

# **CHAPTER ONE**

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### INTRODUCTION

#### 1.1 Preface

All praise be to Almighty Allāh, the Cherisher and Sustainer of the worlds. All praise be to the almighty Allāh who created man, and made him superior to all His creatures, dignified him with religion and knowledge, distinguished him with reason and freed him from slavery except to Him. He guided man to the righteous path in this world and the hereafter. We read in the noble *Qur'ān* :

“Verily, We showed him the way, whether he be grateful or ungrateful” (*Al-Insān* 76. (3)).

And may peace and blessings of Allāh Almighty be upon His Prophet Muhammad the son of ‘*Abd Allāh*, his family and all his companions. History has never experienced nation that is more faithful than Muslims with respect of observing covenants, justice, mercy, and good manners. The source of these qualities is their Islamic faith that has been revealed by the almighty Allāh to His Prophet Muhammad as blessing and mercy for all mankind. We read in the Holy *Qur'ān* the saying of the almighty Allāh in the following verse:

“And We have sent you (O Muhammad peace be on him) not but as mercy for the ‘*Alamīn*” (man kind, jinn and all that exists). (*Al-Anbiyā*’ 21 (107)).

It is through this religion that the almighty Allāh guides people from darkness to light and to the right path. Islam has maintained and acknowledges the rights of ownership for individuals within the bounds of the spiritual and Islamic moral values. Also Islam

recognizes the human instincts of safeguarding one's future and making a reasonable provision for the maintenance of one's family members and dependents in order to live in peace and security. As it is clear the course of history has forced *muslim ummah* to accept institutions (such as insurance, etc.) which have developed in the west and yet in conflict with the values and principles enunciated by Islam and they become the victims of this situation. But a Muslim who was guided by his true religion, does not need any new man-made laws, because Allāh the almighty has perfected the religion of Islam for us, and completed his blessings and has chosen Islam as our religion. We read in the Holy *Qur'ān* the saying of the almighty Allāh in the following verse:

“This day, I have perfected your religion for you, completed My Favour upon you, and have chosen for you Islam as your religion” (*Al-Mā'idah* 5 (3)).

Therefore, whoever goes beyond this is deemed to have diverted from the right path, because doing that will be inconsistent with what the almighty Allāh has ordained for his servants whom He is well aware of what that will make them live happily. Muslims must adhere firmly and strongly to their religion by implementing all its tenets, provisions, and ethics. Because one will only have happiness in accordance with what the almighty Allāh has ordained and revealed for his guidance. Therefore, whenever Islamic law and teachings is implemented and followed, people feel good, happy, safe and secured in respect of themselves, their property, honor and dignity. Likewise, whenever one diverts from the almighty Allāh's way, for him are a life of hardship in this world and the Day of Resurrection. We read in the Holy *Qur'ān* the saying of the almighty Allāh.

“But whosoever turns away from My Reminder (i.e. neither believes in this *Qur’ān* nor acts on its teachings.) Verily, for him is a life of hardship, and We shall raise him up blind on the Day of Resurrection.” (*tā Hā* 20 (124)).

## 1.2 Objectives of the Study

Every objective of the Islamic law is to promote the welfare of the people as mentioned earlier, in safeguarding their faith, life, intellect, posterity and property. The catering for the interest of the people and relieving them of hardship is the basic objective of Islamic laws. Therefore, teaching of Islam should be the *Muslim* paradigm if they want to attain the security, tranquillity, justice, strength, progress and prosperity. In acquiring wealth, Islam does not permit Muslims to earn wealth in the way they like, but it differentiates between what is lawful and unlawful methods for acquiring the wealth. The objective and purpose of this work can be epitomized as follows:

1. To study the position of Islam in the development of mankind socially and economically through its institutions.
2. To examine the concept of the conventional insurance system from Islamic law perspectives.
3. To study the nature and the system of the Islamic Insurance (*Takāful*) concept as an alternative to the conventional insurance.
4. To study the development and the operational system of *Syarikat Takāful Malaysia Berhad*, the first *takāful* (Islamic Insurance) operator in Malaysia as well as in Asia, and *Syarikat Takāful Nasional Sendirian Berhad*.
5. Finally, to compare the Islamic Insurance (*Takāful*) concept with the conventional insurance concept.

