



Prof. Dr. Mohd. Ma'sum Billah

Professor of Islamic Financial, Banking and E-Commerce, University of King Abdul Aziz, Saudi Arabia

masum2001@yahoo.com

PREMIUM OR CONTRIBUTION (MUSAHAMAH) AND DONATION (TABARRU') IN TAKAFUL PRACTICES

Premium or Contribution (al- Musahamah) in an insurance contract is a monetary consideration¹ (al-'Iwad) from the participant's part, which is an obligation arising from a contract between the participant and the operator. An insurance contract is a contract of mutual eration in which the consideration is required not only from one party, but from both parties, in which the operator is unilaterally bound by the contract. The obligation of the settlement of the respective considerations in a transaction of a mutual cooperation is justified by the commandment of Allah (s.wt.)

"Help you one another in righteousness and piety".²

This ayat of the Holy Qur'an renders a duty to mankind to provide their mutual cooperation on bilateral basis. Furthermore, in an insurance contract, once the policy is concluded, the participant is regarded as a principal debtor and must settle the agreed-contribution to the operator accordingly. In such a transaction the participant is under a duty to pay the contributions regularly according to the terms and conditions as stated in the policy. This is justified by the repeated sayings of the Holy Prophet (s.a.w.) in which the principal debtor is urged to settle his debt on time. The Holy Prophet (s.a.w.) said:

"Abu Rifa' reported that ... the Holy Prophet (s.a.w.) said: give it to him, and verily the best of man is he who is best of them in payment it."³

The Holy Prophet (s.a.w.) also said:

"Abu Hurairah « reported ... that a man demanded of the holy Prophet (s.a.w.) for a repayment of a debt ... and verily the best of you is he who is the best of you in repayment of loan."⁴

An insurance policy is a binding contract, and therefore the performance of consideration from both parties, (the participant and operator) through the payment of contribution (by the participant) and the indemnification (by the operator) are obligations, which must be fulfilled. This is justified by the Qur'anic sanction. Allah (s.wt.) says:

"O you who believe fulfill (all) obligations."⁵

It is common to human beings that, it is not possible to always settle the debt on time due to some unexpected reasons. In such a situation what could be the legal position of the participant and also the policy itself? Under Islamic law if a debtor due to some logical reason is unable to settle the debt on time, the debtor should not be pressured by the creditor, rather the creditor is advised to extend the necessary time for the settlement to remit the obligation with a kind heart. The Holy Prophet (s.a.w.) said:

¹ See Musa, Mohamad Yusuf, "The Liberty of the Individual in Contracts and Conditions According to Islamic Law," in Islamic Quarterly, 2:1, 1955, p. 252, at 256 and 260.

² al-Qur'an, Surah al-Maidah, 5: 2.

³ Mishkatul Masabih, (Debt), Karim, al-Haj Maulana, Fazlul, (trans) op. cit., Ch. XIII, No. 4, pp. 206-207.

⁴ Mishkatul Masabih, Loc. cit No. 5, p. 207.

⁵ al-Qur'an, Surah al Maidah, 5: 1.

“Abu Qatadah reported: I heard the holy Prophet (s.a.w.) say: Whoso gives respite to a debtor or grants him remission, Allah (s.w.t.) will save his from the calamities of the resurrection day.”⁶

However, if the participant fails to settle the unpaid contributions within the given period the policy may be discontinued. This is because it is a contract of mutual cooperation. If, therefore, one party is unable to provide his agreed cooperation, then it is unfair to the other party to continue the transaction with unilateral cooperation. Thus, if the policy is terminated due to failure of the payment of the contributions by the participant, the paid contributions should not be forfeited, rather it is suggested here that, the paid contribution should be returned to the participant with the share of profits made over the paid contributions after deduction of the charges due to the operator. The charges to the operator are the debt due on the participant, which must be deducted from the paid contributions as justified by the saying of the Holy Prophet (s.a.w.) :

“Abu Hurairah reported that the Messenger of Allah (s.w.t.) said: Whosoever becomes insolvent and afterwards a man (creditor) takes hold of his exact property he is more entitled to it than others.”⁷

