INSURANCE UNDER NIGERIAN STATUTES: THE ISLAMIC LAW ALTERNATIVE

BY

MUHAMMED MURITALA ABDULRAHMAN

DEPARTMENT OF ISLAMIC LAW

FACULTY OF LAW,

AHMADU BELLO UNIVERSITY,

ZARIA, NIGERIA

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MUHAMMED MURITALA ABDULRAHMAN
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DEPARTMENT OF ISLAMIC LAW,

FACULTY OF LAW,

AHMADU BELLO UNIVERSITY,

ZARIA, NIGERIA

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DECLARATION

I hereby declare that the work in this dissertation entitled "Insurance under Nigerian Statute: The Islamic Law Alternative" was authored by me in the Department of Islamic of Law, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria, under the supervision of Prof. B. Babaji and Prof. Muhammad Arsalan Muhammad.

The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this work has been previously presented or submitted for another degree or diploma at this or any other any institution.

_____ _____

Muhammed Muritala ABDULRAHMAN Date

CERTIFICATION

This Dissertation entitled "INSURANCE UNDER NIGERIAN STATUTES: THE ISLAMIC LAW ALTERNATIVE" by MUHAMMED MURITAL ABDULRAHMAN, meets the regulations governing the award of the degree of LL.M (Master of Laws) of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

_____ _____

Prof. B. Babaji Date
Chairman, Supervisory Committee

_____ _____

Prof. Muhammad Arsalan Muhammad Date
Member, Supervisory Committee

_____ _____

Prof. Sani Idris Date
Head, Department of Islamic Law

_____ _____

Prof. S.Z Abubakar Date
Dean, School of Postgraduate Studies

DEDICATION

Alhamdulillahi, this work is dedicated to my father (Late Abdur-rahman Muhammad Ateeka (Mu'allim)-May Allah overlooks and forgive his shortcomings and admit him into Jannatul-Firdaos), my mother (Mrs. Balqees Muhammed), my brothers and sisters and my immediate family members.

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ABSTRACT

Insurance scheme is put in place to fall back on in the event of risk or calamity occurrence. Nigerian Statutes require that every motor vehicle owner must possess at least third party insurance policy. However, the conventional insurance contradicts certain elements of Islamic law which make it unlawful and unacceptable. Thus, majority of Muslims (believers) and other adherents have refused to adopt the conventional insurance and subsequently, called for alternative *shariah* compliant products. Consequently, this research work discusses essentials elements, formation and operation of insurance scheme with specific emphasis on motor vehicle insurance scheme under Nigerian statutes and Islamic law alternative, differences and thereafter considers the relevant provisions in new *Takaful* Guideline, identifies challenges therein. In the final analysis, observes that there is lack of awareness on the part of public about insurance generally and Islamic alternative (*takaaful*) specifically and finally recommends inter alia that: NAIOCM should relax some of the stringent conditions/requirements to allow more *takaaful* companies to come up, intensifies effort to curb use of fake insurance papers and inject sanity into the industry and that co-operative insurance be adopted as means of promoting insurance scheme among association members.

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CHAPTER ONE

GENERATION INTRODUCTION

1.1 Background to Study

Virtually, all legal systems recognized and guaranteed certain rights for human beings. Further to these recognized rights, some selected rights have been regarded as fundamental rights. Among these fundamental rights is right to acquire and own property. The Nigerian Constitution like that of other civilized countries, followed suit and recognized these fundamental rights[1]. Notable among these rights is right to acquire and own property[2].

In furtherance to the above, the right to own property was further guided and jealously protected to the extent that tampering with same (somebody property) without prior consent and permission of the owner is regarded as criminal act (i.e. offence) under the law[3].

In addition to the above, a Nigerian Citizen is allowed though subject to some limitation to have resort to self-help in an attempt to defend his property[4].

Comparatively, Islam and indeed Islamic law equally in comprehensive form provided for, protected and guaranteed the essential rights[5] (among which is right to own property). Islamic law did not only recognize and protect the right (referred here specifically to right

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[1] See Chapter IV of the Constitution of Federal Republic of Nigeria 1999 (as amended).
[2] See section 43, ibid.
[3] For example see section 286 of Penal Code law, Cap.89 Laws of Northern Nigeria 1963 (applicable now in all northern states and section 383, Criminal Code Act, Cap.C38 Laws of Federation of Nigeria, 2004 (applicable in other states) on the offences of theft and stealing respectively.
[4] See section 33(2) of the Constitution, Op.cit, see also Aguda A. and Okagbue I., *The Principle of Criminal Liability in Nigeria Law,* Heinemann Educational Books Nigeria Plc, Ibadan, 2nd Edition, Pp.304-305
[5] For detail discussion of these rights see Al-Marzouqi,I.A.,Human Rights in Islamic law, 3rd Edition,1426/2005,pp.141-145.

to own property) but also, in attempt to block all ways to its violation, imposed severe penalty/punishment for the offences of theft and Hirabah (Robbery)[6].

It is crystal clear from the above that, both Islamic law and Nigerian Statutes protected the right of people to own property. The laws further criminalized the act of theft, stealing, robbery or any other criminal acts that are inimical to the enjoyment of the right. The reason may not be unconnected with the protection of the interest of the owner in the property rather than the property itself. This is because; the owner may on his own volition dispose of or alienate the property to somebody else.

All what the laws did was to protect the interest of the owner over the property. It is this interest that always propels the owner of the property (e.g. house, car, company, business, and other things capable of being insured) to take out insurance policy against damage, destruction or loss, etc (these often referred to in commercial law as risks)[7].

It has been observed that there is no definite or generally acceptable definition for the contract of insurance or assurance as it is often referred to. This may not be unconnected with the fact that the term insurance is easier to describe than to be defined. To define the contract of insurance is further complicated by the silence of the insurance Act on the definition of the contract. To this ends, Yerokun observed thus: "Since the insurance laws do not provide a definition, it is not easy to define but describe what is insurance."[8]

However, judicial definitions have been provided for insurance contract. For Example, it has been held that a contract of insurance in the widest term is: "A contract whereby one

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[6] See Suratul-Maaidah: Quran 5 verses 33 and 38. In for instance, Khan, M.M. and Al-Hilali, M.T., *Interpretation of the Meaning of the Noble Quran in the English Language*, Darussalam Publishers and Distributors, Riyadh, Saudi Arabia, see also Anwarullah, *The Criminal law of Islam*, (A.S. Noordeen), 2nd Edition, 2002/1423, pp.174-195.

[7] Yerokun, O., *Insurance law in Nigeria*, Emmanuel Centre, Lagos, 1992,p.1

[8] Yerokun, O., Insurance Law in Nigeria, Emmanuel Centre Lagos, 1992, p.g.2. See also Omo-eboh, O., The Law of Insurance Contract in Nigeria, West African Book Publishers Limited, 2012, P.g. 79, for similar observation and conclusion.

person called the insurer undertakes in return for the agreed consideration called the premium, to pay another called the assured, a sum of money or its equivalent, on the happening of a specified event."[9]

From the above definitions both theoretical and judicial one, it is clear that emphasis has been placed on the element of the uncertain nature of the contract (of insurance) as to the time of event, and payment of regular arranged premium. These represent the distinguishing features of conventional insurance contract as distinct to other contracts in terms of their elements.

Contrarily, *atta'ameen* or *takaaful* (Islamic Alternative to insurance) has been rightly described thus:

> A form of assistance premised on righteousness in a situation whereby group members bind and obligated themselves to contribute (in to a form of pool of money) with sole aim of alleviating or relieving any difficulties, hardship, loss of any forms that befall their member. In that wise, they (members) are partners in help by making some contribution in to the pool from which necessary assistance will be rendered to any member faced with calamity.[10]

Lending credence to the spirit and basis of the above mutual insurance as acceptable form of insurance under Islamic law, Yusuf said: "A co-operative effort at mutual help on the part of a group of similarly individuals is an act of virtue and beneficence."[11]

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[9] See Kayode Vs Royal Exchange Assurance (1955-56) W.R.N.L.R. 154, Oloruntade Vs Dantodo (I976) N.C.L.R. 57 @ 59. For similar definition see again, Industrial and General Insurance Company Ltd Vs Kechhinyere (2009) 3 C.L.L.R. P.256 @ P.266, Paragraph 20.

[10] Al-Husary, A., Assiyaasatul-Iqtisodiyyah, wan-nazmul-Maaliyyah Fil-Fiqhil-Islaamiyy, Daarul-Kitaabil-'Arobiy, 1st Edition, 1408/1986, p.g. 351.

[11] Yusuf, S.M., Economic Justice in Nigeria, Kita Bhavam-India, 1988, P.g.90.

Therefore, it may be correct to discern from the definitions and descriptions of the insurance contract in the two legal systems under consideration, that parties to the contract (of insurance) may be individuals or group of individuals. It is also apposite to state here that mutual insurance concerns majority with the protection of members during the happenings of any loss or risks, while commercial insurance is solely put in place for business of insurance. This motive informs the formation or incorporation of company (as a requirement of law) for business of insurance.[12] It may therefore be correct to conclude that the mutual insurance is only for assistance of the members (which is the one sanction by *Shari'ah*), while commercial insurance is for business transaction. It is not to be suggested that commercial insurance is not permissible under Islamic law. This is because formation of company to carry on businesses/contract, including that of insurance, is not prohibited, provided that the principle of Islamic law guiding the businesses are properly followed and complied with.[13]

Having said the above, it is interesting to state here that the interest of the property owner in the insured property forms the subject matter of insurance. To this ends, and in relation to motor vehicle, the learned author of commercial law observed thus:

> In motor insurance contract, the subject matter of insurance is the motor vehicle which is exposed to accident. In personal insurance contract, it is the physical body of the assured. In burglary insurance, it is the property that is exposed to loss and in fire insurance; it is the building which may be exposed to destruction. In a nutshell, it is the motor vehicle; the bodies of the assured, the

[12] See sections 3, 4 and 5 of the Insurance Act, Cap.I 17, Laws of Federation of Nigeria, 2004.

[13] See the mode of operation of company in Islamic insurance in Salahudden, A., Islamic *Banking and Insurance*: *A Global Overview*, A.S. Noordeen, 1427/2006, .p.p.514-515, wherein he detailed on applicability of Mudaarabah Mushaarakah, Takaful and Tabaru'at in Insurance contract by the company, and in accordance with the principles of Islamic law of contract.

> property or building, e.t.c. that constitute the physical object of the insurance.[14]

The summary of the proposition of the above author is to the effect that insurable interest[15] (in the property) is important in the formation and enforceability of contact of insurance of whatever kind (including that of motor vehicle which this work intends to discuss).

It may therefore be correct to state here that, since the purpose of insurance is to cover, cater for or alleviate the effect of unforeseen negative circumstance or risks that affect the property, the institution of insurance could therefore be seen to be in existence from and as old as human existence itself. However, the mode and ways of its formation may not be the same[16]. This is because the primitive insurance contract is in form of mutual insurance and co-operation, whereby the community as a whole will pull the resources together to cater for the loss of individual members whose lives and properties are affected by risks[17] (i.e damages, destruction or loss).

It is very interesting to state here that the Motor vehicle insurance scheme involved some elements that are prohibited and as such majority of scholars has issued *fataawa*[18] (Islamic rulings) to the effect that all forms of conventional insurance are *Haraam* (illegal). The

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[14] Yerokun, O., Op.Cit, p.14.

[15] The term insurable interest means that, the insured must have an interest in the preservation of the thing to be insured, to the extent that he will suffer financially on the happening of the peril or event insured against. See Irokwu. J. O., *Insurance Law and Practice in Nigeria*, Heinemann Educational Books Nigeria Plc, Ibadan, 1999, p.8.

[16] Muslehuddin, M., *Insurance and Islamic Law*, Adam Publishers & Distributors, Delhi-India, 2nd Edition, 1994, Pp.3 and 11.

[17] Muslehuddin, M. Op.cit., P.3 and 11.

[18] This is Islamic jurisprudential terminology used for "verdict or ruling" issued by a prominent scholar, who is qualified and often referred to as "mufti". Such scholar must be knowledgeable in Qur'an and its exegeses, Hadtihs and Islamic jurisprudence in order for him to make ijtihad (Analogical Deduction). For the qualifications and more detail on fataawa and mufti: see Salahu As-shary, U., Adabul-Fatwa, Maktabatul-Khaanajy-Cairo, 1413 A.H/1992, 1st Edition, P.g 35-55.

major reasons for declaring same illegal is that it is a form of gambling, involved usury (Riba) and that they are contract that are rooted in *Garar* (uncertainty)[19].

Furthermore, considering the major objective of insurance (protection of property and elevation/amelioration of hardship), the modern scholars have through doctrine/principle of *Ijtihad* fashioned out alternative scheme termed "*atta'meenul Islamiyy* or *Attakaaful* (as commonly called). The Scholars thereafter applied some principle of Islamic law of Commercial and transactions to develop some products that can be used in the industry to render services that are *shariah* compliant and at the same achieve the same goal for which conventional insurance is targeted (i.e protection of property and elevation/amelioration of hardship).

1.2 Statement of Research Problem

The major constituent elements of contract of insurance under Nigerian Statutes are prompt payment premium as at when due, uncertain nature of the risk and presence of insurable interest of the insured (in the property insured).[20] Some basic elements and features of insurance contract, such as payment of premium and uncertain nature of the events/risks (among others) formed the basis or reasons for the modern Islamic scholars to declare the commercial (conventional) contract of insurance illegal.

Conversely, the law mandated every Car user in Nigeria to insure his/her vehicle (at least) against third party[21]. The Act went further, in order to sanction the compliance of the

[19]http:/www.islamqa.info/en/ref/islamqa/130761 accessed on 20/12/2017, http://www.islamicawakening.com/viewarticle, accessed on 20/12/2017. These Scholars include ;Shaikh Ibn Uthaimeen, Shaikh Solih Al-Fawzan. For their views and reasons for declaring conventional insurance on car illegal, see http://www/islamqa/info/ref/islamqa/102969.

[20]Okany, M.C., (1992), Nigerian Commercial Law, African-Fep Publishers Limited, Onitsha-Anambra, 1st Edition, p. 624.

[21] See exceptions to this in Section 5 of the Motor Vehicle (Third party) Insurance Act, Cap. M 22, Laws of the Federation Of Nigeria, 2004.

above provision, to criminalize the act of failure to have insurance policy in respect of user's vehicle and punishment for the failure was also prescribed.[22]

The implication of the mandatory provision of the Act is that notwithstanding the position of Islamic law on conventional insurance, every car user/owner must possess it. The question is how will these set of citizens be saved, in view of the Right to religion[23] as enshrined in the constitution (which is sacrosanct and cannot be curtailed on this aspect)? How would they cope in this circumstance with a view to practicing their religion which includes full compliance with Islamic dictates? This question is begging for answer. It is a factual problematic situation that is looking for solution or way out. It therefore remains constitutional or legal issue.

It is ore imperative to look outside the conventional insurance scheme in order to develop products that would satisfy and accommodate the interest of the adherent of *shar'iah* as provided in the alternative products. Furthermore, the concept of insurance is novel as same was not institutionalized during the life time of Prophet Mohammed (S.A.W) and the four guided caliphs.[24] However, the modern scholars have through *ijtihad* (analogical deduction) and application of Islamic principles arrived at ruling on conventional insurance[25].

[22]See Section 3(2), ibid.
[23]See section 38 of the Constitution of Federal Republic of Nigeria 1999 (as amended)
[24]See Al-Husary, A., Op.cit., p. 344.
[25]Muslehuddin, M., Insurance and Islamic Law, Adam Publishers and Distributors, Delhi-India, 2nd Edition, 1994, P.p.109-125.

With the release of Guideline for Takaful operation by NAICOM[26], there seems to be way out for adherent of Islamic law in Nigeria, in connection with insurance. This is because, it ushered in for the first time, the era of recognition of the alternative Islamic product of insurance referred to as *Takaaful*. However, there are other issues and challenges that also sprang with the provisions of the Guideline.

1.3 Aims and Objectives of the Research

From what we have stated so far and statement of problem above, the main aim of this research is to make a comparative study of motor vehicle insurance scheme under Nigerian Statutes and Islamic law with a view to achieving the following objectives:

(1) To evaluate the general principle of motor vehicle insurance.

(2) To evaluate the guiding principle of insurance/contract of insurance of vehicle under Islamic Law.

(3) To show the relationship between vehicle insurance under insurance Act and Co-operative insurance under Islamic Law (with specific reference to motor vehicle).

(4) To present the Islamic Alternative product (Takafu/Ta'ameen) to conventional Insurance (limited to vehicle insurance) to adherent of Shariah rules without violating the provision of Motor vehicle Act.

1.4 Justification

It has been observed that most *muslims* and adherent of *Shari'ah* Legal System have refused to adopt conventional Insurance Scheme due to involvement of prohibited elements such as deceit, uncertainty and *Riba* (usury). However, unknown to majority,

[26] The Guideline was released by the National insurance Commission (NAICOM) March 2013 and it could be downloaded on http://naicom.gov.ng/content accessed on 19/12/2014 at 3:20p.m.

Islamic law has alternative and *shariah* compliant products which is regarded as *takaaful* or *atta'meenul islaamy*, devoid of all the prohibited elements and serve the same purpose.

This work would therefore provide the basis (*Ijtihad*) for the alternatives products and mode of operations of the product. This work is therefore justified as it would be of assistance to interested stakeholders in the sector and serve as treatise to be built on.