### 1.3 Scope of the study

The study focuses mainly upon the nature of insurance contract from the *Shar'iah* perspectives, and its application in the *Syarikat Takāful Malaysia Bhd.*, and *Takāful Nasional Sdn.Bhd.*, with particular reference is made to the statutory provisions in the *Takāful Act 1984*. Legal and illegal matters are clearly defined in the Islamic law, therefore, this study concerns itself with the subject of *Fiqh al-Muāmalah* and attempts are made to identify the basic objectives of the *Shar'iah* from the Holy *Qur'ān*, the *Sunnah* (i.e. tradition) of the Prophet Muhammad (peace be on him) and also from the analysis of certain fundamental legal concepts pertaining to business transaction and acquiring the wealth which have been developed by the Muslim jurist.

### 1.4 The Outline of Chapters

This research work is arranged in five chapters. The first chapter (chapter 1) highlights the source of *Muslims* qualities in this world, and the rights of ownership of individuals within the framework of the Islamic spiritual and moral values. Also included in chapter one are the objectives, scope, methodology, and problem of the study. The second chapter (chapter 2) highlights the fundamental and basic principles of the Islamic economic system, especially the principle of ownership for the state, public and individuals, as well as the principle of social justice in the Islamic economy. The issue of interest (*Ribā*) and its impact on society spiritually, morally, socially and economically is also addressed in this chapter. The third chapter (chapter 3) introduces the concept of the conventional insurance by examining its functions, objectives and the essential elements and characteristics of the contract. The chapter also highlights the characteristics of

Islamic law of contract as a means of comparison with the characteristics of the conventional insurance contract. The fourth chapter (chapter 4) examines the contract of insurance from the *Shar'īah* (Islamic law) perspectives and addresses the jurisprudential arguments among the Islamic scholars on the issue whether the modern insurance system and its contract are lawful or unlawful. The fifth chapter (chapter 5) examines the application of Islamic insurance (*Takāful*) in *Syrikat Takāful Malaysia Berhad*, and *Syrikat Takāful Nasional Sdn.Bhd*. The chapter highlights the development and performance of these two companies, and analyzes how the concepts of *al-Muḍārabah* (i.e. profit and loss sharing contract) and *al-Tabarru'* (i.e. donation) being used in the *Takāful* and banks operations.

### 1.5 Methodology

The mechanism adopted by the researcher in this work is divided into two (1) Library based, where the main focus is to locate books, magazines and other materials relating to the research topic. (2) Non library based, the main focus here is to consult eminent Islamic law scholars (*Fuqahā'*) in or out side Malaysia, if necessary. However, the nature of this study involves the analysis of issues and concepts from the Islamic perspectives in relation to the prohibition of conventional insurance and other transactions in Islam, therefore, the methodology and the mechanism adopted must be necessarily be reflective of Islamic scholarship. In this work, both primary and secondary sources are referred to. As far as Islamic works are concerned, direct references to both 'Arabic and translations of the Holy *Qur'ān* and the authentic and authoritative *Ḥadīth* or *Sunnah* (traditions) of Prophet Muhammad (peace be on him and the rest of Prophets) are consistently made. As

far as jurisprudential works are concerned, the classical texts of the orthodox school of the Islamic jurisprudence constitute the main references as far as Islamic scholarship is concerned.

Due to the nature of this study, references to the contemporary jurisprudential works of modern scholars, especially with regard to the views and approaches on the issue, are also made. In the case of modern insurance and *Takāful* concepts, various statutory provisions and the writings of scholars on the subject inside and outside Malaysia are referred to. As mentioned above, in order to define the Islamic paradigm in this study, we seek the assistance from the primary sources in the Holy *Qur'ān* and the authentic *Sunnah* of the Prophet Muhammad (peace be on him and his family) and the writings of Muslim scholars. However, the importance of the rule of reason and logic especially on the technical aspects is also observed. In conformity with Islamic principles, a cautious approach is adopted in this work by using the rule of “The Basic Refers to the Permissibility of Things” except what is prohibited by a sound and explicit *Naṣ* (i.e. either a verse of the *Qur'ān* or a clear, authentic, and explicit *Sunnah* (practice or saying) of Prophet Muhammad (peace be on him and his family), because these are the two main sources of Islamic law (*Shar'īah*).

