INTRODUCTION
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Let us start from the point that in modern times the precious life of every human being is at risk for various reasons. The development of modern society, while providing technological solace and scientific guarantees, also poses so many risks to the human life. These risks may occur to one's life, their property or even their business ventures. Often these risks affect the lives of many in society in such a way that it leaves them vulnerable and helpless. The question, therefore, arises as to how to help these unfortunate people while recognizing that we live in a precarious world. Its uncertainties seem to confront our personal fortunes and our progress at nearly every turn of the road. Nevertheless, it would have been a much more hazardous world if we were not in a position to protect ourselves against its major uncertainties by means of insurance. The important part, which this great provider of security plays in our lives, can perhaps be brought home to us in some degree by briefly contrasting the present with the past. The primary objective of insurance is to uphold shared responsibilities among the parties involved, by way of mutual co-operation and thereby protecting an individual against unexpected risks. To what extent the modern system of insurance within the limits of law is capable of providing comfort and safety to us? An answer to this question can be formulated only after a rigorous examination of the existing systems of insurance and the legal frameworks associated with it.

Historically speaking, before the institution of insurance was organized, human beings were compelled to take tremendous risks inspite of anything they could do about it. This was true not only of the venture of some men but of the average men as well.¹ Back in those days when a man's dwelling was destroyed by fire or tornado, he had to rebuild it with his own hands and by means of his own resources or seldom with, assistance of voluntary aid from his neighbor. The loss was total, for he could not insure

his own life or property like his home against fire or tornado when a man's possession was stolen from him, his fortunes received a severe set back. The damage could be devastating, for he could not insure his belongings, his cattle's, his grains, and his money against thieves. When a man dies suddenly, his wife and children are compelled to survive by utilizing their ancestral property or other properties. Sometimes, they may sell out their land, or start cultivation to make a life from of it. However, since the main source of income has been stopped and the absence of insurances can lead them to a situation where their life will not be financially smooth and prosperous.

Over the years, things have changed and today the system of insurance is one of the foremost enterprises which provide solutions to these types of issues. Fire, tornado, burglary and theft of automobiles are the miseries and insurances are the remedies, and both are part of our everyday affairs. As a result, individuals are no longer compelled to suffer tremendous risks, which their ancestors used to face. By means of insurance, they are able to protect themselves against almost any misfortune, which might overtake them. Contemplating the major hazards of life, it is not difficult to say which one of them gives us the greatest concern. It is naturally the risk of loss of human life. Concern for life is not merely because of the law of self-preservation but also because of our great anxiety to ensure the future welfare and security of our dependants. This deep-rooted human concern for dependants, coupled with consciousness of the risk of loss of human life, naturally leads us to the high appreciation of the utility of life insurance.

The thing which is certain about the present day life is its uncertainty yet the common man goes about his daily chores with the belief that hazards happen to others not to him. Even the most safely minded among us are not immune from uncertainty but are exposed to hidden and unexpected risks. Every meal carries some risk of infection. Every trip to our place of work and back exposes our lives and limbs to risks. The work place particularly the floor of factory is a veritable mine of risk factors. From accidents due to motor vehicle, electric gadgets, fires from gas stoves, roof collapse, burglary, break
death due to allergy to an injunction, floods and drought to crop conditions, to unemployment, the list can never be completed. In this context, insurance can be used as a scheme to control the risk effectively. Its primary function is to substitute certainty for uncertainty as regards the economic cost of disastrous events.2

The institution of insurance is, under common legal system, rendering two pronged services to the nation; one is to help the individual in catastrophe and the other is helping the State to enable it to do social welfare services.

Under common law, insurance practices have obtained substantial recognition that accounts for the rapid development in this area in recent years. It can be assumed that such rapid development was produced by the speedy growth of the legal system in the areas of trade and commerce.