1.5 Scope of the Research

It should be stated from onset that this work would be limited to Motor Vehicle insurance and its Islamic law alternative. Therefore, the work will thoroughly consider the relevant provisions of Insurance Act, 2003 and Motor Vehicle (Third Party Insurance) Act Cap M22 Laws of Federation of Nigeria, 2004, being the statutory Laws governing the aspect, in Nigeria. These are Federal legislations since Insurance is under exclusive jurisdiction of the National Assembly[27]. Reference will also be made to provisions National insurance Commission (NAICOM) Act and the regulation and Guidelines issued by NAICOM in accordance with its the statutory power in regulating and in connection with the Insurance industry.

Conversely, this work also intend to consider Islamic alternative to conventional insurance generally with specific emphasis on motor vehicle insurance, some basic principles of Islamic Law would be referred to. This is because, the area is novel field and same was not institutionalized during the Prophet's life and his companions. However, the Scholars (particularly the modern ones) have utilized the doctrine of *ijtihad* to formalized, institutionalized and structured products that are *shariah* complaint and therefore provided the Islamic Alternative to conventional insurance, particularly in the mode of operation.

[27] Insurance is mentioned in item 33, second Schedule (exclusive Legislative lists) to the Constitution of Federal Republic of Nigeria 1999 (as amended). Thus, no state assembly can legislate on matter of insurance.

1.6 Research Methodology

This work invokes the use of doctrinal research methodology. This is comprised of primary sources such as Constitution, Statutes and judicial authorities as well as secondary sources such as articles and journal and publications. In the same vein, the work also made reference to primary sources of Islamic law (such as Qur'an and Sunnah) and secondary sources such as Ijama', qiyas ijama and the principle of *ijtihad* (analogical deduction) through which the modern scholars adopted in arriving at ruling on conventional insurance[28].

1.7 Literature Review

To the best of the researcher's knowledge there are many authors and writers on the concepts of insurance generally. Furthermore, even though there are limited works on the concept of vehicle insurance under Islamic Law, there are some works that laid down the guiding principles that govern contracts (Contract of insurance inclusive) under Islamic Law. To achieve this, reference would be made to some Islamic classic texts, works, publications, journals and any other relevant materials.

The following are some of the works and authors written on the aspects touching on the issues involved in this work:

Abdul-Azeez, U[29]., dealt extensively on *Riba* (usury) and treated in great detail some transactions that involved or bear semblance of *riba*. In fact, the title of the work speaks

[28]Muslehuddin, M., Insurance and Islamic Law, Adam Publishers and Distributors, Delhi-India, 2nd Edition, 1994, P.p.109-125.

[29] Abdulazeez, U.,(1418 A.H), Ar-RibaaWal- Mu'aamalatul-MasrofiyyahFinazariShari'atil-Islamiyyah, Daarul-'aazimah Publishers and Distributors, Saudi Arabia, 8th Edition,pp.403-427

of the content and what one should expect. The author mentioned and explained some of these among which insurance in conventional way is one. He thereafter concluded that no matter where muslim may find himself, he should shun such insurance. He never envisaged the situation faced by the adherent of Islamic faith and indeed Islamic law, as this writer intends.

Achike, O., in his work[30], after brief introduction and history of the insurance business in Nigeria, discussed the essential elements of insurance contract, formation and enforcements of the terms and conditions contained in the policy form. Generally, this author categorized the insurance into life and general insurance. He thereafter mentioned motor vehicle insurance and discussed it briefly under sub-heading of general type. This author though recognized and admitted the fact that the insurance Act allowed co-operative /mutual insurance, he failed to discuss the benefit/relevance of this special scheme to economy.

Ahmad, A., on his part, in his work[31], focused on the Islamic economic policies. He x-rayed the basic principle of economic in accordance with the *shari'ah* (Islamic law). Ahmad explained the fact that Islamic law condemned cheating and exploitation of fellow being in order to gain economic power or to be economically viable. It was on this basis, he dealt extensively with contract of insurance in conventional way, juristic arguments on same and concluded that same in not in line with the principle of *shariah*. He alternatively advocated for the adoption of takaful (Islamic insurance policy). However, he was silent on the modality to be adopted in achieving the goal.

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[30]Achike, O.,(1985), *Commercial Law in Nigeria*, Fourth Dimension Publishing Co. Ltd, pp. 321-349.

[31]Al-Husary, A., (1408/1986), Assiyaasatul-Iqtisodiyyah, wan-nazmul-Maaliyyah Fil-Fiqhil-Islaamiyy, Daarul-Kitaabil-'Arobiy, 1st Edition,pp. 344-367.

Al-Bagdaady, A[32]., dedicated a chapter for contracts that have element of deception (*garar*). He made copious references to prophetic traditions condemning deception. In his discussion of this topic he expatiated on the contract that involved element of uncertainty or the parties are not aware of the consequence of the terms of the contract. The author though did not mention insurance contract but the examples provided pointed to the fact that conventional insurance contract qualified to belong to the categories.

The work of **Al- Jamal, G**[33], focused on the conventional commercial insurance and concluded after analysis of the operation of the policy that it violated Islamic law principle of contract. He however presented the takaful as an alternative available insurance. He, not being a Nigerian, made no discussion or reference to modus operandi of the offered alternative in Nigeria and in the purview of Nigerian Insurance law.

Al-Jaozy,[34] like Al-bagdaady above, created in his textbook, a sub-head tagged transactions of uncertainty. He pointed out that any transaction whose outcome is not certain or involves lack of precision of its occurrence fall among those prohibited by the prophetic traditions on deceit or deception (*garar*). He equally did not mention insurance but insurance by inference fall in those contracts.

Al- Juzairi[35], A., on his part only treated contract as a whole and stipulated essential elements of contract under Islamic law. Furthermore, he explained, according to four orthodox schools of thoughts (Maliki, Hanafi, Shafi'i and Hambali) the vitiating element of contract among which fraud and deceit were mentioned. This made his work qualify to

[32]Al-Bagdaady, A., Al-Ma'uunah ('ala madh-hab ;aalimil-maddenah), Daarul-Fikri Printing, Publication, and Publication, 1419/1999, p.1029-1032.
[33]Al-Jamal, G.,(No date),The Commercial Insurance and The Islamic Substitute, Al-E'etessam Publishing House-Cairo, pp.25-40.
[34]Al-Jaozy, I.,(1431/2010), Zaadul-ma'aadfiiHady- Khairil-Ibaad, Vol. 4, DaarulFikri-Cairo, pp.400-406.
[35]Al-Juzairy, A., (2000),Kitabul-Fiqh 'alaaMadhahibil-Arba', Vol. 4, Al-maktab Al-thaqofy Publishing and Distributing-Cairo, p. 130-144.

have touched on the topic of this work. This is because the conventional insurance contravened Islamic law principle of contract in the area of deceit and *riba* among others. The author however failed to treat the aspect of insurance under Islamic law.

Bambale, Y.Y.[36], in his work dealt with some variety commercial transactions, their constituents and guiding principles under Islamic law. At the last chapter, the erudite Islamic law expert succinctly explained the concept of *Takaful* (as Islamic insurance).

Hassan, A. A.[37], in his book considered critically various contracts as well as their constituent elements. He dedicated a whole chapter to discuss risks in sale under which he made reference to the prophetic Tradition to the effect that *garar* (uncertainty) should be avoided in any contract. Thus, he theorized that a contract must not be doubtful or uncertain as far as the rights and obligations of the parties are concerned. He thereafter concluded that all the contracts that are rooted in fraud, risks or uncertainty are not permissible under Islamic law. Those contracts were predominant during pre-Islamic era but Islamic law abrogated them and introduced legitimate ones that are in conformity with the principle of *shari'ah*. The discussion on risks made the work relevant to this discussion of insurance, even though the work made no mention of insurance explicitly.

Irukwu, J. O.[38], a commercial law writer in his book discussed after brief history of introduction of insurance with particular reference to Nigeria, extensively on the essential elements of insurance contract generally. He mentioned various categories of insurance wherein he placed vehicle insurance under accident insurance. However, the writer did not discussed in details the motor vehicle insurance scheme as he treated the topic in less than a page. He made no reference to Islamic law position on motor insurance.

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[36]Bambale, Y.Y., (2007), *Islamic law of Commercial and Industrial Transactions*, Malthouse Press Limited, pp.194-202.
[37]Hassan, A. A., *Sales and Contracts in Early Islamic Commercial Law*, Islamic Research Institute, Islamabad-Pakistan, 1st Edition, 1994,p. 67-97.
[38]Irukwu, J.O., Insurance Law and practice in Nigeria, Op.cit, pp.23-33.

Muhammad, A.[39], just like Al-jaozy and Al-Juzairy treated only the essential elements of contract as a whole with mentioning contract of insurance. He treated separately some contracts prohibited by Shariah and reasons for declaring same illegal. One of the reasons is *garar* (uncertainty) or deceit in contract. On this aspect, work even though contract of insurance is not appeared at all in the work.

Muslehuddeen, M., on his own part in his book[40], x-rayed the evolution of insurance from primitive time up till when same was institutionalized and common law principles were adopted. Similarly, the writer stretched his touch-light in to the history of contract under Islamic law as well as basis upon the scholars (particularly modern ones) arrived at ruling on the modern day contract of insurance. The work also failed to envisaged statutory bondage associated with the Islamic insurance in Nigeria. Blame cannot be apportioned to him (for this failure), as he is a Nigerian.

In his Book[41], **Omo-eboh, O**. considered in a great detail the history of insurance regulation in Nigeria, formation and constituent elements of contract of insurance. He made copious reference to provision of Insurance Act and treated all categories of insurance including otor vehicle insurance on the same length.

Okany, M.C's work[42], just like Achike's, concentrated on the insurance contracts as applicable in Nigerian commercial system. In fact he followed the same mode of writing and content of Achike. Thus their works are almost the same. He equally dedicated a

[39]Muhammed, A., (1416/1996), Bidaayatul-Mujtahid WaniaayatulMuqtasid, vol.4, (Daarul-Kitabil-'ilmiyyah, Beiruit-Lebnon, 1st Edition, pp.534-543.
[40]Muslehuddin, M., Op.cit, pp.27-49, 57-80.
[41]Omo-Eboh, O., *The Law of Insurance Contract In Nigeria,* West African Books Publishers Limited, 2012, p. 78-108,
[42]Okany, M.C., Op.cit, pp.665-668.

separate sub-head to the discussion on motor vehicle insurance though a little bit lengthy than that of Achike. Okany did not also consider the insurance under Islamic law.

Saabiq, S., while treating partnership in his work [43]only dedicated about one and half page to partnership in insurance. He made reference to fatwa being issued by Shaikh Ahmad Ibrahim to the effect that insurance contract (in conventional way) is allowed. The writer thereafter refuted the fatwa and presented the doctrine of *Mudarabah* and *Musharakah* as an alternative mode of operation of insurance (including motor vehicle).

Salahudden, A.[44]., on his part in his work treated the aspect of insurance under Islamic law in great detail. He dealt extensively and explicitly with the operation of insurance company without categorization in to life, marine and vehicle. He gave statistic of the operation of *Takaaful* Company in some selected Muslims countries and concluded that *takaaful* is gaining ground and growing vastly and globally. This work did not consider at all the conventional commercial insurance or any statute on insurance.

Yerokun, O., in his own book[45], after brief introduction stated the general principle of insurance law and considered the renovation brought by the new insurance Act. The distinguishing feature of this work is that the author dedicated a whole chapter to the discussion on Motor insurance. The work just like most commercial author did not treat the aspect of motor vehicle insurance under Islamic law.

Yusuf, S. M., in his book[46] criticized commercial insurance scheme under any models. In his reasoning, only mutual /co-operative insurance which is solely meant for the help of

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[43]Saabiq, S., Fiqhus-Sunnah, Vol.3, Daarul-Fathi-Lil 'Ilaamil-'aroby-Cairo, 21st Edition, 1999/1420,Pp.208-209.
[44]Salahudden, A., Islamic*Bankingand Insurance*: *AGlobal Overview*, A.S. Noordeen, 1427/2006, p. 512-543.
[45]Yerokun, O., Op.cit, pp.13-21, 388-404.
[46]Yusuf, S.M., (1988), Economic Justice In Islam, KitabBhavan, New Delhi-Indian, pp.90-93.

members. According to him, mutual insurance/ assurance is so designed to be liquidated it when the objective of collective payment of indemnity for the acts of an individual member of the group is fulfilled. He concluded that mutual help should not be used as a means of capital formation for purposes of industrialism. He classified insurance contract under *Daman* (warrant) and as such postulated that the guarantor is prohibited from charging any fees or taking any money in return from the guarantee. This opinion to this writer's mind is not correct as there is vast different between contract of insurance and guaranty. Therefore, the opinion of Yusuf has not captured what insurance constitute under Islamic law.

Fisher, A. and Taylor, D.Y.[47], in their article, after general introduction of *takaaful* (Islamic Alternative to insurance), basis and guiding principles, greatly discussed the benefits its embracement is capable of injecting in to the economy. In summary, these writers focused only on the beneficial effects of *takaful* in the economy.

Khan, L. A.[48], in his article compare and contrast the conventional commercial insurance with *Takaaful* (Islamic Alternative to insurance) with a view to bringing out guiding principles for the two. He thereafter concluded that the *takaaful* system of insurance has potentiality of bringing financial succumb to the economy rather than cheating, and fraud as manifested in conventional insurance.

Mulhim, S. S. and Sabbagh, M. A., in their article[49] extensively treated Islamic alternative to insurance and practice in Jordan. The article emphasized the various

[47]Fisher, O. and Taylor, D.Y., Prospect s of Evolution of Takaful in the 21st Century, available at www.takaful.com.sam/m4sub3.asp.openaccess.htm accessed on 10/3/13.
[48]Khan, L. A., How does Takaaful Differs from Insurance, available at www/Islamic-banking.com.openaccess accessed on 13/3/2013.
[49]Mulhim, S.A. and Sabbagh, M.A., Islamic Insurance Theory and Practice available at http//www.albaraka.com/media/pdf/research-studies/Book-islamic-insurance.pdf, accessed on 10/3/ 2013.

models, which *takaaful* company can adopt in carrying out insurance business and they encouraged the citizen to embrace and patronized the alternative *shar'iah* compliant products. They however did not consider insurance under any other laws/statutes as the writer intends, with a view to identifying differences and guiding principles.

Raiz, S., in his research work[50] concentrated only on the degree and rate at which people adopt car Islamic insurance scheme in Pakistan and United Arab Emirate (U.A.E). The research statistically after proper consideration of some factors such Age, Educational status and income demographically showed the variant degree between the two countries. The research though (as preamble) talked of *takaaful*, but necessary details on car insurance were omitted and no statute was considered.

Yusuf, T.O., in his article[51] elaborated only on the benefits accruable to Nigerian economy should Islamic alternative to insurance (*Takaaful*) is fully employed. According to him, economy will grow and more funds would be accrued to the participant in *takaaful* and in case of any loss it will be distributed according to the contribution's proportion. He however did not consider legislative or statutory frame work for the operation of Islamic insurance law in the country. No reference was made to motor vehicle insurance in specific.

It is imperative to state here that none of the above reviewed publications discussed the insurance scheme on vehicle side by side with Islamic Law Alternative products (Known as Takaaful/Ta'ameen) as intended to be done in this work. Furthermore, this work also

[50]Riaz, S., (June 2009), Car Islamic Insurance-Influence of Age, Education & Income in Pakistan and U.A.E: A Comparative Study,in Business Research Papers Vol.5, No.4, Pp.457-467.

[51]Yusuf, T.O., Prospect s of Takaaful (Islamic Insurance)'s contribution to the Nigerian Economy, Journal of Finance and Investment Analysis, Vol. 1, no. 3, 2012,Pp. 217-230, Science print Limited. Available at http//www.scienpress.com.upload/jfia/vol%20 3.3.12pdf.accessed on 10/10/17 @7:30 P.M.

intends to briefly consider the provisions of Guideline on Takaaful operation in Nigeria as released by National Insurance Commission ("NAICOM").

1.8 Organizational Layout

This dissertation is arranged in chapters and comprised of five chapters.

Chapter one focuses on the general introduction encompassing statement of research problem, objectives of the research, justification of the research, scope of the research, research methodology and literature review.

Chapter two focuses on Insurance under the Statutes with reference to motor insurance.

Chapter three presents Islamic Law alternative products to conventional insurance by stating the basis for it, models and mode of operations in an attempt to fulfill the main objectives of insurance but in a *Shariah* Complaint atmosphere.

Chapter four makes juxtaposition of the operation of insurance Scheme under Nigerian Statutes and Islamic Law alternative and thereafter used Takaful Guideline 2013 as a yardstick for improvement introduced by *Shariah'* compliant products in Insurance sector/field.

Chapter five provides for summary and conclusion under which observations from the whole discourse in this work are summarily enumerated and recommendations thereto were made to the findings identified.

CHAPTER TWO

MOTOR VEHICLE INSURANCE SCHEME UNDER NIGERIAN STATUTES

2.1 Introduction

The primary purpose of having insurance scheme in place is to ensure security against any future risks or loss. In other words, insurance policy alleviates or reduces the burden of responsibility of the insured upon the occurrence of risks[1]. This purpose is encompassing and cut across all the sphere of our lives. It is therefore interesting to state here that just as it is important to have insurance policy (which is compulsory in some specific areas)[2] under Nigerian law, so also it is relevant to know what contract of insurance is, as well as its constituents elements, in order to observe them and give life to the intention of parties to the contract of insurance. Failure to observe or meet the relevant elements of the contract of insurance may vitiate the entire contract and render any benefit therein unenforceable[3]. Since motor vehicle insurance scheme is a category of contract of insurance, those elements required for the contract of insurance are also applicable here and should therefore be considered. Thus, it is of high interest and for ease of understanding to consider the basic fundamentals and basic elements of contract of insurance under Nigerian statutes before considering specifically motor vehicle insurance and its types.

