Islam occupies a peculiar position in the Malaysian constitutional and legal framework. The Constitution which is the supreme law of the land\(^1\) declares Islam to be the religion of the Federation\(^2\) but does not make the Syariah, that is, the principles of Islamic law, the basic or even the guiding law of the land.\(^3\) In fact, the definition of the word "law" in the Constitution does not include the Syariah.\(^4\) If there is a lacuna in the law, recourse is to be had to the relevant principles of the common law and rules of equity or in some cases to English statutes of general application.\(^5\) The only reference made to Islamic law in the Constitution (or as used therein, Muslim law) is vis-à-vis the distribution of legislative powers between the Parliament and the State Legislative Assemblies. Even so, this term is used only in the orthodox sense, that is, as being synonymous with the personal laws of the Muslims, such as those relating to marriage, divorce, maintenance and succession.\(^6\)

This constitutional set-up reflects the fact that in recognising Islam as the religion of the state, the architects of the Malaysian constitution regarded Islam as just a religion and not as it is regarded by Muslims, as a complete and comprehensive way of life. Hence no inconsistency was seen in the fact that while Islam is made the religion of the state, the law of the land does not include Islamic law. This watertight compartmentalisation between law and religion also enabled the state, whilst giving due recognition to Islam as a faith, to be simultaneously responsible for the development of a distinctly un-Islamic legal, economic and commercial framework within the country.

In the light of the above factors, Islam has not, until recently, played any significant role in influencing the course of development of Malaysian law generally and Malaysian commercial law particularly. Commercial practices which transgress certain aspects of Islamic law such as the Western-style, interest-based, systems of banking

\(^1\) The Federal Constitution (1957), Article 4(2).
\(^2\) Article 3(1).
\(^3\) This is in spite of the fact that the Court of Appeal of the Federated Malay States had held in the early case of Ramah v. Laton (1927) 6 FMSLR 127 that Islamic law was not foreign law but part of the law of the land and that the court must take judicial notice thereof.
\(^4\) According to Article 160(2), "Law" includes written laws, the common law, to the extent applicable, and customs and usages having the force of law.
\(^5\) Civil Law Act 1956 (Revised 1972), ss.3 and 5.
\(^6\) The Federal Constitution, the Ninth Schedule, List II.
and insurance, pawn-brokering, hire-purchase and some aspects of gaming are not only tolerated but are in fact regulated and licensed by the laws of the country.7

The winds of change brought about by the universal resurgence of Islamic fundamentalism in the seventies resulted in the faltering of the Malaysian status quo.8 The “new” Islam, like the Islam during the days of the Prophet and the Companions, is one which covers a nation’s entire way of life including economics, politics, administration and law and justice. The Islamisation of the faith of the individual is required to be complemented with the Islamisation of his entire environment. Every aspect of life is required to be sifted through an Islamic sieve. Practices that are contrary to the teachings of Islam are required to be reorganised, restructured or even reformulated. In the economic and fiscal sector, the greatest challenge is the exorcism of the interest-based economy which had become so entrenched in the entire economic structure of the country.

The two interest-oriented transactions that were the most widespread and hence were the target of the most bitter attacks were the Western systems of banking and insurance. The first major response from the government came with the introduction of an Islamic system of banking to co-exist with the Western system of banking when the Islamic Banking Act 1983 was passed. This was followed a year later by the Takaful Act 1984 which introduced the Islamic system of mutual insurance as an alternative to the Western form of insurance.

This article first considers Islam’s objection to the Western form of insurance. This is followed by an examination of the Takaful Scheme of Mutual Insurance in Malaysia and a consideration of the various legal difficulties that can arise in introducing an Islamic form of commercial transaction in a secular Western-based economy.

THE CONCEPT OF INSURANCE IN ISLAM

Islam’s Objection to the Western Concept of Insurance

The first Islamic régime to introduce the Western concept of insurance within an Islamic jurisdiction was the Ottoman Empire which introduced the Western concept of marine insurance in its Maritime Code of 1863. This was followed in 1874 by the Ottoman Law of Insurance which sanctioned other aspects of non-life insurance.9 The general view then was that only the Western concept of life insurance was Haram, that is, unlawful and sinful in Islam.

The general idea behind the Western concept of insurance has never been, and is not, anathema to Islam. A scheme whereby the resources of the members of a particular group are pooled together in order to help and protect fellow members from hardship

7 For example, the Pawnbrokers Act 1972, the Hire Purchase Act 1967 (Revised 1978), and the Moneylenders Ordinance 1951.
8 The pressure on the government to show greater commitment to Islam came particularly from an opposition party, the fundamentalist Parti Islam Sa-Malaysia (PAS). See generally, “Rapping the Firebrands” and “Walking the Path of Islamisation” in Asiaweek, 14 September 1984.
9 Amin, SH, Islamic Law in the Contemporary World, Royston, Glasgow, 1985, pp.71-84.