stipulated consideration, one party agrees to compensate the other for loss on a specific subject by a specified peril.”

From this definition, one can seek to answer the question: The insurance contract should be considered what type of contract? This question is of extreme importance because different types of contracts have different rulings for them. For example, if a Muslim wanted to exchange money with the intention of a business transaction or profit, that exchange must be done on the spot, with the exchange of monies taking place immediately. This immediate exchange is a condition for this type of transaction (money exchange, whether the money be of the same or different type). However, if a Muslim wants to give another Muslim some money as a loan, with the intention of helping him out, the condition of a spot exchanged is now dropped (as the debtor is allowed to pay the money back later). This condition is dropped because this is considered a “contract” of a charitable nature. Hence, the rules it is subjected to differ from the rules for money exchange, sales and so forth.

Therefore, it is of extreme importance to determine the nature of the insurance contract in order to determine its ruling. For example, can it be considered simply a modern and new type of transaction subject to its own rules? Can it be considered a contract of charity from a “mutual institution”? Or is it simply another type of “sale transaction,” wherein one commodity is exchanged for another, which is the default case concerning mutually onerous financial transactions?

Is Commercial Insurance to be Considered Mutual Support and a Contract of a Charitable Nature?

Among those scholars who argue for the legality of commercial insurance in Islam, there are some who argue that commercial insurance is a new type of contract, being a blend between a charitable contract and a business contract and some who argue that it is purely a charitable type of contract. This is a common conceptualization among Muslim writers. Ma’sum Billah wrote, for example, “The primary objective of insurance is to create mutual co-operation between two

parties.” Since this argument is widespread among some people and may even be convincing to some, it is important to discuss it in detail. Furthermore, this view may greatly affect the contract category in which one will place the insurance contract.

First, it must be realized and clear that a contract being “beneficial” to both parties does not imply that it is a charitable contract or one of mutual support. In fact, it is expected that virtually every business transaction will bring about some benefit to both parties. That is why they both enter into that contract freely. Hence, that is not the standard by which a transaction is to be judged. If that were the case, even deposits with interests in commercial banks would be considered permissible, as the deposit helps the bank and the interest the bank pays helps the depositor. But if the contract violates the principles of the Shareeah, it would be considered forbidden even if the two parties to it may believe or think that it is beneficial.

Second, it is not true that insurance companies or buying insurance policies implies any kind of mutual work, assistance or support. In reality, as al-Shaadhili noted, the real motive behind such policies is simply to avoid the possibility of future harm and to reduce one’s risk. These, in themselves, may be acceptable goals but they must be met within the limits of what is permissible. It is well-known that the insured person puts forth wealth (money) in the form of premiums. It is inconceivable that any insurance company would ever give anyone any form of payment without receiving a signed contract and payment from them first. Therefore, the Board of Leading Scholars of Saudi Arabia stated that the insurance contract is “a mutually onerous contract in which each party receives something in exchange for what it has given... Hence, the attributes of being a charitable contract are negated in the insurance contract.” Indeed, Blanchard mentioned in his classic work on insurance, “The insurer is not operating a charitable institution.”

In fact, most insurance companies do not make small profits off of their individual and small clients. Instead, they make large profits, to the point that some textbooks recommend not taking insurance unless one truly fears he cannot bear the cost of a loss. Beatty and Samuelson wrote, “If you can afford the loss yourself, it is better not to purchase insurance. About half of every dollar that consumers spend on insurance is paid back in claims; the other half goes to the company’s profits and overhead.” (This can explain how is it that some insurance companies are very large and very profitable)

Thus, in reality, the insurance industry is a commercial industry whose goal is to make profits. Instead of considering them a charitable or mutual institution, as some Muslim authors have stated, they should be seen as a company that is taking advantage of humans’ greatest weaknesses and fears. (These types of fears and weaknesses are even greater for those people who do not have a strong belief in God and the Hereafter.) Insurance companies realize this fact and exploit this fundamental weakness of their fellow humans. Mishkin and Eakins explain this process well,

Insurance companies make a profit by charging premiums that are sufficient to pay the expected claims on the company plus a profit. Why do people pay for insurance when they know that over the lifetime of their policy, they will probably pay more in premiums than the expected amount of any loss they will suffer? Because most people are risk averse: They would rather pay a certainty equivalent (the insurance premium) than accept the gamble that they will lose their house or their car. Furthermore, insurance companies use their large advertising budgets to convince humans that they are greatly in need of such insurance and that peace of mind will truly come to them if they are properly and completely insured. In reality, they are taking advantage of people's fears to further their own agendas and gain profits. This is actually a blameworthy practice much more than it could ever be considered a praiseworthy practice.

Finally, while doing research for his Ph.D. dissertation on insurance, Thunayaan interviewed a number of Western authorities in the U.S.A., England and Germany. He found that none of them shared the concept that insurance companies are some kind of charitable institutions or mutual societies. He concluded that this view of insurance companies is not much more than the imagination of some Muslim scholars who have been convinced that insurance is good. Al-Dhareer further states that most people who deal with insurance companies today feel that they are exploitative companies whose goal is only profit by taking advantage of the needs of the people.

There is yet another point that this author has not seen anyone note. This is the issue of the insured. In general, it can be argued that the insured himself is also not entering the insurance contract on a mutual or charitable basis. Instead his goal, unless he feels he is forced to have the insurance, is simply to shift the burden of future expenses from himself to someone else. He does not necessarily care how the insurance company is doing, as long as they are able to pay his claim. He also does not care how the other policyholders of his insurance company are faring. His hope may also be to make money off of the insurance company or at least save money by dealing with them instead of financing his own burdens. (One can even question why a Muslim would not want to face his own burdens himself rather than thrusting them on the shoulders of others.)

In conclusion, not only is the insurance contract not a type of charitable contract but, in reality, it has nothing in common with a charitable contract. Hence, it is neither a charitable contract nor a new type of contract that has some aspects of charity in it. One can still argue that it is a new type of contract unprecedented in the history of Islam. However, as the Board of the Leading Scholars of Saudi Arabia pointed out, it still can be fitted under the general principles of contracts and the overall goals of the Shareeah with respect to business transactions. Thus, the insurance contract has little in common with any form of contract in Islam except the mutual onerous contracts and the principles of sales and, hence, it has to meet the general criteria of such contracts.

Conditions for the Validity of Mutually Onerous Contracts

Al-Zarqa, one of the leading proponents of the legality of insurance, stated, "The fact that insurance is a new contract outside of the realm of the old contracts does not prevent it from

being permissible if it does not contain anything that contradicts the general Shareeah conditions of the system of contracts.”

According to many scholars, the basic ruling concerning any new type of contract is that of permissibility. However, this only means that if there is no sign that the contract should be considered void, then it should be considered permissible. Hence, in Islamic contract theory, there is a detailed discussion of what the contract must consist of as well as what the contract must be avoided. The matters that should be avoided include jahaalah, gharar, riba and qimaar. If any one of these factors is found in a contract, the contract, depending on the extent to which they are present, may be rendered null, void and impermissible.

It is these four concepts of jahaalah, gharar, riba and qimaar in particular that have led the majority of Muslim scholars to declare modern commercial insurance impermissible. Due to space limitations, only gharar and riba, perhaps the two most important concepts, will be discussed here. Before proceeding, however, it is important to note that the goal of the Shareeah concerning such monetary contracts seems to be clear: a proper balance between the two contracting parties and an elimination of uncertainties that can give lead to illicit gains by either party. This is the true justice in business dealings according to the divinely inspired Shareeah.

The Aspect of Gharar (غرر)

Imam Muslim records in his Sahih:

عَنْ أَبِي هُرَيْرَةَ قَالَ نَهَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ بَيْعِ الْغَرَرِ

“On the authority of Abu Hurairah who said that the Messenger of Allah (peace and blessings of Allah be upon him) forbade ‘sales of speculative nature’ (bai al-gharar).” Al-Bukhari and Muslim record,

عَنْ ابْنِ عُمَرَ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ نَهَى عَنْ بَيْعِ الثَّمَرِ حَتَّى يَبْدُوَ صِلَاحُهَا نَهَى الْبَائِعَ وَالْمُبْتَاعَ

“On the authority of ibn Umar who said that ‘the Messenger of Allah (peace and blessings of Allah be upon him) prohibited the sale of fruits until their ripeness and freedom from disease were apparent. He prohibited both the seller and the buyer.’” Commenting on a hadith with similar meaning, al-Nawawi explained why the prohibition was for both the seller and the buyer. He wrote, “As for the seller, it is because he is wanting to devour wealth wrongfully. As for the buyer, it is because he is in accord with him on this forbidden act and because he is [possibly] wasting his wealth while wasting wealth has been prohibited.”

