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Islamic Economics, Finance, Entrepreneurial Development & Public Policy for the Ummah's Socio-economic Wellbeing

Under the above theme, the speakers / paper presenters will discuss the vision of Islamic economics, business and finance, public policy for entrepreneurial development and to enhance social inclusion and good governance, meaning how to develop Islamic countries' economies giving fair opportunity to all segments of the society and provide them not only suitable jobs / employment but also dignity and respect in the society and falah in this world and the Hereafter. As it is possible only through application of the principles of the Shariah, in letter and spirit, in all socio-economic disciplines and business and finance affairs, Shariah compliance of all institutions, products and activities would also be covered in the Theme of the ICIB-2016 event.

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# Risk Sharing in Takaful: An Appraisal of the Takaful Model based on 'Tabarru'

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# TAKAFUL

- ▶ *Takaful is a scheme based on brotherhood, solidarity, and mutual assistance which provides for mutual financial aid and assistance to the participants in case of need, whereby the participants mutually agree to contribute for that purpose". See, for example, (Rabiah and Scott, 2008)*
- ▶ *Takaful means, mutual guarantee provided by a group of people living in the same society against a defined risk or catastrophe befalling one's life, property or any form of valuable things". See, for example, (Billah, 2007, p. 18) and IFSB and IAIS (2008).*

# Takaful

It can be inferred from the two definitions, that Takaful is

- ▶ (i) is mainly based on **mutual cooperation, mutual guaranteeing** in case risks materialize
- ▶ (ii) is a **benevolent** way to assure the participants (policyholders) who agree to help each other against a stipulated risk and
- ▶ (iii) takaful, unlike insurance, provides the opportunity of **risk sharing**, instead of transferring or shifting it to other parties.

Among other difference, the essential item that originates and separate the practice of takaful, is the notion and application of contract of

**TABARRU**

# Understanding the Concept of ‘Tabarru’

Reference to the classical fiqh archives reveals the lexical meaning of Tabarru: It is understood that essence and substance of tabarru is no different from **“HIBAH”**.

*‘It is a charity which is given without being asked, and which does not oblige the person taking the charity to compensate in return’.*

## HANAFI

*“Hibah (Tabarru) is to make someone owner of the corpus of property without any consideration”. The Mejelle (2001), article: 833, p. 131*

## SHAFIS

*“Making someone the owner of something without compensation is Hibah”*

Al-Mahalli (2001), vol. 3, p. 112-113

## MALIKIS

*“Giving something in the personal ownership of the eligible receiver (whom the tabarru is) through the legal transfer without compensation by explicit expression or whatever indicates it”. Al-Dardir (2000), p. 126 see also Zuhaili (2001), vol. 1, p. 539*

## HANBALIS

*‘It is a contract initiated by an eligible party to transfer ownership of existent and deliverable properties to another without compensation. The properties may be known or unknown, but they must be conventionally given as gifts, and the contract language must specify that it is a gift or a property transfer, etc’. Zuhaili (2001), vol. 1, p. 539*

# Analysis of All the Fiqh Definitions of Tabarru`

- ▶ Tabarru/Hibah is a **voluntary unilateral contract** and must be distinguished from commutative contracts; hence, **there should be no compensation or consideration in return of the donation.**
- ▶ Tabarru/Hibah **requires the immediate and clear transfer of the ownership** from the donor to the receiver. Hence, **once given away, the donor ceases to have any right of ownership over the donation.**
- ▶ All these characteristics of Hibah (Tabarru) lead us to the question that if Hibah cannot be a compensatory contract then what is the standing of a compensatory gift(tabarru) in Islamic law?

# Main Issues in Tabarru` Model

- ▶ *Issue of Ceasing Ownership*
  - ▶ COMPENSATION IS A CLEAR EVIDENCE THAT OWNERSHIP NEVER CEASED
  - ▶ THE ISSUE OF PAYMENT OF ZAKAH
  - ▶ LAW OF INHERITENCE SHOULD BE FOLLOWED
  - ▶ WHOSE THE OWNER?
  - ▶ SURPLUS DISTRIBUTION: EVIDENCE OF NO CESSATION OF OWNERSHIP
  - ▶ NON-CLAIM BONUS
- ▶ *Issue of Conditional Gift*
  - ▶ PRESENCE OF RIBA
  - ▶ PRESENCE OF GHARAR
  - ▶ EXISTENCE OF MAISIR
- ▶ *Bilateral Undertaking of Donation*

