

CHAPTER FOUR

CONTEMPORARY ISSUES ON *AL-ḌAMĀN*

The Relationship between of Insurance and Guarantee

There is a strong relationship between guarantee (or surety, or warrantee) and insurance contracts. The fact is that both guarantee and insurance shared the same commonality of protecting people's property, wealth, assets and goods.

Guaranty and surety for property safety is compulsory especially when is diminished compared to its original form. Insurance preserves the problems or risks or damages that would have been incurred by individual customers (buyers), or companies (sellers) of materials.

Hence, the guarantee letter, credit card and of insurance are similar in their functions in that they are resolving around the same principle of guaranteeing and saving people's property from any risks. Therefore, in this chapter I intend to explain the opinions of contemporary jurists on the above mentioned issues.

Section 1: Guarantee letter

Section 2: Credit Cards and their Relationship with Surety

Section 3: Insurance: the most Important System for Guarantee Today

SECTION ONE:

GUARANTEE LETTER⁵⁹⁴

4.1.1 Definition Of Guarantee Letter⁵⁹⁵

A Guarantee Letter is defined as "an agreement from the bank to pay a certain amount of money to a third party if the customer defaults in honoring his obligations within a certain period of time". It is also defined as "a written agreement according to which the bank agrees to guarantee one of its customers – the one who seeks the issuance of the letter – within the limits of a specific amount in favor of a third party in the context of an obligation incumbent upon the guaranteed customers, and that is to guarantee that the customer will honor his obligations towards that party within a specific period on condition that the bank will pay the guaranteed amount when demanded within the period of validity of the guarantee letter without regard to any objections the customer may raise to that effect".⁵⁹⁶

4.1.2 The Importance Of Guarantee Letter⁵⁹⁷

The importance of the Guarantee Letter lies in the fact that it serves as a source of trust between the dealers in the market whether locally or internationally. It

⁵⁹⁴ Muḥammad Rashād Al-Ḥamlāwī, *Al-Qāmūs Al-Ḥadīth Fī Al-'Ulūm Al-Idāriyyah Wa Al-Muḥāsabiyyah Wa Al-Iqtisādiyyah*, (Cairo: Dār Al-Shurūq), p. 175. Dāirah Al-Ma'ājim, *Qāmūs Al-Iqtisād Wa Al-Tijārah*, (Lebanon: Maktabat Lubnan), p. 152.

⁵⁹⁵ Tala'at As'ad 'Abd Hamīd. *Asāsīyah Idārah al-Bunūk*, Maktabah 'Ayn Shams, Al-Qāhirah, 1987, p. 157.

⁵⁹⁶ 'Alī al-Sālūs. "Khitāb Al-Ḍamān", *Majallat Majma' Al-Fiqh Al-Islāmī*, (Jeddah: 1987 Issue 2), 2, p. 1055.

⁵⁹⁷ 'Alī Al-Jamāl, *'Amaliyyāt Al-Bunūk*, (Cairo: Dār Al-Nahḍah Al-'Arabiyyah), p. 350.

also helps to regulate businesses and prevent disappointments which, in turn, will lead to the availability of money for investment in a number of fields of economic activities in addition to the raw material. This, in turn will ultimately lead to the boom of industries and national economies.⁵⁹⁸

It is worth noting that, at times, some companies demand guarantee letters instead of cash insurance if they intend to conclude a deal to perform some work. In such cases, the letter stands as cash insurance. It performs all its functions. At other times, we find that businessmen occasionally go to the bank to obtain a guarantee letter in order to present it to the income tax office as one of the required documents on which the office will agree on the payment by installment for any amount of tax due on the customers or investor. In this case, the bank serves as guarantor for this customer vis-a-vis the income tax office and will, as a result, pay any amount due on the customer if the latter defaults in paying the bank.⁵⁹⁹

In some other cases, we find that a foreign customer who is preparing to leave the country but is at the same time indebted to the office of income tax, can present a guarantee letter to the said office through which the amount involved can be recovered. This facilitates the administrative procedures and at the same time secures the rights of the public treasury.

Some people have the view that guarantee letters contribute in achieving

⁵⁹⁸ Muḥammad Bāqir Al-Ṣadr, *Al-Bank allāribāwī*, (Kuwait: Al-Maṭba'ah Al-Miṣriyyah), p. 128.

⁵⁹⁹ 'Alī Al-Bārūdī. *Al-Uqūd wa 'Amaliyat al-Bunūk al-Tijārīyah* (Alexandaria: Munsha'at al-Ma'ārif, n.d.), 394.

harmony between individuals within a given society when they are used based on mutual consent.⁶⁰⁰

4.1.3 Permissibility Of Imposing A Price For A Guarantee Letter

4.1.3.1 Views Of The Jurists

Three views have been recorded with regard to this point. They are as follows:

1. **Permissibility:** the bank may receive a certain amount of money in return for issuing a guarantee letter. The return, however, they assert, should be according to the customs of that particular state and the procedures and services rendered for that, if evaluated by a religious expert.⁶⁰¹
2. **Impermissibility:** This applies when the customer delegates the bank to transact in his favor with the guaranteed side. Receiving something in this case becomes permissible whether that something is given out of bounty or in return for a benefit gained from the guaranteed individual. The price in any case should be evaluated by the experts according to custom so as to avoid usury.⁶⁰²

⁶⁰⁰ 'Alī Al-Bārūdī. *Al-Uqūd wa 'Amaliyat al-Bunūk al-Tijārīyah*, 394.

⁶⁰¹ Wahbah al-Zuhaylī. *Khiṭabat al-Ḍamān* (Bayrūt: Dār Al-Fikr), p. 14.

⁶⁰² Bayt Tamwīl al-Kuwaitī. *al-Fatāwā al-Shar'īyyah fī al-Masā'il al-Iqtisādiyyah*, I, 131.

3. **The third group** holds the view that it is unlawful to issue a guarantee letter in return for any fee gained by the bank⁶⁰³ except in transactions of security. This is because in the former, the bank seeks information for the customer who intends to obtain the letter and as such the bank deserves to get something in return.

The Legal Control Agent has already defined and enumerated the types of commission that the Faisal Islamic Bank can get when it issues a guarantee letter. They are as follows:

Fees that the bank receives in return for the information it provides through the facilities in the bank as well as the processing of the letter itself. After issuing the guarantee letter, the bank bases on the request of its customer- performs some activities that formalize it and some other work attached to it like recovering a certain amount due to this activity.⁶⁰⁴

From the foregoing pages, it is clear that all that the bank can get after issuing guarantee letters under all circumstances is something in return for its activities and some expenditure made by it, and not for the mere fact of guarantee. It should be noted that there is a difference between guarantee letters whose financial cover must be completely provided by the customers and guarantee letters which need no such financial cover.⁶⁰⁵

⁶⁰³ *Bank Fayṣal al-Islāmī al-Miṣrī*. The 12th Session of Legal Control Agent convened on 6/8/1978.

⁶⁰⁴ *Bank Fayṣal al-Islāmī*. Session: (33) of the above mentioned agent on 13-14 August 1980.

⁶⁰⁵ Aḥmad 'Alī 'Abdullah, "Jawāz Akhdh Al-Ajr Aw Al-'Umūlah Fī Muqābil Kheṭāb Al-Ḍamān, *Majallat Majma' Al-Fiqh Al-Islāmī*, (1986, Issue 2), 2, p. 1131.

In this case the relationship between the one who seeks the letter and the bank is the relationship of proxy and as such the bank can receive a commission in return for this proxy, which becomes a fee, or without a fee with the retaining of the relationship of security in favor of any beneficiary or in favor of the guaranteed person. This is what the Fiqh Academy in Jeddah stresses. If the guarantee letters are without cover, however, the case represents a situation where the obligations of the guarantor are matched with the obligations of another person in what obligates them either instantly or in the future. And this is the true nature of what Islam means by *ḍamān* (guarantee) or *kafālah* (security). This means that the contract between that individual who requests a guarantee letter and the bank is the contract of security and the bank is thus not allowed to receive a commission or anything in return for this surety. The reason is that a contract of bail is one of those voluntary contracts for which no fee should be imposed.⁶⁰⁶

4.1.4 Legal Effects Of The Contract Of Guarantee Letter

4.1.4.1 Guarantee Of *Al-'Uhdah* (Promise)

It is a type of guarantee in a contract of sale in which one of the contracting parties asks the other to present a guarantee that his obligation will be completely honored. The beneficiary in such a guarantee can either be the seller or the buyer, the former for the price and the latter for the commodity sold.⁶⁰⁷

Imām Abū Ḥanīfah stated that this type of guarantee implies both credit

⁶⁰⁶ 'Alī Al-Jamāl, *'Amaliyyāt Al-Bunūk*, (Cairo: Dār Al-Nahdah Al-'Arabiyyah), p. 359.

⁶⁰⁷ Wahbah al-Zuhaylī. *Khiṭābat al-Ḍamān*, p. 17.

recorded in the origin and declared credit, because it is not secured in the origin and as such the guarantee of *al- 'uhdah* rotates between being a guarantee and not a guarantee and as a result of doubt about the existence of probability, as in the case of being guaranteed, the guarantee of promise is regarded invalid. But the two disciples (*ṣaḥābayn*) have held its validity and the soundness of the security because that, as they say, is in line with the unrestricted objectives of the Sharī'ah.⁶⁰⁸

However, the Majallah has stated in Article 631 the following: It is necessary that in security by property the secured thing be recorded in the origin which makes the guaranteeing of the price of the commodity sold valid. Similarly, guaranteeing of a seized property will also be valid as stressed in Article 632 of the Majallah. It is realized accordingly that a contract of security is legally concluded through any expression that indicates a form of promise according to custom.⁶⁰⁹

4.1.4.2 Guarantee Of All Financial Rights

This means to guarantee all the financial rights undertaken by persons. In his book *Bidāyah al-Mujtahid*, Ibn Rushd elaborates by saying that the guaranteeing of property is valid as long as it is on property rights established in conscience i.e., under responsibility except in something whose postponement and whose payment by installments is valid. For example, the maintenance of a wife, which is incumbent

⁶⁰⁸ Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 2, p. 9.