From these hadith and others, there is a consensus among jurists that an overwhelming presence of gharar or uncertainty renders a business contract null and void. Such transactions are ones in

which the probability of one or both of the parties being wronged is great. Concerning the meaning of this concept of gharar, Rayner states,

The Shari'a determined that in the interests of fair, ethical dealing in commutative contracts, unjustified enrichment should be prohibited. This policy precludes any element of uncertainty or risk (Gharar). In a general context, the unanimous proposition of the jurists held that in any transaction, by failing or neglecting to define any of the essential pillars of contract relating to the consideration or the object, the parties undertake a risk which is not indispensable for them. This kind of risk was deemed unacceptable and tantamount to speculation due to its inherent uncertainty. Speculative transactions with these characteristics are therefore prohibited...

Although such contracts are prohibited by the Shareeah, due to their speculative or risky nature and hence the possibility of making gains from such transactions, they can be very alluring to individuals. Thus, ibn al-Atheer, going back to the lexical meaning of the term, says, "Al-Gharar is that concerning which its apparent component is preferable but its non-apparent component is disliked to the person. Hence, its apparent component entices the buyer while its non-apparent component is unknown."

According to ibn Juzay, examples of gharar transactions include:

- (1) "Ignorance of the price and uncertainty about the existence of the object."
- (2) "Uncertainty about the price of the object and about its characteristics, as in the example of the sale of cloth in a shop without any specification about its quality or price." (3) "Uncertainty related to difficulties of delivery."
- (4) "Uncertainty about the existence of the object, as in the case of a sickly animal."

Concerning the issue of insurance, there does not seem to be too much difference of opinion concerning the presence of gharar ("risk, uncertainty") in insurance contracts. Indeed, by definition, it is a contract concerning risk and how to remove the harms of future risks. The buyer (policyholder) pays premiums, yet he is completely in the dark as to whether he will have to resort to this premium in the future and receive any money or reimbursement from his insurance company. In the case of a safe driver, for example, he may pay premiums for years and years and never once files a claim. And if his car does get damaged one day, he does not know how the insurance company will value his car or its damages and what amount they will pay him.

Even the insurance company itself has no certainty with respect to any individual contract it enters into. It is true that they apply statistics and the law of large numbers to "ensure" that the premiums they receive will almost certainly cover any future claims made against them. Hence, they greatly reduce their own risk on a large scale. However, that does not deny the fact that the individual contract also contains risk for the insurance company. There is no principle in Islamic law that this author is aware of that states that gharar is overlooked in a single contract if

numerous such contracts greatly reduce the presence of such risk. (If such a principle existed, then even the gambling industry would have to be allowed. The gambling industry—much better than the insurance industry—can “guarantee” that the house will get a certain percentage of the stakes and even make sure that the players get a certain percentage of winnings to make sure they are enticed to come and play).

In fact, insurance companies are well aware of the possibility of them not being able to pay out all of the claims against them. That is why insurance companies obtain reinsurance, as the risk that they face is still great due to possibility of unforeseen circumstances (such as the breakout of certain diseases, extremely harsh weather leading to a very large number of car accidents and so forth). Furthermore, the “law of large numbers” does not protect against great losses if each individual statistic is a large investment, say in the millions. (This is the fact that the reinsurance companies have to deal with.)

Thus, the presence of gharar in the insurance contract cannot be rationally denied. However, the debate could be over the extent of its presence. The jurists have divided gharar into three categories: (1) that risk which is minimal, impossible to avoid in almost any type of contract and not affecting the validity of a contract; (2) that risk which is great and therefore unacceptable, voiding the contract; (3) that risk which is of an intermediate nature—leading some scholars to categorize it under (1) above and others to categorize it under (2) above. The Jurists state that gharar is to be overlooked when it is a small amount, it is not intended and there is no necessity to engage in it.

The Board of the Leading Scholars of Saudi Arabia stated:

The gharar of insurance is definitely not minimal. It is either of a great or intermediate nature. The weightier view is that it is great. This is because one of the essential components of the insurance contract, without which it cannot exist, is risk. Risk is the possible event that does not depend on the wills of either party. Insurance is not permissible except on a future possibility that is not definite to occur. Hence, gharar is a necessary component of the insurance component and one of its specific characteristics by which it is distinguished. This places it among the gharar that is prohibited.

Commenting on the hadith quoted above prohibiting gharar sales, Al-Baaji stated, “The meaning of ‘sale of a speculative nature’ –and Allah knows best—is what has a lot of gharar in it and predominates it, to the point that the sale becomes described as a sale of a speculative nature. This is the type concerning which there is no difference that it is prohibited.” Al-Baaji’s statement applies to insurance contract because, by definition, such predominant gharar must be present. “An insurance contract must have an element of contingency—that is, the event insured against must be possible but not certain to occur in a given period of time and must be substantially beyond the control of either insured or insurer.” Indeed, contract law considers insurance an aleatory promise. Calamari and Perillo describe this in the following words,

An aleatory promise is conditional on the happening of a fortuitous event, or an event supposed by the parties to be fortuitous. Thus an insurance company's promise to pay a sum of money in the event of fire or other casualty supplies consideration for the insured's payment of a premium even if no casualty occurs... [T]he promise is aleatory; it constitutes consideration because it is conditional on a fortuitous event not within the total control of the promisor.

As can be seen in Comair-Obeid's discussion, gharar (speculation, risk, uncertainty) is one of the most prominent aspects in many aleatory contracts.

This point alone may be sufficient to consider insurance forbidden under Islamic law.

The Aspect of Riba (ربا)

One of the well-known great sins is the taking or paying of riba (interest). Indeed, any Muslim familiar with the numerous texts censuring riba would undoubtedly do his best to avoid any trace of riba. For example, Allah has said in the Quran,

(الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَخْبِطُهُ 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 فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ (275) يَمْحَقُ اللَّهُ الرِّبَا وَيُرْبِي الصَّدَقَاتِ وَاللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَثِيمٍ (276) إِنَّ الَّذِينَ آمَنُوا وَعَمِلُوا الصَّالِحَاتِ وَأَقَامُوا الصَّلَاةَ وَآتَوُا الزَّكَاةَ لَهُمْ أَجْرُهُمْ عِنْدَ رَبِّهِمْ وَلَا خَوْفٌ عَلَيْهِمْ وَلَا هُمْ يَحْزَنُونَ (277) يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنْتُمْ مُؤْمِنِينَ (278) فَإِنْ لَمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِنَ اللَّهِ وَرَسُولِهِ وَإِنْ تُبْتُمْ فَلَكُمْ رُءُوسُ أَمْوَالِكُمْ لَا تَظْلِمُونَ وَلَا تُظْلَمُونَ) (البقرة 275-279)

“Those who devour interest will not stand [on the Day of Judgment] save as he arises whom the devil has deranged by (his) touch. That is because they say, ‘Trade is just like interest,’ whereas Allah has permitted trading and has forbidden interest. He unto whom an admonition from his Lord comes, and (he) refrains (in obedience thereto), shall keep [the money of] that which is past, and his affair (henceforth) is with Allah. As for him who returns (to interest), such are rightful owners of the Fire. They will abide therein forever. Allah destroys interest and gives an increase for charity. Allah loves not every disbelieving, sinner. Truly, [as for] those who believe, perform righteous deeds, establish the prayer and pay the zakat, their reward is with their Lord. No fear shall come upon them neither shall they grieve. O you who believe! Observe your duty to Allah, and give up what remains (due to you) in interest, if you are (in truth) believers. And if you do not, then be informed of a war from Allah and His messenger. But if you repent, then you have your principal [without interest]. Do not wrong [others] and you shall not be wronged” (al-Baqarah 275-279).

Among the other numerous Quranic and hadith texts concerning interest is the following:

عَنْ جَابِرٍ قَالَ لَعَنَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ آكِلَ الرِّبَا وَمُؤَكِّلَهُ وَكَاتِبَهُ وَشَاهِدِيهِ وَقَالَ هُمْ سَوَاءٌ (رواه مسلم)

Jaabir stated, "The Messenger of Allah (peace and blessings of Allah be upon him) cursed the taker of interest, its giver, its recorder and its two witnesses. They are all alike." (Recorded by Muslim) In this important hadith of the Prophet (peace and blessings of Allah be upon him) one sees that the giver and the receiver as well as those who assisted in this forbidden contract are all equally sinful and have all been cursed by the Prophet (peace and blessings of Allah be upon him).