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[1]Irukwu J.O. Op.cit., pp 8-9, Achike, O., Op.cit., p. 318.

[2] The summary of various compulsory insurance policies are: (a) Statutory Group life Insurance as required by section 9(3) of the Pension Reform Act, Cap. P11 Laws of the Federation of Nigeria, 2014. (b) Employee's insurance for Compensation as required by section 33 of the Employee's Compensation Act 2010, (c) Builder's Liability Insurance as required under section 64 of Insurance Act, Cap. I 17, Laws of the Federation 2004. (d) Occupier's Liability Insurance as required under Section 65 of Insurance Act. (e) Motor Vehicles (Third Party) insurance as required by section 68 of Insurance Act, and section 3 (1) of Motor Vehicle (Third Party) Insurance Act, Cap. M22, Laws of Federation 2004(the subject matter of this work). (f) Health Care Professional Indemnity Insurance as required by section 45 of the National Health Insurance Act, Cap. N 42 Laws of the Federation of Nigeria, 2004.

[3]Yerokun, O., Op.cit., p.69, Okanny, M.C., Op.cit., pp.624-625.

2.2 General Principles and Basic Fundamentals of Contract of Insurance

As stated earlier, contract of insurance is generally governed by principles of common law of contract[4]. However, due to their peculiar and special nature contract of insurance (of whatever type) are, in addition to the general principles of contract, governable by special or fundamental principles, which shall be discussed later in this chapter.

The reference to general principles of insurance contract here means those principles of contract generally, that are also applicable to the contract of insurance.[5] Thus, the following general principles of contract are also applicable to contract of insurance: Offer and Acceptance, Consideration, Capacity of parties to enter in to contact and intention to create legal relations.[6]

2.2.1. Offer and Acceptance

Offer has been generally described and defined as "definite undertaking or promise made by one party with the intention that it shall become binding on the party making it as soon as it is accepted by the party to whom it is addressed".[7] Acceptance on the other hand is defined as "a final and unqualified expression of assent to the terms of the offer"[8]. It is therefore important that the acceptance must correspond with the terms and condition of offer.

2.2.2 Parties

Be that as it may, in the contract of insurance just like in any other contract, there must be parties. Parties to contract of insurance are insurer and insured. An insurer is the party that

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[4]Ibid.
[5]Yerokun, O., op.cit. p. 70.
[6] See Omoeboh, O., Op.cit., p.78, for elaboration on the essential elements of contract see Sagay, I. E., ((2000), *Nigerian Law of Contract*, Spectrum Law Publishing, Ibadan, 2nd Edition, pp. 20- 45.
[7]Sagay,I. E., op.cit. p. 20.
[8] Ibid.

undertakes to pay the other (party), on condition of payment of consideration (known as premium), on the occurrence or happening of a specified events/risks. The insured on the other hand, is simply referred to as the policy holder of the insurance.[9]

It is imperative to mention here that any of the parties may make the offer. Thus, offer to enter into insurance contract may be made by a proposed insured or insurer. The insurer could make the offer by stating the premium payable in respect of risk proposed to be insured and invite the insured to accept it.

It is also interesting to note that, just like other commercial contract; no particular form is required for the contract of insurance. What is important is to prove the existence of the contract (of insurance). Thus, contract of insurance can be made orally[10]. The exception to the permissibility or legality of orally made contract of insurance is that of marine insurance. It is the requirement of law that contact of marine insurance must be in writing.[11]

Valid and reasonable the above position of the law may appear, it may be difficult if not impossible to prove the existence of contract of insurance in oral form, particularly in our courts in this era. This is because disputes or litigations (arising out of contracts) may be easily proved and determined by our courts, with the aids of documentary evidences which must have spelt out conditions and obligations of the parties to the contract of insurance. This is further strengthened by the general principle that insurance is a contract of

[9]Omoeboh, O.,op.cit.p. 80.

[10] See the decision of the court in Asewe vs Asiemo Face to Face Assurance Ltd (1975) N.C.L.R. 433 @ 439, where the court held that a contact of insurance need not be in writing.

[11] See Section 24 (1) of the Marine Insurance Act, Cap. M2 Laws of the Federation of Nigeria 2004. In the case of *Ngillari vs National Insurance Corp of Nigeria (1998) 8 NWLR (pt.560) 1 @ p. 24*the supreme court (per Iguh JSC) held that "although writing is necessary in marine insurance, in other forms of insurance there is no legal necessity. Any positive act indicative of an intention to create a contract may be sufficient."

adhesion-that is one whose terms and conditions are dictated by statutory regulations or insurer's requirement.[12]

Currently, the practice is that the offer and acceptance usually take the form of obtaining and filling of proposal form mostly by the insured and acceptance and processing of such form by the insurer (company)[13].

2.2.2.1 Proposal Form

Proposal form represents the offer (from the insured to the insurer) and if same is accepted after thorough evaluation of the information supplied by the proposed insured therein, the later will issue insurance policy to the former. To this extent, it has been established that in law, proposal form is regarded as basis of the contract of insurance.[14] The Proposal Form is the basis in the sense that it set the contract of insurance in motion or in place for other constituent elements to follow. This position is further fortified by the decision of a State High Court in the case of **Babalole vs. Harmony Insurance Co**.[15], where the court held thus:

A contract of insurance, like any other kind of contracts, must be constituted by offer and acceptance and a consideration. The offer is normally contained in a proposal form, duly filled and signed by the assured or the proposer and acceptance is signified by a formal acceptance or by the issuance of policy or by the acceptance of the premium paid by the proposer, or by conduct on the part of insurers.

As a result of the vital role of Proposal Form to the formation of insurance contract, a proposed insured should be conscious and careful as regard to the information supplied in

[12]Yerokun, O.,Op.cit. p. 68, Omogbai., O., Op.Cit. p. 99.
[13]Omoeboh, O., op.cit. p.83.
[14]Achike, O., Op.cit., p.319, Yerokun, O., op.cit. p. 80.
[15](1982) 1 O.Y.H.C. 1 @ P.9. 6, as quoted by Omoehoh, O., Op.Cit, at P.82.

the form. This is so important that all relevant information to the subject matter of the insurance, consideration and the condition of the subject matter as well as other necessary particulars must be accurately supplied with utmost good faith. It has been rightly observed thus:

The proposal form is the usual means by which the prospective insured makes his offer for insurance cover. Proposal forms are fairly standard mass produced documents prepared by insurers. Insurers elicit in proposal forms various information from prospective insured regarding the risk or subject-matter of insurance, the amount of cover requested, and other information regarding the insurance to enable them evaluate the risk and decide whether or not to accept it. The proposal form, for a number of reasons to be outlined, constitutes an important document in the insurance transaction.[16]

It is imperative to note that once the insurers accept the completed proposal form filled by the proposed insured, without any condition, the contract of insurance is considered complete, consequent upon which the insured can benefits from the contract, if the terms therein are honoured and not being breached. To buttress this point, the Supreme Court in the case of **NGILARA Vs. N.I.C.O.N**[17] held thus:

Where therefore a proposal form, containing the materials terms, upon which the insurers are prepared to contract is accepted unconditionally, the contract is deemed complete and the insurers are bound to issue and the proposer to accept, a policy of insurance in accordance with the terms stipulated in the proposal form.

It is common practice for the insurer (i.e. insurance companies) to insert a clause: "I further agree to accept a policy subject to the terms, provisions and conditions of the company" in the proposal form. The implication of this clause is that, having executed the

[16]Omoeboh, O., op.cit.p. 83.
[17] (1998) 8 NWLR PT. 560, P.1 @ p. 23.

proposal form with the clause, the insured is deemed to have agreed to the usual terms and conditions to be found in the insurer's policy, even if he is ignorant of the terms. The clause is referred to as ***"doctrine of incorporation by reference"*** in insurance parlance[18]. The doctrine is actually perceived as great injustice caused the insured to suffer for not complying with terms and conditions not known to him at the time of execution of the proposal form. However, the doctrine has been sanctioned and confirmed as part of our law of insurance, by Supreme Courts in a number of cases[19].

Thus, once the insured has signed a proposal form, referring to the existence of a policy notwithstanding that he (insured) has not received a copy of the policy, he is bound by the terms and conditions of the policy[20]. This injustice (as perceived mostly by laymen) has not yet been cured by the law[21] because the helpless proposed insureds who are hurriedly desirous of having insurance policy, often in most time, do not take time to read carefully and comprehend the content of the form before endorsement.

However, the only way out is for the proposed insured to carefully read the proposal form clause by clause and if the clause of incorporation by reference is contained, he has the right to demand for the insurers' polices, practices and other relevant documents of the insurer that contained the terms, conditions and warranties expected to be observed by the insured, before signing the proposal form, which would constitute the contract of

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[18]Omoeboh, O,.Op.Cit, P. 86.

[19] These cases include Northern Assuarance Co. Ltd Vs. Wuraola (1969) N.C.L.R. 4, Nasidi Vs Mercury Assurance Co. LTD (1971) 1. N.C.L.R. 387. This was reinstated in the case of Nigillari Vs N.I.C.O.N (1998) 8 N.W.L.R. (PT. 560) P.1 @ 21 and 24, where the Supreme Court applied the Principle in wuraola's case and held that once the contract of insurance is established, the terms in the proposal form constitute part of the contractual relationship between the parties, and it will make no difference that the insurer has not yet issued a policy to the insured.

[20]Omoeboh, O.,op. Cit, P.86

[21] Ibid, p.g. 87-88, where the learned author opined that despite the provision of Section 15 of Insurance Act, Cap I17, L.F.N. 2004, which obligated the insurers to deliver the Policy Document to the insured, the document is not the proposal form and insurers'practices that contained the terms, conditions and warranties to be observed by the insured.

insurance. This is a solution for now. Hence, once the proposed insured sign the proposal form, the contract has been constituted, he cannot rescind only for the reason that he was not aware of the terms.

2.2.2.2 Policy of Insurance

Policy of insurance is simply described as the formal document evidencing the contract of insurance usually executed by the insurer. In **Thawardes vs. British General Insurance Co. Ltd**[22], it was held that a policy of insurance is not the contract of insurance arising from the agreement reached by the parties, but merely evidences that contract."

The reference to policy of insurance is just to make a point that policy of insurance only evidences contract of insurance which has already been formed upon the execution of proposal form by the proposed insured and unconditional acceptance of same by the insurers[23] as well as stipulation of consideration-premium. Proposal form therefore is so important to be taken seriously as same constitutes the basis of insurance contract not even cover note or certificate of insurance.

2.2.2.3 Cover Notes

Cover notes represents a temporary insurance from the insurers to the insured as a kind of assurance and protection to the proposed insured pending the time the proposed form is fully and completely accepted or policy is issued.

Cover notes are commonly and predominantly used in motor vehicle insurance in Nigeria[24]. The reason is not far-fetched as the Motor Vehicle Third Party Act requires the evidence of having insurance (at least third party type) by all car users. Since at this stage

[22](1974) N. C. L. R. 304 @ 309.
[23] See the supreme court decision in Yadis Nigeria Lmited vs Great Nigeria Insurance Company Limited (2007) ALLFWLR PT.370, P.1348 @ 1378.
[24]Omoeboh, O., Op.cit, p.88.

the policy is under processing and certificate cannot be issued yet, the cover notes should and always serve the purpose.[25] Thus, when the checking authority(ies) is presented with the cover notes, they deemed it as compliance with the requirement of law, at least for some period pending the issuance of policy or certificate of insurance.

2.2.2.4 Certificate of Insurance

By virtue of section 6(4) of the Motor vehicle (Third party) Act, certificate of insurance is required from the car users as evidence of having insurance policy in place. This underscores the importance of certificate of insurance. This has necessitated the general practice of having/obtaining insurance certificate from the vehicle inspectors (V.I) office(s) along with other vehicle particulars. Research has shown that most of the certificate of insurance brandishing by most car users are fake[26] or mere papers which has no basis of contract of insurance-offer and acceptance, particularly proposal forms were not filed or executed and as such no contract of insurance at all between the insurers and the carriers of these certificates.

However, it is important to state here that certificate of insurance is not the same as insurance contract just as we stated earlier. The certificate only evidences contract but contract of insurance itself has its basis in the proposal form and other constituent elements.[27] Therefore, parading the certificate of insurance when in fact there is no insurance contract, will only entitle the owner to no claim in case of accident or happening

[25]Irukwu, J. O., op.cit. pp.83-84

[26] See The Nation, Monday 6th July 2015, p.28 wherein the Division Police Officer, Sapo Police Station, Lagos stated that 90% of motor insurance Certificates are fake, see also Gam-Ikon, E.O., How Regulators underdeveloped the Insurance Industry in Nigeria- available @ http://www.proshareng.com/news/18757 accessed on 12/04/13.@ 1:30p.m, Nike Popoola, Ensuring Compliance with Insurance Laws- available @ http://www.nigerianbestforum.com/generaltopic/wp-content- accessed on 24/2/2013 by 3:30p.m

[27] In Chime vs United Nigeria Insurance Company Ltd (1972) E.C. S. L. R. 808 @ 439, it was held that the policy, not the certificate, is a document in which is contained the terms of the contract. The certificate is evidence, not conclusive of the existence of a policy of insurance.

of risk. This accounts for failure of most of these fake certificate-carriers, to file a claim from the insurers whose certificates were issued to them.

2.3 Consideration

As stated earlier, since contract of insurance is a form of contract, it is required as an element of contract that there must be consideration`. In another words something of value in the eyes of law must be given for a promise in order to make it enforceable.[28]

In the contract of insurance, the consideration given by the insured to the insurer is known as the premium. In the same vein, the consideration from the insurer to the insured is the promise to indemnify the insured in the event of loss or happening of risk.[29] The general common law position is that the liability of the insurer commences immediately acceptance is communicated to the insured and it is immaterial that the premium has not been paid[30].

However, the requirement of the law of insurance in Nigeria in respect of payment of premium has changed. It is now required by the law that for the insured to claim the insurance benefit, he must show proof that he has fully paid his premium and in advance, before the happening of risk insured against.[31] The law particularly on Motor vehicle was considered by the Court of Appeal in the case of ***Industrial and General Insurance Company Limited vs. Kechinyere (Mrs.)***[32], where the court held that the provision of section 50(1) of Insurance Act is clear and unambiguous. It is to the effect that receipt of an insurance premium shall be a condition precedent to a valid contract of insurance,

[28]Sagay, I. E.,op.cit. p.59.
[29]Irukwu, J. O.,op.cit. p.84.
[30]Ibid.
[31] See section 50(1) of Insurance Act, Cap I17 L.F.N. 2004.
[32] (2010) 1 N.M.L.R. 249 @ 258-259.

failure of which there will be no cover in respect of an insurance risk, unless the premium is paid in advance.

In that case, The Mercedez Benz was insured by insured on 18th December 2002, for a period of twelve months for a premium of N520,000:00(Five Hundred and Twenty Thousand Naira). A deposit of N220, 000:00 (Two Hundred and Twenty Thousand Naira) was paid. The car was robbed at gun point on 15th February 2003. It is a fact not in dispute that at the time the car was robbed the respondent has not paid up the premium of N520, 000:0 0, she was to pay at the time the contract was entered into. It was also not in dispute that the insured only went back to the insurer two (2) day after the robbery, to pay the balance of the premium[33].

Therefore, the premium under Nigerian Insurance law must be paid in advance before the insured is entitle to claims, should the risk fall due.

2.4 Capacity of parties to enter into contact

The general rule is that any person may enter into any form of contract provided such a contract is legal. However, there are certain classes of persons whose rights to freedom of contract have been curtailed by the law[34]. These include illiterates, infants, insane and drunken persons.

The contractual capacity of the categories of the above mentioned persons has been discussed in details in the contract law text[35], brief reference will only be made to them, and only in relation to the contract of insurance.

[33]Ibid, at p. 259.
[34]Irukwu, J. O., op.cit.p.85
[35] For example see Sagay, I. E., op.cit pp. 457-488.

2.4.1 Illiterates

The general rule is that contract made by an illiterate person is binding on him if the contract is oral[36]. This is because illiteracy would not come in given such situation. However, if the contract is written, the illiterates' protection laws[37] would be applicable. The protection is to safeguard the interest of such person in the contract.

Notable legislation is the Illiterates Protection Act/Laws of various states which contain provisions to the effect that the writer of any such document must indicate his name, address and state therein that the content of the document was read to the illiterate and he understood it before affixing his signature, mark or thumb.

The effect is that, the illiterate after the fulfilment and complying with the provision of the law would be deemed to have consented to the contract and is thereafter bound by it.

Applying this requirement of law to the insurance contract, the insurer who mostly prepare the proposal form is duty bound to make sure that the illiterate insured party understood the content of the form and consented to the contract before affixing his mark. However, where the insurer deals with the insured through an agent/broker, such/similar duty is imposed on the agent.[38] Otherwise, the illiterate insured may rely on the provision of the illiterate law to challenge the contract.

Furthermore, illiterate person has capacity to enter into contract of insurance, but for him to be bound by the terms of contract as contained in the policy form/proposal form; insurer is imposed with the duty of complying with the illiterate protection law.

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[36] Ibid, p.458.
[37] These include illiterates' protection Act/Laws of various states, the jurat clause to be inserted in such agreement.
[38] Okany, M. C., op.cit.p. 625.