⁶⁰⁹ *Majallah Al-Aḥkām al-Adliyyah*. Article 631, article 632, Sharḥ Salīm Rasm Baz.

upon the husband and the like.⁶¹⁰

But Ibn Qudāmah maintains the legitimacy of credit in every obligatory property rights or that which will turn into obligation like the price of a sale during the period of option and a dower before or after consummation. In all these cases the rights stand and the possibility of their withdrawal does not prevent the possibility of guaranteeing them.⁶¹¹

What is mentioned above means that guaranteeing all property rights allows the accommodation of all contemporary forms of dealings whether economic, commercial or civil as long as it is a property right.⁶¹²

4.1.4.3 Guaranteeing Nothing To Which Some Right Is Due

In guarantee letters, people undertake to pay a financial right and as such credit becomes workable to all that to which a right is attached whether during life or death, richness or straits. And recovering those rights cannot be valid if the one who issued them annuls the credit. The credit here involves all those who are under obligation in favor of all people. That is to establish confidence between dealers and to realize a stable economy and commerce.⁶¹³

⁶¹⁰ Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, 298.

⁶¹¹ Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 4, 593, 594.

⁶¹² 'Alī Al-Sālūs, "Kheṭāb Al-Ḍamān", *Majallat Majma' Al-Fiqh Al-Islāmī*, (1986, Issue 2), 2, p. 1084.

⁶¹³ Wahbah al-Zuhaylī. *Khiṭabat al-Ḍamān*, p. 25.

It is reported that the Prophet once attended a funeral and people said to him: "O' messenger of Allāh pray on him". "Has he left anything behind", the Prophet asked?" They said: no. "Is he indebted to anybody?", the Prophet asked. "Three *dinārs*" they replied. Then the Prophet said "pray on your companion". Abu Qatādah then repeated to the Prophet: "Pray on him and his debt is paid". The Prophet then prayed on him.⁶¹⁴

This *ḥadīth* means that it is lawful to guarantee a dead person and the guarantor is obligated to pay what he promised whether the dead person was rich or poor and in either case the guarantor will pay from his own pocket. Imām Mālik, however, allows the guarantee to be paid from the property left behind by a rich dead person.⁶¹⁵

4.1.4.4 Credit With Cover

A credit is covered if the one who seeks it has a current account or investment deposit etc. in the bank. In this case he will ask the bank to issue a guarantee letter in order to be able to import some goods or the like. The cover might either be full or partial and this is a form of proxy, which has the meaning of security, because the one who is guaranteed has already paid back his credit.⁶¹⁶

⁶¹⁴ Reported by *al-Bukhārī* in his collection. 3, the Chapter of Security (Kafālah), 126.

⁶¹⁵ *Hāshiyah al-Dusūqī 'Alā Al-Sharḥ al-Kabīr*. (Cairo: Maṭba'ah Muṣṭafā Al-Bābī Al-Ḥalabī), 3, pp. 336-338.

⁶¹⁶ Ḥasan 'Abdullah Al-Amīn, "Dirāsah Ḥawla Kheṭābāt Al-Ḍamān", *Majallat Majma' Al-Fiqh Al-Islāmī*, (1986, Issue 2), 2, p. 1047.

4.1.4.5 Credit Without Cover

A credit without cover is given when the client does not have any amount in the bank to cover the value of the guarantee letter. This type is a form of security.⁶¹⁷

A guarantee letter produces three relationships: the relationship between the customer, who requests the issuing of the letter and the beneficiary; the relationship between the latter and the bank; and the relationship between the customer and the bank. The relationship between the one who requests the letter and the beneficiary is regulated by the agreement between them on the basis of which the letter is issued, but the relationship between the beneficiary and the bank is regulated by the bank's consent to obligate itself without attaching that consent to any condition within the limits of the objectives for which the letter is issued. But the relationship between the one who requests the issuance of the letter and the bank is regulated by the agreement to the effect of which the letter is issued.⁶¹⁸

As far as the Sharī'ah is concerned, the guarantee letter without cover, with regard to the person guaranteed, is not a security or bail. For, security or bail is a joint responsibility between two consciences (obligations) and as such it is a debt according to the majority of jurists or a demand of payment according to the Aḥnāf.⁶¹⁹

⁶¹⁷ Ibid.

⁶¹⁸ Sami Ham'ud, *al-Kafālah wa Khīṭāb al-Ḍamān al-Maṣrafi*, (Cairo: Dār Al-Nahdah Al-'Arabiyyah), 2.

⁶¹⁹ Ibid, p. 17.

This means that the debtor and the guarantor are both responsible for the return of the debt and this is not the case in the guarantee letter; the bank is solely responsible for paying back the debt. The creditor has no right to go back to the customer who requests the issuance of the guarantee letter, but in the event of default, he goes back to the bank to recover the value of the debt.⁶²⁰

The letter of covered credit is a form of debt bailing. This is so according to the majority of the jurists, but for the Aḥnāf it is a form of joint responsibility in demand and not a security in the strict sense of the word; it is only that there are some aspects of security with regard to the bank's pledge to pay a certain amount to the beneficiary and later return to the customer who requests the letter to recover the amount.

What is closer to jurisprudence is that a guarantee letter is a surety by performance or proxy by performance with some aspects of security. According to the Sharī'ah, therefore, this letter is a form of proxy, which permits the bank to receive a commission in return for what it promises to guarantee. This is because receiving fees is lawful for brokers, as in the case of lawyers with their clients, and as such it takes the value of *ijārah* (hiring). But in a pure bail contract fees cannot be allowed with the exception of the view of the Shī'ah Imāmites.⁶²¹

⁶²⁰ 'Abd Al-Sattār Abū Ghuddah, "Kheṭāb Al-Ḍamān", *Majallat Majma' Al-Fiqh Al-Islāmī*, (Jeddah: Issue 2), 2, pp. 1106-1108.

⁶²¹ *Ibid*, 2, p. 1108.

4.1.5 Basis Of The Shī'i Adaptation Of Guarantee Letters And The Like

Guarantee letters with a cover are regarded as agency with a fee to which the right of a third party is attached and that party is the beneficiary, with an aspect of security. The bank is permitted to receive a fee in return for issuing this letter even if the fee is 1%. This is so because custom allows us to divide the fee of a particular performance like that of the lawyers and brokers. The Ḥanbalīs hold that the fee of a worker is decided according to percentage after knowing the capital.⁶²²

The Imāms of the four schools of thought have agreed to the effect⁶²³ that agency with fee is lawful because the Prophet used to send his workers to collect charities and *zakāh* and they used to receive fees in return.

The guarantee letter with cover is not a form of security even if there is an aspect of security subordinated to another relationship and thus takes its ruling. The guarantor in this case can declare the guarantee null once it is established that the one guaranteed is not indebted. But in the case of a guarantee letter, the bank cannot discuss the relationship between the beneficiary and the customer. Any demand of payment in security can only be made when the debt is due. But in the guarantee letter, the beneficiary can request the bank to pay even on the next day after the letter is issued up to the day the right to demand it is terminated. The guarantee letter by a bank is a mere delegation by a customer to the bank to pay a certain amount of

⁶²² Wahbah al-Zuhaylī. *Khīṭābat al-Ḍamān*, p. 18.

⁶²³ Ibn al-Jizri al-Kalbi. *al-Qawānīn al-Fiqhiyyah*, 329; Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 5, 85, 86.

money when required whether there is a debt the payment of which is due or not. But security is to join two responsibilities concerning the guaranteeing of an instant or postponed debt.⁶²⁴

Issuance of a guarantee letter with cover is not a form of loan or debt, which draws benefit; instead it is a legitimate activity in return for a fee. The amount paid by the bank becomes a debt burdened by the customer for whom it is issued. This type of debt carries no interest in any sense.⁶²⁵

Similarly, a guarantee letter with cover is not a form of security or bail because in a contract of bail, a fee cannot be received in return. Even if it is depicted as security, such differences cannot permit the receipt of a fee in the case of a guarantee letter with cover, and the unlawfulness of a fee in credit without cover applies in both cases within the domain of a proxy with fee, i.e., the authorization of the bank to pay a certain amount of money and to receive a fee in return for the services rendered.

As a result, guarantee letters are lawful because they are regarded as guaranteeing a future thing i.e., guaranteeing a right which is not yet due even if the guaranteed party is unaware of that. This is the view of the majority of the jurists.⁶²⁶

⁶²⁴ Sāmī Hamūda. *Khiṭābāt al-Ḍamān* (Bayrūt: Dār Al-Fikr), 6.

⁶²⁵ See ‘Abdul Hamīd Mahmūd al-Balī. *Assasiyah al-‘Amal al-Maṣrafi al-Islāmī*, (Cairo: Maktabah al-Wahbah, 1990), 103, 104.

⁶²⁶ Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, 2, p. 294.

With the exception of the Shāfi'is in their new school, the Ḥanafīs⁶²⁷ have also held the permissibility of a security attached to a condition if the condition is in conformity with the necessity of the contract. For example, when the condition is a cause for the existence of the right. Such as when the guarantor says: If he deserves the commodity sold, I will be a guarantor, or a condition that makes makes its performance easy. Like when he says: If so and so comes – who is the guaranteed – I will be a guarantor.

