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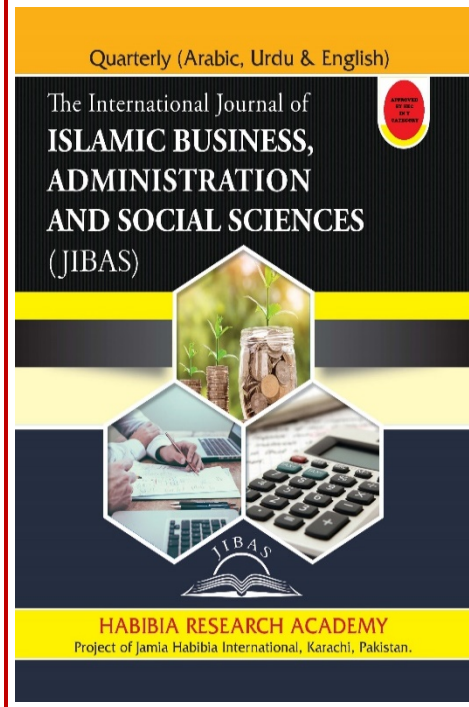
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**TOPIC:**

**THE JURISPRUDENTIAL LEGITIMACY OF INSURANCE  
AND ITS LEGAL NATURE IN AFGHANISTAN**

**AUTHORS:**

1. *parwiz stanekzai*, Lecturer Salam University Kabul, Afghanistan, Email ID: [parwizstanekzai@gmail.com](mailto:parwizstanekzai@gmail.com) Orcid ID: <https://orcid.org/0009-0002-0002-5454>
2. *Abu bakr mudaqiq*, Lecturer Salam University Kabul, Afghanistan, Email ID: [a.mudaqiq21@gmail.com](mailto:a.mudaqiq21@gmail.com) Orcid ID: <https://orcid.org/0009-0003-4822-0109>
3. *Ahmad Samadi*, Lecturer Salam University Kabul, Afghanistan, Email ID: [ahmadsamadi26@gmail.com](mailto:ahmadsamadi26@gmail.com) Orcid ID: <https://orcid.org/0009-0009-1041-282X>

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**THE JURISPRUDENTIAL LEGITIMACY OF INSURANCE  
AND ITS LEGAL NATURE IN AFGHANISTAN**

Parwiz stanekzai , Abu bakr mudaqiq, Ahmad samadi,

**ABSTRACT:**

*Insurance is a financial tool used for protection against financial and economic risks. The primary purpose of insurance is to compensate for financial losses and cover unexpected expenses in the event of an undesirable occurrence such as an accident, illness, or fire. The insurance system involves three parties: the insurer, the insured, and the policyholder. The insurer, or insurance company, is responsible for fulfilling the financial obligations of compensation. The insured or policyholder is the individual or organization that has committed to paying the insurance premium in exchange for coverage and purchases the insurance policy. Insurance in Afghanistan, like in other countries, is a financial tool used for protection against financial and economic risks. Various types of insurance are offered in the country, including fire insurance, home insurance, motor insurance, and commercial insurance. This study focuses on the juristic and legitimacy aspects of insurance, as some scholars consider the insurance contract to be impermissible and illegitimate. The lack of awareness and legitimacy surrounding insurance in Afghanistan has been a fundamental reason for its limited growth in the country. The study also explores the legal nature of this contract and addresses the concerns surrounding its legitimacy.*

**KEYWORDS:** *Insurer, Insured, Legitimacy of jurists, Legal nature of insurance*

**INTRODUCTION:**

Islamic jurisprudence is a dynamic field that has always been able to adapt to the requirements of the times with the help of great Islamic jurists and through the process of ijtehad. As modern life evolves, industry, trade, and other activities must align with Islamic principles. Islamic jurists and scholars bear the responsibility for ensuring this alignment. One specific issue that requires careful consideration and ijtehad is the conformity of insurance contracts with Islamic principles. The traditional texts and teachings do not explicitly address the contemporary concept of insurance, leading to criticism by some scholars who perceive it as a potential instrument of exploitation (Kadarov, 2021). In contrast, Islamic insurance, operating within the framework of Shariah principles, presents economic opportunities and advantages (Miftakhul Jannah & Nugroho, 2019). Therefore, addressing the compatibility of insurance contracts with Islamic principles necessitates open discussions and the application of ijtehad to find appropriate solutions. According to the Islamic perspective, the concept of insurance is referred to as takaful. Takaful is seen as a way to revive the Islamic financial system. As a result, it has become more established and is increasingly visible in public spaces. Rather than decreasing, its presence and importance have grown over time (Malik, 2019).

The Qur'an and Hadiths do not explicitly mention insurance as we understand it today. However, in the early days of Islam, certain agreements such as guarantees and reasonable systems, which share some similarities with liability insurance, were acknowledged and endorsed by Islamic scholars. The concept of insurance, as we currently know it, along with its accompanying laws and regulations, originated from Western societies and

subsequently entered Islamic countries. Recognizing the significance of insurance and the pressing need for it among Muslims in Islamic countries, Islamic jurists such as Taqī ‘Usmānī (2002), El-Gamal (2006), Naim (2020), Al-Qaradawi (2013) and others have undertaken the task of examining insurance, aligning it with Islamic regulations and principles, and providing interpretations (ijtihad) and religious rulings (fatwas) concerning its permissibility.