## 1.6 Statement of the Problem

Broadly speaking, a contract is an effective mode of acquisition of ownership and transfer of property. The arrival of the colonial powers in the Islamic world has witnessed changes and ideologies not in conform to Islamic law and principles, particularly those institutions that have developed in the colonial powers land. Modern insurance system is an example among the many of these institutions, which have penetrated into all aspects of *Muslim ummah* daily life, socially and economically, and have a vital role that cannot be overruled in their life.

Therefore, it is the objective of this work to study deeply the problem of this modern conventional insurance system and also to analyze its concept from the Islamic law (*Shar'iah*) perspectives. The study seeks to answer the following queries:

1. What is the impact of the modern conventional insurance system which consists in its contract the elements of *Ribā* (interest) *Gharar* (danger) and *Maisir* (gambling) on *Muslims* society from the spiritual, moral, social and economic angles?
2. What alternative does the *Muslim ummah* have to the modern conventional insurance system?
3. Is the system of the Islamic insurance (*Takāful*) as an alternative to the modern conventional insurance system achieve its targets and goals among the *Muslims* or a lot need to be done in terms of awareness, understanding and taken steps for the improvement of the system?



4. Does the system of Islamic insurance (*Takāful*) guarantee the security and other benefits to the participants?

## 1.7 Literature Review

There are a lot of books and articles written on modern conventional insurance which have generated a lot of controversies among Muslim scholars pertaining to its legality in the sight of Islamic law (*Sharī'ah*). Majority of Islamic law jurists are of the opinion that the system does not conform to any of the known valid Islamic contracts. However, most of these writings are very much focus on the differences of opinions among Muslims scholars on the matter. There are also abundant of books and articles written on Islamic insurance system (*al-Takāful*) as an alternative to the conventional insurance system. These writings are mainly focused on the operational system of *al-Takāful* and the principles on which the system of *al-Takāful* are based (such as principle of *al-Tabarru'* (i.e. donation, contribution, or gift)) and the principle of *al-Muḍārabah* or *al-Qirāḍ* (i.e. profit and loss sharing contract)). These writings on both conventional insurance and Islamic insurance (*al-Takāful*) are also mainly qualitative in nature. Nevertheless, the researcher has carefully selected certain prohibited forms of business transactions in Islamic law which are related to this study, and also elaborated more on the principle of *al-Tabarru'* and *al-Muḍārabah*, because the two systems are the main core of the Islamic insurance system concept in order to be considered valid in the sight of Islamic Law, and free from the elements of *Ribā* (i.e. interest), *al-maisir*, (i.e. gambling) and *al-gharar* (i.e. risk).

*Ibrāhīm bn. 'Abd al-Rahmān* (n.d.) observed that the conventional insurance contract is one of the highly regarded contracts nowadays due to its tightly knit nature with the economic and business life of the people. He highlights that there is difference of opinion

among the *'ulamā* (muslim scholars) and Muslim researchers as to the legality of such contract under Islamic jurisprudence.<sup>1</sup>

*'Alī Muhee al-Dīn al-Qarrah Dāgī* (1995) indicates that the modern conventional insurance system does not exist neither during the era of the Prophet Muhammad (peace be on him and his family) nor during the time of his companions (may Allāh be pleased with them) or during the time of orthodox rite of *fiqh* (i.e. Islamic jurisprudence). The evolution and development of this system emerged during the last century, and the first jurisprudent (*faqīh*) to discuss this issue is *Imām Ibn 'Ābidīn* the *Ḥanafī* scholar in his *Hāshiyah: Rad al-Muhtār 'ala al-Dur al-Mukhtār* in which he declared the conventional insurance system is unlawful according to Islamic law.<sup>2</sup> As far as the contemporary muslim scholars point of view is concerned, *'Alī al-Qarrah* has pointed out that they have differ among themselves on the legality of the issue. The first opinion adopted by the majority of the contemporary Muslim scholars found that the contracts of present conventional insurance system are considered unlawful in the sight of Islamic law. The second view adopted by few among them are of the opinion that there is nothing unlawful in its contracts. And the third view is the middle between the two views where it sees some of the conventional insurance contracts and practices are unlawful, and some are lawful.<sup>3</sup>