The Ḥanbalīs⁶²⁸ see the legitimacy of a surety, which means: taking the responsibility of another who is still held responsible. The Ḥanafīs and the Ḥanbalīs holds the lawfulness of a hung proxy like: If Mr. X comes; you will be my agent in selling this book. Or in the future, like he says: I have delegated you as my agent in selling this book tomorrow. In such a case, he only becomes agent when the time comes.⁶²⁹

The general rule of considering guarantee letters as a form of proxy with a fee, with an aspect of debt bailing has an exception in guarantee letters of bills of lading either for those who send them or their agents, and in case the documents that represent the goods sent are late, the letter serves as a source of obligation to deliver the goods.⁶³⁰

⁶²⁷ Al-Kamāl Ibn al-Humām, *Fatḥ al-Qadīr*, 5, 404.

⁶²⁸ Ibn al-Rajab al-Hanbalī, *Sharḥ Muntahā al-Irādāt* (Al-Qāhirah: 'Ilm Al-Kutub), 2, p. 110.

⁶²⁹ Al-Kāsānī, *Badā'ī' Al-Ṣanā'ī' fī Tarfīb al-Sharā'ī'*, 6, p. 200; Abū Muhammad Al-Baghdādī, *Majma' al-Damānāt*, 274.

⁶³⁰ Muḥammad 'Alī Al-Taskhīrī, "Kheṭāb Al-Ḍamān", *Majallat Majma' Al-Fiqh Al-Islāmī*, (1986, Issue 2), 2, p. 1112.

4.1.5.1 *Hukm* (The Value) Of Guarantee Letters And The Type Of Agreement With The Banks

From the above explanation, one can realize that guarantee letters are lawful in the Shari'ah and the controversy is about their categorization: are they under the concept of security or surety, direct performance or by proxy?

We have attempted to show the preferred view, which states that in the case of credit with cover it falls under the concept of proxy with a fee. It is however, in return for services and not for the mere fact of bailing.⁶³¹

4.1.5.2 Is The Guarantee Letter A Contract?

A guarantee letter in its preliminary stages is a mere informal promise that does not bind that individual who enters an auction with the government or any other party. In this case, the person is still free to proceed formally or not when the activity ends with him, and not to pay the amount he informally pledges to pay. He is not bound by any contract vis-a-vis the party with whom he auctions. The same thing can be said of a bank.⁶³²

However, a fully-furnished guarantee letter is regarded as a complete contract between the beneficiary and the seeker of its issuance in that, it contains an

⁶³¹ 'Abd Al-Sattār Abū Ghuddah, "Kheṭāb Al-Ḍamān", *Majallat Majma' Al-Fiqh Al-Islāmī*, (Jeddah: Issue 2), 2, p. 1106.

⁶³² 'Abd Al-Sattār Abū Ghuddah, "Kheṭāb Al-Ḍamān", *Majallat Majma' Al-Fiqh Al-Islāmī*, (Jeddah: Issue 2), 2, p. 1108.

obligation to pay an amount of money once the contractor fails to honor his obligations. This obligation is lawful because it is the result of a sound contract. The condition contained in this contract is a form of a penalizing condition permitted by the *jumhūr* (majority of jurists). Al-Qāḍī Shariḥ said: He who voluntarily places a condition on himself is bound by it.⁶³³

⁶³³ See Wahbah al-Zuhaylī. *Khiṭābat al-Ḍamān*, 30.

SECTION TWO:

CREDIT CARDS AND THEIR RELATIONSHIP WITH SURETY

Definition of Credit Card:

A document presented by a party to a natural or particular person based on a contract between them which permits him to buy commodities and services from whoever accepts the document without paying their price on the spot due to the responsibility taken by the party that issues it to pay the price and the possibility of withdrawing money from the banks.⁶³⁴

The idea of credit cards on loan or payment by installment is based on non-payment prior to the party which issues it, but the deserved payment or the payment due on the holder of the card is not made monthly but by periodical installments affordable to him according to his income and the rest is considered a loan on which interest is resettled on his account within specified limits. It is therefore a tool of fulfillment and trust. This is because it establishes debt renewal at the responsibility of the holder of the card within the limits of the value of his monthly expenditure. Because what he pays by periodical installment usually covers the accumulated interest on him with the taking into consideration that there is a limit on the amount and time beyond which the value of this debt cannot go. Such a limit is something that both the bank and the holder of the card decide.⁶³⁵

⁶³⁴ Discussion and suggestions issued by the Fiqh Academy for the Islamic Conference in its seventh session in Jeddah. Decision No. 65, clause 1/7.

⁶³⁵ Muḥammad 'Abdul Ḥalīm Omar, *Al-Iḥar al-Sharī wa al-Muhāsibī Li Bitāqāt al-Itiman*, *Majallat al-Tijārah*, 'Ayn Shams 1992, p. 27.

It is according to this agreement that the bank gives the holder the right that allows him to settle the cards utilization fund on short and long terms in return for the payment of the interest from the debtor's fund. This type of card is the most commonly used in the world.⁶³⁶

4.2.1 Types Of Cards According To The Guarantee Presented By Their Holders

The card is a means of trust. Even for the first type whose holder pays a prior amount to the bank to settle certain dues on him, there is a possibility that this account turns into one without cover, since any process of trust must be based on a guarantee so that the bank will be sure that the customer will use it rightly. There are, therefore, criteria for the investigation of the true status of the customer before agreeing on issuing the card to him.⁶³⁷

4.2.1.1 Cards Issued Based On A Personal Guarantee: (Without A Guarantee By Presenting An Asset)

This type is used by the big customers of the bank. Customers who are very well known to the bank and who have very high incomes (like petroleum companies and university professors).

⁶³⁶ Nawāf 'Abdullah Aḥmad Bātūbārah, "Al-Takyīf Al-Shar'ī Li-Biṭāqat Al-I'timān", *Majallat Al-Buḥūth Al-Fiqhiyyah Al-Mu'aṣirah*, (1418, Year 10, Issue 37), p. 142.

⁶³⁷ Ibid.

4.2.1.2 Cards Issued Based On A Partial Guarantee By Assets

This occurs when the bank requires that the person who is applying for the card presents a guarantee in the form of current account the value of which is less than the value of the card. Long standing customers of the bank and others normally use this type.

4.2.1.3 Cards Issued Based On A Full Guarantee By Asset

This is an agreement according to which the bank will issue the card in return for having the right to keep a part of the account of the holder of the card in the bank. This part is higher in value than the value of the card. This is issued in favor of new customers of the bank.⁶³⁸

4.2.2 The Shar‘ī (Legal) Foundation Of Credit Cards

We mean by legal foundation is the nature of the relationship between the parties in this contract and the legal effects that this relationship yields in order to be able to place it into a suitable category from among the categories of the known contracts or to declare it unique.

It is in this sense that the legal adaptation differs from the legal value (*ḥukm*) which investigates the legitimacy of the deal, its pillars and conditions. It should be

⁶³⁸ Muḥammad 'Abdul Ḥalīm Omar, *Al-Ifṭār Al-Shar‘ī Wa Al-Muḥāsabī Li-Biḡāqat Al-I'timām*, (Beirut: Al-Muassasah Al-'Arabiyyah Li Al-Ṭibā'ah) pp. 29, 30.

not the case that legal adaptation is required in newly invented dealings.

Within this context, if we look at credit cards as explained in the previous chapter, we find that they are a form of agreement in which the bank, which issues them pledges in favor of persons or banks to settle the dues owed to them by the carrier of the card and then the bank will later return to the holder of the card to recover the amount paid. The Shar'ī adaptation of this type of credit is done in accordance with the method in which the cost of the things sold is recovered by the holder of the card. And at this juncture, we raise this question: Is this method of debt recovery similar to methods applied in the Shar'īah?⁶³⁹

4.2.3 Opinions Of Contemporary Jurists On The Issue Of Credit Card In Shar'īah

1. Dr. 'Abdul Satar is of the opinion that the principle of credit card entails the meaning of *wakala* (agency).⁶⁴⁰
2. Dr. Wahbah Zuhaili also contends that the principle of credit card is *hawala* (bill of exchange or check) or *wakala* (agency). However, he refutes the meaning of credit card as *kafala* (guaranty or surety).⁶⁴¹
3. Dr. Nazih Hammad is of the opinion that credit card is the same as *kafala* (guaranty or surety). To him, the company that operates through credit

⁶³⁹ *Majallat Majma' Al-Fiqh Al-Islāmī*, (Jeddah: 1992, Issue 7), 1, p. 717.

⁶⁴⁰ 'Abdul Wahhāb Abū Sulaymān, *Credit Card*, (Damascus: Dār Al-'Ilm), pp. 215-221.

⁶⁴¹ *Majallah Majma' Al-Fiqh Al-Islāmī*, (Jeddah: 1992), No. 1, 7, pp. 607-709.

card is *kafil* (guarantor) since it acquires its gains from the buyers.⁶⁴²

4. Dr. Muṣṭafā Zarqa contends and argues that credit card entails both *kafala* (guaranty) and *wakala* (agency).⁶⁴³

The researcher prefers the opinion that says credit card is guaranty and surety for its strong evidence.

4.2.4 Evidence That The Credit Card System Is A Form Of Security Or Surety

Chief among this evidence is the following:

All cards are attached to the responsibility of the party who issues them for the businessmen, the holder of the card who becomes a debtor. This is what legal interpretation asserts to have been a form of security or surety in the terms of the Jurists. Because surety is defined literally as obligation and technically as an: undertaking to burden someone else's responsibility.⁶⁴⁴

Similarly, the contract of bail is a tripartite contract. The card yields three reciprocal obligations: the party who issues a guarantee obligates itself in favor of a businessman, for example, as the guaranteed, and the holder of the card, who is the debtor whose responsibility is guaranteed. The bank, which issues the card is, in fact,

⁶⁴² Ibid, pp. 668-669.

⁶⁴³ Ibid, p. 664.

⁶⁴⁴ Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, 198.

having a contract with both the businessman and the holder of the card, but all that revolves around the contract of security.