# Issue of Ceasing Ownership

- ▶ This fact points out that even after servicing the claims made over the donation fund, this fund belongs to the participants
- ▶ One response is that the Tabarru, in the context of contemporary takaful system, is not a bona fide charity; rather it is more suitably a commitment to donate. It means that the participants do not lose the ownership of the contributions right away; rather the transfer of ownership takes place later.
- ▶ in Islamic law, is it permissible to apply the rulings of a real Tabarru on a contract of mere commitment of donation in future? Or putting it differently, can the Islamic rulings of a contract of Tabarru be also applicable to a promise of Tabarru? Can a future promise be treated as a valid binding contract in Islamic law?
- ▶ It is argued that Tabarru is a binding pledge; hence, it may serve as a real contract of Tabarru. We opine that, although, some contemporary scholars support the binding nature of a unilateral promise in financial transactions; however, even according to them, a sheer promise cannot replace a real contract. Hence, a promise cannot be equivalent to a contract

# CONT

- ▶ Moreover, it may be stated that in family Takaful, if the contributions are regarded as Tabarru, then only the beneficiaries can be entitled for the donation on the basis of need; but, the participants themselves cannot receive that donation. If they receive that donation, while at the same time they are the donors themselves, then it cannot be considered as Tabarru. Moreover most of the fund is invested.
- ▶ In case if no peril occurs and no claim is made over the charity fund, then the operator provides no-claim bonus (NCB)

# The Status of Conditional Tabarru (Hiba bi al-Shart) in Fiqh

- ▶ *It is a voluntary act that results in compensated ownership transfer between living individuals. Or it is a contract of donation with a condition of compensation.*
- ▶ All four schools of jurisprudence declare conditional Tabarru (gift) as a contract of sale, with some minor differences in small details; and thus, all the legal conditions and requirements of sale must be satisfied for this contract to be validated.

# As bilateral undertaking

- ▶ The weakness of this proposition is quite apparent. First, a bilateral undertaking is considered as unilateral in order to assume the arrangement, instead of exchange contract, as benevolent charity contract. Secondly, the so called unilateral contract is then declared as a binding one. Besides, in this system, a group of participants undertakes to compensate the contributors who file any claim, which is happened to be the same group of participants. In other words, the same group of participants is both the insured and the insurer.
- ▶ in any of the case, one can readily observe that the undertaking of donation from the participant has to be met with the undertaking of compensation. Thus, it goes without saying that the responsibility of donation, promised by the participants, is not a unilateral undertaking; it is more accurately a bilateral undertaking of Tabarru. Hence, it will become a similar situation as of conditional-gift (Hiba al-Thawab). Therefore, all the issues related to conditional-gift. Furthermore, since the undertaking from both sides possess the characteristic of binding-ness and is enforceable by the court, this will also cause the problem of **coercion** in donation (Jabar fi al-Tabarru, جبرفي التبرع)

# Conclusion

- ▶ When the contributions of the participants become genuine donations, the non-commutative nature of the payments inoculate the Takaful model from the proscribed uncertainty (Gharar), interest (Riba), and gambling (Maisir).
- ▶ It can hence be asserted that the perception of Tabarru is the basic element in the composition of Takaful model, which is defined by Shariah as a unilateral contract in which the transfer of ownership of a property takes place without any consideration. However, in current Takaful practices, this notion is not so clear.
- ▶ In Islamic economics and finance, theories and practices cannot afford to be indifferent from the framework of Shariah acquiescence. The case of Takaful industry, as part of the same Islamic system, is of no different. The industry has to be compliant with the stipulated Shariah rules and principles, while remaining competitive in the insurance market.

# Application of Other Quranic Rules/Institutions simultaneous with application of Al-Bay

- ▶ Quran reveals a comprehensive set of rules governing the structure and operations of an economy:
- ▶ Risks and reward sharing, Property rights, Trust and faithfulness to Contracts, Consumer Behavior,
- ▶ Investment Behavior , Market Behavior, Distribution,
- ▶ Redistribution, Governance, no 'Ghash', No Gharar and 'Maisir'
- ▶ Shariah approved sources of factors and products before they enter the market;
- ▶ Provision of full information regarding qualities, quantities and prices of factors of production and product to all buyers and sellers.

# Cont

- ▶ The Quran makes clear that the compliance with the prescribed rules is the guarantor of: better socio economic justice and cohesion, unity and order in any human collectivity and economic growth and stability.
- ▶ see for example chapter 5 verse 2; chapter 3 verse 103; chapter 8 verse 46)
- ▶ The promise made in the verse 96 of chapter 7 of the Quran (see also chapter 65 verse 2; chapter 65 verse 3; chapter 5 verse 65-66; chapter 12 verse 90' chapter 5 verse 66; chapter 8 verse 53; chapter 10 verse 9; chapter 2 verse 25; chapter 16 verse 97; chapter 24 verse 55; chapter 40 verse 40). Conversely all prohibited behavior are those that ultimately lead to social injustice and disintegration