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<sup>1</sup> Ibrāhīm bin. 'Abd al-Rahmān al-'Arwān, *'Aqd al-Ta'mīn al-Tijārī wa Ḥukmuh fī al-Fiqh al-Islāmī*. King Saud university. Kingdom of Saudi Arabia, pp.1-56

<sup>2</sup> 'Alī Muhee al-Dīn al-Qarrah Dāgī, *al-Ta'mīn 'ala al-Ḥayāt wa mustajaddāt al- 'Uqūd*. Qatar University, pp.117-118.

<sup>3</sup> *Ibid.*, pp. 118-119.

Many conferences have been held to discuss on the legality of modern conventional insurance in the sight of Islamic law as presently practiced. Formal legal opinion (*fatwā*) have been issued in these conferences unanimously and collectively that the conventional insurance as presently practiced is unlawful (*Ḥarām*) according to Islamic law (*Sharīah*).

The following are the most notable ones:

The second Muslim league conference of Islamic scholars held in Cairo 1965 and 1972. Judicial conference held in *Makkah al-Mukarramah* in 1978. Declaration of the Islamic supreme council in Saudi Arabia in 1977, and the declaration of the Malaysia *fatwā* committee of the national religious council in 1972 <sup>4</sup>. All of these conferences have agreed unanimously that the modern form of conventional insurance and its practices is unlawful in the sight of Islamic law as it contains the following elements in its contract: (1) *Ribā* (i.e. interest) in all its dealings. (2) *al-Gharar* (i.e. risk, danger, etc.). (3) *al-Gubn* (i.e. cheating, swindle, fraud, etc.). (4) *al-Qimār* (i.e. gambling) (5) *al-Jahālāh* (i.e. want of knowledge).<sup>5</sup>

*Wahbah al-Zuhailī*, (1995) claims that for these five reasons the contract of the present conventional insurance fell under the unlawful contracts in Islamic law (*Sharīah*). He concludes that after many years of dialogue, debate, discussion, and conferences the views of the majority among the contemporary *muslim* scholars who found the contract

<sup>4</sup> Wahbah al-Zuhailī, (1995) *Al-D awābit al-Sharī 'ah li Suwar 'Uqūd al ta'mīn ala al-Ḥayāh wa I 'ādah al ta'mīn*. Kuwait, p. 111.

<sup>5</sup> *Ibid.*, p.111-116.

of modern conventional insurance unlawful in the sight of Islamic Law based on the above mentioned reasons are more preferable. Thus, an objective study has been made by the devoted and sincere jurisprudents in order to develop an alternative system to conventional insurance which can fulfil the need of the *muslim ummah* without violating the fundamental principles of Islam, and that noble efforts leads to the birth of Islamic insurance system (*al-Ta'mīn al-Ta'āwunī*, or *al-Takāful*).<sup>6</sup>

*Yūsuf. al-Qara ḍāwī* (1993) observes that the insurance against hazards can be modified in a manner which would bring it closer to the Islamic principle by means of contract of "donation with a condition of compensation." In the event of calamity such type of transaction is allowed in some Islamic schools of jurisprudence. If such a modification is effected, and if the company is free of usurious business, he said one may declare insurance against hazards to be a lawful contract.<sup>7</sup>

*Muhammad Ḥamīdullāh* (1951) in his article **The defects in Western insurance system**, explains that insurance essentially means the distribution of burden or hardship over as large a number of people as possible, thus lessening the burden of each as much as practicable so that none of them feels it. According to him this can be done in two ways: either through speculating and gambling and taking risks in expectation of greater benefits, or in a spirit of mutuality, fellowship and avoidance of one sided risks. In all western and Westernized countries, the former mode is in vogue, and there is no end of

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<sup>6</sup> *Ibid.*, p. 116.