Numerous scholars have argued that the insurance contract contains a clear element of *riba*. To understand this argument fully, one must consider what is the "object" of the insurance contract (محل عقد التأمين أو المعقود عليه). In a mutually onerous transaction, one person gives up some form of wealth in exchange for something that is also of value. The policyholder pays premiums, that is the form of wealth that he is giving up. What, though, is the object of the contract that he is getting in exchange for his payment of money? Many who consider insurance legal argue that he is paying money in exchange for "security and peace of mind." Two questions then arise: Is that a valid "object of contract" in Islamic law? And, if that is not valid, what then must be seen as the "object of contract" in insurance?

There are certain conditions that a possible "object" must meet in order for the transaction to be considered a valid and binding transaction. These conditions include the following: (1) legality, (2) existence, (3) the property of being deliverable and (4) precise determination.

Can "security and peace of mind" possibly meet these criteria for a valid object of a financial contract? Undoubtedly, this very subjective object does not meet the criteria for the object of a financial contract. Al-Dhareer wrote,

[Al-Zarqa argues that] what is exchanged for the premiums is security. That is, the object of the contract in insurance is security. This argument is supported by neither *fiqh* nor law. As is obvious, security is the motivating factor behind the insurance contract. But the object of the contract is what each of the insured and the insurer pays or it is what one of them pays. If we were to say that security is the object of the contract, then the insurance contract would be void from both a legal and a *fiqh* perspective. It is from the accepted premises in both [secular] law and *fiqh* that the object of the contract must be something possibly deliverable. If the object is not so possible, the contract is void. It is self-evident that security in an insurance contract is not something possibly bound to. Indeed, "security" is not something that passes from one of the contracting parties to the other nor is it a usufruct or effort that one is exerting and deserving a wage for.

From a contract and business perspective, what one truly gets in return for premium payments is simply money and nothing else. Fabozzi, et al., probably said it best when they began their discussion of insurance companies by saying, "Insurance companies are financial intermediaries that, for a price, will make a payment if a certain event occurs."

This is problematic, to say the least. This means that the insurance contract is nothing more than an exchange of money for money, which an element of chance and risk being present. Islamic law

strictly regulates the exchange of money for money. Ubaadah ibn al-Saamit narrated that the Prophet (peace and blessings of Allah be upon him) said,

الذَّهَبُ بِالذَّهَبِ وَالْفِضَّةُ بِالْفِضَّةِ وَالْبُرُّ بِالْبُرِّ وَالشَّعِيرُ بِالشَّعِيرِ وَالتَّمْرُ بِالتَّمْرِ وَالْمِلْحُ بِالْمِلْحِ مِثْلًا بِمِثْلِ سَوَاءٍ بِسَوَاءٍ يَدًا بِيَدٍ فَإِذَا اِخْتَلَفَتْ هَذِهِ الْأَصْنَافُ فَبِيعُوا كَيْفَ شِئْتُمْ إِذَا كَانَ يَدًا بِيَدٍ (رواه مسلم)

“Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt [must be] the same amount for the same amount, equal for equal, hand to hand. If these genus differ, you may trade them as you wish if they are hand to hand.” This hadith makes it clear that money exchanges must be done hand to hand and, if the money is of the same genus, the amounts must be equal. If this condition is not met, one has fallen into riba. In fact, in insurance contracts, it is possible for someone to fall into both riba al-fadhl (interest via an increase payment) and riba al-nasee`a (interest via a delay in a payment that is required to be hand-to-hand). The amount that one receives (directly or indirectly) from the insurance company, if one ever does receive something from them, will be equal to, less than or greater than the premium payments that the policyholder has paid over time to the insurance company. If the policyholder receives more money than he has paid the insurance company, this is riba al-fadhl. In the very unlikely scenario of the two amounts being equal, the exchange of money was not hand to hand and hence the two parties have been involved in riba al-nasee`a.

Again, in the case of insurance, with respect to the commodity that is actually exchanged, one is truly only exchanging money for money at a later date depending on some unpredictable event. This author cannot see how such an exchange cannot be envisioned as anything other than one involving interest.

Al-Qari takes a different approach. He argues that those who have written about insurance have failed to recognize its true object. After agreeing that insurance is a mutually onerous contract, he argues that the object of the insurance contract is “liability to compensate” and not the compensation payments that are received. The insured, therefore, pays a fixed payment in exchange for this liability or obligation to be compensated in the case of specific types of harm. Thus, the object of the contract exists whether or not the insurance company ever has to compensate the insured. And since the insurance company is relying on “the law of large numbers,” there is virtually no speculation on its part either. He later states that in this way it is therefore similar to al-kifaalah or al-dhamaan (contract of guaranty or surety). In fact, what he has described is nothing but a contract of guaranty.

However, the scholars have noted that insurance cannot be considered analogous to the contract of guaranty for a number of reasons. One of the reasons is that the guarantor cannot take any form of payment for the guaranty. If such payment is stipulated, the contract is voided. Secondly, the guarantor is considered secondary to the one who receives such a guaranty. In other words, in case of a debt, the creditor seeks his money first from the debtor and only when the debtor cannot pay will the creditor turn to the guarantor for payment.

In fact, logically speaking, when one takes into consideration what is al-dhamaan (financial surety), it has to be a charitable type of contract. Otherwise, one is paying money for money, which is interest. Secondly, one is paying for a surety concerning something that may or may not happen. This is nothing but gharar and jahaalah again. Hence, the only way such a contract could be within the limits prescribed by the Shareeah—given that the Shareeah would not allow a mutually onerous contract that clearly violates the principles of mutually onerous contracts—is if it were moved to the category of charitable contracts, wherein it is not paid for and the aspects of gharar and jahaalah can be overlooked. Thus, the “liability to compensate” is not an acceptable object of a mutually onerous contract—and al-Qari agrees that the insurance contract is a mutually onerous contract.

There is another important issue that is related to the practices of the contemporary commercial insurance companies. This concerns how they invest their money and where they get part of their funds to pay off any claims. It is true, as al-Zarqa and many others have argued, that this point has nothing in essence to do with the insurance contract per se. In other words, an insurance company that is void of this criticism can easily be envisioned. However, at times, when discussing a particular contemporary topic, one has to move from a theoretical level to the practical reality, so that the reader knows what actually applies to the situation that he is facing. This is especially true if one is discussing the ruling of insurance in a non-Islamic country such as the United States or other countries of the West.

Madura has discussed the assets of insurance companies and where they invest their money, using data from the 1999 Life Insurance Fact Book. Analyzing the data with respect to life insurance companies, one can see that 74% of their funds are invested in clearly forbidden ways, all involving interest (corporate bonds, government securities, mortgages and policy loans). Another 21% are invested in stocks, which must be considered doubtful since one cannot determine whether such stocks are Islamically acceptable or not. Only 5% are invested in real estate or are made up of assets, such as policy payments. The graphical representation of this data, as shown in Figure 1, renders the data more clearly. The use of funds by property and casualty insurance companies is even more dramatic from an Islamic perspective. 77% of their funds are invested in clearly forbidden means, all involving interest (different types of bonds). 20% is invested in common stock, which again, must be considered questionable. And only 2% form “other.” Figure 2 is a graphical presentation of these investments.

As this author admits above, this criticism has nothing to do with the insurance contract per se and hypothetically this problem could be avoided. However, the truth of the situation is that a Muslim who buys insurance from Western commercial insurance companies is, in reality, giving his money to a company and asking that company to return that money (and, most likely, more) if certain events occur. The Muslim should realize that that company is going to invest that money in ways that are Islamically unacceptable. It is partially through those unacceptable means that the policyholder will be receiving his money back. In other words, instead of the Muslim investing the money himself in forbidden ways, he simply gives it to another person (“a financial intermediary,”

the insurance company) and allows him to do those forbidden acts with his own money, with the intention that he will benefit from it when the necessary time comes. It does not seem that a Muslim should be pleased with this arrangement. If, as the above hadith states, the witness and the recorder of the interest transaction are accursed, what must be the case of the person who knowingly gives money to another to invest in interest bearing accounts virtually on his behalf? It is almost akin to the case of selling grapes to an individual when the seller knows that the buyer is going to make alcohol out of those grapes. Regardless of the legal ruling concerning that case as stated by many of the scholars, no individual Muslim should feel innocent in front of Allah when he has contributed to the performance of a forbidden act. Allah says,

(وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ)

“Help one another in righteousness and piety—and do not help one another in sin and transgression” (al-Maaidah 2).