Several researchers, including Zeng et al. (2017), Kwon (2011), Sarwary et al. (2020), Behzad (2022), and Higgin-Steele (2018), have conducted studies on insurance in Afghanistan. However, none of these studies have specifically focused on exploring the legitimacy of insurance contracts and their legal nature within the context of Afghan laws. The primary goal of this research is to explore the reconciliation of insurance practices with the principles of Shariah, which are regarded as essential for Islamic society. By relying on Islamic jurisprudence, this study aims to examine the extent to which insurance contracts align with the guidelines set forth by Shariah law and determine their legal standing in Afghanistan. To achieve this objective, the research will delve into the foundations of jurisprudence, carefully analyzing the fundamental principles and teachings of Islamic law. By doing so, it aims to shed light on the conceptual and theoretical basis that underpins insurance practices and their adherence to Islamic principles.

Regarding insurance contracts, there are very few research studies conducted in Afghanistan. Some of the published works including Mohammad Reza Rahmani, (2020), Safiullah Aminzadeh (2016), Abdullah Ghafari (2019), Mohammad Hassan Rezayi, (2021), Ahmad Javid Shaibi, (2018), Dr. Sayed Mohammad Tengar, (2016). In general, it can be seen that the publications and articles on insurance in Afghanistan have discussed the importance of insurance, types of insurance, the nature of insurance contracts, the elements of the contract, the expiration period, and the termination of the transaction. However, none of these publications have discussed the legitimacy of insurance contracts and their legal nature according to Afghan laws. Therefore, this study aims to address this gap and establish the foundation of insurance contracts in Afghanistan, completing the research and presenting it to the community.

### **Study Questions**

1-Main Question: What are the jurisprudential and legal opinions regarding the legitimacy of insurance?

1-1- Subsidiary Question 1: Which jurists and legal scholars consider insurance as illegitimate and what are their arguments?

1-2- Subsidiary Question 2: Which jurists and legal scholars consider insurance as legitimate and what are their arguments?

1-3- Subsidiary Question 3: Which opinion regarding the legitimacy of insurance is stronger and why?

2- Main Question 2: How can the legal nature of an insurance contract be analyzed?

2-1- Subsidiary Question 2-1: In what ways is an insurance contract similar to and different from other contracts?

**STUDY OBJECTIVES**

1. Examining the jurisprudential and legal opinions regarding the legitimacy of insurance and presenting valid arguments for each viewpoint.
2. Introducing jurists and legal scholars who consider insurance as illegitimate and presenting their arguments in this regard.
3. Introducing jurists and legal scholars who consider insurance as legitimate and presenting their valid arguments.
4. Analysing and comparing different opinions and strengthening the arguments to clarify a stronger theory regarding the legitimacy of insurance.
5. Analysing the legal nature of an insurance contract and examining its similarities and differences with other contracts.

**RESEARCH METHODOLOGY**

Regarding the research method and the process of collecting the prepared and organized materials, it should be noted that the current research is of a descriptive research type, which uses library and research-based approaches to gather the required sources. In this research, reputable legal books and applicable laws of Afghanistan regarding insurance, such as the Insurance Law, the Principles of Afghan Commerce, the Civil Law, and the Constitution of National Insurance Afghanistan, have been referred to.

**1- GENERAL DEFINITIONS**

Before we discuss the ruling and legitimacy of insurance and its legal essence, it is necessary to discuss the definition and texts that are argued, so that later we can clarify the ruling and legitimacy of the insurance contract and its legal essence in the light of that ruling:

**A) DEFINITION OF INSURANCE**

Insurance is a Persian word derived from "bim" (fear) and means to have fear or concern about something, and is a specific guarantee for life or property that has become prevalent in modern civilization<sup>1</sup>. In Arabic, insurance means the provision and is provided for security, and security is essentially the assurance of safety and the disappearance of fear and apprehension.<sup>2</sup> Security is the opposite of fear, just as trust is the opposite of treachery and denial is the opposite of affirmation. As mentioned in the Holy Quran: "الَّذِي أَطْعَمَهُمْ مِنْ جُوعٍ وَآمَنَهُمْ مِنْ خَوْفٍ"<sup>3</sup>, giving them security from fear. And again "إِذْ جَعَلْنَا الْبَيْتَ مَثَابَةً لِّلنَّاسِ وَأَمْنًا؛" "when we made the Kaaba a gathering place for mankind and a place of security." Some believe that the word "insurance" comes from the Hindi word "Bima" which means provision (theme) and security in Arabic, while in English it means insurance, and in Dari, it means Bima, all of which have legal implications.

Regarding the definition of the term "insurance," various definitions have been given, but the Afghan Insurance Law has defined insurance as follows:

(Insurance is a contract between the insurer and the insured, according to which the insurer is obliged to compensate the other party in return for receiving a certain insurance premium)<sup>4</sup>, also according to the Afghan Commercial Code: (Insurance is a contract in which the insurance company pays Compensates for the damages and losses of individuals

that result from the occurrence of certain accidents and forced causes, by granting a certain amount of money.)<sup>5</sup>

### WORDS AND IDIOMS

1- Who is the insured? A real person or a court enters into an insurance contract in its own right or through a power of attorney to obtain one type of insurance for its benefit or the benefit of another.