The Second Piece Of Evidence

This legal categorization covers the stage of the processing of the card and the agreements with the merchant, which represents the stage of the contract's conclusion. It is not a condition in Jurisprudence that the contract is furnished at the same time or prior to the guaranteed debt. Since the issuance of the card and the agreements with the merchants are completed even before the debt comes into effect. And this is lawful according to the jurists, without having disagreed over the question of guaranteeing what is not obligatory. The jurists' conceptualization of one of the aspects of this question fits completely the concept of this Card.

The Ḥanafīs contend that if a man says to another man trade with Mr. A and so will be the guarantor for that which is indeed, then that is sound.⁶⁴⁵

According to the Mālikīs when a person says that to another and promises to guarantee the price of what is traded, he will be bound by his promise.⁶⁴⁶

But according to the Shāfi'īs, some of them stipulate that the thing guaranteed must be an already established right during the contract. And guaranteeing what is

⁶⁴⁵ Al-Sarakhsī, *al-Mabṣūṭ*, 2, 55.

⁶⁴⁶ Al-Khatab. *Mawāhib al-Jalīl*, 5, 99.

obligatory like a price of a sale was regarded in the past as sound due to people's need for this type of undertaking.⁶⁴⁷

As for the Ḥanbalīs, its legitimacy comes in a general form. If a person says: "Whoever guarantees right after it has been established", or he says that "I make it incumbent upon me", will be bound by what he actually gave. And in explaining this statement, the explainer asserts and al-Karkhī's question indicates the ruling that guaranteeing an unknown is sound and thus the guaranteeing what is not yet obligatory is legitimate.⁶⁴⁸

The Third Piece Of Evidence

What the bank stipulates on the holder of the card in opening a current account from which it pays the due owed by the holder of the card, although we said above that such a process could be categorized as a form of proxy, that will not contradict the fact that the process remains a form of security. Because it is said that if he guarantees with his money on condition that he will give him from the deposit of the one guaranteed, then that will be sound if the one guaranteed gives that permission.⁶⁴⁹

And this legal form makes the card closer to security and bail than to proxy.

⁶⁴⁷ Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muḥtāj*, 2, 201.

⁶⁴⁸ Ibn Qudāmah al-Maqdisī, *Al-Mughnī wa al-Sharḥ al-Kabīr*, 5, 92.

⁶⁴⁹ Al-Kamāl Ibn al-Humām, *Fath al-Qadīr*, 7, 188.

Fourth Piece Of Evidence

The stipulation of the bank upon the holder of the card to put a deposit at the former's disposal finds sanction in a similar juristic model as it is said if the guarantor-the party who issues the Card-takes a mortgage in this property, then that will be sound as in the case of a mortgage for a postponed debt.⁶⁵⁰ As such, this case also applies to dealing in credit cards.

These four pieces of evidence explain that security is in complete conformity with credit cards when being processed, but when it is used, there is other evidence that proves it.

The Fifth Piece Of Evidence

The guarantor will not guarantee the sum credited until and unless the money has been paid it in his favor.⁶⁵¹ The party which issues the card will not return to the holder until and unless the documents are received from the trader, whether in cash or through his current account kept in the bank.

The Sixth Piece Of Evidence

The agreement to put a limit on the purchasing power of the holder of the

⁶⁵⁰ Al-Kamāl Ibn al-Humām, *Fatḥ al-Qadīr*, 7, 308.

⁶⁵¹ Ibid., 191.

card is something that the party which issues the card is committed to follow and therefore, will not be held responsible for any expenditure beyond that limit. This also finds support in jurisprudence.⁶⁵²

The Seventh Piece Of Evidence

One of the conditions stipulated for the issuing of the card is that the party, which issues it will have the right to withdraw its validity and to declare this fact to all those concerned. The party will cease to be responsible for any purchase made after that. This is what Islamic law decides regarding this question.

With regard to that, it is said that if one says to another party "deal with so and so to the amount of one hundred, and I will be a guarantor within that hundred or within an absolute amount". He will have the right to withdraw his promise before or after the deal starts and in the latter case, he will only be responsible for what has already been conducted.⁶⁵³

The Eighth Piece Of Evidence

The agreement between the party which issues the card and the trader is to the effect that the former will not pay any amount which is not supported by documents signed by the holder of the card. Once a part of or the whole of the goods

⁶⁵² Al-Khatīb Al-Sharbīnī, *Al-Mughnī al-Muhtāj*, 203.

⁶⁵³ Al-khirshi. *Hāshiyah al-Khirshi*, (Cairo: Al-Maṭba'ah Al-Amrīyyah, 1317H), 6, 25.

is withdrawn after the issuer of the card has paid its value, the issuer will recover it through the former's account. The holder of the Card has the right to object to what exceeds his balance etc. and all these transactions are juridically related to the necessity of establishing the guaranteed loan and the collapse of the security.

What happens when a part or the whole of the sale is returned? This question has been discussed by the jurists in a number of juristic models. Chief among them are those who follow the example in which one says to the other "take a loan from so and so and I will guarantee you". In this case, he will be bound within the limits of the actual loan as proved by testimony or confession.⁶⁵⁴ And if one person guarantees another with money to pay the price of a thing the latter buys and then it appears that the thing bought originally belonged to the buyer, he becomes cleared of obligations and so has become his guarantor, and this is also true if he returns the thing bought because of a fault in it.⁶⁵⁵

4.2.5 Opinions Of The Jurists On The Question Of Al-Rusūm (The Fees)

There are a number of opinions on this issue. We mention among them the following:⁶⁵⁶

First Opinion: The permissibility in the Sharī'ah of taking fees in return for

⁶⁵⁴ Ibn 'Arafah, *Ḥāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, p. 333.

⁶⁵⁵ Al-Sarakhsī, *al-Mabṣūṭ*, 2, p. 96.

⁶⁵⁶ *Majallah Majma' Fiqh al-Islāmī*, (Darr al-Sbi), No. 7., 1, 47, 476, 651 and 708.

services rendered in transferring the account from one bank to another bank in which the facilities of the banks are used. Due to the difference in legal adaptation from one country to another, whether the fee is independent cash or a percentage, this represents a fee in return for transferring the loan.

Second Opinion: This opinion also supports its permissibility but on the condition that the fee be an independent amount and not a percentage of the value of the withdrawn amount.⁶⁵⁷

Third Opinion: This supports the non-permissibility of fees because the process of withdrawing the loan and an increase on the loan is considered *ribā* (usury) and the practical application from the Islamic banks has an impact on these opinions. There are some that take fees from the holder of the card based on a percentage. And there are some that declare in the agreement that all withdrawals are done without considering the fee.⁶⁵⁸

However, the legal *ḥukm* (ruling) over the interest borne by the holder of the card in return for cash withdrawal is a form of *ribā* (usury) which is prohibited in the Sharī'ah. And since this matter is not a kind of withdrawal based on the cards as the international organization on credit cards decide, as they leave the bank free either to impose the amount of the interest or not to do so. This means that the conditions of interest are not available in Islamic banks.⁶⁵⁹ It is therefore possible to cancel this

⁶⁵⁷ Ibid, p. 47.

⁶⁵⁸ Ibid, p. 445.

⁶⁵⁹ Yūnus Al-Maṣrī, *Biṭāqat Al-ʾīmān*, (Beirut: Dār Al-Qalam), p. 410.

condition on the card to make its use lawful. The interests of the third type, which originally considers monthly dues as a loan settled by the holder of the card by installment and at the same time bearing the interest of such a loan is usury and as such the use of the card becomes unlawful. Because of the fact that this type is the most commonly used one in the world because of the trust and confidence it provides for the holder of the card, it is possible to try to find a new formula to provide such confidence and at the same time one which is free from *ribā*. We have already proposed this in a previous paper. In addition to that the following models can be added in its application:⁶⁶⁰

The units of the sale can be cleared in the name of the bank, which issues the card and the holder is considered an agent for the bank and the goods remain a trust in his hand. When they receive those units it will pay its value to the traders.

At the end of every month the holder of the card will come to the bank to clear with the bank the contract of *murābahah* (profit sharing) at a new price. The price the bank pays and its profit, can be increased according to the period of debt settlement by the customer. The bank will recover the amount on periodical installments from the holder of the card, if he agrees to this proposal.⁶⁶¹ Then the Islamic bank can deal in three types of cards. But if it does not agree, our view is that the dealing be confined to the two previous types to avoid usury. The additional

⁶⁶⁰ Muḥammad 'Abdul Ḥalīm Omar, *Al-Iṭār al-Sharī wa al-Muhāsibī Li Bitāqāt al-Itiman*, *Majallat al-Tijārah*, 'Ayn Shams 1992, p. 110.

⁶⁶¹ (This proposal can be supported for two things mentioned in the agreement of the card i.e., that it is impermissible for the trader when returning to the holder).

characteristics that the issuer provides for the holder is as mentioned before, regarding the agreement of issuing the card outside the terms of the contract-that the party which issues the card will provide to the holder of the golden card legal assistance and consultation through the associations of international SOS For one complete hour all over the world, priority of booking at some hotels and airlines, sending letters on their behalf to different destinations during emergency times, providing general information by free telephone lines all over the world, and finally insuring against the risks of travelling if the card is used in air ticket booking and in insurance office in general for the holder and his family.⁶⁶²

⁶⁶² Ibid, p. 117.

SECTION THREE:

INSURANCE: THE MOST IMPORTANT CONTEMPORARY SYSTEM FOR GUARANTEE

4.3.1 Definition Of *Ta'mīn* (Insurance)

Insurance is defined as "a method of various ways and means to protect mankind against different risks in his life or economic activities." Some define it as "organized cooperation between a large number of people who are subjected to some risks".⁶⁶³

4.3.2 The Origins Of The Idea Of Insurance

There is no doubt that insurance is nothing but organized cooperation between a large number of people to repel major risks by making minor sacrifices.⁶⁶⁴ Insurance is understood by the specialists in law as a system of cooperation and mutual understanding.⁶⁶⁵

Based on this, this idea is acceptable in Islam because it is in line with the objectives of the Shari'ah which stress cooperation between people in doing good. Insurance is, therefore, a form of social cooperation, mutual support and selfless

⁶⁶³ The Conference on Islamic Economics held in the King 'Abdul Aziz University Jeddah 1986, 373.

