

## CHAPTER 18

# Tabarru' and takaful

### 18.1 Introduction

Takaful is structured around the concept of donation – the cornerstone of charity and philanthropy. However, it is a special kind of charity that makes the donor a potential beneficiary of the donation itself, as is the case with takaful. Therefore, it is interesting to study this phenomenon in order to determine consequences and implications for using it as a tool for organized charity and its management for the benefit of targeted social groups.

Takaful is based on the principles of mutual cooperation and donation (tabarru'). These principles can be used to develop Islamic banking and finance as a socially responsible model and a tool for community development. The actual practice of takaful, however, aligns itself more with the profit-motive than social responsibility and community development. Additionally, from a Shari'a viewpoint, there are some major problems with the actual practices of takaful. Cumulatively, these issues have the potential of making the whole practice of takaful null and void provided remedial measures are not taken to correct these shortcomings.

Under the Islamic law of transactions, the existence of gharar (contractual uncertainty), which otherwise may nullify an exchange contract, is tolerated in a contract of donation. This corresponds to the Islamic legal maxim "uncertainty is tolerable in a gratuitous contract". This is mainly due to the fact that parties who enter into a donation contract do not aim to make profit out of the contributed sum, and hence, the potential dispute that normally arises in a profit-making transaction is deemed to be negligible. Furthermore, the issue of uncertainty is irrelevant since the contributor voluntarily gives away his property or right to the recipient without any consideration.

In contrast, conventional insurance, which is based on

an exchange contract, aims at making profit out of the insurance operations. In such a contract, gharar is prohibited because it may give rise to a potential dispute. A person who pays the premium (insurance price) pursuant to an insurance policy actually does so in exchange for 'peace of mind.' In return for the premium, the insurer indemnifies the insured should any mishap occur during the insurance period. As uncertainty is an integral part of the incidence of claim against a definite payment of premium, the conventional insurance contract is deemed unacceptable from a Shari'a viewpoint.

On the other hand, takaful, represents a reciprocal relationship and agreement of mutual help between participating members who undertake to mutually guarantee and indemnify each other in a particular defined event. The act of guaranteeing each other implies mutual help and mutual indemnity on the basis of brotherhood deeply rooted in the tabarru' principle which tolerates the presence of gharar.

Notwithstanding the above, many contemporary scholars have started to raise concerns on the current practice of takaful. This concern stems from the fact that many takaful products and operations have started to converge towards the general practice of conventional insurance. In particular, the fundamental structure of takaful, which is premised on the basic concept of tabarru', is being questioned for its provision of benefits offered to the participants at the beginning of the takaful contract in return for the contributions paid to the tabarru' pool managed by takaful operators. This chapter aims to highlight some of the issues with regards to this fundamental issue of tabarru', which has been used to underpin the concept of takaful as an alternative to conventional insurance.

## 18.2 Concept of tabarru'

Tabarru' is derived from the word tabarra'a which carries the meaning of contribution, gift, donation or charity. Technically, tabarru' is a unilateral declaration of intent, which is considered to be a contract under Islamic commercial law. The purpose of this type of contract is to give favour to the recipient without any specific consideration in return. Unlike the exchange contract, this type of contract is valid and enforceable in Islamic commercial law even without consideration.

### The basis for tabarru' is stated in the Qur'an:

*"It is not righteousness that ye turn your faces to the East and the West; but righteous is he who believeth in Allah and the Last Day and the angels and the Scripture and the prophets; and giveth wealth, for love of Him, to kinsfolk and to orphans and the needy and the wayfarer and to those who ask, and to set slaves free; and observe proper worship and pays the poor-due; and those who keep their treaty when they make one, and the patient in tribulation and adversity and time of stress. Such are they who are sincere. Such are the God-fearing." (2: 177)*

There is an immediate sense of benediction in this verse. The Muslim is expected to give gratuitously, to help others, and only for the love of Allah. The idea is also supported by many hadiths. For instance, in a hadith Asma' narrated that the Prophet Muhammad said:

*"Give (in charity) and do not give reluctantly lest Allah should give you in a limited amount; and do not withhold your money lest Allah should withhold it from you." (Sahih Bukhari)*

Essentially, tabarru' is a contribution or donation which entails no return but rather a reward from Allah alone. Thus, there are two important pillars of tabarru', namely the absence of counter-value and the intention to perform tabarru'. In the absence of any of the two, it is no longer considered tabarru'. For instance, if a donor contributes with an expectation of a counter-value from the donation given, then the whole transaction will be perceived as an exchange contract rather than a donation.