<sup>7</sup> *Yūsuf. al-Qara ḍāwī*, *Al- Ḥalāl wa al-Ḥarām fī al- Islām*. Kuwait. International Islamic Federation of Student Organizations, 1993, p.276.

its varieties. He outlines the reasons behind the objections of this system from the Islamic point of view: (1) the risk is one-sided, that is, on the side of the company; (2) the premium received by the company is invested in interest-bearing securities, which again is against Islamic principles, which lay down “neither to do harm to others nor to be harmed”. He concludes that as far as the risk to company is concerned, human intelligence has devised means by which it is reduced to a minimum. Yet it is, from the point of views of Islam, essentially wrong and vicious that any contract should be based on one-sided risk, however small that may be.<sup>8</sup>

*Yūsuf. al-Qara ḍāwī* (1993) points out that as far as life insurance is concerned, he is of the opinion that the concept is very remote from Islamic business transaction therefore is unacceptable.<sup>9</sup>

*‘Alī Muḥee al-Dīn al-Qarrah Dāgī* (1995) and *Wahbah al-Zuhailī*, (1995) argue that the concept of life insurance is not contradictory to the Islamic principles, rather, is something desirable in Islam as a form of helping one another in virtue, righteousness and piety.<sup>10</sup> As Allāh the almighty says:

“Help you one another in virtue and piety, but do not help one another in sin and transgression” (*Al-Mā'idah* (5) 2)

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<sup>8</sup> Muhammad Ḥamīdullāl. *The Islamic Review* “The defects in Western insurance system” (March-April 1951) pp.45-46

<sup>9</sup> Yūsuf. al-Qara ḍāwī , *Al- Ḥalāl wa al-Ḥarām fī al- Islām*. Kuwait. International Islamic Federation of Student Organizations, 1993, p.276.

<sup>10</sup> Wahbah al-Zuhailī, (1995) *Al-ḍawābit al-Sharīḥ li ṣawar 'uqūd al-ta'mīn ala al-Ḥayāt wa l 'āḍah al ta'mīn*. Kuwait, p. 119. See also 'Alī Muḥee al-Dīn al-Qarrah Dāgī, *al-Ta'mīn 'ala al-Ḥayāt wa mustajaddāt al- 'Uqūd*. Qatar university, pp.122-123.

They said, it is patent in the Holy *Qur'ān* and *Sunnah* (i.e. Prophet Muhammad Peace be on him traditions) that Islam does recognize the human instincts of safeguarding one's future and making a reasonable provision for the maintenance of one's family members and dependents. Therefore, thinking of safeguarding one's future and the future of his children is not inconsistent or inharmonious with the Islamic '*aqīdah*' (i.e. belief) and the principle of *tawakkul 'ala Allāh* (i.e. to trust in Allāh and rely on Him), because it is out of adopting or following ways and means with leaving all his affair to the almighty Allāh<sup>11</sup>

*Yūsuf. al-Qara ḍāwī* (1993) observes that the objection of the modern form of insurance companies and their current practices does not mean that Islam is against the concept of insurance as a community pooling to alleviate the burden of the individuals, lest it should be ruinous to him. Islam only opposes the means and methods in which these companies operate. Therefore, if other insurance practices are employed which do not stand in conflict with Islamic forms of business transactions, Islam welcomes them.<sup>12</sup> *Al-Qaraḍāwī* concludes that the modern form of conventional insurance system is contrary to the whole concept of cooperation among people. While the principle of cooperation requires that the poor and needy be paid more than the rich, the rich, who can afford high premiums, get back much more in the event of death or an accident than the poor.<sup>13</sup>

<sup>11</sup> 'Alī Muḥee al-Dīn al-Qarraḥ Dāgī, *al-Ta'mīn 'alā al-Ḥayāt wa mustajaddāt al-'Uqūd*. Qatar university, pp. 124-126.

<sup>12</sup> Yūsuf. al-Qara ḍāwī, *Al-Ḥalāl wa al-Ḥarām fī al-Islam*. Kuwait. International Islamic Federation of Student Organizations, 1993, pp. 276-277.

<sup>13</sup> *Ibid.*, p. 126.