2- Insured amount: The maximum liability (amount) that the insurer is obliged to compensate for the damage is and is mentioned in the insurance policy.

3- Insurance reserves: are financial funds that are created from the company's revenue sources to compensate for the costs of the company's operations and reinsurance payments.

4- Compensation without obligation (excreta): Compensation of the insured's compensation by the insurer in exceptional cases, even though the insurer does not have a legal obligation to pay the insured.

5- Insurance fee: It is the amount that the insured pays to the insurance company in exchange for obtaining insurance.

6- Compensation: It is a cash or exchange amount that is paid to the insured in case of an accident and the stabilization of the damage.

7- Insurance policy: It is a legal document that is submitted to the insured by the insurer as an insurance contract.

8- Accident: It is a situation in which the insured person documents his claim for compensation to the insurance policy.

9- Who is the insurer? It is the insurance company that provides the insurance services.

10- Reinsurance: The system of insurance risks to different companies based on contracts and agreements.

Regarding the safe transmission of texts and hadiths mentioned, we refer to the argument that jurists use for it:

### AMAN (SECURITY) IN THE HOLY QURAN

1- {وَإِذْ قَالَ إِبْرَاهِيمُ رَبِّ اجْعَلْ هَذَا بَلَدًا آمِنًا} <sup>6</sup> When he said, Ibrahim, peace be upon him, my Allah! Make this city a safe place.

2- {الَّذِي أَطْعَمَهُمْ مِنْ جُوعٍ وَأَمَّنَّهُمْ مِنْ خَوْفٍ} <sup>7</sup> The one who fed them because they were hungry and gave them security because they were afraid.

### AMAN(SECURITY) IN HADITHS

1- {عن أنس أن النبي صلى الله عليه وسلم قال: {إن المؤمن من أمنه الناس على أموالهم وأنفسهم}-1} A believer is someone whom people trust over their wealth and their lives.

2- 8- {وقال أيضاً} والذى نفسى بيده لا يدخل الجنة من لا يأمن من جاره بوائقه} <sup>8</sup> "I cannot enter paradise if my neighbor is not safe from me, as my life is in his hands."

### 2- INSURANCE ACCORDING TO ISLAMIC LAW

We know that insurance contracts are one of the new and modern types of contracts. In the past, there was little attention given to insurance until the 13th century AH, when the first person to study it (Ibn Abidin) did so. Since this contract and agreement did not exist in the past and no events had occurred regarding it, no Islamic legal text or opinion from the

Companions of the Prophet (peace be upon him) and other scholars had been expressed regarding its ruling. However, in recent times, various opinions have been presented, some scholars consider insurance permissible because there is no evidence to prove its prohibition, so they consider it permissible based on the well-known principle in Islamic law (أن الأصل في الأشياء الإباحة) that everything is permissible unless there is evidence to prove its prohibition. Another group of scholars, however, believe that this contract is void and prohibited, because they have evidence to prove its prohibition, and there is no other evidence to prevent the application of these proofs. A third group of scholars have distinguished between various types of insurance in the past<sup>9</sup>. In general, the opinions of Islamic jurists and scholars can be divided into three categories:

### **1-FIRST THEORY: THE INSURANCE CONTRACT IS INVALID**

Some scholars and jurists who hold this view are Ibn Abidin Hanafi in the book "Hashiyat Ibn Abidin", Muhammad Bakheet bin Al-Mattai'i, the Mufti of Egypt, Sheikh Muhammad Rashid Rida, Muhammad Abu Zahra, Abdullah Al-Qalili, the Mufti of Jordan, Muhammad Abu Al-Yasar Abidin, the Mufti of Syria, Dr. Sadiq Al-Darir, the head of Al-Azhar University, Dr. Yusuf Qaradawi, Dr. Jalal Mustafa Al-Sayyed, and many other scholars and jurists of the Islamic Ummah, who are also in favor of this theory. Furthermore, many scientific and jurisprudential organizations such as the Grand Mufti Council of Saudi Arabia, the Islamic Jurisprudential Council associated with the Muslim World League, the jurisprudential council associated with the Islamic Conference, whose headquarters are in Jeddah, and the World Conference on Islamic Economics have all asserted the validity of this view. The competition Committee of Faisal Islamic Bank and many other organizations and scientific conferences have also endorsed this view.<sup>10</sup>

### **FIRST REASON: THE INSURANCE CONTRACT IS FRAUDULENT AND DECEITFUL**

The insurance contract is a two-way agreement that involves fraud and deceit in its formation. Fraud in transactions is one of the factors that lead to the invalidity of contracts. Abu Huraira (may Allah be pleased with him) said, "The Prophet (peace be upon him) prohibited sales of speculation.<sup>11</sup>" "This prohibition in the Prophet's hadith leads to the invalidity of contracts that involve fraud. To accurately recognize fraud, it must be said that fraud is uncertainty and doubt in obtaining profit or loss in transactions, or when recognition of something is difficult, and its truth is unknown. Imam Sarakhsi (Hanafi) defined it as follows: "Something whose outcome is unknown is Gharar." And Imam Quraafi (Maliki) said, "Gharar is something whose attainment or non-attainment is not clear, like selling a bird in the air." Ibn Hazm (may Allah have mercy on him) defined Gharar as follows:

"Gharar is when the buyer does not know what he has bought, or the seller does not know what he has sold, and this ignorance comes from one of the parties and any contract or agreement that is suspicious and uncertain is considered Gharar and fraud in financial transactions, and it must usually be effective in the contract."<sup>12</sup>

Building upon the above definitions, it can be concluded that the insurance contract is deemed fraudulent as there is uncertainty and doubt regarding the compensation of damages and the amount to be paid, which violates the principle of Gharar in financial transactions.