Under Islamic law, the idea of insurance (takaful) originated from the doctrine of 'al-aqilah' practiced by the ancient Arab tribes before 570 CE. It then obtained recognition in Islamic law because of the approval of Holy Prophet Mohammed (PBUH) in one of his judgments against a woman from the tribe of Huzail.3 Unfortunately, the development of Islamic Insurance practice has been less than satisfactory, and it is unable to keep pace with the developments in other aspects of commercial law. The main reason for such poor progress in the development of Islamic insurance (in both principle and practice) may be due to the conflicting opinions among Muslim scholars as regard to the validity of insurance practices. This diversification comes from a misconception about insurance, which has haunted the minds of many Muslim scholars and general Muslim Ummah. As a result, today we witness only a minimal development in the field of Islamic Insurance amidst the

3. See Sahih al-Bukhari, Kitab al-Diyat (Translated in English) by Dr. Khan in Muhsin, The translation of the Hearing of Sahih al-Bukhari (Lahore, Pakistan; Kazi Publications, 1979), Vol. 9, No. 45, p. 34.
reluctance of scholars to involve them in comprehensive research in order to come up with relevant literature in this field.

Insurance under Islam has undoubtedly played a great role in commercial activities and contributed towards achieving a stable economic environment. It may be that conventional insurance involves some elements such as riba (usury), compulsory nomination clause, etc., which are contrary to the divine sanctions. However since the, primary objective of insurance is to create a shared responsibility among the parties on the basis of mutual cooperation in providing protection for a person against unexpected risk so it may be justified by Divine sanctions i.e. Quran. The importance of insurance in providing economic security to the individual, therefore, cannot be denied by looking at only the unlawful elements that exist in conventional practices.

For the purpose of providing social and economic security for the Muslim Ummah, it is necessary to come up with an alternative insurance model (a variation of the conventional insurance policy) which must be justified by the Quran and the Sunnah. Islamic Insurance (Takaful) is based on the concept of social solidarity, cooperation and mutual indemnification of losses. Takaful operates on the Islamic principles of taaawun (brotherhood or mutual assistance) and tabarru’ (donation, gift or contribution). In takaful, the risk of loss is shared collectively and voluntarily by the participants who guarantee each other against defined losses or damages. Each participating member contributes resources (premium payments) and personal efforts to support the needy participants within the group. Consistent with Islamic beliefs, takaful is an example of how the fortunate may assist the unfortunate few. The essence of takaful is to maintain equity among the members of a group and to assist those in the group who have suffered misfortune. Earning a profit is not the sole objective of the takaful operator or participants (who share in any surplus takaful fund). The takaful participants are viewed as both the insurer and the insured. An Islamic insurance model may thus be based on, inter alia, the principles of al-Mudarbah financing and would,
therefore, be in line with the Islamic principles of inheritance and bequest. This kind of insurance is completely in harmony with the teachings of Islam as enshrined in the Holy Quran and the Sunnah.

It is sincerely hoped that all Muslim scholars will avoid their differences and reach to common consensus in their views on the issue of the validity of insurance just by looking at conventional insurance practices. Moreover, they should try to construct a comprehensive alternative model of insurance practices, which may be justified by Shariah principles so as to ensure that the contemporary Muslim Ummah may be able to benefit from and enjoy a better socio-economic security against unexpected risks or tragedies.\(^5\)

1. **The Choice of Topic**

There are many loopholes and lacuna in common legal system relating to insurance. The system requires much improvement so that the provisions of the insurance laws may be applied for the benefit of the insured. Under this system the benefits to the insured are much less as of the insurer (the State), on the other hand the Islamic insurance (takaful) which is generally prevailing in Muslim countries looks more appreciable because here the takaful contract is made basically for the benefit of insured.

On minute study of two systems one may find a lot of difference not only in the concept but in the operational frame work also. As common law insurance is based on the principle of indemnity whereas the Islamic Insurance is based on mutual co-operation and brotherhood.

A legally viable and effective mechanism is necessary to resolve conflicts in International financial system and avoid financial wars. There are lot of hue and cry and protests against the practice of Islamic insurance (takaful) in developing countries.

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The above facts have prompted me to undertake the study of insurance law under common legal system and Islamic legal system. In my thesis, I have tried to point out the difference in the application of these two systems and endeavor has also been made to justify the life insurance under Islam.

2. Need for study

The need for this research work stems its origin from the world wide accepted principles of insurance, which basically means sharing the responsibility. There is a lot of difference between the principles and practice of insurance under both the systems. As both the systems are very good in their own spheres but with the present financial crisis in the world arena, insurance in Islamic system is more effective in order to deal with the contemporary financial crises in the world. Under Islamic system of insurance profit and losses are divided among group of people and it is not the individual who has to bear all the risk, as risk under this system is to be shared between the group of people. So it is a requirement of contemporary world. A fully impartial and independent Islamic insurance system is a need of an hour under International financial system, hence the need for research in this area.