*Muṣṭafa al Zarqā'* (1982) argues that Islam does encourage *Muslims* to innovate new kinds of contracts as necessitated with the consideration of Islamic principles and requirements. In Islam the basic refers to the permissibility of things, therefore, insurance is not part of what is generally forbidden unless there is a clear evidence for prohibiting it. Also human transactions which bring benefit to them are permissible unless there is a clear evidence to say otherwise. According to him insurance has become necessity in this contemporary era which cannot be escaped. People have realized their tremendous need to the modern form of insurance contract, because it is the only way to shove perils of disaster, catastrophes on their properties.<sup>14</sup> This stand according to him and those who see nothing unlawful in the modern form of insurance system, is reinforced by a number of principles observed by jurisprudents, and they are:

1. necessity dictates exceptions,
2. if something is confined (tighten) it became widen,
3. Harm necessitates ease.<sup>15</sup>

Barou N. claims that number of economists have admitted that commercial insurance is a form of gambling or speculation and therefore could not be considered within the ambit of co-operative activities.<sup>16</sup>

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<sup>14</sup> Muṣṭafa Aḥmad al Zarqā'. *'Aqd al Ta'mīn wa al- Mau qif- al-Sharī'ah al-Islāmīyah*. Syria: Damascus. University Press, p. 45 ff.

<sup>15</sup> *Ibid*.

<sup>16</sup> Barou N., *Co-operative Insurance*, (London, 1936) , P. 43.



Mark S. Dorfman indicates that conventional insurance contracts are aleatory; so are gambling events. This means that the parties to the contract know in advance that the money they will exchange will be unequal.<sup>17</sup>

In 1976, the first international conference on Islamic Economy held in *Makkah al-Mukarramah*, resolved that the modern form of conventional insurance companies and their practices does not satisfy the Islamic conditions and aims in order to become lawful or acceptable, and as a result of that, the conference proposed to set up a committee among the muslim scholars both jurists and economists to study the possibility of the implementation of the Islamic system of insurance free from interest and other unacceptable elements (such as risk, gambling, etc.) as an alternative to the modern conventional insurance system.<sup>18</sup>

Nik Ramlah (1992) points out that the Malaysia fatwā committee of the national religious council declared in 1972 that the conventional insurance concept is unlawful in the sight of Islamic law. In 1982, the government set up a committee to study the implementation of the Islamic system of insurance in Malaysia. The Committee recommended the introduction of an insurance system based on *Takāful* concept. Based on these recommendations the *Takāful* act 1984 was passed and this has paved the way for the introduction of the *Takāful* industry in Malaysia.<sup>19</sup>

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<sup>17</sup> Mark S. Dorfman, *Introduction to Insurance*, 2<sup>nd</sup> Edition, p.178.

<sup>18</sup> 'Abd al-Laṭīf Maḥmūd al- Maḥmūd, *al-Ta'mīn al-ijtimā'ī fī Daw' al- Shari'ah al-Islāmiyyah*. Dār al-Nafā'is, 1994, pp.300-316.

<sup>19</sup> Nik Ramlah Nik Mahmood. *Insurance Law in Malaysia*. Malaysia. Butterworths. 1992, p.244.

Hardinur Mohd Noor (1996) indicates that the *Takāful* industry in Malaysia provides its business according to the principles of *al-Takāful* which means the act of a group of people reciprocally guaranteeing each other, and *al-Muḍārabah* which is the commercial profit-sharing contract between the providers of capital for business venture and the *Takāful* company.<sup>20</sup>

There are many of valuable books, studies and articles written on the *Takāful* industry in Malaysia, among them:

**Insurance Law in Malaysia** by Nik Ramlah Nik Mahmood; **Takāful (Islamic Insurance) Concept & Operational System From The Practitioner's Perspective** by BIMB; Etc. The authors of these precious books have done distinguished and outstanding work in explaining the concept and the operational system of the *Takāful* industry in Malaysia. But what I observed during my reading of these books and other books on the subject is that, they lack the jurisprudence (*fiqh*) elaboration on the issues, which the main concept of the Islamic insurance (*al-Takāful*) is based upon. For example, the principles of *al-Muḍārabah* and *Tabarru'*/ duties and rights of the investor and the agent in *al-Muḍārabah* contract/ right for a child who rich the age of puberty to enter the contract of *al-Muḍārabah*/ etc. and that leads to the idea of this research work.

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<sup>20</sup> *Takāful (Islamic Insurance) Concept & Operational System From The Practitioner's Perspective*. Kuala Lumpur. BIMB 1996, p. 47.