It must be noted here that the illiterate protection laws are only meant to protect a person illiterate in the language of a contractual document from being cheated and not in all language. For instance, Section 2 of the Illiterates Protection Law, Cap 67, 1994, Laws of Lagos States, provides thus:

> Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter, or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement-
>
> That he was instructed to write such letter or document by the person for whom it purports to have been written and that letter or document fully and correctly represents his instruction; and
>
> If the letter or document purports to be signed with the signature or mark of the illiterate person,that prior to its being signed it was read over and explained to the illiterate person, and that the signature or mark was made by such person.

It is interesting to note that the above provision of the law is contained in other various states laws.[39] Thus, the substance of law applicable to illiterates' contract is uniform throughout Nigeria.

The whole essence of the protection of law to illiterates is to ensure that illiterates are not cheated or defrauded by the content of the document they execute and to prove that the illiterates actually prepared to be bound by the contract, after he has understood same. The Court of Appeal (per Sulu Gambari JCA, (as he then was) emphasised this need, in the case of **SALAMI Vs. SAVANAH BANK[40],** when he held thus:

[39]For example see section 2 of Illiterate Law of Kwara State, Cap I 1 Laws of Kwara State, (2007), section 2 of Illiterates Protection Act, Cap I1 Laws of Federal Capital Territory, Abuja, which have similar content with the provision of Lagos state illiterate law.

[40](1990) 2 N.W.L.R. Pt. 130 p. 125.

"The illiterate must not only be informed of the content of the document before he signed it, the explanation must also be correct, it must not be extraneous, misconceived so as to convey a different meaning of the undertaking than was intended by the parties."

Failure to comply with the provision of illiterates' protection laws may result to different legal effects. It can make the contract illegal, void, voidable or enforceable[41], depending on the nature of the contract.

It is essential obligation on the insurer to make sure that the illiterate insured understand the nature of the contract of insurance or the proposal form before execution/signing, most especially, if he (illiterate insured) signed the form in the insurer's office without his lawyer, relatives or witness in attendance(which is common occurrence in practice). This is to ensure the compliance with the illiterates' protection law.

It is important to state that the illiterates' protection laws are only shield for the illiterates (to protect their interests) but not a sword. Thus, if there is proof that the illiterate understands the nature of the contract; the contract would be made valid, even if the other party has failed to comply with the illiterates' protection law[42].

2.4.2 Infant

There are arguments as to what is the age of maturity or majority, when a person is ceased to be an infant. Some favours eighteen (18) years of age while others argued in favour of Twenty-one (21)[43].

The general rule of common law is that contracts made by an infant are voidable at his option (that is not binding on the infant but binding on the other party)[44]. However, the

[41]See Sagay, I. E.,op.cit. p.472.
[42]Sagay, I. E.,op.cit. 468.
[43] Ibid, pp.475-478.

above position of common law has been modified by infants Relief Act and Sales of Goods Act[45] which made provision for necessaries or contracts of necessities and made such a binding one for the benefit of the infant[46].

It may be rightly correct to state that since the contract of insurance is necessary and by provision of the law compulsory for all car user/owner, if an infant possess a car, insurance contract is compulsory. Entry into such contract that is beneficial to him (infant) is necessary and as such he is deemed to have possessed/has capacity to enter in such contract, particularly Third (3) party car insurance, which is mainly for the benefit of the affected third party (ies).

2.4.3 Lunatic and Drunken persons

The position of law has since been settled that a contract made by an insane or drunken person is binding on him only, if the contract is for necessaries[47]. In addition to that, just like mentally disordered person, a person in a state of drunkenness has the advantage of law as the contract would be regarded voidable at his instance.[48]

It is therefore submitted that the contract of insurance entered into with the lunatic and drunken person would be regarded as valid, provided that necessary elements of the contract are present and no fraud or misrepresentation is found in the contract.

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[44] Ibid.
[45] Infant Relief Act of 1874 and Sale of Goods Act 1893. Both Acts are Statutes of General Application in force in England before 1 January 1900, and therefore, by virtue of Section 45 of the Interpretation Act, Cap. I 9 Laws of the Federation of Nigeria, 2004, are applicable in Nigeria
[46]Etomi, G., (2014), An introduction to Commercial law in Nigeria, Text, Cases & Materials (MIJ Professional Publishers Limited), pp. 24-25, see also Achike, O. op.cit, pp.34-35.
[47]Irukwu, J. O., op.cit. p.85, Sagay, I. E., Op.cit, pp.487-488.
[48]Sagay, I. E., op.cit. p.488.

It has however been observed that insurers in this country rarely have occasion to do business with insane and drunken person, but insurance policies are issued from time to time to infants.[49]

2.5 Intention to Create Legal Relation

In common law, it is clear that the requirement of intention is essential to the formation of contract, particularly commercial contract as opposed to social and domestic contracts.[50] However, the law presumes the presence of the contractual intention in commercial agreement.[51] Thus, the court will presume the presence of intention of parties from surrounding circumstance of the contract and arrives that there is consensus ad idem.[52]

Therefore, contract of insurance, being commercial in nature, requires the presence of intention of both the insured and insurer to create a legal relation. The intention can be easily deduced from the acts of the parties- filling and processing of the proposal form, payment/acceptance of premium, etc.

2.6 Basic Principles of Insurance Contract

Because of their special and peculiar nature, contracts of insurance are governable by basic/fundamental principles[53]. These Principles are:

- The Doctrine of uberrima Fides-Utmost Good Faith.
- The requirement of an insurable interest.
- The Principle of indemnity and subrogation.

[49]Irukwu, O., Op.cit.p.85.
[50]Sagay, I. E, Op.cit, pp.113-117.
[51] Ibid.
[52]Iruwu, J. O., Op.cit.p. 85.
[53]Ackike, O, 0p.cit.p.321, Okany, M. C., op.cit. p. 630.

2.6.1 The Doctrine of Uberrima Fides-Utmost-Good Faith

This doctrine imposes duties on parties to the contract of insurance to declare/supply necessary information relevant to the formation of the contract. Unlike in other contracts, where the doctrine of Caveat emptor-buyer be aware applies and where the seller is not bound to make any representations to the buyer with respect to the quality of the goods, the subject matter of the transaction, the law imposed a duty on the assured/insured to make a disclosure of material facts of the contract, which will enable the insurer to make his judgment to accept the contract.[54]

This doctrine is also known as non-concealment of material facts and showing of utmost good faith by the insured is the hall mark of all contracts uberrima fides.[55] The principle of utmost good faith is very important in the sense that the material facts supplied by the insured would be the basis for the decision of insurer either to accept or refuse the offer or to insist on higher premium.[56] Therefore, correct and accurate information must be supplied. In the case of Yadis Nig. Ltd vs. C.N. I.C. Ltd,[57] the supreme court (Per Akintan JSC (as he then was) reiterated the essence of utmost good faith in insurance contract, when he stated thus: "The position of the law is that the contract of insurance must be one of utmost good faith."

Since the information is required from the insured via proposal form, the insured is duty bound by this doctrine of utmost good faith to supply all required information truly and genuinely.

[54]Ackike, O., Op.cit. p. 630.
[55]Okany, M. C.,Op.cit, p.322.
[56] Ibid.
[57](2007) ALL FWLR pt.370, P. 1348 @ p. 1378 paras E.

Generally, a fact is deemed to be material if it will influence the decision of the insurers in accepting the premium payable or avoid the contract entirely.[58] However, each case with its peculiar circumstance, will determine what constitute materiality of any fact.

It must be pointed out here that the duty of disclosure of material facts is limited to those facts actually known or ought to be reasonably within the knowledge of the insured at the time of contracting and applicable to latter emerged facts.[59]

The doctrine of utmost good faith brings about treating a particular item/clause as condition or warranties and failure to observe them may vitiate the contract or make it voidable at the instance of the other party. Since, the duty to disclose is not implied term of the contract, non-disclosure does not by itself give rise to a claim in damages; the remedy lies in the avoidance of the contract.[60]

2.6.2 Insurable Interest

It is also fundamental and essential in any contract of insurance that the insured must show that he has an insurable interest in the subject matter of insurance. Section 56 of the Insurance Act provided thus:

A policy of insurance made by a person on the life of any other or any other event whatsoever shall be null and void where the person for whose benefit or on whose account the policy of insurance is made has no insurable interest in the policy of insurance or where it is made by gambling or wagering.

Consequently, where the insured cannot establish that he will suffer financial loss in the event of the destruction of the subject matter of insurance, there would not be insurable

[58]Achike, O., op.cit.p.g.323.
[59]Okany, M. C., Op.cit, p.631.
[60]Ibid, p.630.

interest and the contract would be declared invalid[61]. To this end, in the case of **Law Union and Rock Insurance of Nigeria Ltd Vs. Onuoha**,[62] per Oguntade JCA (as he then was) explained insurable interest as very elastic and not always coterminous with ownership, wholly or partly of the particular goods insured. He held that a court called upon to determine whether or not a particular claimant has an insurable interest in the property concerned will need to consider the issue whether the destruction or diminution in value of the property will result in a loss to the claimant.

Insurable interest is applicable in all types of insurance. In the area of property, it is factual and natural that a person would have interest in his properties of whatever kind.[63] For example person would have insurable interest in his car, house or business. Therefore, there is insurable interest on those properties.

From the above, it is discernible that ownership plays a vital role in evaluating insurable interest. Furthermore, only a person who has direct legal or equitable interest in the subject matter of insurance policy can be said to have an insurable interest on such subject.

Having said that, it is important to put to record here that time for ascertaining the existence of insurable interest has legal implication.

2.6.3 Time for Ascertaining the Existence of Insurable Interest

In determining the effect of this, distinction must be made between life insurance and other insurance. In life insurance, the insured must have an insurable interest at the time at which the contract of insurance is concluded and it is not compulsory that the interest existed at the time of maturity of the policy or at the time of death.

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[61] Achike, O., op. cit, p.324
[62] (1998) 6 N.W.L.R., Pt. 555, p. 576
[63] Ibid,p.326

In contract of insurance for fire or accident, the insured must establish his insurable interest on the destroyed object not only at the time of effecting the insurance policy but must also exist at the time of loss. This distinction is important and has legal effect in connection with benefit from insurance policy.[64] The illustration of the erudite commercial law writer, on this distinction, is apposite, where he stated thus:

> If Chikwado has planned to buy a motor car on September 15th, it is permissible for him to arrange in advance, say on 10th July, with the insurance company whereby the policy takes effect from September 15th, so long as he has purchased the car by that date. If for example, Chikwado obtains a good offer from Amachi on 4thNovember and sells the car to him on the same day but the car is involved in a ghastly accident on December 18th, it is obvious that having sold the car, Chikwado will not recover from the insurance company the sum payable under the policy. Therefore, by the sale of the car, Chikwardo's interest terminates. Amachi, on his part, cannot rely on the policy taken on the car by Chikwardo to make a claim, unless he has taken a new policy or there has been a proper legal assignment of the policy to him.[65]

2.6.4 Indemnity & Subrogation

2.6.4.1 Indemnity

Indemnity means a guarantee or assurance to put the insured in the same position in which he was immediately prior to the happening of the uncertain event. The insurer undertakes to make good the loss.

All types of insurance contracts (except life and personal accident insurance) are contract of indemnity[66]. Accordingly, the insurer undertakes to indemnify the insured against a loss of the subject matter of insurance due to insured cause. In other words, contract of

[64]Achike, O., op.cit. P.327.
[65]Okany, M. C.,op.cit. p. 639.
[66]Ibid.

insurance is of two (2) types, namely indemnity insurance and contingency insurance (i.e. insurance contract in respect of life and personal accident).[67]

The principle of indemnity is based on the idea that the assured/insured in the case of loss shall only be compensated against the actual total loss. However, in contract of insurance of life and accident, the insurer simply undertakes to pay certain stipulated sum of money in the event of death or personal accident.[68]

The whole essence of indemnity principle is to ensure that the insured does not make a profit out of his loss. To this end, Achike observed thus:

Therefore under this principle, it is illegal for the insured to recover more than the value of his actual loss, because the dictates of public policy frown on the insured making a profit over and above the amount of his actual loss.[69]

It is important to point out here that in case of property insurance, and the property is damaged or destroyed beyond repairs, the insurer must indemnify the insured to the full value of the insurance (market value), and in that case, the insured must surrender the salvage of the chattel to the insurer.[70]

2.6.4.2 Subrogation

This doctrine is a correspondent right to the doctrine of indemnity. By this doctrine, the insurer, having indemnified the insured in respect of the loss, is conferred with a right and benefit which the insured is ordinarily entitled to.

Therefore, subrogation is the transfer of rights from the insured to the insurer who has satisfied and settled the loss or damage to the property or any subject matter of insurance

[67]Achike, O.,Op.cit., p. 327.
[68] Ibid.
[69]Achike, op.cit.p.327.
[70]Okany, M. C., op.cit. p.640.

contract.[71] In exercising the right of subrogation, the insurers become entitled to the benefit of rights and remedies which are available to the insured and which will go in extinction or diminution of the loss that they are obliged to bear. Consequently, the insurer (under the doctrine of subrogation) is entitled to maintain actions in the name of the insured for any claim from a third party, who is negligent or caused the act that brought the loss or damage the insured property.

By way of illustration, if "A" insures his car with "B" company and thereafter, the car involved in an accident of collusion on negligence of C. With the principle of indemnity, B Company must indemnify A on the car and under the doctrine of subrogation, B Company can maintain claim against C for tort of negligence but such action must be maintained in A's name.

2.6.4.3 Double Insurance & Doctrine of contribution

To further build upon the doctrine of indemnity, subrogation and rule against double portion, this doctrine operates in the event or situation where a person takes two (2) or more insurance policies upon the same subject and in respect of the same insurable interest.

An insured is allowed and at liberty to have double insurance. However, the total amount of insurance on the subject of insurance (if materialized) must not exceed the value of the loss.[72] In such situation, the insured is allowed to recover the total value of the loss from any of the insurers up to the amount of the policy. The insurer who settles the total value

[71]Achike, O.,op.cit. p.327.
[72]Ibid, pp.331-332.

can claim contribution from the other insurer(s) in the ratio of the amount with each insurer.[73]

The above principle would be better understood with the following illustration:

Mr Okon insured his car against accident with X Company for the sum of N20, 000:00 (Twenty Thousand Naira only) and at the same time with Y Company for another N30, 000:00 (Thirty Thousand Naira). Thereafter, the car involved in accident to the extent of N10, 000:00 (Ten Thousand Naira). Mr. Okon can claim the entire N10, 000:00 (Ten Thousand) from X or Y Company. In this situation, either company can reimburse itself from other in proportion to the amount of the policy with each one of them. Therefore, if X paid the whole N10, 000:00, it can claim the contribution from Y in the following calculation = 30,000/50,000 x 10,000 = N6, 000: 00. In essence, X will claim N6, 000:00 (Six Thousand Naira only) from Y.

Conversely, if Y paid the whole loss, it can claim the contribution from X, in the following calculation = 20,000/50,000 x 10,000 = N4, 000:00 Therefore, Y will claim the sum of N4, 000:00 (Four Thousand Naira only) from X.

It should be noted that the rule is based on the principle of fairness and equity.It is important to note lastly that the insured must not wilfully destroyed the property, to be entitled to the policy benefit and the burden of proving that the conduct of the insured was deliberate is on the insurer.[74] It should be also noted that just like any other contract, contract of insurance must be a legal one and not to insured illegal items/property.

[73]Okany, M.C., *op.cit.*pp.639- 640.
[74]Achike, O., op.cit.p .646.

2.7 Relevant Motor Vehicle Insurance Laws, Regulation and Administration under Nigerian Statutes

It is generally acceptable that life is full of risks; in fact life itself is risk. Thus, almost every activity of our lives involves risk. In another word, every human being is faced with risks to life or property, including business. This is because as individual has risks staring in his face, so economic enterprise faces business risks[75]. It is therefore prudent to make relevant preparation to alleviate the effect of risk. This formed the basis of insurance law or contract of insurance. Furthermore, the need for insurance is more relevant in the modern time as a result of our involvement in hazard and risky activities.[76] This necessitated the need for insurance policy and as a result, the Country witnessed the existence of Mushroom or Kangaroo insurance Co-operations/companies.[77] To curb this situation, the Federal Military Government promulgated the insurance Decree No. 59, 1976.[78] This enactment was regarded as the first comprehensive law regulating insurance and those transacting insurance business in Nigeria. Thus, subsequent laws have largely followed pattern of the 1976 Insurance Act (which came in to operation on 1st December 1976).

Since the date thereof, insurance generally and motor insurance specifically has been regulated by statutes and agencies involved such as National Insurance Commission (NAICOM)[79] and Nigeria Council for Registered Insurance Brokers (NCRIB)[80]. The

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[75]Yerokun, O., *Op.cit*p.1
[76]Achike, O., Op.cit.,p.316
[77]Achike,O.,Commercial law, Op.Cit. p.g. 319.
[78] This Act has been severally amended. The current one is insurance Act Cap 117, Laws of Federation of Nigeria Laws of .the Federation of Nigeria 2004. On several amendments, see Omo-eboh, O., (2012), *The Law of Insurance Contract in Nigeria,* West African Book Publishers Limited, p.2.
[79] This is current regulatory and supervisory agency of government for insurance industry in Nigeria. It was created by NAICOM Act, Cap.N53, Laws of the Federation of Nigeria, 2004. Section 7 of the Act spelt out the functions of the Commission.

cumulative efforts of the agencies, in implementing the laws, contributed to success and tremendous improvement recorded in the field. Prior to this time, the insurance business and industries were regarded as forum for fraud.