### **SECOND REASON: INSURANCE CONTRACTS ARE AKIN TO GAMBLING AND POSSESS THE CHARACTERISTICS OF GAMBLING**

The section that is seen in insurance contracts possesses all the characteristics of gambling. Therefore, its ruling is also similar to gambling. In gambling, there is winning and losing, and fate is the determinant. It is a destroyer of ethical and practical human actions, just as Allah Almighty mentions in the Holy Quran about gambling.

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ

"Intoxicants and games of chance...are an abomination, - of Satan's handiwork: eschew such (abomination), that ye may prosper." O ye who believe (mime)! Intoxicants and gambling, (dedication of) stones, and (divination by) arrows are an abomination, - of Satan's handwork: eschew such (abomination), that ye may prosper. The path of gambling, according to Ibn Taymiyyah, is taking someone's money with the question of whether it will be compensated for that person or not. It is a risk. Based on the statements and confessions of legal experts, the same characteristic is present in insurance contracts because a person who guarantees the protection of other people's property against accidents and risks is a wager and a bet. The insurer promises an unspecified amount to the insured person and receives a certain amount from the insured person. If no risk occurs, the amount that the insured person has received will be earned without trouble. And if a risk occurs, the amount received is more than what he/she has taken, which is the same as gambling, betting, and risk.

### **THIRD REASON: INSURANCE CONTRACTS INVOLVE USURY TRANSACTIONS**

Insurance contracts are considered usury transactions, and any transaction that involves usury is considered void, unlawful, and invalid. According to the definition provided by legal experts, insurance is a contract in which the insurance company must pay an amount to the insured person in exchange for a sum that has been previously received. This exchange of goods and services without any invoice being issued is considered interest and usury. Therefore, insurance contracts are considered invalid and unlawful.<sup>13</sup>

### **2-SECOND THEORY: INSURANCE CONTRACTS ARE A VALID AND PERMISSIBLE CONTRACT**

Scientific personalities, jurists, and scholars who agree with this theory consider insurance contracts as legitimate and permissible contracts. They include Mustafa Al-Zarqa, Sheikh Ali Al-Khafif, the late Sheikh Abdulwahab Khallaf, Sheikh Abdulmanaf Mahmoud, the late Dr. Mohammad Yousef Mousa, Professor Ahmed Taha Al-Sanusi, Professor Tawfiq Ali Wahba, Dr. Jafar Shahidi, Sheikh Abdulhamid Al-Sa'ih, and Sheikh Mohammad Bin Hassan Al-Hajawi Al-Tha'labi, who have also issued.<sup>14</sup>

**FIRST REASON: COMPARING INSURANCE CONTRACTS TO THE ISSUE OF PAYING BLOOD MONEY FOR UNINTENTIONAL MURDER BY THE RELATIVES OF THE KILLER (AQILAH).**

A group of Islamic scholars and jurists who believe in the legitimacy and permissibility of insurance contracts compare insurance contracts to the issue of paying blood money for unintentional murder by the relatives of the killer (Aqilah) in Islamic jurisprudence. It has been stated in Islamic jurisprudence that if unintentional murder is committed by someone, the qisas (retribution) will not be carried out, but all the relatives of the killer must cooperate to pay the blood money. This is to reduce the effects of this tragedy on the killer's family. For a strong bond among family members, Islam has established the law of Aqilah regarding blood money. If someone unintentionally or accidentally kills a person, the blood money is paid from the assets of the relatives, family members, and tribe of the killer over a period of three years. Only the killer is not obligated to pay the blood money, and if the relatives fail to pay the blood money, they can turn to close relatives for help in paying it. If the killer is a (latest) newborn baby and does not have enough property to pay the blood money, the public treasury can pay it. Insurance companies also do the same thing, meaning they pay a certain amount to the insured person to reduce the damage and compensate for some of the losses incurred by the insured.

**SECOND REASON: COMPARING INSURANCE CONTRACTS TO THE ISSUE OF GUARANTEEING A ROAD**

Comparing insurance contracts to the issue of guaranteeing a road from potential risks is another way that some Islamic scholars and jurists who believe in the legitimacy and permissibility of insurance contracts use to explain the concept. In the case of guaranteeing a road, one person tells another that the road is safe and has no risks, and if any danger or problem arises, they will compensate for the losses incurred. If a risk or problem is found in the safety of the road, the guarantor will be responsible for compensating for the damages, as they have accepted the potential element of compensation. This is similar to when one person tells another that if my rights are proven, you are my guarantor or if I travel to a certain place tomorrow, you are my agent. All of these potential elements can be compared to insurance, as insurance companies also have a guarantee in the event of an incident or accident occurring.<sup>15</sup>