## 18.3 Issue of ownership and possession in takaful

This basic structure of takaful premised on the tabarru' principle gives rise to a fundamental Shari'a concern regarding the absolute ownership transfer. When a participant pays a premium to the takaful operator, he has effectively donated his contribution as tabarru', thus relinquishing his ownership over the object donated as prescribed by the rules of tabarru'. Many scholars have asserted that for a donation or gift to be in compliance with Shari'a, the donor must enable the beneficiary to own the donation<sup>1</sup>. This is a very important point, which is not entirely out of line with the conventional notion of a gift or donation. After all, a gift or donation cannot be made without transferring the ownership of the object to be gifted. In the contemporary practice of takaful, however, the concept of donation is stretched to keep

the structure of takaful operations as close to conventional insurance as possible. This is something that must be revisited if takaful has any meaningful role to play in making Islamic finance substantially different from its conventional counterpart. Otherwise, the proponents of Islamic finance will continue to present it as a replacement for conventional finance, without changing the form of their offerings.

Those who favour the current practice of takaful and defend the notion of donation as a central facet of takaful business rather erroneously put forth the viewpoint of some hanafi scholars who regard possession by the receiver of the gift only as a condition for the validity of donation and gift. According to this view, transfer of ownership is not a cornerstone of donating or gifting. This is however a flawed argument<sup>2</sup>.

Consequently, many industry observers believe that the contemporary takaful business cannot be considered as based on a classical tabarru' contract. It can at best be taken as a qualified or conditional tabarru' contract. Firstly, the contribution made by a participant in takaful is with consideration to a right to claim for compensation in the event of loss or damage of subject matter. Thus, the tabarru' is not merely for charity but conditional upon certain consideration, namely the right to claim takaful benefits in the event of loss. Without such a right, a party will neither participate nor offer the tabarru'. This is deemed to be a violation of the fundamental objective of tabarru'.

Secondly, takaful participants are normally obliged to pay different amounts of contributions depending on the different degree of risk exposure. This inevitably implies that their participation in the fund is conditional upon a certain amount of contribution in return for a certain amount of compensation. Should the participant disagree with the amount, he will not be allowed to participate or benefit from the takaful protection scheme. Again this would be perceived as contradictory to the nature of tabarru' since the real intention of the contracting parties is not for donation, but rather to make them eligible for certain benefits under takaful.

Thirdly, there are some controversial practices in takaful operations which contravene the pure tabarru' concept. For example, surrendering of benefit, survival benefit or even sharing of underwriting surplus among participants of takaful although they have surrendered all their rights over their donation to the fund. Therefore, it should not return to the participants upon maturity of the policy or liquidation of the fund.

As an alternative to the pure tabarru' concept, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) suggested the principle of "commitment to donate", which would underscore the relationship between the participant and the takaful fund. According to this concept, a contributor may donate a sum of money for mutual help and cooperation on the condition that the balance, if any, should be returned to him. This will allow him to retain his ownership right over the initial contribution he made, with a provision allowing him to waive his right of ownership over the portion used to indemnify other participants.

<sup>1</sup> See, for example, Ibn Qudama in his famous book *Al-Mughni*, and Ibn Nujaym in *Al-Bahr al-Rai'q Sharh Kanz al-Daqa'iq*.

<sup>2</sup> According to Al-Utsaimin in *Al-Sharh al-Mumtā' Kitāb al-Waqf wa al-Hiba wa al-Wasiyyah*, hiba will only take effect upon the recipient of the donation taking possession of it. This corresponds to the Islamic legal maxim "Tabarru' will not take effect unless there is a possession". This view is based on the hadith, which says, "A gift is not permissible unless it is possessed" (*Al-Zailaie al-Hanafi, Fakhrudin Uthman Ibn Ali. Tabyan al-Haqiq Sharh Kanz al-Daqa'iq. Kitāb: al-Hibah. Dar al-Kitāb al-Islami*). Therefore, hiba is voidable without complete possession. This is further reiterated by a Maliki's scholar Al-Qarafi in his book *Anwar al-Baru' fi Anua' al-Furuq*, who mentions, "If possession does not take effect in a gift, it is void." Shafi' scholars also shared the same view with regards to taking possession as an important pillar for a gift to be valid. They based their opinion on the famous saying of Imam al-Shafii in his book *al-Umm*, which states, "Gift and charity are all permissible contracts which exclude compensation and should be completed by possession."

This principle was expounded by Maliki jurists, whereby if a person commits himself to do a good deed without subjecting it to other conditions, he is obliged to fulfill it as long as he does not die or become bankrupt<sup>3</sup>. In takaful, the participants commit themselves to donate to other participants who may sustain losses in future. This principle is important as the majority of scholars are of the opinion that an act of donating is not complete unless and until the subject matter is transferred to the donee, even if a commitment to donate has been given. The transfer of ownership is established only when the donee takes possession of the subject matter of donation. This is the opinion of many jurists but not Maliki jurists.