⁶⁶⁴ Al-Sanhūri. *Al-Wasā'iṭ fī Sharḥ Al-Qānūn Al-Madani*, 7, 1401.

⁶⁶⁵ Muṣṭafā al-Zarqā, *A'qd al-ta'mīn wa mawqif al-Shari'ah al-Islāmīyah minhu* (Damascus: Fiqh week and symposium of Ibn Taymiyyah, 1380 A.H), 385.

purported gain. A number of obligations are prescribed in the Sharī'ah to bring about these noble objectives. Beginning from the obligation of *zakāh* and its beneficiaries, the system of maintenance assigned for the benefit of one's relatives and additional charities paid to the needy, all are prescribed to effect social cooperation.⁶⁶⁶

4.3.3 The Summary

Insurance as a system comprises two aspects: the theoretical aspect which is its basis, and the practical aspect represented by the contracts which the law regulates and which are applied in both the Western as well as the Islamic world.

The First Aspect and its Technical Basis:

- a. A tradition of cooperation between the members of society. This is because man cannot face the challenges and risks of life alone. Distributing them to a number of people, therefore, should lessen the risks of life. This aspect of insurance has two forms:
 1. Personal cooperation, which occurs between people.
 2. Material cooperation, which does not originally exist between the people but between various risks. This, is the form to which the big companies that conduct complex activities enter.⁶⁶⁷

⁶⁶⁶ 'Abbas Ḥosnī, *'Aqd Al-Ta'mīn Ft Al-Fiqh Al-Islāmī*, (Maktabat Wahbah), p. 16.

⁶⁶⁷ 'Ādil 'Iz, *Mabādi' Al-Ta'mīn*, (Cairo: Maktabat Al-Sa'ādah), p. 22.

- b. Risk-share by distributing the risks to a number of customers whence each of them pays a specific amount of money through which what has become a real risk can be shared among the customers. There must, therefore, be a form of similarity in nature between those risks like fire, for example, and not between dissimilar things like fire and death.
- c. Statistical factors for probabilities based on the law of big numbers that lead to some results which are close to reality and also based on the qualities of the risks insured against in different times.

These technical bases are all accepted in the Sharī'ah because they aim at bring about the objectives of the Sharī'ah. The same thing applies to the benefits and advantages of ta'mīn (insurance) which can be realized for individuals and societies. For the individual, this system encourages them to take more risks with more confidence and for society at large, this system leads to economic prosperity. All the above-mentioned benefits are also legitimate and Islam calls for whatever can make them a reality.⁶⁶⁸

4.3.4 Definition Of Risks⁶⁶⁹

Risk, in our understanding, is: "a probable state which, if it comes true, brings harm." Risk has been defined by a committee, which was established by American

⁶⁶⁸ 'Abd al-Wadūd Yahyā, *Al-Ta'mīn 'alā al-Ḥayah* (al-Qāhirah: Dār al-Fikr), 42.

⁶⁶⁹ Al-Sanhūrī. *Al-Wasā'it fī Sharḥ Al-Qānūn Al-Madani*, 7, 1139.

Insurance Company as “a lack of certain knowledge about results in the events”. Having doubt about the results of certain activities is the basic element of the concept of risk. And as a result, risk-taking always means a lack of true knowledge about many possible consequences of certain activities. And this is the distinguishing factor that distinguishes risk from loss when there is doubt about the likeliness of the results, we are in the state of risk but when there is certainty that the result will be a loss, there will be no risk, rather it is only a loss.

In real life, we always find risks associated with all human actions. Taking medicine, for example, can be harmful to the patient who seeks benefit in it. Drinking water to quench one’s thirst can also be harmful due to some unexpected side effects. In the economic sense, however, what we mean by risks is the likelihood of financial loss.⁶⁷⁰

4.3.5 Types Of Economic Risks

Insurance specialists have divided risks into a number of divisions in order to classify their types. Due to their different backgrounds and views, a considerable number of types were brought to light. These types depict how much risk man is subjected to and that necessitates cooperation to ward off or lessen the effects of risks.

- a. Some specialists have classified risk, according to its results, into three kinds:

⁶⁷⁰ Ibid, 7, p. 114.

1. Risks on property like its perishing or destruction or any other cause.
 2. Risks of responsibility in favor of a third party like the responsibility of harming an innocent person or his property like in the case of car accidents.
 3. Functional risks, those risks associated with employees and the consequences on their families, like their retirement or death.
- b. Some have classified risks, according to the source of the harm they inflict on people, into three kinds:
1. Material risks, which result from natural causes like destruction caused by floods and hurricanes.
 2. Social risks, which occur as a result of abnormal behavior of some people especially during riots and chaotic incidents.
 3. Risks of commercial markets like a reduction in the prices of certain commodities after their purchase.
- c. Some classify risks, according to their nature into two kinds:
1. Pure risk which occur, when there is only the possibility of loss and harm.

2. Speculative risk or commercial risks which occur when there is a possibility of both loss and profit. This type cannot be insured. It is only a pure risk that can be insured as will be seen later. (See Encyclopedia Britannica, the term insurance).
- d. Some classify risks, according to their flexibility and rigidity, into two kinds:
1. Static risks, which are rigid in their factors and causes not coming out of development of life, like errors, trespassing and thefts. Such risks occur even in stable economies.
 2. Dynamic risks which occur due to some changes in people's wants or requirements of their machinery, or changes in organizational behavior that may harm the already existing institutions which use old equipment. It is realized that the static risks lead most of the time to collective harm. But dynamic risks do not, in general, harm society at large. They do, however, harm individuals who can be surprised by the sudden changes of the new organization.⁶⁷¹

Risk-taking and its effects in the general sense: risk-taking in the general sense causes men a lot of burdens and different kinds of sufferings. Man, as a result, attempts by nature to avoid risks as much as he can. As far as some

⁶⁷¹ Salāmah 'Abdullah, *Al-Khaṭar Wa Al-Ta'mīn*, (Cairo: Maktabat Al-Manār), p. 19.

sociologists and philosophers are concerned, some risks are not only part of our lives but are necessary because they increase courage and stamina to overcome difficulties as they increase human creativity. Man, however, by nature hates risks and always attempts to avoid them because they bring him anxieties and depression. All those are different kinds of harm which people are generally afflicted with.⁶⁷²

These responsibilities, sufferings and harm caused by these risks can be classified into three groups:

1. Material harm that comes as a result of the occurrence of risks and the loss which such occurrences bring with them.
2. Psychological harm which is represented by continuous fear and anxiety in anticipation of the occurrence of such risks. This situation affects man and his activities.
3. Social and economic harm caused by a lack of effective collective activity when there a great possibility that such risks will take place like the possibility of compulsory reduction of rentals which makes people abstain from building houses.

This, in general is the outcome of the risks on people. The outcomes, in

⁶⁷² Ibid, p. 23.

general, can be classified into three kinds: material, social and economic.⁶⁷³

4.3.6 Ways Of Averting Risks

It is natural that people react to a possible occurrence of risks. Their reactions take different manners:

1. Averting risks by avoiding activities that lead to them like a businessman who abstains from importing pargoods from a far away place or from overseas at a particular time due to the possibility of robbery or piracy.
2. Taking risks without regard to the possible harm. Some people courageously take risks to bear their consequences whether good or bad. This, to them, is a way of averting the dangers of risks psychologically but not economically.
3. By taking too much care and caution in an attempt to reach one's end with less harm and with the limiting of the possibilities of the occurrence of risks like someone who imports goods over a distance longer than the original road because it is more secure or like someone who employs a number of security guards to protect his shop.
4. By resorting to ways in which risks can be transferred to somebody else

⁶⁷³ Muṣṭafā al-Zarqā, *Niẓām al-Ta'mīn: ḥaqīqatuhū wa ra'y al-sharī' fihī* (Muassasah al-Risālah, 4th ed. 1994), 109.

as in the case of renting a house to live in instead of buying it because of the possibility of fire.⁶⁷⁴

5. By neutralizing the risks to avoid their effects like selling a commodity on condition that its buyer would collect it from the factory to avoid its destruction during transportation. Another example is to sell a commodity at today's price for delivery in the future.
6. By risk pooling which happens when a large number of units, which can be subject to risks, are put together so that the possibility of this happening to them becomes greater and one would thus shift one's attention from negative surprises to a certainty of the occurrence of risks. This sixth way is different from the previous ones basically because it is scientific and based on the insurance of large numbers, i.e., mathematical calculations which stress that possibilities of changes and surprises are less in big numbers than in individual numbers like, for example, the changes in sickness, death or fire are more certain than changes in individual numbers. When for example a big company owns about 500 cars, the possibility of one of these cars being involved in an accident will be greater than a single private car owned by an individual getting involved in an accident.⁶⁷⁵
7. By resorting to insurance to avoid risks. This way has become the

⁶⁷⁴ 'Abbās Ḥosnī, *'Aqd Al-Ta'mīn Fī Al-Fiqh Al-Islāmī*, p. 54.