**THIRD REASON: COMPARING INSURANCE CONTRACTS TO THE ISSUE OF PENSION OR RETIREMENT PLANS**

Another reason why supporters of insurance contracts compare it to the issue of pension or retirement plans is that pension or retirement plans are contracts between employees and the government where a small amount of their monthly salary is deducted and paid back to them after retirement or death for their spouse and children. These installments paid for life insurance are similar to pension or retirement plans and in both cases, the individual does not know how much they have paid and what the total amount is, sometimes receiving more or less than what they have paid. Therefore, if retirement or pension plans are legitimate and permissible, insurance should also be legitimate. Since there is a lot of obscurity in life insurance about pension or retirement plans, all Islamic scholars and jurists



recognize and consider pension and retirement plans as legitimate and permissible. They see it as one of the foundations and necessities of the system, a government responsibility, and in the public interest.

Therefore, they do not deny pension or retirement plans, but they do not consider insurance permissible among people.

#### **FOURTH REASON: COMPARING THE INSURANCE CONTRACT WITH THE RENTAL OF A SECURITY GUARD**

The scholars who consider insurance contracts to be permissible have compared them to rental contracts and have stated that "just as there is security in both insurance and hiring a security guard, renting a security guard is permissible in Islam, insurance is also valid and permissible due to their shared focus on security. Another reason why they consider it permissible is that in both cases, the tenant is guaranteed protection against future harm or damage."

Rental is a contractual agreement based on the tenant's use of the rented item for a specific period and at a specified price. According to the verses of the Holy Quran and the traditions of the Prophet Muhammad (peace be upon him), a rental agreement is a valid and legitimate contract. Allah Almighty says, (فَإِنْ أَرْضَعْنَ لَكُمْ فَآوَهُنَّ أَجُورَهُنَّ) and if they breastfeed for you, then give them their payment." So if they breastfeed your children, then give them their compensation. And Allah continues, "And they found therein a wall about to collapse, so he restored it. Also, Allah Almighty said, (فَوَجَدَا فِيهَا جِدَارًا يُرِيدُ أَنْ يَنْقَضَ فَأَقَامَهُ، قَالَ لَوْ شِئْتُ لَتَخَدَّتْ عَلَيْهِ أَجْرًا)

If you wished, you could have taken for it a payment, So they found a wall that was about to collapse, and Khidr (peace be upon him) fixed it. Musa (peace be upon him) said, "If you wanted, you could have taken payment for it." And Aisha (may Allah be pleased with her) says, ((استأجر النبي صلى الله عليه وسلم وأبو بكر رجلاً من بني الدليل ثم من بني عبد بن عدى، هادياً خريته)) "The Prophet (peace be upon him) and Abu Bakr hired a man from the Banu Dayl and then from the Banu Abd ibn Adi as a guide." They rented a man from the Banu Dayl and the Banu Abd ibn Adi as a guide who was skilled, knowledgeable, and experienced.

Those who consider insurance contracts permissible have compared them to rental contracts and have reasoned that just as there is security in renting a security guard, insurance is also valid and permissible because of their shared focus on security. Furthermore, in both cases, the tenant is guaranteed protection against future harm or damage. However, even though insurance and rental contracts have some similarities in providing security.

#### **3-THIRD THEORY: SOME INSURANCES ARE PERMISSIBLE, AND SOME ARE IMPERMISSIBLE**

Some scholars and jurists consider some types of insurance permissible while rejecting the permissibility of other types. These individuals include Muhammad Hassan al-Hajjawi, Najmuddin al-Wa'ez, Ata al-Mufti al-Iraqi, and Sheikh Abdullah bin Zaid Al-Muhammad. Muhammad Hassan al-Hajjawi believes that insuring both movable and immovable property against unforeseeable events is permissible, but life insurance is incorrect.

Najmuddin al-Wa'ez and Ata al-Mufti al-Iraqi state that insuring property against events and risks that are caused by humans, and not natural disasters that are beyond human control, is unlawful and impermissible. However, Sheikh Abdullah bin Zaid Al-Muhammad believes that ensuring transportation equipment such as cars, planes, ships, and industrial factories is permissible, but ensuring other objects is prohibited.<sup>16</sup>

### **3- LEGAL NATURE OF THE INSURANCE CONTRACT**

In the previous section, we discussed the legitimacy of the insurance contract. In this section, we will focus on the legal nature of the insurance contract. Insurance is a specific type of contract that, in addition to general contract principles, has its own rules and characteristics. Insurance is a contract between a natural or legal person (insured) and an insurance company (insurer). This contract has certain characteristics that we will explain below:

- Insurance is a voluntary contract.
- Insurance is a necessary contract.
- Insurance is a reciprocal contract.
- Insurance is a contingent contract.
- Insurance is a declaratory or accessory contract

#### **1- AN INSURANCE CONTRACT IS A CONSENSUAL OR VOLUNTARY CONTRACT**

The linguistic definition of consent is that it is the source of being pleased or satisfied. It means choosing, heart's content, and contrary to anger and dislike. In legal terminology, consent refers to the internal satisfaction of a person, without coercion, to perform a transaction<sup>17</sup>. The Afghan Civil Law defines consent as follows: "The condition for the validity of a contract is the consent of the parties without coercion or force."<sup>18</sup>