It is to be noted here that reference to statutes mean laws enacted by the legislature (i.e the legislative arm of government either National Assembly or State Houses of Assembly.[81]

Since insurance is under the exclusive legislative list, only the National Assembly can make law on it.[82]

Consequently, the following statutes have been identified to have either directly or indirectly governed the regulation of the motor vehicle insurance in Nigeria.

2.7.1 Insurance Act

The apposite provision of this legislation to motor vehicle insurance is section 68 which provides thus:

> No person shall use or permit any other person to use a motor vehicle on a road unless a liability which he may thereby incur in respect of damage to the property of third parties is insured with an insurer registered under this Act.
>
> The insurance taken out pursuant to subsection (1) of this section shall cover liability of not less than N1Million.

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[80] NCRIB was created by NCRIB Act, 2003 which is contained in Cap.N148 Laws of the Federation of Nigeria, 2004. For the Duties of the Council see section 2 of the Act. See also the Decision of the Court of Appeal in ***NAICOM VS NCRIB (2006) 7 C.L.R.N. P.105*** to the effect that both NAICOM and NCRIB are empowered to regulate insurance brokers though NCRIB has more extensive powers because it regulates both natural and artificial persons.

[81] On various nomenclature of law in consideration of the bodies that passed them, see Obilade, A. O., (1979), *The Nigerian Legal System*, Spectrum Law Publishing, Ibadan, 1979, pp. 64-68.

[82] See item 33 of second schedule to the constitution of Federal Republic of Nigeria, 1999 (as amended).

> The insurance under this section shall be in addition to the liabilities required to be insured under the Motor Vehicle (Third party) Insurance Act, 1950 and shall be regulated mutatis mutandis by the provision of this Act

The Act regulates all form of insurance business except mutual co-operative insurance and foreign company engaging in reinsurance.[83] The Act also provided that before any company commences the business of insurance, it must be incorporated in line with Companies and Allied Matter Act, and also register with National Insurance Commission.[84]

Certain minimum share capital are required for various categories of insurance business and insurers are also mandated to deposit 50% (Fifty percent) of the paid up share capital with the Central Bank of Nigeria.[85] The essence of insurance Act is to free the insurance business (sector) from all sort of fraud and safeguard the interest of insured or policy holders.

It is interesting to point out that the provision of Section 68(3) of the Insurance Act made reference to Motor vehicle insurance Act, and mandatorily required that the former should regulate the latter. Therefore, by implication National Insurance Commission also regulates Vehicle insurance.[86]

2.7.2 Motor Vehicle (Third Party) Insurance Act Cap. M22. L.F.N. 2004

This is a specific law on motor vehicle insurance policy. It provides that all car users/owners must have at least insurance against third party.[87] There are categories of

[83] See 1 section of the insurance Act, Cap. I 17 Laws of Federation of Nigeria 2004
[84] Ibid, Sections 3 & 4.
[85] Sections 9 & 10 of Insurance Act Op.cit.
[86] See section 102 which is interpretation section wherein the body is referred to as NAICOM.
[87] See section 3 of the Motor vehicle insurance Act Cap. M22, L,F.N. 2004.

people exempted from the provision of the Act.[88]The policy must be issued by an approved insurer, otherwise known as registered insurer under the insurance Act.

In a nut shell, the focus of the provisions of this Act is on third party protection under the insurance cover in respect of any injury caused by assured or his servant.[89]

Furthermore, the following legislations are also relevant to the regulation and administration of motor vehicle insurance policy.

2.7.3 National Insurance Commission Act

The Commission was established by section 1 of the National Insurance Commission Act.[90] The commission is saddled with responsibility of establishing standards for the conduct of insurance business in Nigeria, approving rates of insurance premium to be paid in respect of all classes of insurance business, protecting insurance policy holders and beneficiaries and third parties to insurance contract and other such activities connected or incidental in its other functions under the Act[91].

2.7.4 Nigerian Council of Registered Insurance Brokers

By virtue of section 36 (3) (a) of the Insurance Act, only companies that meet the required qualifications that would be specified to be registered. The Nigerian Council of Registered Insurance Brokers is a creation of statute,[92] and is a body responsible for

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[88] See section 5 of the Act. They include Government owing vehicle, police vehicle and other vehicles declared by minister to be so exempted. See also various regulations to the Act that exempted some special vehicles, e.g. Local Government vehicles, foreign vehicles, e.t.c.

[89] Yerokun, O.op.cit. p. 19.

[90] Cap. N53, Laws of Federation of Nigeria, 2004.

[91] For details of functions of the Commission, see S. 7 of the National Insurance Commission Act, Cap. N53, Laws of Federation of Nigeria, 2004.

[92] Nigerian Council for Registered Insurance Brokers Act, Cap. N148 Laws of Federation of Nigeria 2004

dealing with qualification of insurance Brokers while the National Insurance Commission is the body that registers the bodies so qualified for business.[93]

Other relevant laws that enhance administration and regulation of motor vehicle insurance include:

2.7.5 Road Traffic Act/Law

Road traffic Act in respect of federal road or high way made provision for production of some relevant documents to the police or other authorized officer. Those documents include evidence of compliance with the provision of motor vehicle insurance policy. Similar provisions were found in traffic law in respect of states roads.[94]

The totality of all these laws is to enforce the law on motor vehicle insurance policy as required by the law.

2.7.6 Federal Road Safety Commission Act

By virtue of section of 11(4) (i) & (ii) of Federal Road Safety Commission Act,[95] members of the Corps have power to arrest and prosecute offence of being on road without possessing a valid driving license or any other licenses or permit required by law or for operating a vehicle with forged driving license or insurance papers.

Section 12 of the Act also enumerates the rank or designation of the members of the Corps as route commander, Vehicle inspection Marshal, and Road Marshal.

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[93] See the decision of court of Appeal in the case of *National Insurance Commission Vs National Council for Registered Insurance Broker* (2006) 7 C.L.R.N., P. 105 @ P.117.

[94] For instance section 9 of Road Traffic law of Kwara State, Cap. R 5, Laws of Kwara State, 2007, provided for the appointment of principal Inspector of Motor Vehicle to perform such duties which may include demanding for necessary documents required for car users by the laws.

[95] Cap F19 Laws of Federation of Nigeria, 2004.

2.7.7 Police Act

With omnibus power conferred on police,[96] it may therefore be right to state that the police also have power to enforce and prosecute breach of insurance law.

The above position is fortified by provision of section 18 of Road Traffic Act, which provides thus: "Where a motor vehicle is found plying or being driven or used in any highway within the Federal Capital Territory, without the necessary particulars, a police officer may impound the vehicle and cause vehicle to be removed to a removed vehicle park."

2.8 Nature of Contract of Insurance on Motor Vehicle

Motor vehicle insurance otherwise known as Car insurance or automotive insurance constitutes the largest section in insurance market in Nigeria.[97] This is because the law makes it compulsory for every motorist to possess a policy of insurance in respect of third party risks.[98]

Third party insurance as a minimum policy provides cover only for death or bodily injury of other road user-third party.[99] However, it does not cover damages to property of a third party, the insured's property or vehicle or to injury to his person.[100]

Car insurance is an absolute necessity for everyone who drives car. That apart, coverage is essential, the potential cost surrounding an accident-whether for repair or replacement cost

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[96] Section 4 of the Police Act, Cap. P19, Laws of Federation of Nigeria, 2004, empowered the police to preserve law and order and enforce all laws.
[97] Yerokun, O., op.cit p. 389, Agomo, C.K., (2013), *Modern Nigerian Law of Insurance* (2nd Edition) Concept Publication Ltd, p. 217.
[98] See section 3, Motor vehicle (Third party) Insurance Act, Op.cit, Section 86 Insurance Act, Op.cit.
[99] Achike, O., op.cit. p.. 345.
[100] Okany, M. C.,op.cit. P.665.

of the car or other property, medical costs of the victim, may be too huge for the car owner, without adequate coverage.

2.8.1 Definition of Motor vehicle insurance

The contract of insurance of whatever type can be accommodated by definition of insurance contract earlier given in this work.[101]

However, motor vehicle insurance can be easily and simply referred to as "a contract by which an insurer assumes the risk of, or any loss the owner or operator of a vehicle may incur through damage to property or persons due to an accident".[102]

The law provides that anyone who uses or cause or permits another to use a motor vehicle on a road must have insurance to cover the liability to pay damages for death or bodily injury caused by or arising out of the use of such vehicle.

Exemption to section 3 as provided by section 5 is to the effect that the obligation to insure under section 3(1) does not apply in the following circumstances:

i. In respect of vehicles belonging to the Government of the Federation or a State while they are being used or operated for the purposes of the Government.

ii. In respect of motor vehicles used by a person who has deposited N10, 000:00 (Ten Thousand Naira) with the Accountant-General of the Federation in respect of such motor vehicles.

iii. With respect to motor vehicles which are being driven for police purposes.

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[101] See chapter 1.

[102] Aigbokhavbo, V., *Law of Banking and Insurance II*, Course Book (Course Code-Law 432 (2010) for School of law, National Open University of Nigeria, p.72.

iv. In respect of any person declared by the president to be exempted from the provisions of this Act.

v. In respect of any motor vehicles declared by the president to be exempted from the provision of the Act.

It should be noted that certain categories of persons are exempted from benefiting from liability cover under the Act. Such persons include injuries sustained or death arising out of, in the course of employment of the insured employee and persons in passenger vehicle without remuneration (i.e not on hire or reward) persons on any contractual liability.[103]

2.8.2 Motor Vehicle Defined

Section 2 (1) of the Motor Vehicle (third party) Insurance Act, defined motor vehicle thus: "Motor vehicle means, a vehicle propelled by mechanical power other than a vehicle constructed to run on rail and includes a motor cycle".

By the wording of the definition above (which is descriptive in nature than definitive), motor vehicles include car, motor cycle, lorries, crane, motor scooter or graders, trailer, Agricultural machine, tractor etc.[104]

2.8.3 Forms /Types of Motor Vehicle Insurance Scheme

It must be emphasized here that Motor Vehicle (Third Party) Insurance Act, does not restrict the terms of the policy cover, but merely specified minimum policy, a car user

[103]Okany, M. C.,op.cit p.665.

[104] The list is not exhaustive. The list is gleaned by the writer from provision of section 22 of the Federal Road Safety Commission Act, Cap. F19, L.F.N. 2004. This is because, license is required for those vehicles, it therefore analogically deducted that insurance policy would be required for them.

must have. Therefore, the assured/insured may extend the scope of the risk to be covered by the policy.[105]

Consequently, the followings are forms of Motor Vehicle insurance Scheme:

i. Third party Insurance Policy (Compulsory Insurance)

ii. Comprehensive

iii. Third Party, Fire & Theft[106]

2.8.3.1 Third party Insurance Policy (Compulsory Insurance)

This policy insures the owner of the vehicle against liability which is incurred in respect of the death or bodily injury caused to third parties while using the vehicle or in permitting the use of the motor vehicle. This is the minimum required by the law. The policy provides indemnity for death and bodily injuries occasioned to 3rd parties or their properties.

By virtue of Section 13 Motor Vehicle (Third Party) Insurance Act, no settlement made by an insurer in respect of a claim which might be made by a third party in respect of any liability that is required to be covered by a policy issued under the provisions of the Act is valid, unless such third party is a party to such settlement. It is similarly provided that a policy issued under the Act shall remain in force and be available to third parties notwithstanding the death of any person issued under such policy as if such insured person were still alive.

[105]Okany, M. C.,Op. Cit.p.665.
[106]Agomo, C.K., Op.cit., p.216.

Therefore, third party policy only protects the interest of the third party, but neither protects the insured against damage to others nor provides protection to the policy holder.[107]

It is relevant to state here that, since the insurer always dictate the terms of the insurance contract, certain restrictions which may affect the interest of third party (who is a beneficiary) of the policy may be inserted to the proposal form or policy. To protect the third party interest, the Act (Motor Vehicle Third Party) Insurance Act, made adequate provisions whereby certain restrictions if placed on prices (to cover third party) will be void, as against third party.[108]

Section 9 of the Act also voided some provisions if incorporated in the policy to the extent that they affect the benefit of the third party. They include provisions that relate to:

i. The age or physical or mental condition of persons driving the motor vehicle.

ii. The condition of the motor vehicle

iii. The number of persons that the motor vehicle carries,

iv. The weight and nature of good carried;

v. Time at which or the areas within which the motor vehicle is used and other relevant information on the vehicle.[109]

It should be noted that where the restrictions are placed on the insurance policy as to the usage of the vehicle and the insurer breached such provision, the insurer would still be

[107]Yerokun, O., op.cit. 393

[108] See for instance s. 8 of the Motor Vehicle (Third Party) Insurance Act, provides that failure of the insured to report an accident causing injury to the third party does not bar the third party to recover

[109] See section 9 of Motor vehicle (Third party) insurance Act, for comprehensive list.

liable for any injury sustained by a third party. However, the insurer is entitled to recover such sum from the insured.[110]

2.8.3.2 Comprehensive Policy

As the name implies, this is more extensive than the other ones. It is designed to cover wider risks, under the third party policy and covers the risks of damage to the insured's own motor vehicle. It also covers expenses incurred for medical expenses, for treatment of the injury sustained by the insured. It covers also the driver or anybody permitted by the owner to drive, or any occupant of the vehicle when an accident occurred.[111]

2.8.3.3 Third Party Fire & Theft Policy

This provides cover for accidental damage to the insured's vehicle arising out of fire or theft. It would also cover loss or damage to third party property or bodily injury or death to third party. It also cover legal fees incurred in defending actions emanating from an accident for which a claim is being made as well as towing fee for conveying the damaged or stolen vehicle from the scene of accident or place of discovery to the nearest mechanic for safe place of custody.[112]

It must be stated here that motor vehicle insurance policy covers obtained in Nigeria is inapplicable to accidents, damage or loss which occurs outside the territory. However, if the policy explicitly stated that the policy be extended to accident outside the Nigerian shore, same shall cover such accident.[113]

This Chapter has discussed the essential elements of contract as it relates to insurance as well as specific rules guiding insurance under Nigeria statutes. It also reflects the policy of

[110]Okany, M. C., op.cit. 1992, p.666, Achike, O., Op.cit, p.346.

[111]Yerokun, O., op.cit.p.393
[112]Aigbokhavbo, V., op.cit. p. 74.
[113] Ibid, 75.

insurance to motor vehicle with its various modes and the extents of loss/damages to which each category covers. In this chapter, the discussion on motor vehicle insurance scheme is limited to that of common law as adopted in Nigerian Statute; the Islamic alternative to insurance would be discussed in the next chapter.

CHAPTER THREE

MOTOR VEHICLE INSURANCE: ISLAMIC LAW ALTERNATIVE

3.1 Introduction

Islam and indeed Islamic law consist of rules or set of rules and procedures that guide and govern all affairs of human being in all ramifications.[1] Thus, Islamic law is all encompassing as it regulates the creed (*aqeedah*), acts of worships (*Ibadah*) as well as human dealings, trade and commercial transactions. The set of rules that regulate commercial transactions is generally termed as '*Fiqhul Mu'aamalah'* under Islamic law. There are numerous quranic injunctions that have emphasized the need to engage in commercial activities in order to earn lawful living.[2]

Having said that, it is important to note that Islamic law did not only command participation in economic social activities in a community but also spelt out the rules and guiding principles as well as essential elements to be observed for valid transaction(s) under *Shari'ah* (Islamic Law). It is essential to point out here that these principles were spelt out or derived primarily from *Quran* and *Sunnah* as well as other sources of Islamic Law particularly *Ijma*, *Qiyas* and *Urf* (Custom of particular community and profession that offended no provision or well established principles of *Shari'ah*).[3]

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[1] Qur'an chapter 16 verse 59.
[2] For instance see Quran chapters 73 verse 20, 35 verse 12 and chapter 62 verse 12 to mention but a few.
[3] Sources of Islamic Law refer to root where Islamic Law derived its validity on a particular issue/doctrine or that which form basis for validity, permissibility or legality or otherwise of an act, issue, occurrence. These includes: Qur'an, Sunnah, Ijam', Qiyas, istihsan/istislah or MasalihulMursalah (Public Interest), Istishab (Legal Presumption), SaddalDharai' (Blocking the ways that may lead to evil/difficulty or committing Haraam (Forbideen acts) and Urf and 'Adah (Custom). For discussion on the sources see Doi A.I., (1971), *Shariah: The Islamic Law,* Sweet and Maxwell-London, 1st Edition, pp.21-84.

Even though the conventional insurance generally and motor vehicle insurance particularly is not valid under Islamic law, there is an alternative framework which complies with Islamic law that has been developed. This alternative scheme, in English language, can be termed "Islamic Insurance". But, in Islamic law parlance, it is technically known as *Takaful*.[4] As a form of commercial transaction, the principles upon which Motor Vehicle *Takaful* are based and derived from can also be traceable to all or some of the sources of Islamic law earlier noted, particularly as based on and derived from the principles of *ijtihad*.

Consequently, as a follow up to preceding discussions in Chapter Two, this Chapter gives a clear clarification on the Islamic law perspective on insurance in general and motor vehicle insurance in particular with specific efforts aimed at disclosing how the Islamic alternative to the motor vehicle insurance operates.