⁶⁷⁵ Muṣṭafā al-Zarqā, *Niẓām al-Ta'mīn: ḥaqīqatuhū wa ra'y al-sharī' fīhī*, p. 110.

universal one. This method is linked to method number six, which we have just explained. However, the following conditions must be fulfilled if this way is to work:

- i. that the insured risks belong to the type of pure risks as explained earlier.
- ii. that the insured risk is measurable or calculable so as to allow the theory of large numbers to apply different possibilities.
- iii. that the danger or risk be real. This condition necessitates that the *musta'mīn*, the one who seeks insurance, has interest in the insurance against risks (see Encyclopedia Britannica). Insurance has two main forms:

The pure cooperative method, which is known as reciprocal insurance, and the commercial method, which is known as insurance by installment. The latter type is contractual and the insurance companies use it. This method is used when the number of customers increases. In this case, the insured loss borne by the company is strictly calculated and their results are certain.⁶⁷⁶

Having discussed the previous methods, it is appropriate to quote from the Encyclopedia Britannica definition, which provides a correct description of the

⁶⁷⁶ Ibid, p. 111.

nature and function of insurance. In the above mentioned Encyclopedia, under the word "Insurance" comes the following:

"Insurance can be described as a social mean to which a large number of people resort in a way, which is fairly organized in order to eliminate or lessen dangers of a real economic risks which are known to the people."

The original function of insurance is to create certainty and replace doubt about the possibility of economic loss with confidence. The purpose of insurance is to distribute dangers to a number of people to lessen its impact on a few individuals.

4.3.7 The Contracts Which Are Similar To Insurance In Islamic Law

Anyone who investigates Islamic law, will see that for a very long time, Islamic law has discussed different forms of social security, some of which carry a lot of importance because of the role they play in securing people against risks. In the following pages, we will mention some of those forms:

4.3.7.1 First: The System Of *Al-'Āqilah* (Family Solidarity)

This system involves the distribution of responsibilities that result from the unintentional killing of an innocent person caused by one individual to all male members of his family. The Sharī'ah prescribes them together within a particular period of time to pay the blood money. This system involves the interest of the two

sides: the side of the victim's family and the side of the unintentional killer. This system is based on tribal bonds but there is nothing in the Sharī'ah that disallow it especially today when, in civil societies, a number of syndicates and organizations are at work.⁶⁷⁷

4.3.7.2 Second: Assisting Sincere Debtors And Students From The Zakah Revenue

The Qur'ānic verse, which enumerates the beneficiaries of *zakāh*, in Sūrah al-Tawbah, has made it incumbent upon the rich to give out *zakāh* to a number of individuals including debtors and students to help them fulfill their needs.

Al-Gharīm (a person burdened by the accumulation of debts): *al-gharīm* is that individual who is indebted in legitimate things and who has no money to pay back the debt.⁶⁷⁸

Such an individual enjoys *zakāh* to help him meet his needs whether his debts come from a personal or public legitimate interest. The first is like the one who loses his house in a fire or his money in a flood, or when he wants to get married or unintentionally destroys somebody's property. And the second is like when entering in an obligation such as having to pay al-diyah (blood money) or paying

⁶⁷⁷ Muḥammad Abū Husan, *Aḥkām al-Jarīmah wa al-'Uqūbah*, 250. Also see Ibn Mawdūd al-Ḥanafī, *al-Akḥbār Li ta'līl al-Mukhtār*, (Amman: Dār Firās Li Al-Ṭibā'ah Wa Al-Nashr), 4, 137.

⁶⁷⁸ Al-Zayla'ī, *Tabyīn al-Haqā'iq Sharḥ Kanz al-Daqā'iq*, 6, 153. Yūsuf al-Qaraḍāwī, *Fiqh al-Zakāh* (Maktabah Wahbah), 2, 145.

compensation for the sake of reconciling an essential relationship.

Ibn al-Sabīl (son of the road): *Ibn al-Sabīl* is a person who is on a long journey to seek knowledge, for example, and become a stranger without neither money or someone who can help him.

This individual also enjoys his share from the *zakāh* revenue from the public treasure to help him meet his immediate needs. This help is not voluntary but is an obligation on the Islamic State until he returns safely to his home. It is, however, pertinent to mention here that Qur'ānic interpreters have different opinions with regard to this assistance. Their opinions manifest the in-depth way in which those interpreters think.⁶⁷⁹

4.3.7.3 Third: Supporting The Poor

The Islamic law provides some guarantees to protect man from the dangers of inability because of age. There are three ways prescribed to help and assist the poor who are incapable of working because of age:

1. The first source prescribed to help the poor is the *zakāh* fund. It is incumbent upon the rich to pay out *zakāh* to certain individuals, the first of whom are the poor.

⁶⁷⁹ Al-Nawawī, *al-Majmū' Sharḥ Al-Muḥadḥab*, 6, 153. Also see Yūsuf al-Qaraḍāwī, *Fiqh al-Zakāh*, 2, 145.

2. The second source is the system of maintaining relatives. This wonderful system reflects the importance that Islam gives to social justice. The Shari'ah prescribes the duty of maintaining some members of one's family based on three reasons: ownership, marriage and blood relationship with detailed conditions in the jurisprudential schools.

It is interesting at this juncture to point out in particular the system of relationship maintenance. This system provides that a rich individual is obligated to maintain his poor relations. Jurists disagree over certain conditions attached to this right. The most accepted argument is that those who have the right to inherit have the right to be maintained if they are poor. If the rich members in one family are many, the responsibility of maintenance is distributed among them. This is in accordance with the rule "*al-ghurm bi al-ghurm*" (the one who enjoys the gain, endures the pain). This is social cooperation that starts with the family and extends to the public treasury.⁶⁸⁰

The jurists have discussed this subject in detail. Among their *ijtihadāt* is that knowledge seekers are regarded as the poor who need help. This is so as long as the person who seeks knowledge is prevented from working to get money by his search for knowledge. Womanhood is also regarded as inability in certain situations.

3. The third source is that which the public treasury provides for the poor.

⁶⁸⁰ Ibid., 2, 176.

This is based on the Prophet's saying: "Whoever does and leaves behind wealth, that wealth belongs to his heir and if he leaves behind debt or poor children, they should be maintained by the ruler, I am more entitled to help the faithful than themselves."⁶⁸¹

In the above-mentioned *ḥadīth* the Prophet uses the Arabic term *daya* (children who have money to support them) and as a result, they have the right to be maintained by the state.

4.3.8 An Important Observation

In any case, attention should be drawn when looking into the Islamic rulings that Islam is a complete way of life in its rulings. It is therefore, wrong for an investigator to lose sight of that holistic approach and to look partially into those rulings. The system of inheritance, for example, and the system of maintaining one's relationship are harmoniously integrated as in the dictum "the one who enjoys the gain, endures the pain" as pointed out earlier. These systems are morally oriented to strengthen the family bond as ordained in the Qur'ān and the Sunnah. The rich, therefore, should help the poor with a smile on their faces because this will strengthen the family bond, which is the foundation of a strong society.

It is also appropriate at this juncture to point out that what we have discussed above in the general sense about insurance and social solidarity in Islam is all

⁶⁸¹ Reported by *al-Bukhārī*, *Muslim*, *al-Nasā'ī* and *Aḥmad*.

legitimate and binding like any other binding obligation in Islam.⁶⁸²

There are also in Islam some other forms of social and individual solidarity which are optional. These systems are imposed to fight poverty and social ills. This voluntary execution, nevertheless, gives reward here and in the hereafter.

Some of these forms are, for example, responsibility towards orphans as indicated in the *ḥadīth*: “I and someone who takes care of orphans are as equal in paradise as these”.⁶⁸³ By “these” he was referring to the two equal fingers of his right and left hands. And the responsibility of a neighbor towards his neighbor is also stressed in another *ḥadīth* in which the Prophet once said to his Companions: “I swear to God he does not believe, I swear to God he is not a believer”, “Who? The Prophet of Allāh”, they asked. “He who sleeps the night with satisfaction of food knowing that his next neighbor is hungry.”⁶⁸⁴

These warnings even if they are not legally binding contain a lot of weight for a Muslim.⁶⁸⁵

4.3.9 Social Securities

Indeed, feeling the need to coordinate efforts and strengths and the

⁶⁸² Yūsuf al-Qaraḍāwī, *Fiqh al-Zākāh*, 2, 178.

⁶⁸³ Al-Bukhārī, *Al-Jāmi' Al-Ṣaḥīḥ*, (Damascus: Dār Al-Fikr), 7, p. 68.

⁶⁸⁴ Ibid, 8, p. 10.

⁶⁸⁵ Fathī Lāshīn, *Ṣiḡḥah Muqtaraḥa Li Al-Ta'mīn*, (Kuwait: Bayt Al-Tamwīl Al-Kuwaitī), p. 84.

responsibility of the state to realize the necessary protection from the dangers of life and their effects, this feeling is manifested today in a number of security forms supported by the contemporary state and sanctioned by law. This is known as social security. Chief among its forms are:

1. The system of pensions for aged functionaries. This system provides old aged pensioners with a source of income that can support them for the rest of their lives.
2. The system of social insurance for workers. This system provides security for the workers. Compensation and remedies are paid to the workers in the event of sickness or injury that occurs during work. In this system, the public treasury cooperates with the employers in financing funds for that purpose. Workers' acts in many countries contain laws that protect the workers against exploitation by putting a limit, for example, to the working hours and the like.⁶⁸⁶

The workers' acts and laws are the symbol that distinguishes between developed and developing worlds. The more the workers are protected the more they are encouraged to produce. These laws, therefore, are the basic pillars for successful production.⁶⁸⁷

⁶⁸⁶ Husayn Hāmid Hassan, *Hukm al-Sharī'ah al-Islāmīyah fī 'Uqūd al-Ta'mīn*, The First Conference On Islamic Economics held in Jeddah, 1976, 140.

⁶⁸⁷ Ibid., 383-384.

3. Medical and health care in their different forms and types. Societies are different in their preparedness and capacities to establish effective systems of health care.
4. Cooperative associations that are founded either by the state or by other agents supported by the state. This is to protect people against unreasonable price increases, monopoly and all forms of exploitations. And at the same time, this system helps to provide enough foodstuff and housing.