Therefore, an insurance contract is a contractual agreement whose validity depends on the preparation of a written document. Insurance contracts are generally concluded through a written insurance policy. Although insurance law states that the insurance contract and its terms must be in writing, numerous reasons prove the opposite, and insurance can be formed in consensual contracts, whether verbally or by mutual agreement and offer and acceptance. In common law, there is no standard form of an insurance contract, and oral agreements are valid<sup>19</sup>. The courts recognize insurance commitments and accept them as valid from the date of verbal agreement. Once the parties agree on the subject matter and terms, the insurance contract is concluded, and the written document provides only a means of proving the contract.<sup>20</sup>

#### **2- INSURANCE CONTRACT IS A NECESSARY CONTRACT**

As we know, a necessary contract is a contract that neither party can terminate or annul without the consent of the other party. According to the definition in Afghan Civil Law, a necessary contract is: "Once a contract is executed as necessary, it cannot be revoked or modified without the consent of the parties or the law."<sup>21</sup> Alternatively, a necessary contract is a contract where neither party has the right to terminate it without the other party's consent, except in specific circumstances as defined by the law.<sup>22</sup> In other words, a necessary contract is a contract where neither party has the authority to terminate it

without the other party's consent, such as a sale or lease agreement, where neither the buyer nor the seller can terminate the transaction without the other party's consent. This is referred to as "Iqala" in the applicable law.<sup>23</sup>

One point that needs to be mentioned is that the principle in contracts is the necessity of contracts because fulfilling contracts is mandatory based on Sharia law. As Allah says, "( يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ ) O you who have believed, fulfill [all] contracts". The Civil Code (mujalatul Al Ahkam Al-Adliyya) defines a necessary contract as a binding contract that is free from revocation. With regards to the effect of a necessary sale contract, the Civil Code (mujalatul Al Ahkam Al-Adliyya) states: "If a sale is binding and necessary, neither party has the right to return the goods to the other party."<sup>24</sup> An insurance contract is a necessary contract in the sense that neither party has the right to terminate it, except in specific cases recognized by the law. The insurance contract obliges both parties to fulfill the terms of the contract, and they cannot terminate the contract at will unless the law recognizes their right to terminate or the contract allows them to do so, or the term of the contract expires. An insurance contract does not terminate automatically in the event of death or disability of the insured, and the rights and obligations arising from the contract are transferred to the heirs in the event of death or are managed by a legal representative in case of disability. However, a life insurance contract is an exceptional type of insurance contract, as it involves investment, and individuals are not obliged to continue their savings and investment. If the policyholder refuses to pay the life insurance premium, which is his contractual obligation, the insurer cannot force him to pay it. In fact, by the nature of life insurance, the policyholder has the right to stop paying the premium and refuse to pay it, but the insurer is always obliged to fulfill its contractual obligations and cannot stop the contract or refuse to fulfill its obligations. It should be noted that in the event of disability.

### **3- A RECIPROCAL (MUTUAL) CONTRACT IS AN INSURANCE CONTRACT**

Lawyers and professors define a reciprocal contract as a contract in which each of the two parties receives something in exchange for something else, which may be either a tangible asset or a commitment.<sup>25</sup> The main role of contracts in social life is to provide a natural and fair way for the distribution and exchange of wealth, which strengthens personal initiative and does not feel external compulsion in its observance. In today's world, if anyone gives something of value to another or takes on a commitment, it is mostly to obtain something equivalent or more than what they have given. Therefore, reciprocal contracts are contracts in which one party commits to perform an action or provide an asset to the other party in exchange for an asset or commitment that they receive from the other party, such as sales contracts.<sup>26</sup>

Therefore, (a contract of exchange is a financial contract in which the properties of the two parties are exchanged with each other). Jurisprudence defines a contract of exchange as a contract that involves obligations and commitments from both sides. Therefore, each of the parties in the exchange contract commits to perform an action or own a property in return for what the other party owns or commits, such as sales contracts, leases, partnerships, etc., which are based on the exchange between the parties. For example, in a sales contract, the

seller commits to own the item, and the buyer commits to own the price. As the Afghan Civil Law states: (If an exchange contract is made based on the interests of the parties, and has all the necessary conditions for validity and enforceability, the possessor of the property is obliged to deliver it to the beneficiary of the contract, and the beneficiary is obliged to deliver the benefit to the possessor of the property).<sup>27</sup>

Therefore, it is clear that an insurance contract is not non-reciprocal due to its nature, but it is one of the reciprocal contracts because it requires commitments from both parties. Both the insurer and the insured accept commitments about each other, i.e., both in terms of disclosing the actual risk of the insurance and paying the insurance premium and in terms of covering the defined risk in the contract. The insurer is released from its obligations in the following cases:

- 1- If the compensation is claimed based on false information about an incident.
- 2- If the insured fails to inform the insurance company within a certain period or fails to pay the insurance premium.