3.2 Insurance as Contract In Islamic Law

Contract under Islamic law is termed *Al-'Aqd* which has various meanings of "tying", "tightness", "strengthen", consolidation, perfection and integration of two (2) things.[5] However, the juristic meaning of contract has been as: "the connection that exists between two statements or whatever replaces the two statements, from which consequences a legal obligation emerges".[6]

The above definition recognizes only bi-lateral contract/agreement and to this end, some scholars did not agree with same. Consequently, some Jurists have defined *'aqd* (contract) in a way that accommodates both unilateral and bi-lateral agreements provided that all

[4] See Bambale Y. Y. (2007) *Islamic law of Commercial and Industrial Transactions* (Malthouse Press Limited, Lagos) p. 193 where the Chapter that discusses this scheme is titled "*Takaful* (Islamic Insurance)".
[5] Zubair, A., (1990), *Principle of Islamic law of contract*, I.C.C.Publication-Lagos, p.9.
[6] Abu-Zahran, M., (1357 H.), *Al-Mulkiyyah wanazariyyat al aqd*, Cairo, p.171.

necessary elements and conditions are met. Thus, *Aqd* has more broadly been defined as: "an agreement by which a person or several persons oblige themselves in a favour of another or other persons to give, to do or not to do something".[7] With this definition, unilateral promises, such as endowment; divorce; '*Itq* (Emancipation); and, gratuitous promises; are enclosed to be regarded as *'aqd,* and as such binding.[8]

It is discernible from the above definitions that certain elements must be present before contract is said to have been validly formed. While elaborating on these elements is not necessary in this study, it suffices that the elements include:

1. Offer and Acceptance
2. Contracting parties
3. Subject matter of the contract,
4. Consideration.[9]

From various definitions of contract in Islamic law, including those earlier noted, it is deducible that the contract of *takaaful* (Islamic insurance or simply insurance) in whatever forms (i.e. whether mutual or commercial) are also founded in Islamic law;[10] though they must be structured to be co-operative in nature to enjoin such Islamic legal recognition.[11] Thus, insurance (in the form in which it is recognised in Islamic law) therefore qualifies as a contract under Islamic law, though with its distinct and distinguishing features that

[7] Ibid, p. 199.
[8] Zubair, A. Op.cit. p.11.
[9] Ibid, 39.
[10] Abdulazeez, U., (1418.A.H.), *Arribahwal-mu'aamalatulmasrofiyyah fi nazarish-Shari'atilIslamiyyah*, Daarul-'aazimah Publishers and Distributors, Saudi Arabia, 8th edition, p. 405.
[11] Ibn 'Uthaimin, "The Difference Between Cooperative Insurance and Commercial Insurance" in *Fatawa Islamiyah*, "Insurance & Other Issues" p. 21.

would be examined later in this work by which it is perceived as the Islamic alternative to the conventional insurance.

Essentially, the whole idea/goal of insurance is to cover/address outcome of hazard and misfortune to property. Therefore by the principle/concept of mutuality and helping one another, there is a basis for insurance in Islamic law.[12] This would be appreciated if viewed from the purview that insurance brings about alleviation of hardships and provides alternative security (funds) and assistance for those that face unexpected risks and perils.[13] With *takaaful*, effective and mutual helpful surplus distribution mechanism of risks and hazards is ensured among the participants.[14] *Takaaful* also enables man to make provisions for his morrow in line with the emphatic directive given in the Quran where it is clearly enjoined thus: "O you who believe! Fear Allah and keep your duty to Him and let every person look to what he has sent forth for the morrow and fear Allah. Verily! Allah is all aware of what you do".[15]

Unlike the conventional insurance which seeks to compensate for the loss suffered, the Islamic insurance "does not mean compensation, it only means mutual cooperation in times of affliction and accidents".[16] It is therefore obvious that insurance (i.e. *takaaful*) is qualified as a contract under Islamic law, notwithstanding the fact that scholars differ on the nomenclature under which same is formed or developed.[17] To this end, it would be

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[12] Quran chapter 5 verse 2. See also Salaudden, Op. cit. Pp. 512-513.
[13] TK 2002 Takaful and Actuarial Practices, (Course Module), Op.cit, @ Unit 2.3.1 p. 15
[14] Zubairu S. D., (2016) *Understanding Takaful (Islamic Insurance) in Nigeria* (SC (Sang Choy International Ltd,) p.123
[15] Quran 59 verse 18
[16] Ibn 'Uthaimin, "The Difference Between Cooperative Insurance and Commercial Insurance" in *Fatawa Islamiyah*, "Insurance & Other Issues" p. 21
[17] Scholars differed on this, some opined that insurance contract is formed from Daman, while others maintained that it is from Hawalah and some others postulated that it is from Kafaalah (guarantee). For detail on this see Muslehuddeen, M., *Insurance and Islamic Law*, Adam Publishers and Distributors, Delhi-India, 2nd Edition, 1994, pp.126-129.

instructive to look at how Motor Vehicle Insurance, which is the focus of this study, is accommodated under the Islamic Insurance Scheme (*takaaful*).

3.3 Alternative Islamic Insurance Scheme (*Takaaful*)

Takaful is the Islamic alternative to the conventional insurance and it is an Arabic word which connotes "mutual assurance" or "joint responsibility". Etymologically, it derived from the root word "*kafala*" which literarily means "to support" and "to guarantee".[18] To another scholar, "*kafala*" itself is derived from "*al-kifl*" which means junction or addition and by that it signifies the junction of one person to another in relation to a claim.[19] Essentially, *kaafala* connotes to guarantee other persons for the claim of a third party. This can be seen from the story of Prophet *Yuusuf* (Joseph) when he guaranteed reward of a camel load for whoever located the lost golden bowl of the king.[20]

As insurance is closely associated with risk and calamity, it is informing to clarify the position of Islamic law on risks. Under the Islamic law of transaction, one is not allowed to make a profit unless he takes risk on a transaction. Again, belief in destiny (*Qadar*-good or bad) is an essential part of the article of faith and pillar of Islam.[21] Consequently, a Muslim has obligations to put all his affairs onto Allah and submit to Him on all that befalls him, whether positive or negative. Allah has decreed to test the believers in their affairs and properties.[22]

Notwithstanding the above position of Islam, Muslims (believers) are still enjoined to take drastic steps and make frantic efforts to achieve best in the worldly affairs and attain

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[18]Salaudden, A., Op.cit, Pp. 512.
[19]Muslehuddin, M., Op.cit., p.127.
[20] Qur'an chapter 12 verse 72.
[21] Ibn Rajab, A., *Jaami'ul-Uluumiwal-Hikami(Commentary on Imam Nawawy 40 (Forty) Hadiths,*Hadith No.2), Daarul-FajriLitturah-Cairo, 2nd Edition, 1431/2010, pp. 40-76.
[22] Qur'an Chapter 2 verse 104.

outmost success in the hereafter (gaining *Al-jannah*-paradise). Thus, they must take reasonable measures to prevent misfortune and occurrence of hazard as much as possible and whatever happens thereafter (whether positive or negative) could be rightly attributed to destiny (*qadar*)[23]. If it were otherwise, human beings would not be judged on their deeds, but on destiny and to allow that will amount to injustice.

The fact that a *Muslim* must take all necessary steps to prevent calamity and misfortune is supported by a narration from Prophet Muhammad (May the peace and blessing of Allah be upon him) to the effect that: "The Prophet told a Bedouin who left his camel untied, but to the trust and will of Allah: 'Tie your camel first, then put your trust in Allah'".[24] Thus, like a camel, insuring one's motor vehicle is an effort in the form of tying one's camel and then putting one's trust in Allah as long as it is *Shari'ah* compliant. This is a cooperative insurance which "only means mutual cooperation in times of affliction and accidents"[25] as different from the conventional strictly-commercial insurance whose sole aim is profit and which is "a form of gambling, which Allah – Almighty, All Powerful – has forbidden in His Book".[26]

3.3.1 Origin and Basis for Motor Vehicle Insurance in Islamic Law

For proper understanding of the basis and origin of the Motor Vehicle *takaaful*, recourse must be made to where the scholars derived proof for validity of *takaaful* generally. This cannot be otherwise since there is no specific origin and basis for Motor Vehicle *takaaful*

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[23] Quran Chapter 13 verse 11, See Ibn Rajab, A., (1431/2010), Jaami'ul-Uluumiwal-Hikami (Commentary on Imam Nawawy's 40 (Forty) Ahaadith), Daarul-FajriLitturah-Cairo, 2nd Edition, p. 97, where the prophet admonished the companions not to rely on destiny only but to also follow up in good deeds so as to attain success

[24] Reported in Sahihil Bukhari, related by Anas Bin Maalik as quoted in TK 2002 Takaful and Actuarial Practices, Op.cit., @ Unit 1 p. 16, see also Salaudden, A., Op.cit., p. 512.

[25] Ibn 'Uthaimin, "The Difference Between Cooperative Insurance and Commercial Insurance" in *Fatawa Islamiyah*, "Insurance & Other Issues" p. 21

[26] ibid

as different from other types of *takaaful*. Rather, the general origin and basis established for *takaaful* generally also support the Motor Vehicle *takaaful*. Based on the principles of *ijtihad*, various schemes put in place and upon which *takaful* has been developed also support the motor vehicle *takaaful*. It is therefore not surprising that Motor Vehicle *takaaful* is packaged as the Islamic alternative to the conventional motor vehicle insurance scheme, through exercise of *ijtihad* and adoption of various Islamic principles guiding some other schemes which enjoy Shari'ah validity as analysed below. Even though there are divergent opinions on the most suitable modes of operation of *takaful* in the modern day out of these schemes, the fact remain that the Islamic motor vehicle insurance has been justified and implemented on the basis of some of these schemes. The following explanations would throw light on this. There are various principles upon which the Islamic validity and basis for motor vehicle insurance has been anchored. They are therefore examined one after the other.

3.3.1.1. Basis for Takaaful in Established Principles in Islamic Law

i. Principle of Ta'aawun (mutual assistance and co-operation)

The two primary sources of *Shariah* categorically enjoin and encourage mutual assistance and corporation among the believers. They also emphasized the huge reward attached to the act of removing hardships and calamity for fellow believers. One of the traditions was narrated by *Abu Hurairah* that the Prophet said that whoever removes a worldly hardship from a believer, Allah will remove from him one of the hardships of the Day of Judgment.[27] Therefore, forming a pool or fund by way of co-operation to assist one

[27] Qur'an Chapter 5 verse 2, Qur'an Chapter 49 verse 10. For various Ahadith (prophetic traditions) see Ibn Rajab, A., Op. cit., p. 60, wherein the prophet by way of similitude likened the love and mercy of believers among themselves to a single body.

another is an act of worship that will generate reward for the participants. Based on this concept of *Ta'aawun*, motor vehicle *taakaful* is approved and legally sanctioned.[28]

ii. Principle of Daman (Restitution), Kafaalah(Guarantee) and Hawalah (transfer of claims/Debt).

After deep and thoughtful *ijtihad* on the principles and application of the schemes of *daman* (restitution), *kafaalah* (guarantee) and *hawalah* (transfer of claims), scholars of Islamic law came to a conclusion that assumption of risks or claims by a person and transfer of such risks/claims to another are allowed under the Shari'ah.[29] Since the essence of Motor Vehicle insurance under the *takaful* scheme as alternative to the conventional system is to make one assumes the risks that may be faced by another in respect of the insured Motor Vehicle, the scheme is founded on this principle.

iii. Principle of Wakaalah (Agency)

Operation of *Takaful* either as mutual/co-operative insurance or as company insurance entails that *takaful* operators act as a Service Provider to the participants. By that, they accumulate funds and manage same for and on behalf of the participants on the basis of *wakaalah* (wherein someone puts his business or management of funds on the trust of another and he in turn has religious obligation to honour such trust).[30] Participants in the Motor Vehicle *takaaful* establish a relationship with the *takaful* operator in the form of agency which makes the operator to be assigned with the management of the pools in the contributions and assuage the risk that may be encountered by any participant in respect of his Motor Vehicle.

[28]Bambale Y.Y., op.cit.p.193-194.
[29] TK 2002 Op.cit., @ Unit 1.5 @ p.g. 15
[30] Ibid, @Unit 2.5.6. p.g. 26.

iv. Principle of law that "all commercial transactions are permissible unless they are specifically prohibited"

It is a well-established principle of *Shariah* that "all commercial transactions are permissible except one specifically prohibited by clear proof".[31] Based on this principle, scholars (particularly modern ones) declared *takaful* as permissible, since there is no any proof that prohibited it. Notably, the reason for divergent opinions on *takaaful* is that insurance was not known until the 13th Century.[32] Therefore, the old scholars had no opportunity of issuing *fataawa* on it and as such it called for opinions of the modern scholars as insurance businesses began to grow and even became compulsory in some jurisdictions.[33]

Under this principle, since there is no specific proof against insuring Motor Vehicles, taking out a Motor Vehicle *takaaful* is legally presumed to be permissible in Islamic law. To declare it illegal or unlawful would amount to declaring what is not expressly declared unlawful by *Shari'ah* as unlawful.

v. Principle of Public Interest (Masaalihul-Mursalaah)

Contemporary Scholars have considered *takaaful* to be necessary on the basis of public interest and environmental changes, coupled with world growths of economy and the needs to be *Shariah* compliant.[34] From the perspective of this doctrine, there are many justifications for the motor vehicle *takaaful* on the basis of public interest.

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[31] Al-Usaemeen, M.S., (2010), *Al-HallalWalHaraam* (DaarutTaofeeqiyyahLitturaath-Cairo, p.225.
[32] The First Takaful Company-Islamic Insurance Company of Sudan-was established in 1979: see Salahudeedn A. Op.cit, p. 516; Bambale.Y.Y.,Op.cit, P. 200.
[33] Al-Husary, A., Op.cit., p. 344.
[34] TK 2002 Takaful and Actuarial Practices, Op.cit, @ Unit 1.6.4. p.g. 21.

First, Muslims are part of the larger modern society, the Nigerian society in this respect, where motor vehicle insurance schemes have been made inevitable and the Muslims only have choice to either design the scheme that will comply with the Islamic principles or subject themselves to the conventional non-Islamic system. Second, the positive statutory law of Nigeria requires that all vehicle owners should make provisions through insurance to indemnify a third party that may be affected by their conducts. Also, since the motor vehicle insurance legal instrument in Nigeria permits the motor vehicle *takaful* scheme, it is very well in line with the principle of *Masaalihul-Mursalaah* for the scheme to be institutionalised. Otherwise, it may eventually lose the recognition that has been accorded to it.

vi. Principle of Al-Aqilah

In their bid to practically demonstrate clear basis and origin for *takaaful*, scholars extensively considered the practice of the Arab custom of blood money under the principle of *Al-Aqilah* and exerted their *ijtihad* prowess to formulate and advance rules of *takaaful*.[35] They thoughtfully reasoned that since the principle of *aqilah* was sanctioned by Prophet Muhammad (SAW), it became part of the Sunnah and reliance on it to develop any scheme subject to regulations of the *Shari'ah* can therefore be explored. On the justification for exploring *aqilah* to develop *takaaful*, Zubairu argues as follows:

"*Al-Aqilah* system is a classical representation of joint guarantee by a group of people to help each other in the event of mishap. This is in line with Islamic principle of mutual help and cooperation in good and virtuous acts".[36]

It was also reported that Caliph Umar (may Allah be pleased with him) once directed all Districts of the State to list the names of the Muslim brothers-in-arms and the people

[35] Ibid, Unit 1.6.1. @p.g. 17.
[36] Zubairu S. D, op cit. p.88

whose names were on the list were made to owe each other some mutual co-operation or assistance to contribute blood money in the event of any manslaughter committed by any of their own tribe.[37] In this regard, it is well established for vehicle owners to agree to support each other mutually and in a cooperative manner in case of any hazard which any one of them may face in their respective vehicles.

3.3.1.2. Basis for Motor Vehicle Takaaful from Juristic Analyses

Research has shown that Ibn Abidin (1784-1836) was the pioneer Islamic jurist that delved into the concept of insurance, specifically marine insurance, which was the first form of insurance that existed in Islamic countries. He exerted his *ijtihad* to conclude that, since it was compulsory to have insurance before one could deal in marine, Muslims could engage in such insurance only to that extent.[38]

However, beyond merely sanctioning and engaging in any insurance just because it is compulsory as expressed by *Ibn Abidin*, the contemporary scholars advanced and developed various modes of operation for insurance on the basis of the *takaaful* scheme in order to get rid of illegal elements identified with the conventional system and make it *Shariah* compliant. Some of these illegal elements are: (i) *Gharar* (Uncertainty);[39] (ii) *Maisir* (Gambling);[40] (iii) *Riba* (Usury);[41] (iv) cheating[42] or deceit.[43] Consequently,

[37] Ibid, p. 18.
[38] Ibid.
[39] Insurance Policies are among the contracts that involve a great deal of ambiguity, because neither the insurer nor the insured can know at the time of entering into the contract what he will give or take. In fact uncertainty is an essential element of insurance as explained in Chapter two.
[40] What is meant by gambling is when one pays something of his own money and takes a chance either he will gain more than or will lose the money that he paid. This is exactly the game of insurance.
[41] Conventional insurance involves Riba. The reality of transaction is that it is paying money for money to be given at a later date. If the amount are equal, then this is Riba An-Nasee'ah. In the same vein, if what is paid to the insured is more or less, then it is Riba Al-fadl. Both Riba Al-Fadl and Riba An-Nasee'ah are haraam (Forbidden)

takaaful scheme is fashioned out to free Muslims and their economy from interest and unjust and illegal elements. Thus, *takaaful* is premised on mutual assistance and assurance, solidarity and shared responsibility among members. Under the system, profit and loss would be shared among the insured.