4.3.10 Classes And Kinds Of Insurance:

Insurance is classified into two categories based on two aspects: its subject matter and its method. As far as the former is concerned, insurance is divided into three categories:

Category 1: insurance of things like insuring one's car or shop against risks of theft, fire and the like.

Category 2: insurance for responsibility. It is also known as insurance against a third party like insuring the owner of a car in his responsibility towards a third party who might be the victim of an accident caused unintentionally by the insured party and the responsibility of an employer to insure his workers from injury

or death that happens to them while working.⁶⁸⁸

Category 3: what is known as life insurance (which we will explain later as a wrong). In this type, an insurance agent will agree to pay an agreed amount to the family of the insured deceased if he dies in a specific period in return for a specific amount of money paid in monthly or yearly installments by the insured party.

These are the three categories of insurance according to the subject matter, which all kinds of insurance have in common. Some of these categories are compulsory and legally binding. Insuring oneself against the responsibilities towards a third party is a category in point. It is incumbent upon the owners of cars to insure them to avoid accidents in which the owner of a particular car becomes bankrupt. Because in this situation, the victim of the accident or his family, in the case of death, will have nowhere to go in there attempt to get some remedy.

The same can be said about civil and aircrafts. They cannot legally fly without complete insurance to cover the possible victims of accidents, be they its passengers or crew.⁶⁸⁹

Some misgivings regarding insurance and the responses to them:

The opponents of insurance who stress its illegitimacy have voiced certain misgivings, the strongest of which are the following:

⁶⁸⁸ Muṣṭafā al-Zarqā, *Nizām al-Ta'mīn: ḥaqīqatuhū wa ra'y al-sharī' fihī*, p. 131.

⁶⁸⁹ Muṣṭafā al-Zarqā, *Nizām al-Ta'mīn: ḥaqīqatuhū wa ra'y al-sharī' fihī*, p. 132.

1. That insurance is a form of gambling.
2. That insurance is a form of mortgage.
3. That insurance, especially life insurance, represents a challenge to divine destiny.
4. That insurance involves *gharar* (cheating) and cheating is prohibited in Islam.
5. That insurance involves ambiguity, which nullifies contracts.
6. That insurance involves *ribā* (usury) and usury is prohibited in Sharī'ah based on the Qur'ānic texts.⁶⁹⁰

4.3.11 Responses To The Misgivings:

1. The first three misgivings: gambling, mortgage and destiny-challenge.
 - The risks that a gambler bears are self-made, i.e., he deliberately creates them against himself while the risks and dangers that an insured person is threatened with originate most of the time from economic activities and other emergencies. And as a result, the one who is subjected to danger tries to avoid it by paying specific amounts.
 - A gambler is also different from an insurance customer in the economic effect: while the gambler confuses the natural system of life which is

⁶⁹⁰ Sa'īdī Abū Jīb, *Al-Ta'mīn Bayna Al-Haḍr Wa Al-Ibāḥah*, (Damascus: Dār Al-Fikr), p. 70.

based on hard work and a fair return to hard work, insurance on the contrary removes confusion in economic life, which occurs due to accidents and natural catastrophes and which cannot be totally avoided. One can then ask: "What is the relationship between insurance and gambling?"⁶⁹¹

Most of those who write on insurance in Islam do not mention the law or the theory of large numbers on which the insurance systems are based. Neither do they discuss the effects of insurance on economic life.

And with regard to the misgivings concerning mortgage, I would here remind my reader of what is mentioned in the Encyclopedia Britannica that distinguishes mortgage from insurance. It should be mentioned that in the insurance rules the one who is insured must have an interest in return to the proposed insurance like when he is threatened by the possibility of harm from a probable accident.⁶⁹² Without such a condition, insurance becomes a form of mortgage whenever there is that interest. What the insurance company pays to a beneficiary when an accident occurs is compensation for the harm with which he is afflicted and not a profit as in the case of a mortgage.⁶⁹³

2. With regard to the misgivings of cheating and ambiguity,⁶⁹⁴ they do not

⁶⁹¹ Muḥammad Najāt Siddīqī, *al-Kitābāt al-Mu'āṣirah* (Wāhitun: Al-Ma'had al-'Ālamī lī al-Fikr al-Islāmī), p. 49.

⁶⁹² Al-Sanhūri. *Al-Wasā'it fī Sharḥ Al-Qānūn Al-Madanī*, 7, p. 987.

⁶⁹³ Muḥammad Najāt Siddīqī, *al-Kitābāt al-Mu'āṣirah*, p. 50.

⁶⁹⁴ Ibn 'Arafah, *Hāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, p. 25.

legitimize insurance because they have different degrees and conditions that nullify a contract and these conditions do not exist here. *Gharar* (allegory) and *jahālah* (ambiguity) also have exceptions known to the Sharī'ah either for necessity or need. The Sharī'ah has legitimized many contracts with some degrees of ambiguity because of people's need for them. The same can be said with regard to insurance. To explain this, we will explain in more detail about *gharar* and *jahālah* in the following paragraphs:

Al-Gharar (allegory) is to act based on probabilities and uncertainties like buying a future catch of a fisherman or the prey of a hunter who does not know what he will exactly hunt tomorrow.⁶⁹⁵

And *al-jahālah* (ambiguity) is a situation in a contract that makes the subject matter of the contract unclear in whole or in part like selling one she-goat in the midst of a large number of goats.⁶⁹⁶

It is something accepted that the Prophet prohibited *gharar* in dealings and the reality is that many Islamic dealings have one form of *gharar* or another. It is, however, the degree of allegory or ambiguities, which define what form of dealings are prohibited. There is, for example, in companies and loans and some other forms of leasing a degree of ambiguity. This degree, nevertheless, does not make those contracts illegitimate. Based on their degrees, therefore, the Prophet forbade certain

⁶⁹⁵ Ibn 'Ābidīn, *Hāshiyat Radd al-Mukhtār 'Alā al-Durr al-Mukhtār*, 4, p. 109.

⁶⁹⁶ See Qalyūbī and 'Amīrah, *Ḥashiyah Qalyūbī wa 'Amīrah 'ala Sharḥ al-Minhāj*, 2, 58.

kinds of dealings by defining them, like selling the future catch of a fisherman or what is in the womb of a she-goat.⁶⁹⁷ These were certain dealings endorsed in pre-Islamic Arabia and later prohibited by the Prophet. The Prophet also prohibited selling fruit still on trees before it is ripe but after that it can be sold despite the fact that selling it in this sense involves some form of *gharar* which is light compared with the need for such dealings.

As a result, the jurists allow the selling of repeated harvests of a tree even though its future fruits can involve some form of *gharar*. They argue that the future fruits are attached to the present yields despite the fact that this form involves *gharar*.

It is also permissible to hire a wet nurse to breast feed a child by providing her in return with food drinks despite the clear ambiguity this contract involves.

The Ḥanāfī jurists, in particular, stress that *jahālah* does not prevent the legitimacy of a particular contract except when it leads to a problematic dispute – that is in which the two opponents have equal arguments – like selling a she-goat from a herd without particularizing it. The seller here aims at selling a bad one and the buyer aims at buying a good one and both have the proof of non-identification. But in cases where ambiguity does not lead to a problematic dispute there the problem of legitimacy will not arise.⁶⁹⁸

⁶⁹⁷ Al-Kāsānī, *Badāi' Al-Ṣanāi' fī Tarfīb al-Sharāi'*, 3, p. 305.

⁶⁹⁸ Ibid, 3, p. 306.

As a result, with the contract of insurance, although it involves a degree of ambiguity, this degree does not mount to illegitimacy. It is rather possible to say that the installment paid by the insurance customer is in fact in return for the confidence provided by the insurance company in its pledge to compensate the customer in the event of an accident. Such a pledge has some legal expositions among which are: the binding promise as known in the Mālikī School of Thought⁶⁹⁹ and the dictum of obligation of promise if attached to a condition as known in the Ḥanafī School of Thought⁷⁰⁰ (and the condition to which it is attached is paying the installments) and as such the return becomes the confidence provided by the company. With this explanation the problem of *gharar* is completely eliminated.⁷⁰¹

One may wonder how security or confidence can be exchanged for money. The answer to that is that there is nothing in the Sharī'ah that prevents it.

But concerning the misgiving of *ribā* (usury) in which they say that the insurance customer pays, as they say, an insignificant amount of money and receives in return, when something harmful happens to him, a large and disproportionate amount of money. This misgiving does not stand scrutiny because a contract of insurance is originally based on the mutual understanding and cooperation to compensate a victim of unexpected disasters.

By the same token, if this misgiving had been tantamount to making

⁶⁹⁹ Ibn 'Arafah, *Ḥāshiyat al-Dusūqī 'alā al-Sharḥ Al-Kabīr*, 3, 25.

⁷⁰⁰ Al-Sarakhsī, *al-Mabṣūṭ*, 11, 117.

⁷⁰¹ Muṣṭafā al-Zarqā, *Niẓām al-Ta'mīn: ḥaqīqatuhū wa ra'y al-sharī' fihī*, 170.

insurance illegitimate, then the pension system would also have been illegitimate. Because in this case, a worker pays an insignificant amount in installments and when he reaches a pensionable age, the state will pay him a large amount. And since this system is legitimate as agreed by all jurists with all its shortcomings, the system of insurance cannot but be legitimate too.

It should be noted that quoting the pension system does not mean accepting it without reservations. The reason we quote it here is just to show that the two systems are similar in context and form and that no jurist contends against it because this system is based on mutual understanding and cooperation in which all will benefit.⁷⁰²

4.3.12 Proofs Of The Legitimacy Of Insurance

1. It is not a condition that new contracts must be in conformity with previous legitimate contracts in Islam, and neither is it a condition that its conditions be available in the Qur'ān and the Sunnah of the Prophet. It is rather sufficient in dealings that their subject matter is not contradictory to the fundamental tenets of the laws that regulate dealings. This is what is known as freedom of contract, which is supported by the Qur'ān and the Sunnah in verses and *ḥadīth* like: "O you, who believe, fulfill your contracts".⁷⁰³ And Allāh's saying: "fulfill your pledge, verily pledges are

⁷⁰² Al-Sanhūrī. *Al-Wasā'if fī Sharḥ Al-Qānūn Al-Madani*, 7, 1087.