Therefore, intentional concealment of facts or false statements by the insured that alters the nature of the risk or downplays its importance can lead to the invalidation of the insurance contract).<sup>28</sup>

#### **4- AN INSURANCE CONTRACT INVOLVES POTENTIAL RISK**

As we found from the definition of an insurance contract, only potential risk can be the subject of the insurance contract, as the Afghan Civil Law states: "An exchange contract is considered potential if chance and happenstance play a role in determining the two exchanges, and the contract is based on that." Therefore, in the definition of potential contracts, it can be said: "It is a reciprocal contract in which the amount of two exchanges depends on an uncertain future event."<sup>29</sup>

Therefore, an insurance contract is considered one of the common cases of potential contracts because, at the time of the contract, the insurer does not know how much they have to pay, such as life insurance on the condition of death. After all, the insured may die after paying the first premium, and the insurer is obliged to pay the entire insurance amount. This very fact that the insurance contract involves potential risk forms the basis of the validity of the insurance contract. In the same way, if the risk has occurred before concluding the insurance contract, the insurance contract is void. The Afghan Insurance Law is explicit on this matter: "If the risk for which the same type of insurance is being taken out has occurred before the insurance contract, in that case, the insurance contract is considered void."<sup>30</sup>

#### **5- A SUPPLEMENTAL (ADHESION) INSURANCE CONTRACT**

Is a contract in which the terms of the contract are taken entirely by one party, and the other party specifies all the terms and effects in advance, unlike the usual process of contracting. The person or entity wishing to enter into the contract must either give up or accept all of the other party's terms, and essentially agree to a plan that the other party independently regulates. That is why this group of contracts is called supplemental, joining, or adhesion contracts, such as contracts related to the use of electricity, water, telephone, railways, mines, and the like. Therefore, in adhesion contracts, acceptance is absolute and

not subject to dispute, and the person who wants to accept the offer of adhesion contracts must either completely accept or reject it. Afghanistan's Civil Law states: "Acceptance in adhesion contracts is achieved by mere delivery within the limits of the conditions laid down by the offeror, these conditions are not disputable."<sup>31</sup>

Therefore, sometimes an insurance policy is also referred to as a supplemental contract because the contract has been prepared and arranged by the insurer in advance, and the insured only negotiates some of its aspects with the insurer, meaning that the insurance policy contract has been previously prepared and arranged, and only the insured is added to it.

If a contract is made in the form of adhesion and under unfair conditions, the court may modify the conditions or rule in favor of the opposite party in a fair way, unless the adhesion conditions are set by government agencies.

#### **4- ELEMENTS AND CONDITIONS OF INSURANCE CONTRACTS**

The Afghan Civil Law stipulates that the same conditions apply to all types of contracts, including insurance contracts. These conditions relate to the elements and fundamentals of each contract, which are consent, parties, and the subject matter or main purpose of the contract.<sup>32</sup> For example, if someone lacks legal capacity, they will not have the right to enter into financial contracts, including insurance contracts. Similarly, if a mentally ill person signs a sale contract, the contract will be null and void due to the lack of legal capacity.

In addition to the general conditions specified by Civil Law, Islamic jurisprudence identifies necessary conditions for the formation of all contracts. These conditions include the capacity of the parties, the capacity of the object, adherence to the specific conditions of the contract, the benefit of the contract, the preservation of the offer until the acceptance occurs properly, and joining the gathering of the parties to finalize the contract.<sup>33</sup>

Insurance contracts also include specific conditions that are exclusive to insurance contracts. These conditions include:

- Determining the insured subject matter,
- Specifying and determining the installments and payments,
- Determining the duration of the contract and its start and end times,
- Determining the insurance amount.<sup>34</sup>

#### **A) ELEMENTS OF AN INSURANCE CONTRACT**

An insurance contract has certain elements like other contracts that, if not present, can result in the invalidity of the contract. The insurance contract has three essential elements, which are as follows:

##### **1. CONSENT**

"Consent is the agreement of two or more parties. Afghan Civil Law is explicit about the importance of consent in contracts, stating "the conditions for the validity of a contract are the mutual consent of the parties without coercion or duress".<sup>35</sup> Therefore, the insurance contract will only be legally valid if there is mutual consent from both parties. Thus, according to the law, for an insurance contract to be valid and legally binding, it must have:

1- Both parties should be present for the contract.

2- They should have legal capacity.

3- Their intention should be free from defects predicted in the law (known as defects of will). However, in practice, the insurance contract is concluded in a particular manner and involves a relatively lengthy and formal process.<sup>36</sup>

## **2. SUBJECT MATTER**

The Afghan Civil Law states regarding the subject matter of a contract as follows: "For every type of obligation arising from a contract, the existence of a subject matter to which the contract relates, and which can be the subject of a contract is considered necessary. The subject matter of a contract can be formed by a certain thing, a debt, a benefit or other financial rights, and the performance or non-performance of an act subject to the contract may also be included." Therefore, the subject matter of an insurance contract or insurance obligations must be possible, determined, and legal. The purpose of being determined is to eliminate ambiguity, such as when a person with two houses enters into a fire insurance contract for their home and does not specify which one has been insured, the insurance contract is null and void due to the ambiguity of the subject matter." In other words, an impossible

## **3. CAUSE**

The Afghan Civil Law defines cause as: "The main purpose for which a legitimate contract is entered into." Or the cause is "the direct purpose that the obligated party has set as the goal of their commitment." The presence of a legitimate cause is considered the main condition in every contract unless there is a reason to deny it. However, sometimes the contract may be null and void due to the opposing nature of the cause in question, failure to comply with customary norms or its non-existence."