By other juristic exertions, various regulations and resolutions have been made to ratify *takaaful* as lawful *Shariah* compliant insurance system. These resolutions include:

a. Council of Saudi Ulama (1397 AH/1977) resolution,

b. Fiah Council of Muslim World League (1398/1978) resolution,

c. FiqhCounci l Organisation of Islamic Conference (1405/1985),

d. Symposium on Islamic Jurisprudence, Libya (1972),

e. Fataawa of Malaysian Religious Council (1972),

f. First International Conference on Islamic Economics, Makkah,(February,1976),

g. The Islamic Conference, Makkah, (October 1976).[44]

In furtherance to these resolutions, collaboration among Islamic countries and Islamic Economics and Financial institutions also led to formation of the International Association of Insurance Supervisors (IAIS) in 1994 and further development of *takaaful* industry and regulatory roles particularly on Shariah compliance. Subsequently, references are being made to guidelines and standards (related to *takaaful*) issued by the International Islamic Organisations listed above and others such as the Accounting and Auditing Organisation

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[42] Extensive consideration of conventional insurance policy revealed that it is a way of consumption of people's wealth unlawfully and unjustly. This is contrary to injunction of Allah in Quran Chapter 4 verse 29.

[43] Generally see Muslehuddin, M., Op.cit.,p.512.;Evidence for prohibition of commercial insurance @http://islamqa.info/en/ref/islamqa/13076 accessed on 15/10/2012.

[44] As quoted in TK 2000 Takaaful , Op. Cit, Unit 1 p. 22.

of Islamic Financial Institutions (AAOIFI) and Islamic Financial Services Board (IFSB).[45] This is to maintain standards and compliance with Islamic principle in the operation of *takaaful* companies and businesses.

Due to the fact that *takaaful* is so important and relevant to the modern day economy (as some insurance were mandatorily required before one is allowed to participate in some economy (e.g. marine, construction and motor vehicle), contemporary scholars have developed various models[46] in transacting *takaaful* businesses.

In order to achieve this and provide for a *Shariah* compliant competitive alternative market in insurance industry, modern scholars have stressed the concept of partnership under Islamic law and applied same to be relevant in the modern day for formation of company. There are various verses and *ahaadith* that buttress the permissibility of partnership among of which is one reported by Abu *Dawuud* wherein the prophet was reported to have said:

Allah, Exalted be He, says:

> "I am the third of the two partners (i.e Allah is with them, taking care of, keeping supporting, and sending down blessing upon their trade) as long as one of them does not cheat the other. But when he cheats him, I depart from them (i.e. to take blessing away from their trade.[47]

Consequently, Islamic finance experts and scholars have developed various models of operations for *Takaaful* Company (ies) in order to create acceptable alternative insurance motor vehicle insurance covers.

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[45] Ibid @p.g 34-35., Salaudden, Op. cit. p. 512.
[46] That is a form of contract that exists between the takaaful operator (company) and the participants.
[47] Al-Fawzani, S, Op.cit. p.241

3.4 Motor Vehicle Insurance Operation in *Takaaful* Company

Islamic law recognizes the right of human being to own property provided is a lawful property and same is owned/possessed lawfully. Motor, is a necessity to some of users, while many use it for commercial purposes other possess it for personal running. As stated earlier, Islamic law imposed duty on individuals to take steps to protect their properties against loss or risks that can cause destruction.

It is of great importance to mention here that Conventional Insurance is divided into two (2) aspects to wit: Conceptual Aspect and Practical Aspect. While the conceptual aspect is termed as the reason for the scheme which is protection of loss or mitigation of risk over the property, the practical aspect is referred to as the mode of operation.[48]

The Experts of Islamic Finance, after consideration of the two aspects of the conventional insurance, came to conclusion that though there is presence of prohibited element in the Practical aspect-mode of operation , there is nothing wrong with the Conceptual aspects.[49] Alternatively, the Experts through the principles of *ijtihad* developed various models to be adopted as mode of operation that would be *shariah* compliant and under which several Conceptual aspect of insurance could be actualized.

The above efforts contributed to high and increase in the statistic number of motor insurance policy compared to other type of insurance. This is because, one of the most common General *takaful* (just as same is the case in conventional insurance)[50] products is for coverage of motor-vehicles.[51]

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[48] Darazo, S.Z., Op.cit.p.82-83.
[49] Ibid.
[50] Chapter 2 (supra).
[51] TK 2000, Op. cit, Unit 4, p. 5.

Consequently, the Followings are major categories of *takaaful* models currently being formulated by experts and adopted by operators in the sector:

3.4.1 Co-operative Model:

Under this model, contribution and donation are collected and pooled as the participant fund (i.e. *takaaful* fund). Claims and management expenses are met from the fund. People would be employed to collect contributions and donations from the participants, manage and administer the scheme and make claims and benefit payments to the members. Benefit belong only to the participants and in the case of deficit of the fund, members would be obliged to make up the fund for further application to members' claims.

This model is fashioned out purely on the principle of mutual assistance and joint benefit. The funds are gathered from the participants on the doctrine of *Tabarru'*(donation and contribution). It is important to note here that the first modern day *takaaful* sector (i.e. Islamic Insurance Co of Sudan) in 1976 was established under this model.[52] The reason for adoption of this modality may be as a result of the need to create a co-operative entity with a sole aim of mitigating the loss of members as an alternative to the widespread and generally acceptable insurance.

3.4.2 Mudhorabah Model:

Under this model, the operator (*takaaful* company) essentially acts as *mudarib* (entrepreneur) while the participants are capital providers (*Robbul-Maal*). Participants' contributions/donations made in form of *tabbarru'* are channelled to the *takaaful* fund. Here, the *takaaful* Company manages the business, including managing the *takaaful* fund and in consideration, is entitled to a share of the fund which is inclusive of underwriting surplus and investment returns. The sharing of profit would be shared in accordance with a

[52]Salaudden, A., Op.cit. p. 516.

pre-agreed ratio (***percentage %)*** between the *takaaful* company and the participants at the expiration/lapse of policy tenure and discharge and fulfilment of all obligation of *takaaful*.[53]

3.4.3 Wakalah-Based Model [54]

Under this model, *takaaful* operator (company) act as the agent on behalf of the participants. For the service, the *takaaful* company is entitled to a fee. The operator is paid a pre-agreed fee for the services rendered in respect of underwriting, management and investment of the fund. Any liability on the fund is borne from the fund. The *wakaalah* fee is normally deducted from the contributions upfront.[55]

3.4.4 Wakalah-Mudarabah/Wakalah with Mudarabah on the investment:

This model was derived after due re-structure of the above (wakalah based model) and is an hybrid model where *takaaful* operator (company) would, in addition to *wakalaah* fee, is paid an additional performance fee based on a pre-agreed ***percentage (%)*** of the investment profits for the management of the investment activities of the fund. This is the most commonly used by *Takaful* operators throughout the world.[56]

3.4.5 *Waqf* Model:

Under this model, a *waqf* is established by the participants. There would be a certain amount of capital through a *waqf* account. The *takaaful* operator would be authorized to invest the fund in accordance with the *shariah* principles and as trustee. The trust deed would be executed among the participants and the operator. The Deed must also contain the rules for distribution of its funds and the beneficiaries.

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[53] TK 2000, Op. cit, Unit 3, page 12.
[54] Wakalah refers to a contract whereby a person authorizes another to do a certain well-defined legal action on his behalf either free or for a fee. Here, it is for a fee,
[55] TK 2000,Op.cit, unit 3.4.3, pp. 14-15.
[56] Ibid.

For conveniences, practicability, and proper running of the *takaaful* businesses by takaful operators, it has been conventionally stipulated that funds be categorized in to two (2) accounts: The Risk Pool shall be referred to as Participant Risk Fund (**PRF**) and Participant Investment Fund (**PIF**). The fund in PRF would be used to liquidate the claims/ cover any loss of the participants, while fund in PIF is solely for an investments and profit therein would be shared among the participants and *takaaful* operator.

It is important to put to record here that there is urgent need to adopt the system of separation of the two funds. This is to get rid of some illegal and vitiating elements notable among of which are interest and gambling that are involved in insurance. Segregation of the fund would enable the *takaaful* companies/operators to manage the risk pool and applied it to the claims/losses of the participants and at the same time invest the investment funds in legal businesses, the profit thereon derived, would be shared in proportion to the pre-agreed formula.

It is relevant here to share the view/comment of a researcher[57] on the adoption of the models for operation of Takaful. The comment borders on the following:

a) Problem of contributors being beneficiary of the fund.[58] To the researcher, it is not befitting for the participant to benefit from the pool.

b) Mixture of Financing Models. This according to the researcher may warrant the operator to circumvent certain portions of each model which might create restrictions particularly to profit making and company viability.[59]

[57]Dikko, M., Viability of Islamic Insurance in the face of Global Challenges., (Unpublished) being a LL.M. thesis submitted to Faculty of Law, Ahmadu Bello University, Zaria, 2011, pp. 137-138.
[58] Ibid.
[59] Ibid,

The issues raised by the researcher above, to my mind, have been resolved, if proper procedures and models are complied with. The fact that one contributed to the fund (pool) does not debar him from benefiting. That is why it is developed under the basis of mutual assistance and assurance.

On the second issue of mixture of funds, *takaaful* operator has obligation to operate in line with the principles and models it has adopted. In fact, the regulatory bodies vide guidelines placed duty on the operators to adopt any of the models and stick to the rules and regulations governing such model.[60]

3.5 Insurance Covers in Motor Vehicle *Takaaful*

Cover in insurance parlance connotes the ranges/scope of risk/loss to be protected in the property in accordance with the agreement between the parties as stated in the insurance policy document.

It is cardinal principles of contract under Islamic law that parties are bound by their agreement except if the agreement contained prohibited elements.[61] Therefore, the issue of insurance cover in takaaful operation is not on operation models but conceptual and thus all that identified covers under conventional insurance also acceptable.

From the general practice in the sector (*takaaful*), the followings covers are available:

i. Comprehensive Vehicle *Takaaful* (either for private or Commercial.

ii. Third Party Insurance Vehicle *Takaaful* (It has the same covers with third party insurance policy explained in chapter 2.

[60] For instance Guidelines for Takaful Insurance operators 2013 (for Nigeria operator) stipulated such rule.

[61] There is authentic hadiths to effect that" muslims are bound by their obligation /agreement except those which permit prohibited deeds or prohibited permitted deeds. see: Ibn Majah Vol.2, Hadith 784.

iii. Third Party, Fire and Theft *Takaaful* (it has the same covers as explained in chapter 2.

It must be stated that there is no specific format for the *takaaful* policy cover and certificate and various format have been used by *takaaful* companies, provided that the participants agree and consent to the policy. Furthermore, various forms of motor vehicle insurance as discussed in previous chapter[62] are also practicable and could be provided by *takaaful* company.

As a general guide, the following types of covers have also been identified:

1. Own Damage: Under this, the operator would indemnify the participant/policyholder against loss or damage to the Motor vehicle stated in the Schedule.

2. Legal Liability to Third (3rd) party: With this type of policy, takaful company is under obligation to indemnify the participant against all sum of monies, claims and expenses which the participant is legally obliged to pay in connection with:

a) Death of or bodily injury to any third party.

b) Damage to property of a third party other than property owned by the participant.

3. Accidents to participant:

With this policy cover, the (*takaaful*) operator would be under obligation to pay compensation to the participant for bodily injury sustained (in connection with the Motor vehicle) by the participant. It may also cover injury sustained by participant in the process

[62] I mean Third Party Insurance, Comprehensive Policy and Accident, Fire and Theft as discussed in Chapter 2 (supra).

of mounting in to or dismounting from or travelling in any motor-car result in death or permanent disablement.[63]

It is of great importance to state here that the above list is not exhaustive. Therefore, *takaful* operators/companies are legally allowed to adopt any other policy/cover that suite the purpose of the participants provided it is a *Shariah* compliant. This is in line with general principle that all act of commercial transaction are permissible unless it is specifically prohibited by proof.[64]

The above policy covers are lawful and acceptable provided mode of operation adopted in issuing the covers are *shariah* complaint. This is because the major distinguishing factor of the *Takaaful* motor covers is that they are free from prohibited elements.

Each covers highlighted above has mutual understanding, agreement and consent of all the participants to undertake the responsibility of relieving, indemnifying and mitigating the loss of respective participants. This is first agreement that must be executed by every participant. Consequently, the participants engage the service of the *Takaaful* operator to manage the funds (pool of fund contributed by the participants) and the operator would be entitled to fee/commission and compensation as per the models and agreement adopted. There must be agreement executed by the participant and operators to that effect[65].

In addition to the above, it also important to state here that as a distinguishing factor, the surplus funds which arises when there is excess in the participants fund after meeting all obligations and expenses (e.g for re-*takaaful*), would be distributed amongst the participants as profit[66].

[63] TK 2001 , Op. cit, Unit 4, page 5
[64] Al-Usaemeen, M.S., op. cit p.g.225.
[65] TK 2001, Op.cit. Unit 4, pp.1-8.
[66] Darazo, Z.S. Op.cit. p.123.

It has been stated that takaaful companies/entities have developed and adopted the following methods for distribution of surpluses to the participants:

i. Pro-rata method: By this method, the surplus is distributed to all participants in proportion to the contribution paid during the relevant year without considering whether a participant is paid any claim or not.

ii. Selective method: with this method, any participant who has received claims (whether small or big) in respect of his vehicle/property will not be allowed to share from the surplus.

iii. Off-setting method: this implies that any participant whose claims received exceed the amount of contribution collected or due to him for the duration, such participant will not benefit from the surplus[67].

The above represent the mode of operation and treatment of surplus by *takaaful* operators.

Following the development of the *shariah* compliant products, the global trend has been that the adherent of Islamic Law moved their government to incorporate the alternative in to the insurance frame work[68]. It is on this basis that in Nigeria several calls, agitation and complaint (relying on right to religion, right to own property) have been lodged with government to provide frame work for *Takaaful* products. It is excited that the Commission has yielded to this call by release of the 2013 Guideline for *Takaaful*.[69]

[67] Ibid, 123-124.
[68] Notable amongst the countries are Malaysia, Sudan and some countries in the middle east.
[69] The entire guideline could be downloaded on http://naicom.gov.ng/content accessed on 19/12/2014 at 3:20.

3.6 Takaaful Guideline 2013

It is a general knowledge that prior to the release of Takaful Guideline in March 2013, there is no specific legal frame and recognition for the operation of *Takaaful* business in Nigeria.

It has also been discovered that, unlike what is obtainable in other developing Countries, insurance industry did not contribute to the Nation's Gross Domestic Product (GDP). In an attempt to improve on the situation and diversification in the industry, NAICOM embarked on research and discovered that there is need to provide alternative opportunity in the industry for those that disregarded the conventional insurance as result of some of the reasons provided above.[70]

Consequently, the Commission came up with the guideline for Takaful tagged "Operational Guidelines 2013 for Takaful-Insurance operators". Thus Guideline was to take effect from March 2013.[71]

Darazo has aptly captured the objectives of the guideline when he said:

> The Guideline provides a framework that regulates the conduct of Takaful Insurance business in Nigeria. This will provide a platform within which the intending Takaful Companies can operate. The objective is to set-out requirements and minimum standards for operations and disclosure that aims to protect the interest of consumers/participants. It is also aimed at providing a framework for the establishment and growth of Takaful-insurance business that is efficient and leads to financially sound and sustainable Takaful-Insurance funds.[72]

It is of great help and convenience to briefly highlight key issues raised by the Guideline.

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[70] Ibid.
[71] Section 1.9 of the Guideline.
[72] Z.S.Darazo, Op.Cit.

3.7.1 *Takaaful* Insurance Operators are Required to obtain the Approval of the Commission (NAICOM) on the Operational Model, they Intend to use.

In a bid to obtain the consent, the intending operator must submit its application along with other necessary documents such as product model, approval of its Advisory Council of Experts (ACE) and Board of Directors, contract between *Takaaful* insurance and Participants, etc.

3.7.2 Registration Requirement for Takaful Operator

The applicant must be a limited Liability Company registered under the Company and Allied Matters Act (CAMA), which must have as part of its name such words or terminology that connotes *takaaful* operation, and with minimum deposit of N100, 000,000.00 (One Hundred Million Naira, in case of General *Takaaful*) to be kept with Central Bank of Nigeria.

The Guideline apart from the above highlighted procedures provides for *Shariah* Governance/Advisory Council of Experts who shall be reporting directly to the Board of Directors of the *Takaaful* Company. It also stipulates duties imposed on Takaful operators, funds segregation, surplus distribution, Financial Reporting, Expenses, Minimum Disclosures and Auditor's Report.[73] As regards to Corporate Governance, in addition to what it is contained in the Guideline, *Takaaful* operators are required to comply with normal Governance requirements obtainable in Conventional Insurance regulations. These includes requirements for appointment of Board of Directors, CEO/Key persons to be fit

[73] Section 3 of the Guideline extensively captured the governance standards required from Takaful operators while section 4 provided for structures, managements and distributions of the Takaful operators' funds.

and proper, Auditors, Appointed Actuary and other issues guided by Laws or general regulations in the insurance Industry.[74]

At this juncture, it is important to put on record that the guideline categorized *Takaaful* operation into two (2) classes: Family *Takaaful* Insurance and General *Takaaful* Insurance.[75] Family Takaful Insurance is described as typically a long term arrangement between the takaful operators and *takaaful* - insurance Participant providing the policyholder with financial relief, for instance, bereavement, critical illness or disabling injury to fund contributor. On the other hand, General Takaful-insurance is described as typically a short term arrangement between the takaful operators and takaful - insurance Participant providing financial compensation for specific losses such as theft or damage etc but will exclude Family Takaful-Insurance.[76]

It is also provided that in carrying out the business, *takaaful* operator must adopt any of the following models:

i. Takaful-insurance based on *Mudarabah* (Profit sharing) contract.

ii. Takaful Insurance based on *Wakalah* (Agency) contract.

iii. Takaful-insurance based on hybrid *Wakalah*-Mudarabah (Agency-profit sharing) contract.[77]

With reference to what we have discussed in this Chapter, it is clear that the guideline allows *takaaful* operator to adopt any of the above specified (3) three models as against the five models we mentioned earlier in this chapter.[78] Therefore, *takaaful* operators are not

[74] Z. S. Darazo, Op.cit.
[75] Section 2.1 of the Guideline provided for this.
[76] Section 2.1 of the Guideline.
[77] Section 2.2 (a-c) of the Guideline.
[78] Chapter three (3) at page 15-17.

allowed to adopt Cooperative model and *waqf* model explained before,[79] except with special approval of the Commission.