3. The Objective of the Study

The present research study tends to achieve the following objectives and put forward an agenda for academicians, policymakers, highest legislative establishments and corporations involving in insurance business to incorporate thereof in their pursuit for providing maximum benefits to the participants:

i) The study is an effort to understand the conceptual framework of insurance under both the legal systems.

ii) A threadbare study has been pursued in discussing the operational framework under both the systems. In respect of the models of insurance under common legal system, it is quite mature, on the other hand, a working model has been proposed by the researcher based on the Islamic principles that may suit to the Indian position.
iii) To find out the feasibility of introducing life insurance in Islamic system.

iv) To propose the legal regulation of Islamic insurance in developing countries.

4. **Hypothesis**

The hypothesis and research variable of the present research work have been premised on the following formulation:

i) To find out the faults and lacunas in both the systems.

ii) An effort has been made for the comparative study of both the systems and to bring out the distinctions between them.

iii) To prepare a roadmap for the implementation of the practices of Islamic insurance (takaful) in India including the feasibility of life insurance under Islam.

iv) To have an alternative system of insurance in India as the insurance practices in the country are insurer oriented not insured oriented.

5. **Scope of Study**

The scope is restricted to the following domain:

(i) The conceptual framework of insurance under common legal system and Islamic legal system

(ii) The rule oriented set up under which both insurance system works.

(iii) Identifying the differences between two systems.

(iv) To provide a relatively clear description and understanding of Islamic insurance system.

(v) The manner in which insurance under both the system could be made more justiciable and equitable.

(vi) Emphasis of study on insurance under common legal system has been mainly confined to the Indian position.
6. **Impact of Study**

Since the subject matter of the study exhaustively deals with the problems, difficulties and solutions, the impact of study would be to add to the existing fund of knowledge and to provide the latest update, so as to make it useful in the present as well as in the future.

7. **Methodology**

The methodology adopted by the researcher is purely doctrinal and analytical in nature. It involved an in depth study of source materials, text review, case study and comparative study of both the systems of insurance. The research is based on two types of material i.e. primary materials and secondary materials. The Primary materials consists of verses of Holy Quran, Hadiths, text of laws, declarations etc. on the issue. Secondary material consists of books, articles, encyclopedia, research papers, newspapers and magazines. The research also includes study of case laws. Use of internet was also made to gather important information relating to the subject of study. The entire research is analytical and descriptive in its nature. Through out the work uniform mode of citation was followed. Articles from Journals are cited as suggested by the respective journals themselves. While citing a textbook the author’s name is cited first, followed by the name of the book, publisher, place of publication, year of publication and page number.

This work should not be considered as exhaustive and conclusive. There is a lot of scope for further study on the topic and relating to the other matters concerning insurance particularly under Islamic law.

8. **Chapter-wise Introduction**

The brief chapter-wise contents are as under:

*Chapter-I* This chapter deals with the history, origin and development of insurance under common legal system as well as under Islamic legal system.
Chapter-II This chapter exhaustively deals with the central idea and principles of insurance under common legal system as well as under Islamic legal system with Sharia'h thoughts. The sources of law affecting insurance under common legal system and Islamic legal system are also elaborately discussed. Further, this chapter also deals with the comparative consideration of essential elements of both the systems.

Chapter-III This chapter exclusively pertains to the origin and development of re-insurance under common legal system as well as under Islamic legal system. It will also highlight the importance of re-insurance in the working of both the system in the contemporary era.

Chapter-IV This chapter is devoted to the conceptual framework of life insurance under common legal system and Islamic legal system. It will also deal with the factors affecting the validity of the life insurance under Islamic legal system. Suggestions with regard to the applicability of life insurance under Islamic legal system are also made.

Chapter-V This chapter pertains to the regulatory framework of insurance under common legal system. It also examines the different models of regulation of Islamic Insurance and their effects.

Chapter-VI This chapter attempts to deal with the differences between insurance under common legal system and Islamic legal system.