Other Problematic Matters

Gharar and riba are two aspects that are unavoidable in contemporary commercial insurance. By themselves, they should be enough to render the judgment that such contracts are impermissible in Islamic law. However, there are yet other matters that are problematic with the insurance contract which would render it void in an Islamic contract. These include gambling, wagering, unknown quantity, taking on responsibility that is not sanctioned by the Shareeah and so on. Space limitations here do not allow this author to discuss those aspects in detail but they provide further support for the opinion that commercial insurance is forbidden.

Do the Need and the Benefits Override the Prohibited Aspects?

Even given all of the unacceptable aspects of the commercial business contract, one could argue that the general need and overriding benefits of such a contract make it permissible. Although he did not discuss insurance in particular, Abu Sulaimaan argues that the true fiqh of business contracts are based on need and necessity. Abu Sulaimaan writes, “Most of the financial contracts in the Hanafi school are based on necessity. They are permitted in contradiction to analogy.” (Although it is not possible to discuss this topic here in detail, it is important to note that such a view about these business transactions cannot be considered the strongest view. Ibn Taimiyyah, in particular, has refuted this view in detail. He stated, for example, “It is not a condition for a sound, balanced analogy that its soundness be known to all. If someone sees something of the Shareeah that differs from analogy, it actually only differs from the analogy that he has structured in his own mind. At the same time, though, it is not contradicting confirmed, sound analogy.”)

In any case, though, sometimes relying on the views of early Hanafi scholars, many contemporary scholars, such as al-Sanhoori and al-Zarqa, have argued that even though insurance involves gharar, the overriding need for insurance makes such a contract permissible. They argue that

insurance developed and continues to be resorted to because it fulfills a general need and is part of the public interest. Due to this overriding benefit, insurance must be considered permissible even if it is argued that it violates some of the principles of a business contract. They argue that without resorting to this type of business contract, Muslims will be forced into a situation of hardship and difficulty. This need makes it similar to a necessity that is considered permissible according to Islamic law. Al-Zarqa argues that the early respected scholars, taking into consideration the broader, magnanimous principles of the Shareeah, stated that the droppings of livestock was not to be treated as impure for the people of the village and bedouins, since there was no way for them to avoid such droppings without undue hardship. Al-Zarqa rhetorically asks about what those scholars would say if they would today see the great need for insurance and the hardships found in avoiding it.

Al-Misri argues that those who consider insurance permissible are those that consider the economic benefits of insurance while those who consider it forbidden fail to consider those important benefits. Although there are such possible benefits to insurance, one has to weigh the costs too. Simply finding something beneficial does not render an action permissible. Hence, Allah has stated about wine and gambling,

(يَسْأَلُونَكَ عَنِ الْخَمْرِ وَالْمَيْسِرِ قُلْ فِيهِمَا إِثْمٌ كَبِيرٌ وَمَنَافِعُ لِلنَّاسِ وَإِثْمُهُمَا أَكْبَرُ مِن نَّفْعِهِمَا)

“They ask you about wine and gambling. Say, ‘In both is great sin, and (some) benefits for mankind; but the sin of them is greater than their benefits’” (al-Baqarah 219). The verse clearly states that there is some benefit to both wine and gambling. However, the mere presence of some beneficial aspect is not the overriding issue. The question is whether its harm or sin is greater than its benefit or vice-versa. Thus, the important point is that the overriding benefit (as seen in the light of Islamic goals and directives) outweighs the harm involved.

Furthermore, the ends cannot justify the means. In other words, even if the overall benefits or goals of investment are aspects respected or consistent with the Shareeah, the steps that one takes to fulfill those otherwise permissible goals must be first determined to be legal—unless one is in a constrained case of necessity, which shall be discussed later.

Some of the benefits from insurance can include:

(1) The preponderance and popularity of insurance companies has led to a great concentration of wealth in the hands of the insurance companies. These insurance companies are profit driven. Thus, they in turn invest that wealth in the economy. In other words, it is a way of tapping savings and making sure that those savings do not sit idle but are indeed invested for the betterment of society.

(2) Since people are risk averse, it is difficult to get many of them to invest in large projects, risking a great deal of their money. If they are protected against any loss, it will be easier to encourage

them to invest in larger projects. Without such a protection, those large projects may not be undertaken. Especially in contemporary times and in particular in developing countries, the need for larger and massive investments is great. Without contemporary forms of insurance, many of these types of investments would not be undertaken. Hence some writers even claim that modern civilization as it is known today cannot come about save through modern forms of insurance. Siddiqi wrote, "The present system of wealth-creation and the present level of civilization are simply inconceivable without recourse to insurance. The absence of insurance is bound to lead to a lowering of the level of wealth-creation and to the decline of civilization." (3) The willingness for individuals to invest together will also be increased if they feel that their investments are somehow guaranteed against loss. This is where investment can once again increase the propensity to invest.

(4) "Because insurance is available and affordable, banks can make loans with the assurance that the loan's collateral (property that can be taken as payment if a loan goes unpaid) is covered against damage. This increased availability of credit helps people buy homes and cars. Insurance also provides the capital that communities need to quickly rebuild and recover economically from natural disasters, such as tornadoes or hurricanes." At the same time, there are definitely some harmful aspects to the insurance industry. These include:

(1) The insurance industry leads to a greater concentration of income in the hands of the rich. This, in itself, strikes at one of the overall goals of the Islamic society and economic system, as is derived from Allah's words:

(مَا أَفَاءَ اللَّهُ عَلَى رَسُولِهِ مِنْ أَهْلِ الْقُرَى فَلِلَّهِ وَلِلرَّسُولِ وَلِذِي الْقُرْبَىٰ وَالْيَتَامَىٰ وَالْمَسَاكِينِ وَابْنِ السَّبِيلِ كَيْ لَا يَكُونَ دُولَةً بَيْنَ الْأَغْنِيَاءِ مِنْكُمْ)

"What Allah has bestowed on His Messenger (and taken away) from the people of the townships, belongs to Allah, to His Messenger and to kindred and orphans, the needy and the wayfarer; in order that it may not (merely) make a circuit between the wealthy among you" (Al-Hashr 7).

Insurance leads to a greater maldistribution of wealth in a number of ways. First, insurance, in general, is a very profitable industry and those who own the industry companies benefit from that profit. Second, the richer a person is, the less need he has for insurance but the more insurance he can afford to cover virtually any possible loss to his wealth. Hence, the rich are able to hedge against any loss. The poor, who many times cannot afford such insurance, face unrecoverable losses and can become even poorer. (Perhaps the current crisis in health insurance in the United States is an excellent demonstration of this phenomenon. Millions of the middle class, especially self-employed, have no health insurance because they simply cannot afford it, as rates have skyrocketed for health insurance. These people are often forced to pay for their own health care, which is also expensive and keeps them in a cycle of semi-poverty. Those in the upper class do not face this difficulty.) Third, as corporations become larger and larger, it becomes more and more difficult for smaller companies to compete. Some of the heavy costs facing any company are the

various insurance costs, some of them required by law. Over time, the smaller companies simply cannot compete and are driven out of business due to the great costs, especially insurance costs, of doing business.

(2) Most of the Muslim countries in the world form part of the lesser developed world. With respect to these countries, the insurance industry has led to a financial drain from those economies. The larger insurance companies and reinsurance companies are mostly from the more advanced countries. They take the payments that they receive from the lesser developed countries and invest them in the more advanced countries. Hence, there is a transplant of needed capital from the poorer countries to the richer countries.

Finally, in preparing his Ph.D. dissertation on insurance, Thunayaan interviewed a number of insurance experts and researchers in Egypt, Germany, United States and England. He found that about 55% of those interviewed were of the opinion that the evils of insurance outweigh their good. Another 25% stated that insurance is evil, not containing any good. 15% said that insurance's good is equal to its evil. Amazingly, only 5% stated that insurance's good outweigh its evil.

In sum, the more objectionable aspects that a contract has to it, the stronger will the evidence have to be to show that it is needed and that its objectionable aspects are to be overlooked. Ibn Taimiyyah once noted that the harm of riba is greater than that of gharar and that is why gharar is sometimes overlooked if there is a strong need for its related transaction. However, in the case of insurance, there is the problem of riba, gharar, jahaalah and other aspects (some of them not discussed in detail here). Obviously, the issue of riba, for example, is not a light matter. Hence, to override it—if such a concept is possibly acceptable—one would have to present a very strong, definitive case. It is admitted that there are definitely some benefits to the commercial insurance industry as it currently exists. However, in this author's view, there does not seem to be enough evidence to prove that its benefits so outweigh its harms that although it contradicts many of the aspects of a sound contract, it must still be considered acceptable due to overriding need. And Allah alone knows best.