The Maliki jurists are of the opinion that a commitment to donate is sufficient to create a binding donation, based on the sayings of Ali Ibn Abu Talib and Ibn Mas'ud, who are reported to have said, "A gift, if specifically defined, is binding, whether received or not." Their opinion is based on the saying of the Prophet, which states, "A person who withdraws his gift or donation is like a dog that withholds its vomit." (Sahih Bukhari).

This principle is important in the case of takaful whereby upon participating in a takaful contract, the participants are said to have given full commitment to pay contributions to the takaful fund. The fund is also committed to compensate them against any losses experienced by them, within the period of the policy. Thus, in case a participant delays payment of his contributions, the company can claim from him the contributions, and it may be considered as his debt to the fund until he officially withdraws from the policy. Here, the fact that he has not delivered his donation makes him liable to pay them as he has committed himself to pay it, and it is already a binding contract. So, "commitment to donate" here is deemed to be binding and enforceable as pledge alone can create a binding *tabarru'* contract. Asserting that takaful is a binding contract is important as it is the basis for the computation of the periodical contributions and the amount of compensation payable to the participant.

On the other hand, the relationship between the takaful fund and the recipient of the compensation is said to be a "commitment to compensate", which is a form of "commitment to donate." It is said to be a form of conditional commitment whereby the performance of the commitment is subject to the certain need, namely a claim by a takaful participant due to some loss sustained. Thus, in takaful, the contributions of the participant may be utilised fully or partially, thus allowing them to claim any underwriting surplus<sup>4</sup>.

Notwithstanding the above, the question remains whether the counter-value in such a takaful practice is tantamount to an exchange contract. There is a minority view in Islamic jurisprudence, which allows conditional donations for someone who commits to donate something to someone else in return for something<sup>5</sup>. For example, person A gives his pen as a gift to person B on the condition that person B gives their book in return.

This view should, however, be considered with caution in the context of the practice of modern takaful business. While in the above example of person A do-

nating an object (X) in exchange for receiving another object (Y) could be acceptable, its application in takaful is weak. In takaful, a member donates an amount of money to other members of the group in exchange for money, which is likely to be in different amounts. This therefore creates a *ribawi* situation and hence a vast majority of jurists from all schools of thought disallow such a conditional exchange of gifts. The matter is known in classical jurisprudence as *hiba bi al-thawab* (gift with expected compensation) or *hibah bi shart al-'iwad* (gift with stipulated counter-value). Shafii and Hanbali's scholars disallow such a transaction based on the following hadith, which stipulates "A person who withdraws his gift or donation is like a vomiting person who withholds his vomits".

Those (e.g., the Maliki school of thought) who allow such an exchange of gifts do so only within the context of contracts of exchange. An exchange of gifts is acceptable only if it does not give rise to the problems associated with *riba* and *gharar* (contractual uncertainty). In the takaful context, the gift is the contribution in exchange for the indemnification by the risk fund. Many industry observers and contemporary jurists opine that the exchange of gifts will take the ruling of an exchange contract. This triggers all the issues related to the prohibition of *riba*, contractual uncertainty and ignorance about price and the object of sale. Given this, there is a dire need for the existing models of takaful and their practices to be re-evaluated from a pure Shari'a viewpoint. Failing to do so will render the contract of takaful no different from the conventional practices of insurance.

## 18.4 The way forward

The best way to organise takaful is by way of a community-based practice that must be structured as a not-for-profit activity. Given the huge emphasis in Islam on social responsibility and its visible exclusion in the practices of Islamic banking and finance, takaful should be re-organised as a socially responsible business and not just a profit maximising business activity following the steps of the conventional insurance.

<sup>3</sup> See Al Hattab, *Tahrir Al Kalam fi Masa'il Al Iltizam*, Beirut: Dar Al Gharb Al Islami, 1984 at p 71.

<sup>4</sup> This is based on the opinion of Sheikh Abdul Sattar Abu Ghuddah in *Buhuth fil Mu'amalat wal A'salib Al Masrifiyah Al Islamiyyah*, Vol. 6, Jeddah, Majmu'ah Dallah Al Baraka, 2005, p. 300.

<sup>5</sup> See, for example, Al Hattab, in his book *Tahrir Al Kalam fi Masa'il Al Iltizam*. He accepts *hiba al-thawab* on the grounds that the two gifts should be deemed gifts in their own rights. Thus, according to him, this is acceptable if someone commits to donate on the condition of expecting something in return from the donee.