It is essential to make specific reference to Section 5 of the Guideline, as it contained provisions on the rights and Obligations of the Participants.

Section 5.1 provides thus:

> The participant is required to provide complete and accurate information to the *takaaful*-insurance operator. The Takaful-insurance Operator will use appropriate tools and technique to obtain information from participants before entering into a *Takaful*-Insurance with a potential participant. Tools and techniques to be used by a Takaful-Insurance Operator include but not limited to proposal forms, questionnaires and interview.

Since the policy is on the Motor *Takaaful* such information to be obtained should include the year of the car, condition, whether the car is personal or commercial and other vital information that will enable *Takaaful* company to determine whether to enter into such contract.

Section 5.4 of the Guideline is particular about how contract would be sealed between the participant and a *Takaaful* operator when it provided thus:

> The Takaful-Insurance Operator and the Participant will have entered into a contract once an offer made by Takaful-Insurance Operator is accepted by the participant. This is determined as having occurred when the participant has confirmed acceptance of the offer (e.g. signed policy documentation) and the Takaful-Insurance Operator has received payment of the agreed contribution amount.

[79] Ibid.

> However, where participant pays the contribution to an authorized Takaful-Insurance agent, broker or other intermediary, the contribution will be deemed to have been received by the Takaful-Insurance Operator.[80]

The Guideline also provided that the *Takaaful*-Insurance Operator shall issue a *Takaaful*-Insurance Certificate to evidence the existence of the contract within thirty (30) days of the payment being received by the *Takaaful*-Insurance Operator.[81]

Another essential clause of the guideline is the provisions for the management of the *Takaaful*-Insurance funds. This is because the funds must be managed and maintained in such manners that are compliant with the Islamic injunction and guiding principles so as to free the funds from any unlawful elements like *Riba* (usury), Gambling and other prohibited elements upon which conventional insurance was declared unlawful. With a view to guiding against these elements, the guideline provides that *Takaaful*-Insurance Operator shall establish:

a) A Participants' Risk Fund: This fund accumulates the portion of Participants' contributions that is pooled to fulfil any claims arising from eligible claimants within the cover period. Under a *Tabarru'* (donation) contract the fund is collectively owned by the pool of participants.

b) A Participants' Investment Fund: This Fund accumulates the portion of Participants' contributions that is to be used for investment to meet future pay-outs under Family *Takaaful*-Insurance business. The Fund is individually owned by the

[80] Section 5.6 of the Guideline.
[81] Section 5.5 of the Guideline.

participant and the *Takaaful*-Insurance Operator must ensure that specific investments can be identified against each fund.[82]

A *Takaaful*-Insurance Operator is also required to establish investment policies for Participants Risk Fund and Participants' Investment Fund such policies include Assets to be invested, risk profile assets, investment objectives. It is also put *Takaaful*-insurance Operator (operating through window)[83] under obligation to ensure that its *Takaaful* Funds are not leaked to or mingled with non-compliant funds.[84] This can be seen in **annexure** sample.

It shall be observed that the requirement that the *Takaaful*-Insurance operator shall establish Participants' Investment Fund is only in connection with Family Takaful-Insurance and not in relation to General *Takaaful*-Insurance under which Motor *Takaaful* falls. The reason may not be unconnected with the fact that Family *Takaaful* is for a long term and commercial in nature and as such the fund must be separated and properly monitored to ensure preservation.

It may therefore be correct to say that what is mandatorily required for *Takaful*-Insurance operator is to have only Participants' Risk Fund in relation to Motor Takaful since it is for a short term usually one year but subject to renewal. However, nothing in the regulation prevents Takaful operator from maintaining Participants' Investment Fund. *Takaaful*-Insurance operator may voluntarily adopt the investment Fund for the purpose of proper segregation, monitoring and management of the Funds.

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[82] Section 4.2 of the Guideline.
[83] It is imperative to note that the National Insurance Commission has licensed only three (3) Insurance Companies to operative Takaful-insurance under the window. The Three (3) Companies are Niger insurance Ltd, African Alliance insurance Ltd and Cornerstone insurance Ltd (who has Halal Takaful Ltd as subsidiary to operate the Takaful products: see Z. S. Darazo, Op. Cit, p.5
[84] Section 4.4 (a-d) of the Guideline.

The Guideline further required *Takaaful*-Insurance Operator to process claims and payment to complainant in a reasonable of time and that such payment must be made from correct *Takaaful*-insurance fund and in line with the *Takaaful*-insurance contract terms and conditions.[85] It is also required that Takaful-Insurance operator to have a written policy related to the treatment of the surplus generated in the participants Risk Fund.[86]

On remuneration of *Takaaful*-Insurance operator, it is provided that arrangement on this must be set and documented in *Takaaful*-insurance contracts before a *Takaaful*-insurance agreement is signed. The *Takaaful*-insurance operator shall receive remuneration which depends upon the model adopted and contracts executed.[87]

With the release and commencement of *Takaaful*-Insurance Guidelines 2013, the agitation and yearning of majority Muslims and others, who have viewed the conventional insurance system as unfair, unjust and against equity and equality, has been attended to at least to some extent. It is therefore submitted that the atmosphere is now clear for intending Takaful-insurance Operators to grasp the opportunity and register for commencement of business in line with the Guideline and other regulatory provisions. It is however, observed that the Guideline on Takaful-insurance only envisaged for commercial operation as it made no provision for Co-operative *Takaaful*.

In this Chapter, we have established that *takaaful* is a form of contract that is developed from general principles of Islamic law of contract and concept of mutual co-operation and joint assistance. We have equally shown that trend of global need to be involved in insurance industry, necessitated the urgent need to develop alternative insurance policy/products that are *shariah* compliant to the adherent of Islamic law and all those

[85] Section 5.7 & 8 of the Guideline.
[86] Section 5.9-13 of the Guideline.
[87] Section 6 of the Guideline.

who believed in its system. Various policies/models on Motor vehicle as adopted by some *takaaful* operators were also highlighted. It also spelt out some relevant provisions of *Takaaful* Guideline 2013 release by NICOM. The next chapter shall consider the similarities and difference between the conventional insurance scheme on vehicle and Islamic Alternatives.

CHAPTER FOUR

JUXTAPOSITION OF MOTOR VEHICLE INSURANCE SCHEME AND MOTOR *TAKAAFUL* AS ISLAMIC LAW ALTERNATIVE

4. 1 Introduction

In the immediate preceding two (2) chapters (chapters 2 and 3 supra), we have discussed insurance scheme on motor vehicle under Nigerian Statutes and Takaaful as Islamic Alternatives respectively. Various legislations, Legal principles and fundamental features that formed the basis of motor Vehicle insurance Scheme under the two systems had been also highlighted.

In this chapter, we would juxtapose the operation of the motor vehicles insurance scheme under the two systems with a view to pointing out some differences.

4.2 Contrasting Takaaful (as Islamic Alternative to Insurance) Operation with Conventional Motor Vehicle insurance Scheme under Nigeria Statutes

As earlier stated in chapter three (3), there is no objection from Islamic Points of view to the Conceptual Aspect of motor insurance Scheme (which is asset protection). However, due to the involvement of certain unlawful elements (such usury, gambling, uncertainty and cheating), in the operation of the scheme, Islamic Law experts and jurist have formulated some models to be adopted in operating the scheme that would make it to be *shariah* compliant and achieve the purpose of protecting the property-vehicle.

Therefore we will juxtapose the two systems in order to identify differences between the operations of the scheme. *Takaaful* (as Islamic Alternative to Insurance) differed from insurance in connection with motor vehicle insurance in the following areas and issues:

1. Insurance on motor vehicle under Nigeria Statutes is Commercial (with exception of co-operative insurance)[88] while Takaful is essentially based on principle of tabarru' (donation), mutual assistance and doctrine of helping one another (ta'aawun), but the aspect of commercial is developed to invest the funds in the pool in order not to tide down the money.

2. Common law insurance is one codified in the statutes while takaful is developed from Principles of Islamic Commercial law through the exercise of doctrine of *Ijtihad*.

3. Minimum amount to be deposited with the Central Bank of Nigeria.

   While Takaful-Insurance Operators are required to deposit N100, 000,000:00 (One Hundred Million Naira) each for Family *Takaaful* and General *Takaaful* separately[89], Conventional insurance companies must deposit 50% of the minimum required Capital, depending on the Categories of insurance to be offered as stipulated under Section 9[90] of the Insurance Act.[91]

4. Under Conventional Insurance on motor vehicle, insurance companies owns the premium and as such control ownership of the funds, invest the funds and make profits out of the business without declaring any profit to the policy-holders. The only benefit for the policy holder is when the loss or risks

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[88] Section 1(a) of Insurance Act, Cap I17, L.F.N. 2004.
[89] Appendix to the Takaful-insurance Guideline.
[90] Provided that an insurance Company must have a paid up Share Capital of the following amount before carrying out business:
(a) in case of life insurance, not less than N150,000,000.00;
(b)in case of general insurance, not less than N200,000,000.00;
(c)in case of composite insurance business, not less than N350,000,000.00;
(d) in case of Re-insurance Business, not less than N350,000,000.00.
However, by regulation issued by NAICOM in 2005, the amount has been review-up to N2,000,000,000:00, N3,000,000,000:00, N5,000,000,000:00 and N10,000,000,000:00 respectively: see Agomo, C.K., Op.cit, P. 247.
[91] Section 10 of the insurance Act.

occurred to the vehicle insured under the policy. *Takaaful* company, on other hand, is not owner of the fund but only a manager and administrator of the funds. It is on the managerial services rendered that qualifies the company to entitle to commission or profit depending on the modes/method adopted.

5. Under Conventional insurance, there is essentially risk transfer mechanism. However, under Takaful the policy does not entail risk transfer, but a kind of social function of mutual risk-bearing/sharing. Thus, *takaaful* is not a sale or an exchange rather is a membership contract to a common pool; of which every member is entitled to certain benefits.[92]

6. The essential motivational factor for the conventional insurance is search for the profit. Contrastingly, motivation for Takaful operation/policies is directed by ethical means for the overall benefits of society and environment and fulfillment of Islamic objective of social welfare.[93]

7. Conventional insurance as practiced under our statutes is interest based, while takaful is shariah compliant and as such free from interest (*riba*) and other forbidden (*haraam*) elements.[94]

8. On the dissolution of conventional insurance company, reserved and surplus funds belong to the shareholders, while reserve/surplus capital is distributed to the participants or donated to charity, when *takaaful* operator is dissolved.[95]

It is of great importance to state here that the list of the above differences is not exhaustive as there may be other differences not known to the researcher. It is therefore opened to

[92] http://www.financialislam.com/takaful...islamic insurance. access on 14th Nov. 2017 at 12.00p.m.
[93] Ibid.
[94] www.islamqa.info/en/ref/islamqa/13076.
[95] http://www.financialislam.com, ibid.

improvement. The Centre message here is that there exist vast differences between *Takaaful* and conventional modes of insurance.

Conclusively, this chapter has juxtaposed the operation of Motor insurance Scheme under Nigerian Statutes and *Takaaful* (as Islamic Alternative for insurance).

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

It is a statutory requirement that every motor vehicle user/owner must have at least third (3^{rd}) party insurance schemes in connection with the vehicle. Consequently, the insurance companies have a lot of role to play in rendering services to the intending insured. However, the mode of operation of the insurance companies involve some forbidden elements (under the Islamic law such as involvement of *riba*, gambling, cheating and upon this, scholars have declared the conventional insurance as unlawful.[96]

Be that as it may, to enable the adherent of *shariah* rules and principles to abide by the principles and at the same times comply with the statutory requirement of motor vehicle insurance, this work has highlighted the principles of laws governing motor vehicles insurance under the Nigerian Statutes and Islamic alternative (to motor insurance), juxtaposed their mode of operations. It also provides highlights of some provisions of new *Takaaful* Insurance Guideline 2013.[97]

Chapter one focuses on the general introduction encompassing statement of research problem, objectives of the research, justification of the research, scope of the research, research methodology and literature review.

Chapter two discusses the essentials constituents, formation and principle of insurance under Common law as a basis for development of insurance under Nigerian Statues, with specific reference to motor vehicle.

[96] See discussion on chapter Three (3) supra
[97] See Chapter 4 (supra)

Chapter three focuses on principles and doctrine of Islamic Law as a basis/origin for formation of *Takaaful* (alternative to insurance), via exercise of doctrine of *Ijtihaad* (analogical deduction). It further provides for the new developed Islamic models for operation of Islamic alternative to insurance-*Takaaful.*

Chapter four makes juxtaposition of the operation of insurance Scheme under Nigerian Statutes and *Takaaful* (also known as alternative to Insurance)

5.2 Findings

From the analysis made in this work, it is right to conclude that there are vast different features particularly in the modus operandi of conventional motor insurance Scheme and Motor *Takaaful* (Islamic alternative to insurance), though the two systems are put in place to protect the properties (i.e. motor vehicle specifically in this work) of the participants. Consequently, the operation of the two systems differed and that made it governable and regulated by different guideline, in addition to general statutory provisions.

After proper consideration of the Nigerian Statutes on Motor vehicle Insurance, its Islamic Law Alternative products as well as Takaful Guideline released by NAICOM, the following findings were made:

i. Most of Insurance Certificates/papers being brandished by vehicle owners in Nigeria are fake. Thus, the main objective of such cover is being defeated in the event of occurrence of risk.

ii. Huge amount of funds is required for the registration as *Takaaful*- insurance operators and as such serve as hindrance in getting more *Takaaful*-Insurance operators registered. The amount may not be so big for conventional insurance operator because the governing principle is mainly for business and making

profit. This is not so in case of *Takaaful* which is primarily based on mutual assistance amongst the participants. This may account for the fact that there are just very few operators licensed[98] so far to operate as takaaful operators under the Guidelines.[99]

iii. Co-operative Model of *Takaaful* which could have been widely acceptable and serve as practical platform for non-Commercial *Takaaful* operators, was disregarded by the Guideline.

iv. Inadequacy of Non-Interest Financial Institutions that offer Islamic financing to create market and enabling environment for *Takaaful*-insurance operator to invest the accumulated funds (pool).

v. Lack of public awareness on the nature and essential constituent of conventional insurance contract generally and Islamic Alternative in specific.

5.3 Recommendations

Flowing from the above findings, the following recommendations are proposed to improve on the Insurance Market generally and operation of *Takaaful* in Nigeria and create market for it:

i. NAICOM should create more public awareness on the need for genuine motor vehicle insurance policy/cover and specifically expose those insurance companies who allowed their certificates to be used as fake papers.

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[98] The companies are: Jaiz *Takaful* Plc and *Noor Takaaful* Ltd as full fledge while Niger Insurance Plc, Cornerstone Insurance Ltd and African Alliance Insurance Ltd were licensed to operate under Takaful window.

[99] Z. S. Darazo, *Takaful* Insurance Implementation: A drive towards an inclusive insurance sector in Nigeria-available on http://www.takaful.coop/images/stories/NAICOM_Jo accessed on 16/10/2016 at 12: 32 p.m.

ii. The Federal and State Governments should create incentives including but not limited to tax, registration fees and requirements for intending Takaful-Insurance operators(particularly) for society and association (which is not for purposely for business) in order to assist the industry to flourish.

iii. Co-operative societies should utilize provision of Section 1(a) of the Insurance Act and establish co-operative *Takaaful* particularly in the area of Motor Vehicle. All what is required is the registration as an association and compliance with conditions stated in the section. The section provided thus:

> This Act applies to all insurance businesses and insurers, other than insurance business carried on or by insurers of the following description-(a) a friendly society that is an association of persons established with no share for the purposes of aiding its members or their dependants where such association does not employ any person whose main occupation-(i)is the canvassing of other persons to become members of the association;(ii) is the collecting of contributions or subscriptions towards the funds of the association from its members;"

This could take the form of mutual insurance associations which were the earliest forms of insurers[100]. Mutual Insurance Association is a kind of co-operative insurance organization and it is operated solely for the benefit of its members. Any profit left over after the losses and expenses have been paid is distributed amongst the members[101]

[100]Irukwu, J.O, Op.cit,p.15
[101]Ibid.

i. There is need for more Financial Institution that offer Islamic Fin ance to serve as vehicle to invest the surplus funds (pool) of the *Takaaful* contributions.

ii. *Ulamau* (Islamic Scholars and Jurists) should write more books with local content on the *Takaaful* and further make intensive awareness to the general public on the subject, particularly on motor vehicle which is common and mandatory to all motor vehicle users.

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