Conclusion on the Legality of Commercial Insurance

The conclusion here is that commercial insurance as it presently exists is definitely forbidden. From this author's reading on this topic, this is also the conclusion of the vast majority of the scholars who have discussed this issue in some detail. For example, it is the conclusion of the Islamic Fiqh Council of the OIC, the Board of the Leading Scholars of Saudi Arabia, the Fiqh Council of Makkah under the auspices of the Muslim World League, al-Sideeq al-Dhareer, Wahba al-Zuhaili, Muhammad Mustafa al-Shanqeeti, Salaah al-Saawi with Abdullah al-Muslih, Sulaimaan Thunayaan, Ali Abu al-Basl, Abdul-Raof al-Shaadhili. Faisal Maulawi, Mohammad Muslehuiddin, Afzalur Rahman, and numerous other respected scholars and jurists.

[It is beyond the scope of this brief paper to review and critique the views of those who consider insurance permissible. The strongest supporters of commercial insurance, void of its forbidden aspects such as investing monies in received in forbidden means (a condition that virtually makes the discussion a moot point practically speaking), include Mustafa al-Zarqa, Ali al-Khafeef, Muhammad al-Bahi and Rafeeq al-Misri. Al-Zarqa's views were first presented in 1961 and his earlier writings and some later writings were published as recently as 1994. In one of the few books that deal with this topic in English, Vogel summarized a couple of al-Zarqa's arguments and then wrote, "Despite its persuasiveness, this line of argument did not vanquish opposition to insurance." In this author's view, al-Zarqa's arguments were not persuasive and have been refuted by many scholars since their first appearance—to the point that one would have expected al-Zarqa over time to drop some of his weaker arguments in support of insurance, something he never did in his published works. Rafeeq al-Misri's book, *al-Khatar wa al-Tameen: Hal al-Tameen al-Tijaari Jaaiz Sharan*, is, in this author's view, a much stronger argument for the acceptance of commercial insurance. In that work, al-Misri, referring to some of al-Zarqa's and others' arguments, stated "I have no doubt that many of those who consider commercial insurance permissible use weak evidence to support it. I also have no doubt that some of them want to make it permissible by forced arguments at any price, built on a preconceived conclusion."]

However, the conclusion that commercial insurance is forbidden definitely does not end the necessary discussion. The next logical point is whether the law of necessity may be invoked concerning insurance, especially for those living in non-Muslim lands.

The Law of Necessity

Once it has been determined that commercial insurance as it currently exists in the United States, in particular, is forbidden, the next question that could arise is whether it is permissible for Muslims living in the West to resort to insurance as a case of necessity. In order to answer this question properly, some of the basic issues related to the law of necessity must first at least be stated.

In his study on the law of necessity, Mubaarak defined necessity (الضرورة) as, "Fear of destruction or great harm to one of the necessities of life for either oneself or another, with definitive or probable expectation, unless one does what can repel that destruction or great harm." It is very important to note that necessity is very different from "meeting one's needs." For example, being very hungry does not usually lead to starvation but one is in need to eat. In such a case, one is not permitted to eat something usually forbidden simply because he is very hungry. However, if that state should continue to the point that the person fears some harm to himself or possibly death due to his state of hunger, that need then becomes a necessity. Unfortunately, as Mubaarak discusses at length, too many scholars are very quick to invoke the law of necessity even when the conditions for it do not apply.

There are many important principles related to the law of necessity. Some of the more relevant for this article are the following:

(1) The invoking of the law of necessity must be in accord with the principles of the Shareeah: In other words, the goal or purpose for which the law is invoked must be sanctioned or supported by the Shareeah. This is an important principle with respect to insurance. There is no question, for example, that the preservation of wealth is one of the goals of the Shareeah. However, is there any sanction in the Shareeah to engage in forbidden financial transactions in order to supposedly “preserve” the value of one’s wealth or “guarantee” against the loss of wealth? Note that there is a big difference between taking steps to protect one’s property (such as locking one’s car and closing one’s garage) and protecting the value of one’s property. In the latter case, if the property is destroyed, the property is actually lost and there is only a transfer of funds from one group or individual to another. Whenever necessity is considered, there are usually two contradicting factors at work and one has to determine which is the more important. In this case, one has a transaction which is forbidden by the Shareeah, which implies that it must be something harmful for society as a whole, versus the risk of the possibility of a future loss. Obviously, there is a difference between a true necessity or need and simply trying to preserve what one possesses. Not every loss to one’s possession can be considered a case of necessity or great need. Unfortunately, to date, this author has not found any scholar commenting on this point.

(2) The expected and feared harm must be either definite to occur or most probable: In other words, the threat to one’s well-being cannot be simply imaginary or not very probable. One must have a real reason to expect some harm or one must actually be enduring such harm. If the probability of such a harm is only minimal or not likely, one is then not allowed to invoke the law of necessity. Of course, insurance companies are masters at the use of probability but one does not find the question discussed from this angle by the scholars. For example, if there is a 1% probability of a house burning down in a particular neighborhood, given past experiences, would that 1% probability render the invoking of the law of necessity by a homeowner permissible?

(3) The law of necessity may only be invoked if one cannot find a permissible alternative that would alleviate one’s situation. If a “legal alternative” is available, one must take advantage of that legal alternative and avoid any forbidden means.

(4) Only the minimum necessary of what is normally forbidden may be resorted to. Furthermore, once the situation is change and the harm alleviated, the law of necessity cannot no longer be resorted to. Not only that, a Muslim should try to remove oneself from the case of necessity, based on the Islamic maxim, “Harm is to be removed.”

(5) Lesser of two harms or not resorting to a greater evil. The Muslim must weigh the different aspects of engaging in a forbidden transaction with a possible harm that may come to him. Obviously, not all, possible future harms would be considered strong enough to resort to the law of necessity. For example, an individual may own a boat that he uses for reasons of pleasure. That

boat may be very expensive and he may not be pleased at losing such a valuable item. But such an event is simply from the vicissitudes of life that a Muslim should learn to live with and be patient with. More importantly, the loss of sail boat cannot truly put an individual into a state of necessity. The boat is more of a luxury. In such a case, the lesser of the two harms would be to risk losing the boat in order to avoid a forbidden type of transaction.

(6) The necessity has to be direct and constraining.

Insurance, the Law of Necessity and the Opinions of Contemporary Scholars

Unfortunately, this author could not find many who explicitly discussed the relevant situation in the West, or the United States in particular. However, it would be appropriate to present some of the opinions expressed that can be considered relevant to the situation in non-Muslim lands. In particular, this author noted comments related to three issues that are of most importance. These three issues are:

(a) Given that commercial insurance is considered forbidden, can such insurance be resorted to in the name of necessity or overriding need?

(b) If the state requires its citizens to get a certain type of insurance, can that requirement be considered a necessitating force allowing Muslims to take prohibited commercial insurance?

(c) If the contract is agreed to in a non-Islamic state, will that have any effect on the application of the contract?

Invoking the Law of Necessity in the Discussion of Insurance

There is quite a bit of difference of opinion among the scholars on the question of invoking the law of necessity to allow insurance.

The Board of the Leading Scholars of Saudi Arabia explicitly stated that law of necessity cannot be invoked with respect to insurance because the means that Allah has permitted to earn the good things are many times more than what has been forbidden. Thus, there is no recognized, Shareeah necessity driving one to what the Shareeah has forbidden concerning insurance. It [insurance] is just something that many of the people have grown accustomed to since they have been taking part in those contracts for a long time now. What they must do is simply remove themselves from them [those types of contracts] and cut themselves off from them and, instead, choose another permissible mean that can be a substitute for it, such as mutual societies...

Abu Zahrah explicitly states that to say that commercial insurance is permissible out of necessity means that there must be no alternative. However, he says that such alternative exists. He points to the example of a cooperative insurance venture in Khartoum. He also strongly qualifies the permissibility of reinsuring with commercial insurance companies. Al-Furfooor states that he does not accept the claim of necessity, as the Muslim world should be able to replace the exploitative

system of commercial insurance with a system that is consistent with Islam. He states that such would not be a hardship if the people truly wanted to implement the law of their Lord. Abdullah al-Bassaam strongly warns against simply accepting some practice because it is widespread and a common practice. If such an approach is taken by the Muslim scholars, all of Islam will be destroyed.