The question arises as to how the contributions paid by the policyholder should be regarded. Should the contributions be regarded as partial capital to a Mudharabah financing deal or should they be regarded as a total donation to a charitable fund, or should the contributions be paid into two accounts (i.e. partial amount would be regarded as a capital to a Mudharabah financing deal, while the remaining partial amount will be given away to the charitable fund of the company as a Tabarru' standing or donation)? To resolve the above question some possible suggestions are made as follows;

In any kind of life policy, the paid contributions may be divided into two portions; one portion may be regarded as partial capital to Mudharabah financing arrangement, while the remaining portion would be given away as a Tabarru (donation), which is kept in the charitable account of the company (operator). The percentage of allocation of the paid-contributions into two separate accounts may depend on the company's policy. The reason is that, an insurance policy is based on the principle of al-Mudharabah financing, in which the operator is under a responsibility to pay the regular contributions, and in which the participant has the right over the portion allocated as capital to obtain a share of profits, and dividends and the capital, regardless of whether the risk runs over the subject matter of the policy or not. But, the account credited in the charitable account of the company as Tabarru' (donation) would be utilised by the company to provide a material security for the beneficiaries of the deceased (participant) after the unexpected risk occurs over the subject matter of the policy. The reason why the portion of the contribution is allocated as a Tabarru (donation) is that, under Islamic law Tabarru' is like sadaqah (charity) or a Hibah (gift).⁸ The nature of al-Tabarru is that, once the donor gives it as a Tabarru the ownership from him (donor) is transferred immediately to the donee without any consideration. Al- Nasafi maintains that:

“The hibah (or sadaqah or Tabarru') is the making of another person owner of the corpus of property without taking consideration from the donor”⁹

In a general policy (operated by the Islamic insurance companies today)¹⁰, the policyholder pays a contribution on a short term basis in which both the operator and

⁶Mishkatul Masabih, (Debt), Karim, al-Haj Maulana Fazlul, (trans) op. cit Ch. XIII, No. 3 , p. 206.

⁷Mishkatul Masabih, Loc. cit, No. 21, p. 216.

⁸See Al-Hilli, Najm al-Din Abu Jafar, Shara'i al-Islam, Beirut, Vol. II p. 253; also in Khan, Muhammad Akram, Glossary of Islamic Economics, See al-Tabarru, p. 729.

⁹Al-Nasafi, Abdullah b. Mahmud; Kanz al-Daqa'iq, Cairo, n.d., p. 352

¹⁰Among them the Takaful operators in Malaysia.

the participant mutually agree that, the paid contribution in the policy is a contribution to the fund, which is used for a reasonable compensation against an unexpected risk that may occur to a subject matter of the policy. However, if the risk runs over the subject matter the fund will provide necessary compensation, but if no risk runs over the subject matter, the paid contribution to the fund may remain as a contribution. But for a non-claim ground, the operator upon the maturity of the policy provides an amount of bonus to the participant depending on the company's policy.

If, for instance, the paid contribution in a general policy is regarded as either Tabarru' (donation) or sadaqah (charity) or Hibah (gift) instead of labeling it (the contribution) as a contribution (al-Musahamah) , this certainly creates a clash between the principles of (Tabarru, sadaqah and Hibah) and the practices of general insurance in the sight of Shari'ah principles.

Under Islamic law, it is unlawful for the donor to seek any benefit over the donated property after the property is given away as a donation. This is indicated in the repeated sayings of the Holy Prophet (s.a.w.):

"Ibn 'Umar ® and Ibn 'Abbas ® reported that the Messenger of Allah (s.w.t.) said: It is not lawful for a man to give gift and afterwards to take it back except a father regarding what he gives his child. The parable of one who gives a gift and then takes it back is like the parable of a dog which eats till when it is satisfied , it vomits and then takes his vomiting back."¹¹