## **B) START TIME OF AN INSURANCE CONTRACT**

Insurance is one of the contractual agreements and starts after the contract is entered into. However, sometimes it may be possible to specify a different time for the start of the contract in the agreement. Usually, the start time of the contract is the day after the contract is entered into (24 hours after the contract is entered into), but it may be determined at a different time and day. It is possible to delay the conclusion of the insurance until the full payment of the insurance premium is made. In the presence of these conditions, the insurance agreement remains pending, and the effects of the contract will not begin until the payment of the insurance premium is completed. Regarding the insurance premium, the Insurance Law states that: "The insurance premium is the amount paid by the insured to the insurance company in exchange for obtaining insurance."<sup>37</sup>

The question being raised is: If the insured has not paid the insurance premium and during this time the insured event or accident occurs, is the insurer obliged to compensate for the damages? In response, it should be said that since an insurance contract is a consensual agreement, obligations and liabilities of both parties arise as soon as the contract is concluded. Therefore, paying the insurance premium by the insured is mandatory because one party undertakes to compensate the other party for the incurred damages for a fee in case of an accident. If the insured fails to fulfill their obligation to pay the insurance premium, they may refuse to fulfill their obligations and even refuse to pay the

compensation to the insurer. Since there is an obligation of one party to the other party, the Afghan Insurance Law has provided for such a situation as follows:

"The insured shall take all necessary measures, as far as possible, to prevent the occurrence of damage, as well as to reduce and mitigate losses."<sup>38</sup>

An insurance contract may be terminated due to the expiration of the term, the completion of the subject matter, or mutual agreement. Ultimately, invalidity, annulment, rescission, or the passage of time creates the grounds for ending the insurance contract.

### **C) THE EXPIRATION OF THE INSURANCE PERIOD OR THE COMPLETION OF THE SUBJECT MATTER OF INSURANCE**

At the time of concluding the insurance contract, the duration of the insurance contract must be specified, and after its expiration, the insurance company is not obliged to compensate the insured party. In cargo insurance, the insurance starts and ends based on internal and international transportation systems such as CIF and CER, and other customary rules of chambers of commerce or international trade, which are mentioned in the 2000 Inco Terms. The expiration of the insurance period in cargo insurance is the date of delivery of the goods to the buyer. On the other hand, in life insurance, the commitments of the insurance company begin when the insured person dies, and the contract ends after fulfilling their obligations by the insurance company. In some cases, the insurance contract ends with the occurrence of the risk, such as in fire insurance. If a store is insured against fire, after a fire, the insurance company fulfills its obligations to compensate for the damages to the insured party, and thus, the contract between them ends. Other reasons for the end of insurance include the death of the insured party, mutual agreement, or based on reasons mentioned in the contract text.

### **CONCLUSION**

Insurance contracts are a relatively new development that did not exist in the time of the Prophet Muhammad nor during the time of the Khalifahs or early Islamic jurists. The importance and necessity of this contract necessitated that Islamic jurists conduct discussions and analysis according to Islamic principles and standards, to determine its permissibility and legality. The door of *ijtihad* was open, and the system of contracting in Islam is not limited to specifically named contracts, as was known in the early days of Islam, such as buying, renting, gift-giving, mortgage, partnership, division, and other contracts. Rather, the mention and rules of such contracts are found in Islamic jurisprudence sources, from the book, the Sunnah, and consensus. Is it permissible to create new types of contracts unrelated to the previous contracts when there is a need and necessity in society? Indeed, some scholars consider insurance contracts to be impermissible, while others compare them to specific contracts and justify their legitimacy. Their view is that as long as there is no explicit prohibition against the contract and by relying on the Quran verses "(وَفَوَّابًا بِالْعُقُودِ) وَتِجَارَةً عَنْ تَرَاضٍ)" the contract is considered valid and necessary.

An insurance contract is a voluntary transaction that human reasoning recognizes as beneficial for individuals in society. In today's human societies, a country's system cannot

play an important role in trade without insurance. Without insurance activities, the economy of countries will be limited and unable to develop well.

**RECOMMENDATIONS**

As insurance is a commercial contract and is currently recognized in most countries, including our beloved Afghanistan, insurance is currently experiencing growth and prosperity in the country. Incidents such as traffic accidents, fires, thefts, etc., are increasing. For example, a recent fire incident in Kabul, Kootah Sangi, and Abbasin Plaza resulted in significant losses as there was no insurance coverage with insurance companies, and the affected parties bore an immense burden. Another recent incident involved a large market in Herat during the time of the Islamic Emirates, where a fire caused millions of dollars in damages, and since the market had no insurance contract with any entity, it had to bear all the losses alone. Therefore, the government needs to devise plans to consider its citizens and compensate the affected individuals. A solution must be found.

In this regard, the following proposals are suggested:

1. Raising public awareness about the legitimacy and benefits of insurance contracts.
2. Establishing practical ways to institutionalize insurance in the country.
3. Educating citizens about this legal institution and its rights.
4. Making certain types of insurance mandatory, where there is no difference of opinion among religious scholars, such as fire insurance, theft insurance, and traffic accident insurance, among others.

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