⁷⁰³ *Al-Qur'an, Al-Mā'idah* (5): 1.

binding".⁷⁰⁴ With regard to the *ḥadīth*, there is a number of a *ḥadīth* that indicate the unlawfulness of breaching promises. In addition, there is the *ḥadīth* reported by al-Tirmidhī and authenticated by Amr b. 'Awf al-Muzni from the Prophet who is reported to have said: "*Al-Sulḥ* (reconciliation) among Muslims is permissible except (if it contains) a condition that prohibits the legitimate or legitimizes what is prohibited." In another version: "Muslims are bound by their conditions except a condition that illegitimizes what is lawful or legitimizes the unlawful". Al-Bukhārī also reported it in an emphatic mode, which generalizes it.

This is also in line with the objectives of the Sharī'ah that aim at making it easy for people as it is supported by the *uṣulī* maxim that says: "the origin of things pertain to their permissibility".⁷⁰⁵

Sheikh al-Islam Ibn Taymiyyah argued beautifully in favor of the above-mentioned rule. Other jurists like al-Fakhr al-Rāzī also deduced certain rulings in that line in his interpretation of the Qur'ānic verse: "do not cause mischief on earth after making it more suitable [to live in]".⁷⁰⁶ This verse gives a direct indication that any contract that receives a mutual consent between its opponents is sound and correct. The reason is that nullifying it after it has been concluded sound will be considered causing

⁷⁰⁴ *Al-Qur'an, al-Isrā'* (17): 34.

⁷⁰⁵ 'Alī Muḥy Al-Dīn Al-Dāghī, *al-Dawābiṭ al-Shar'īyah fī 'uqūd al-ta'mīn*, 4th ed., Fiqh Symposium Kuwait Financial House, 1995, 190-191.

⁷⁰⁶ *Al-Qur'an, Al-A'rāf*(7): 56.

corruption and mischief after doing good, which the verse has unambiguously prohibited. This verse is strengthened by the above quoted verse (...fulfill your contracts⁷⁰⁷...) and Allāh's sayings: "and those who keep their promise and their trusts".⁷⁰⁸ It is also supported by all general rules that stress the fulfillment of pledges.⁷⁰⁹

2. It is a fully accepted proposition to all truly learned men of the Sharī'ah that there cannot be an interest that provides human necessities or repels harm from them except if it is considered by the Sharī'ah. And people's interests are elastic and can change according to time place and the people concerned.⁷¹⁰

3. Volition: In order for an insurance contract to be legitimate, it must as a principle, be based on volition. This is so because while clear ambiguity and allegory easily impact on pure commutative contracts, this is not the case with voluntary contracts. The criterion with which commutative contracts are measured is different from for voluntary contracts. The former, therefore, should be based on clarity because each of the contracting parties' aims at receiving something clearly defined in return for a clearly defined thing.

⁷⁰⁷ *Al-Qur'an, Al-Mā'idah* (5): 1. '

⁷⁰⁸ *Al-Qur'an, Al-Mu'minīn* (23): 8.

⁷⁰⁹ Al-Fakh al-Rāzī, *Mafātīḥ al-Ghayb al-Tafsīr al-Kabīr*, 4, 350.

⁷¹⁰ Muṣṭafā al-Zarqā, *Niẓām al-Ta'mīn: ḥaqīqatuhū wa ra'y al-sharī' fīhī*, 9.

This is made crystal clear in Allāh's verse: "do not devour your wealth amongst you except through a trade to which you consent to".⁷¹¹

The origin in that goes against the background that in the Sharī'ah, contracts should not lead to dispute and (*jahālah*) in compensatory contracts can always lead to dispute. The Sharī'ah, therefore, nullifies those contracts which involve any element that would eventually lead to dispute. However, if the contract is a voluntary one like *hibah* (gift), dispute cannot take place even if the person who received the gift was expecting more than what is given.⁷¹² On the contrary, in commutative contracts, if the seller delivers what the buyer expects dispute can start. As a result, the Sharī'ah attempts to block all means that lead to dispute.⁷¹³

Having responded to these misgivings, one can see that they do not stand scrutiny and the insurance system is thus legitimate.

4. The origin of things pertains to their permissibility:

This maxim means that this type of contract is in origin lawful until contrary proof is provided. And as long as such proof is not provided, people can enjoy its benefits as lawful.

⁷¹¹ *Al-Qur'an, Al-Nisā'* (4): 29.

⁷¹² See Al-Qarāfī, *Al-Furūq*, 1, p. 150.

⁷¹³ Ibid.

On the other hand, the Sharī'ah does not confine people to particular known contracts. On the contrary, people are encouraged to innovate whatever contract brings benefits to them as long as the pillars and conditions stipulated by Islam are in tact.⁷¹⁴ As a consequence, because insurance is a new contract does not make it unlawful, and neither does it make it a contract beyond the boundaries of the Sharī'ah.

4.3.12.1 Necessity And Insurance

Insurance has become a necessity in today's life. People have realized their need for it as a means of avoiding real threats of natural disasters. Businessmen and economists consider it a necessity for sound economies. They, base themselves on insurance benefits, and make great efforts to realize more economic successes with more confidence. We have also shown the advantages of this system to both individuals and societies. Without insurance a society can deteriorate economically and this can lead people to frustration and laziness.⁷¹⁵ Insurance is, therefore, lawful.

4.3.12.2 Speculation And Insurance

We wish here to measure insurance in terms of the measurement of speculative economic risks. This is because they have something in common. In the

⁷¹⁴ Sa'dī Abū Jayb, *al-Ta'mīn Bayn al-Ḥazru wa al-Ibāḥah* (Bayrūt: Dār Al-Ma'rifah), p. 43.

⁷¹⁵ Ibid, p. 49.

opinion of the jurists al-muglarib, a speculator is a person who gives an amount of money to another to trade with it so that any profit gained will be distributed between them. The share of the one who provides the capital is due to him because it is his capital and the share of the trader legitimately belongs to him because of his work.

Insurance is very similar to this in that the insurance company serves as that trader and the customers act as capital providers and the profit is shared between them.⁷¹⁶

4.3.12.3 Securing Dangers Of The Road And Insurance

The Ḥanafī jurists hold the view⁷¹⁷ that whoever says to another “follow this road because it is secure and if anything happens to you in it I will compensate you” and then he follows it and his money is stolen, he will have to compensate him for its loss.

This is a form of road security guarantees. And the form we have mentioned strongly supports the lawfulness of insurance against dangers. If the jurists of the past had been living with us today, they would have no alternative but to accept the insurance system.

4.3.12.4 The Contract Of Guarding And Insurance

The jurists have agreed over the legitimacy of hiring a person to guard shops

⁷¹⁶ Ibid, p. 56.

⁷¹⁷ See Al-Zayla‘ī, *Tabyīn al-Haqā’iq Sharḥ Kanz al-Daqa’iq*, 5, p. 141. Ibn ‘Ābidīn, *Hāshiyat Radd al-Mukhtār ‘Alā al-Durr al-Mukhtār*, 5, 50.

and other properties. And there is no effect for such guarding except to provide security, confidence and continuous safety against aggression and that is the purpose of such a contract.

By analogy, insurance as a contract serves the same or a similar purpose. It provides security and confidence to the insurance customer and this similar effect can serve as a basis for its legitimacy.

4.3.12.5 Profit And Insurance

The fact that the insurance system achieves some profits does not negate the quality of cooperation in commercial insurance because of the fact that commercial insurance is different from many forms of commercial dealings. This is because the basis of the latter's transactions is to detect dangers of harm that would have befallen certain individuals had the contract not been concluded and this itself is a form of cooperation.

But other commercial contracts are commutative; exchanging money for money and benefit in return for benefit to realize some needs equal in nature and not merely for cooperation.

4.3.13 Summary And Conclusion

In the light of what has been discussed above, it becomes clear that human

beings are always endangered in their economic and social activities. They are always threatened by unexpected surprises that lead to the destruction of their plans and total collapse of the foundations of their economic activities and eventually to their social status.⁷¹⁸

We have seen the concern of human beings and the lawgivers in the past and the in present to lessen the impact of those dangers, whether those dangers belong to those which cannot be avoided like death and old age or avoidable ones like poverty and inability by creating security systems in different domains. Amongst all the religions and legal systems, we have shown how Islam first organized such a system to provide man with more security.

It also becomes clear how much need human beings have to find ways in which they can overcome the heavy impact of the dangers of life in different aspects and situations, especially those aspects which are not covered by social security systems. This, it is obvious, cannot be realized for all except through methods of cooperation and coordinated efforts to lessen the burden of these dangers on individuals by tallying collective actions.

This method of cooperation is mostly represented by the insurance system whether it is a primitive and non-contractual system or a developed contractual system, and whether it is a profitable system conducted by big companies or insurance in favor of things, responsibilities or life insurance.

⁷¹⁸ Husayn Hāmid Ḥassan, *Hukm al-Sharī'ah al-Islāmīyah fī 'Uqūd al-Ta'mīn*, p. 145.

But profitable insurance, which is regulated by the insurance companies, local or international, carries with it the germs of exploitation of those who desperately need them by imposing very high installments on them to gain more and more profit.⁷¹⁹

⁷¹⁹ Ḥusayn Ḥāmid Ḥassan, *Hukm al-Sharī'ah al-Islāmīyah fī 'Uqūd al-Ta'mīn*, p. 147.