But in al-Musahamah (contribution) once a contribution is made by a person, it need not necessarily be in favour of someone else, but it could also be in favour of the contributor himself. Moreover, the nature of contribution is far from the actual nature of donation. In other words, in a contribution, the contributor does not cease his right of benefit over the contributed fund, and the contributor also has the right to revoke the contributions even after it is given away, unless the contribution is given as a charity. This includes for example; a contribution made to a mutual fund for the purpose of seeking benefits for the contributors themselves in the future, in which the persons who make contributions are entitled to mutual help from the fund. This is justified by the Qur'anic sanction in which Allah (s.w.t.) commanded the believers to sustain mutual cooperation, which may include cooperation in consideration of voluntary contributions. Allah (s.w.t.) says to the effect:

"Help you one another in righteousness and piety, but help you not one another in sin and rancor."¹²

It is therefore, submitted that, al-Tabarru differs from al-Musahamah both in principles and practices. The property given away as al-Tabarru' is given in consideration of no material benefit for the donor, but mainly for the consideration of spiritual benefit, whereas in al-Musahamah, the contributor normally gives it away in consideration of lawful material benefit. Since the nature of an insurance policy is that, the policyholder pays voluntary contribution in consideration of material benefits, but not in consideration of spiritual benefits or reward, it follows that the contribution paid by the policyholder in the general policy is considered as contribution (al-Musahamah), but not as a Tabarru' (donation).

Relying on the logical, evidential, and legal point of views and also on practicality, it is suggested that, in a general policy the contributions, required by the insurer to be

¹¹Mishkatul Masabih, loc. cit., No. 21, p. 318.

¹²al-Qur'an, Surah al-Maidah, 5: 2.

paid by the policyholder should be labeled as al-Musahamah (contribution) instead of al-Tabarru' (donation), so that the practices of insurance with special reference to the contribution in a general policy may not contravene the relevant Shari'ah principles and at the same time the policyholder may be able to make a claim¹³ in consideration of paid contributions in a lawful manner.

It is concluded here that, the contributions paid by the participant in a life policy could be divided into two accounts, ie, personal account and charitable account. The amount deposited in the personal account may be regarded as the capital of the policyholder and be treated under the principles of al-Mudharabah profit and loss sharing, while the amount deposited in the charitable account may be labeled as al-Tabarru' (donation), in which the policyholder reserves no right of benefits, as it is given away for the benefit of others. In a general policy however, the paid contribution by the policyholder should not be treated as al-Tabarru' (donation), but as al-Musahamah (contribution), in which the policyholder may retain his right of claim (if the risk occurs to the subject matter of the policy), and also of a no claim bonus (if the risk does not run over the subject matter) upon the maturity period. This suggestion does not clash with the fundamental principles of Islamic law especially the governing principles of al-Tabarru', al-sadaqah, al-hibah, al-Musahamah, and al-Mudharabah financing, nor with the chief objective of insurance practices under Shari'ah discipline.

In the light of the above and also in harmony with the Divine sanctions for a general insurance policy the following suggestions are made:

- (i) The contribution paid by the policyholder to the insurance company should not be regarded as a Tabarru' (donation) nor sadaqah (charity) nor hibah (gift);
- (ii) The contribution may be paid as a contribution in which the contribution could be labeled as al-Musahamah (contribution);¹⁴
- (iii) The paid contribution could be credited in an account, which may be named as a mutual fund;
- (iv) The fund may be divided into three accounts. Firstly, a percentage to be allocated for the company's management,¹⁵ secondly, a percentage could be kept in a special account, which can only be used for the compensation against the risk on the subject matter of the policy, while the third portion may be credited in an account to meet the no claim bonus upon the maturity of each policy (to be paid to the policyholder who has not made any claim during the policy period) and
- (v) The sources of this fund could be the paid contributions from the agreed policyholders. Therefore, the policyholder may be regarded as a member of the fund and they are the ones who have the right to make a claim against the risk if it occurs to the subject matter, within the policy period.

¹³See Mohamed, Abdulla I, "Stipulations for the Benefit of Third Parties in Islamic Law of Contracts," in Journal of Islamic and Comparative Law, Vol. 9, 1980, p. 7 at 8.

¹⁴See "Contribution" in A Dictionary of Economics & Commerce, English - Arabic, op. cit., p. 70.

¹⁵Because it is a short term policy (unlike a life policy) in which the company may not get enough time to mobilize the paid-contributions and makes profits in order to manage the company accordingly.