Abdul-Azeez al-Khayyat says that even reinvesting is not permissible with such commercial insurance companies. He also adds that he fears that the Islamic companies will simply then rely on those companies beyond what is allowed by necessity and without attempting to create Islamic reinsurance companies. The one exception he states to this is if the government requires a specific company to specifically reinvest and they cannot find an Islamic reinsurance company to reinvest with. Muhammad Uthmaan Shabeer states that, even given the restrictions that scholars have laid down, there is no room any more for reinvesting with non-Islamic companies now that Islamic alternatives exist, such as the reinvestment companies in Bahrain and Tunis. Muhammad al-Ashqar also states that there definitely is no “necessity” for reinvesting with such commercial investments. He then says that he has doubt whether there is any “need” to do so. Finally, he says that if there was “need,” that was in the past now. Currently, there are other acceptable ways in reinvesting and thus no one is excused from such proper means. Al-Minyaawi makes the same conclusion.

Similarly, al-Dhareer argues that the gharar in insurance is not to be overlooked because the need for it is not specific and there is another way to solve this problem.

Al-Zarqa explicitly asks what al-Dhareer would say if there was no such Islamic alternative, which is the situation, he says, today. Thus, he says that commercial insurance must be specifically resorted to in order to meet the needs of the people. Al-Zarqa further notes that Ibn Rushd stated that gharar can be overlooked due to necessity, meaning a strong need as al-Dhareer explained it. He further notes that even the Shareeah Supervisory Board of the Faisal Islamic Bank of Sudan, headed by al-Dhareer himself, says that it is allowed for the mutual insurance company run by said bank to reinsure its policies with an international commercial insurance company, since there is no proper Islamic reinsurance company in that country.

Indeed, it is interesting to note how many state the permissibility of reinvesting as a type of necessity. For example, here is a portion of the text of the Shareeah Supervisory Board from the Faisal Islamic Bank of Sudan that al-Zarqa referred to above,

An exception for the prohibition of reinsuring [with commercial insurance companies] is the situation or situations wherein the need is specific for reinsuring, the case where the Islamic insurance company will encounter hardships and difficulties if they do not deal with the reinsurance companies. The Shareeah Supervisory Board for the Arabic-Islamic Insurance Company also states that due to need, the Islamic insurance company can reinsure with commercial insurance companies. However, they add that if they receive any profits from that

company, they should not add that money to their accounts but should give it away to beneficial causes. The Shareeah Supervisory Board of the Islamic Insurance Company of Jordan says similarly, saying that need requires such companies to reinvest. The Jordanian Majlis al-Iftaa has also concluded the same.

Al-Zuhaili says that, presently, there is no excuse to resort to insurance, since the need for it is not specific, meaning its goals can be met through permissible means such as Islamic insurance companies. However, he then states that if “we accept the proposition that the need is specific, insurance is permissible to the extent that is needed only.” However, he also concluded that it is allowed to reinsure with a commercial insurance company because in that case the need does become particular and constraining. He also discussed the numerous conditions that must be applied even in that case of “need” or “necessity.” After concluding that commercial insurance is forbidden, Maulawi is one of the few who takes up the question of resorting to commercial insurance in the absence of an Islamically acceptable alternative. He says that if the insurance is optional—not required by the state—yet in a Muslim’s particular case he may be facing difficulties that he would not be able to bear, he then can resort to insurance under the law of necessity. He cautions that this is not a general ruling for Muslims but that each individual case needs to be looked at to see if necessity truly exists, as in some cases the possible harm may not be great or the person would be able to bear it. Ahmad al-Sharbasi also said that insurance is unlawful due to its riba aspect. But, “In case it is not possible to get rid of this system of interest immediately, it may be treated as a necessity and be acted upon for the present while we endeavor to get rid of it.”

It is perhaps of great interest to note the opinions of some of the scholars of India, since they live in a non-Muslim environment somewhat similar to those who live in the West. Ubaydulla Rahmani of India says similarly that insurance is permissible “when the conditions are such that there is no safety of life and property.” Abd al-Salam Nadwi noted the communal riots in India as a cause for the necessity of insurance. A committee of the Nadwat al-Ulamaa in Lucknow, India concluded in 1965 that,

Taking into consideration the importance of insurance which has penetrated deep into human life, the difficulties involved in conducting business without it and especially the need to protect life and property, it seems that Islamic law provides for insurance in case of emergency. NOTE: Emergency implies the danger of unbearable loss to one’s life, property and dependants. The decision whether such emergency has arisen or not depends upon the opinion of the person in danger, which is to be formed after consultation with ‘Ulama [scholars] and in full realisation of one’s own responsibility before God.

Al-Qaasimi, also of India, discussed the question of health insurance. He specifically mentioned the rising cost of health care in the United States and Europe. He says that such expenses are usually more than one can bear and without health insurance one can find himself in grave difficulties. He also argues that the amount of gharar is small in health insurance because, he argues, that such

gharar will not lead to disputes since it will be based upon what the professionals and doctors prescribe for the patient. (In this author's view, this reasoning is weak on two counts. First, "leading to disputes" is not the effective legal cause that prohibits gharar and, secondly, such disputes with insurance companies and medical professionals in the U.S. are well-known.) He also argues that if such health insurance is required by the state, it is to be considered permissible. He then states that if it is not required, then in countries like his where health expenses are high, the gharar should be considered moderate and overlooked. Thus, health insurance should be considered permissible. Finally, he states, "People are forced to choose it [that is, health insurance]. The American Muslim is driven by necessity to take health insurance." Similarly, in the discussion portion, Ali al-Quradaaghi also argues that health insurance for those living in the West is beyond being simply a need; it is definitely a necessity. Finally, being perhaps the most blatant statement on this issue, Abdul-Lateef Janaahi stated, "We can never differ that insurance is a necessity of the necessities of life." At the same time, he states that statistics from ten countries show that if zakat was paid in the way that it is supposed to be paid, it would be sufficient to cover the needs and would make insurance unneeded. Thus, all that is really needed is that the Muslim governments apply zakat properly. (Note that this contradicts his statement that insurance is a necessity of life.)

Government Required Insurance

A number of scholars referred to the case where a particular type of insurance is required by law. Maulawi explicitly writes that if the government makes such insurance required, the Muslim is forced out of necessity to take it, although that does not change the basic ruling concerning insurance. He also says that one only takes such insurance if he cannot avoid it by some means that will not cause him harm or difficulty. Mahdi Hasan of India, a non-Muslim land, also states that insurance is permissible if it is compulsory. He cites the cases of petroleum companies, aircraft, steamers, automobile and the like. Wahbah al-Zuhaili, "Obligatory insurance, such as auto liability insurance, that the state requires is permissible, as it is the same [in ruling] as paying taxes to the state." Abdullah ibn Baih shares the same opinion. Rules for non-Muslim Lands

As was noted earlier, ibn Abideen was one of the first scholars to discuss the legality of insurance. Due to his being the first, many scholars today still quote his opinion. Among the points that he made is that if such an insurance contract was made outside of the lands of Islam, it would be permitted to take such money from the non-Muslim in the non-Islamic land. It is permissible to take their wealth with their consent in ways that are not permissible in the land ruled by Islam. Perhaps the second Muslim scholar to discuss insurance was Muhammad Bakheet al-Muti'yi, writing in 1906 C.E./1324 A.H. He said that according to the Hanafi school, the Muslim who is residing in a land other than the land of Islam may take any of their wealth, even if it is via interest or gambling, as long as it is through their goodwill and consent. He says that what is not allowed is to deceive or cheat them. As long as that is not done, their wealth can be taken. Muhammad Rasheed Ridha gave virtually the same ruling, saying that their wealth can be taken in such ways

although wealth cannot be given to them via such unlawful means. These statements, in particular the one by ibn Abideen, are quoted by a number of scholars without any comment, implying acceptance of such a conclusion. Therefore, within the space limits of this paper, it is important to briefly touch upon this point.

As noted above, the above is a Hanafi view (but not the view of Abu Yusuf). As al-Muti'yi stated, this view states that if a Muslim enters a non-Islamic state in a peaceful and secure manner, it is permissible for him to take their wealth if it is with their consent and without any deception. This view is traced back to, for example, Abu Hanifah's student Muhammad al-Shaibaani who said, "If a Muslim enters the *daar al-harb* (land of war) in security, there is no harm in him taking their wealth with their goodwill through any means." The Hanafi scholar ibn al-Humaam stated that a Muslim may sell non-Muslims pork or alcohol or gamble with them.

The majority view is that what is not permissible for Muslims in the land of Islam is not permissible for them in the land of disbelief. Al-Shafi'ee, for example, said, "*Daar al-harb* does not drop any obligation from them nor does it drop any prayer, fast or zakat. The legal punishments are still obligatory upon them."

It is beyond the scope of this paper to discuss this issue in detail. In this author's view, the opinion of the vast majority is definitely the stronger opinion. Perhaps the most important thing to note here, again, is that ibn Abideen's and al-Muti'yi's statements are being quoted as if there is agreement on such a principle. However, that is not correct. Again, the vast majority do not accept this concept. What is forbidden for a Muslim in an Islamic state is also forbidden in a non-Islamic state. Summary of These Three Issues

The opinions of the respected scholars concerning three important and relevant issues have now been reviewed. Concerning the first issue, invoking the law of necessity as a justification for insurance, the opinions of the scholars are not completely conclusive. Many of the scholars stated that commercial insurance is not allowed due to the presence of Islamically acceptable alternatives. However, as a whole, such alternatives are not available in the U.S. or the West. One cannot conclude, however, from their argument that without the presence of such an alternative, insurance would be permissible as a type of necessity. This would be argument *o contrario* (مفهوم المخالفة), which is not always a conclusive argument. On the other hand, there are a number of scholars who specifically say that it is allowed to resort to insurance as a type of necessity. Some of them even mentioned the situation in the West in particular. In this author's view, the issue is still somewhat debatable, especially given some of the conditions for invoking the law of necessity. Indeed, as is virtually the case with every invoking of the law of necessity, the specifics of each case and type of insurance has to be studied. Perhaps an important statement to remember is that quoted earlier from the Nadwat al-Ulamaa, "Emergency implies the danger of unbearable loss to one's life, property and dependants" (emphasis added). The author's own views on specific types of insurance in the West will be given below.

As for the question of getting the insurance that is mandated by the state, there seems to be a general agreement among the scholars that such can be resorted to as a case of necessity. This author did not note any scholar who specifically disagreed with this view.

Concerning the issue of applying the laws of Islam in the non-Muslim lands, this author has concluded, without discussing it in detail, that the view of the Hanafis, which is mentioned in passing in many of the works related to insurance, is the weaker opinion. What is forbidden for the Muslim in an Islamic state is also forbidden for him in a non-Muslim state.

Insurance, the Law of Necessity and Living in the West

For the Muslim, the overriding point concerning commercial profit-oriented Western insurance companies is that the basic ruling concerning them is that of prohibition, due to the reasons described earlier. Hence, whenever he does not feel that there is truly a strong need or necessity to take insurance, it should be avoided. Even when a Muslim decides that he is facing a situation where he truly necessitates insurance, he should try to seek the ways by which he will be involved as little as possible with this forbidden institution. This may require some research or effort on his part. However, this will allow him to take the legal allowance of resorting to such a necessity while at the same time meeting the requirements of invoking that important principle of necessity.

Furthermore, as in all cases of necessity, after meeting the theoretical qualifications for invoking the law of necessity, the individual's particular situation and abilities will be the final determinant as to whether he is truly in a state of necessity.

Obviously, there are many forms, types and companies of insurance available today in the West or in the United States. Indeed, one could discuss accident, all-risk, automobile, casualty, credit, employer's liability, fidelity, fire, floater, health, homeowners, key-person, liability, life, medical, malpractice, marine, mortgage and title insurance. In this short paper, this author will restrict himself to three of the basic and prevalent forms of insurance: life insurance, auto insurance and health insurance.

Life Insurance

It is natural for people to want to take care of themselves and their families, even beyond their deaths. Such has been a natural desire for years, long before the presence of modern-day insurance. In fact, there is definite Islamic justification for this goal. For example, al-Bukhari and Muslim record on the authority of Saad ibn Abi Waqqaas that the Prophet (peace and blessings of Allah be upon him) stated,

إِنَّكَ أَنْ تَذَرَ وَرَثَتَكَ أَغْنِيَاءَ خَيْرٌ مِنْ أَنْ تَذَرَهُمْ عَالَةً يَتَكَفَّفُونَ النَّاسَ

“It is better for you to leave your heirs well-off than to have them dependent, begging from the people.”

But as with the case with all noble goals, the means to achieve them must be permissible and proper. It would not be acceptable for someone to put money in a savings account, taking interest, and arguing that he is saving that money for his children’s well-being after his death. Similarly, he cannot go out and steal a few thousand dollars and save it for his children and so forth. One tries to achieve this proper goal through the proper means. Thus, Islam put definite restrictions on behavior even when the goal is praiseworthy.

In particular in this case, there seems to be no room for invoking the law of necessity. Allah has reminded all people that He is in fact the true Sustainer and Provider. He has warned against taking illegal steps thinking that those illegal steps are the keys to preventing poverty. One should ponder the deep meaning of two verses of the Quran, in which Allah refutes the argument of those who sought to avoid children, via forbidden steps, thinking that such will keep themselves or their children from poverty. Allah says,

(وَلَا تَقْتُلُوا أَوْلَادَكُمْ مِنْ إِمْلَاقٍ نَحْنُ نَرْزُقُكُمْ وَإِيَّاهُمْ)

“Kill not your children on a plea of want – We provide sustenance for you and for them” (al-Anaam 151). And, similarly Allah says,

(وَلَا تَقْتُلُوا أَوْلَادَكُمْ خَشْيَةَ إِمْلَاقٍ نَحْنُ نَرْزُقُهُمْ وَإِيَّاكُمْ إِنَّ قَتْلَهُمْ كَانَ حِطًّا كَبِيرًا) “Kill not your children for fear of want: We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin” (Israa 31). The killing of children is a great sin. However, it is also clear that being involved in riba is a great sin. One, therefore, should not resort to riba in fear of “future possible poverty.” It may be that if the Muslims fear Allah, Allah will provide very well for them. Thus, life insurance cannot be considered a legal alternative for the Muslims living in the West. Maulawi also concludes that there is no room for invoking the law of necessity when it comes to life insurance. One point that he mentions is that the goal of life insurance is to accumulate wealth (for oneself or one’s family) and not to remove any harm that has occurred. It is for this reason that some scholars who otherwise approve of insurance consider life insurance in particular to be forbidden.

The Question of Insurance (Part 2)

Auto Insurance

Auto insurance in most (if not all) Western countries is mandated by the state. (Among Muslim scholars, Al-Zarqa and Abdullah Ali-Mahmood argue that automobile insurance must be required even from a Shareeah perspective as it is the way by which people can fulfill their responsibility towards others in the case of accidents, which are an everyday occurrence and whose effects can be very costly.) As was stated above, there does not seem to be any disagreement among commentary scholars that taking such insurance is a type of necessity. Without such insurance one could face heavy fines and even imprisonment. This is what tilts the scale in favor of considering this type of insurance a genuine need or necessity. However, it is important to remember that the principle of necessity requires that one limit one's indulgence in the normally prohibited act. In other words, one must take the minimum auto insurance required by law, which is usually simply liability insurance. One cannot go beyond that and get, for example, full coverage thinking that such is allowed in this case under the rule of necessity. One must restrict oneself to the minimum necessary to avoid the potential harm of not having the state required insurance.

Other types of insurance may also be mandated by the state. This is especially true if one wants to run specific types of businesses, organizations, schools and so forth. These forms of insurance, when there is a true need for them, would probably fall under the same category as auto insurance. However, again, one must be careful to get the minimum required, as is demanded by the law of necessity. Also, one should be cautious about attempting to benefit from such insurance.

Health Insurance

The 2001 session of the Majma al-Fiqh al-Islami of the OIC discussed the question of health insurance. They all seem to agree that health care is a "necessity of life." However, with the exception of one author, they did not discuss in detail the question of resorting to health insurance as a type of necessity or in a manner that is most relevant to the situation in the West or the United States. Some of the authors, such as al-Dhareer, only considered health insurance as a form of governmental or social insurance, which is true for the majority of the countries of the world but not for the United States. The one exception to that tone was the paper by al-Qaadhi Mujaahid al-Islam al-Qaasimi of India, a non-Muslim country,

who, as noted above, argued that health insurance is a necessity for Muslim Americans.

There is no reason here to go into details concerning the health care situation in the United States—being somewhat unique in that there is virtually no universal health care for its citizens. For Muslims and non-Muslims alike, there is a true crisis. Health insurance in the United States is costly and health care is even costlier. Hence, by 2001, 43 million Americans were without any health insurance—mostly because they just could not afford it. Medical bills are the reason for almost 50% of all bankruptcies. (Incidentally, insurance is not always the solution to this “necessity.” Norton’s Bankruptcy Advisor stated, “The bankruptcy courts are populated not only with the uninsured, but also with those whose insurance does not cover all the financial consequences of their medical problems.”) In the face of this type of situation, it is perhaps with least reserve that a Muslim scholar can say that medical insurance is a necessity for Muslims in the United States, as al-Qaasimi clearly stated.

However, once again, saying that such a state is one of necessity does not mean that one simply goes out and gets any type of medical insurance available. The principle of necessity requires that one minimize the normally forbidden act to the best of one’s ability. Hence, many Muslims would be facing different possible scenarios in the United States concerning their need to indulge in health insurance and it is incumbent upon them to determine which is best from an Islamic perspective.

For example, here are some scenarios that Muslims face in the United States with respect to medical insurance:

Scenario A: The Muslim works for a non-Muslim company. In many cases, the employee is offered a number of health care packages. Obviously, if the Muslim is taking health insurance in the name of “necessity,” he should seek the package that is most consistent with the principles of necessity.

In some cases, the employer offers some form of comprehensive medical insurance as a free benefit, with the employee paying the premium. In this scenario, the Muslim does not actually have to pay anything for the insurance—although obviously somebody is paying on his behalf, which is also problematic. At the same time, though, the Muslim does not have to accept any of the benefits of the insurance. When the Muslim sees any doctor and the bill is something that he can reasonably pay himself, he has the right to pay on his own behalf and not resort to his insurance company. Again, if one can actually easily afford paying a medical bill, he has no right to invoke the law of necessity. This is an important point to think about it because the lure of saving a thousand dollars or so on a medical bill can be

quite strong. But if it is not a true necessity, what right does a Muslim truly have to take advantage of it? That is one thing that is strange about invoking the law of necessity with respect to insurance: One is not concerned about what is happening, in general, but what might happen. But if what might happen occurs and it is within one's financial means to handle it, how can the law of necessity then be invoked? However, if a true necessity that is beyond his means should ever arise, then he has that luxury and can invoke the law of necessity to benefit from that insurance plan. The point concerning the law of necessity is that it is only to be resorted to when it is truly a great need or necessity. Only when that necessity exists does the Muslim have the right to benefit from the insurance contract that is in its essence forbidden in Islamic law.

Scenario B: The Muslim works for a non-Muslim company that offers some form of health insurance but the employee has to pay for it. However, due to group discounts, this worker will probably be paying less through his work for the same type of insurance than he would if he were to get the insurance on his own, as an individual. Hence, he will be paying less to the insurance company—a principle alluded to in the rules of necessity—by opting for the company's offer than getting his own insurance, *ceteris paribus*. Here, the main question the Muslim must answer is whether he feels that he truly needs health insurance. No one can truly predict what medical needs he may need in the future—no one expects to break his ankle while walking down stairs, for example. Given the current health care climate in the United States today, where “the market rules,” a Muslim may be better off guaranteeing that he does have some form of insurance. However, the Muslim should keep in mind the principles outlined in Scenario C below.

Scenario C: For self-employed Muslims, Muslims working at jobs with no medical benefits and even Muslims working at jobs that offer a variety of plans, one of the goals is still to minimize one's involvement in the action that is normally considered forbidden. In this author's research, he has found that the best option from a Shareeah perspective is “catastrophic health insurance.” Basically, this is health insurance with a high deductible (such as \$10,000 per year down to \$1,000 per year). The advantages of this type of health insurance is that it is cheaper (hence, the Muslim has to pay less for this service that if it were not for necessity he would avoid) and the Muslim continues to pay for his medical service until they truly become beyond his means and a case of necessity. Again, the Muslim will have to pay more for medical services through such a scheme but the goal of invoking necessity in this case cannot be simply to escape any payment at all. One should be willing to pay for his needs and resort to insurance only when absolutely necessary. If this is not the approach that is taken, then the rules of necessity are not being applied properly.

Scenario D: The last case to be discussed here is a seemingly healthy Muslim who decides to put his reliance and trust in Allah and not get any form of health insurance because he does not feel comfortable about the legality of health insurance. Could this be considered permissible even though if some great medical emergency should occur it would probably be beyond his means? It would be difficult to say that this approach is impermissible. As noted above, many Americans are following this path and surviving—as after the fact there may be some means to handle such emergency situations. Note that one cannot say that this person should be considered similarly to the one who refuses to eat forbidden meat and, consequently, dies. The person who refused to eat that food would be considered sinful. However, that necessity was direct, restraining and covered explicitly by the texts of the Quran. In the case of not getting health insurance, the analysis has to be quite different. And Allah knows best.

Conclusions and Topics for Further Study

This paper has discussed some of the issues related to insurance in non-Muslim lands. Due to space limitations, only one type of insurance was discussed: “commercial, for-profit insurance.” The starting point of the analysis here was to determine into which category of contracts insurance falls. It was concluded that insurance contracts are not “mutual” contracts or contracts of a charitable nature. Instead, they are mutually onerous contracts that must meet the strict criteria of those types of contracts. Hence, the author concluded in agreement with the vast majority of the scholars that “commercial, for-profit insurance” is forbidden in Islamic law. Among other things, such insurance contracts involve both gharar and riba.

The question of whether such gharar and riba could be overlooked due to a great need for such a transaction was then discussed. It was concluded that the “need” could not justify overlooking the negative aspects of insurance from a Shareeah point of view.

Unfortunately, though, in this world in which Islamic law is not dominant, such cannot be the end of a contemporary discussion on insurance. After the above discussions, the only remaining possibility was whether a Muslim could resort to insurance by invoking the law of necessity. As in all cases of necessity, after meeting the theoretical qualifications for invoking the law of necessity, the individual’s particular situation and abilities will be the final determinant as to whether he is truly in a state of necessity. However, three typical cases were discussed. The first was life insurance. This author could not find any Shareeah justification for resorting to any form of commercial life insurance. Auto insurance was then discussed as an example of state required insurance. It was noted that all scholars seem to agree

that taking insurance of this nature is permissible for the Muslim in order to avoid the dire consequences of not having this insurance. Finally, health insurance was discussed—a critical issue for those Muslims living in the United States in particular. The point that was emphasized here is that even if one resorts to such insurance as a type of necessity, one should find the form of insurance that will be considered the most consistent with the guidelines of the Shareeah. In particular, even in cases of necessity, one must resort to the minimum of what is required to meet one's necessities. One is not free to go beyond that minimum. Hence, a Muslim should seek a policy that allows him to pay for his medical needs when he is able to and to resort to said policy only when a true state of necessity arises.

There are a number of issues that fall beyond the scope of this paper. However, it is hoped that the scholars of Islam will take up such topics.

These issues include the following:

(1) There is a small but growing movement in the United States demanding universal health care. One of the issues that the scholars are discussing is the extent and role that Muslims should play in the political process in the West, such as in the United States. In this case, providing health care for all citizens could be considered a *maroof* (مفروف) that Muslims may have the right to work for and which can remove them from part of the state of necessity that they find themselves currently in. Does this mean that Muslims should or must work for such a change that would relieve them from invoking the law of necessity even in a non-Muslim environment? This is a topic that shall be left to those who are specialized in this discussion.

(2) A very important topic of discussion for the major Islamic organizations is the possibility of establishing truly Islamic insurance companies in the United States or in the West as a whole. This discussion could start with a detailed study of the current laws governing insurance companies at the present time. Obviously, this company would require a large financial investment, beyond the ability of individuals on their own.

(3) There should be a detailed discussion of the different types of insurance available in the West to determine which of the options is best in the light of the Shareeah—the lesser of the evils, so to speak. For example, with respect to health insurance, there are traditional health insurance, HMOs, PPOs, and so forth. There should also be a study of the current mutual insurance companies in the West to see if they are closer to the Islamic framework.

(5) There also needs to be an in-depth discussion of insurance when it is secondary to the contract itself. For example, when leasing a vehicle, the lessee will be

required to acquire full coverage insurance for the vehicle. Does that void the entire contract from a Shareeah perspective or could that possibly be considered a case where the contract is sound but the particular condition is considered void? If it is the latter, how does something of that nature work in a non-Islamic environment like the United States?

(6) To what extent may a Muslim employer provide insurance benefits to his employees, be they Muslim or non-Muslim?

هذا والله أعلم