

PROTECTION AGAINST CREDITORS, INDEMNITY AND NO CLAIM BENEFITS (NCB) UNDER LIFE INSURANCE AND FAMILY TAKAFUL

(Perlindungan Terhadap Pemiutang dan Indemniti dan Manfaat Tiada Tuntutan (NCB) di Bawah Insurans Hayat dan Takaful Keluarga)

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ABSTRACT

This is a doctrinal and comparative research between the traditional law and the *Shariah* with regard to issues of protection against creditors, indemnity and no claim benefits (NCB) under life insurance and family *takaful*. The aim is to find similarities and dissimilarities between life insurance and family *takaful vis-à-vis* the issues based on *Maqasid al-Shariah*. It is found that both the traditional law and the *Shariah* assert that creditors have priority over the life policy and family *takaful* benefits even if the beneficiaries will get nothing from it. Again, under both systems, it is submitted that although ‘Indemnity’ and ‘No claim benefits’ are paid but the *Shariah* does not allow forfeiture of the indemnity because of lack of utmost good faith (*uberimae fidei*) or discontinuing payment of the premiums/contributions by the policyholder or participant. It is further submitted that under *takaful* the No Claim Benefits (NCB) should be paid based on *al-Mudarabah* agreement and not interest and uncertainty. And all these ensure protection of religion and property.

Keywords: Indemnity; no claim benefits (NCB); *takaful*; insurance; creditors

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ABSTRAK

Ini adalah penyelidikan yang menggunakan kaedah doktrinal dan perbandingan antara undang-undang tradisional dan undang-undang Islam tentang isu perlindungan terhadap pemiutang, indemniti dan tiada tuntutan manfaat di bawah insurans nyawa dan takaful keluarga. Tujuan penyelidikan ini adalah mencari persamaan dan perbezaan antara insurans nyawa dan takaful keluarga berasaskan Maqasid al-Shariah. Adalah didapati bahawa kedua-dua undang-undang tradisional dan undang-undang Islam memberi keutamaan kepada pemiutang terhadap manfaat insurans nyawa dan takaful keluarga sekalipun benefisiari tidak mendapat apa-apa manfaat daripadanya. Seterusnya sekalipun indemniti dan tiada tuntutan manfaat telah dibayar, undang-undang Islam tidak membenarkan pengambilan semula indemniti kerana kekurangan niat baik atau pemberhentian pembayaran premium/sumbanga oleh pemegang polisi atau peserta. Di bawah takaful pula, tuntutan tiada manfaat juga perlu dibayar berasaskan prinsip perjanjian al-Mudarabah dan bukannya faedah dan ketidaktentuan. Kesemua ini adalah bagi memastikan perlindungan kepada agama dan harta.

Kata kunci: *Tanggung rugi; tiada manfaat tuntutan (NCB); takaful; insurans; pemiutang*

INTRODUCTION

This research would explore some issues under life insurance and family *takaful*. The aim is to find similarities and dissimilarities between life insurance and family *takaful vis-à-vis* the issues. The issues are: protection of the life insurance policy benefits against creditors, indemnity, and no claim benefits (NCB). Section I of this research is the introduction. Section II overviews Philosophical Perspective of Assessment of the: *Maqasid al-Shariah*. Section III explains protection of the life insurance policy benefits against creditors. Section IV discusses Indemnity and no claim benefits (NCB). Finally, section V which is the conclusion summarizes the research findings and presents the authors opinion on the issues.

PHILOSOPHICAL PERSPECTIVE OF ASSESSMENT OF THE MAQASID AL-SHARIAH

The *Maqasid Shariah* is the purposes and wisdoms behind the enactments of the Shariah. They are the goals Islam seeks to attain through morals and laws (Siddiqi 2004) as it is the purpose and wisdom behind the enactment of all or most of the *Shariah* rulings or objectives that are designed to achieve specific benefits to people in their daily activities (Muhammad al-Tahir 1366 H). In the early stages of the development of Islamic legal thought, much attention was not given to the *Maqasid* as a subject of the *Shariah* on its own but they were later included by the jurists of the *madhahib* (Kamali 1999). Significant developments were made in the formulation of

the theory of *Maqasid* in the time of al-Ghazali and then al-Shatibi (Kamali 1999). According to Imam al-Ghazali, the objectives of *Shariah* related to people are five, namely, protection of religion, life, family, reason and property, hence anything that serves these is considered as *maslaha* (public policy). ‘Life’ comes first out of these five, because other objectives are important if there is life in someone (al-Ghazali 1322H). Al-Imam Shatibi (790M/1388H) in his discussion of this subject gave *maslaha* a central role where he endorsed the five objectives forwarded by Ghazali earlier but gave it little importance.

Later the list was expanded by the scholars. Freedom, justice and personal dignity or honour was included (al-Hasany 1995). Ibn Taymiyah (1398H) maintained that securing benefits (*manafi*) for people and protecting them from harm (*madarr*) are regarded as the general objective (Ibn Taimiyyah 1983a) where he added in the list things like fulfilment of contracts, preservation of ties of kinship, honouring the rights of one’s neighbour, in so far as the affairs of this world are concerned, and the love of God, sincerity, trustworthiness, and moral purity, in relationship to the hereafter. Thus, by this Ibn Taymiyyah left the scope of the *Maqasid* open and not designated into specified list. This view is favoured by contemporary commentators such as al-Raisuni (1992) and al-Qaradawi (1990). For example, Kamali (1999) proposed the inclusion of economic development and strengthening of R&D in technology and science to the structure of *Maqasid* because of their importance in determining the standing of the ummah in the world community. Laldin (2010) states that the specific *Maqasid* are maintaining the circulation of wealth, achieving comprehensive communal prosperity, financial transparency and valid ownership of wealth. And this is another illustration of expanding the list of *Maqasid al-Shariah*.

THREE BROAD DIVISIONS

Generally, the ulama divided *Maqasid* into three categories based on importance, starting with *daruriyyat* (essential), followed by *hajiyyat* (complementary) and *tahsiniyyat* (embellishments). The important interests (*daruriyyat*) are specified at five, which are faith, life, lineage, intellect and property. These are essential to the continuous of normal order in society and the survival and spiritual enhancement of individuals, to the extent that when they collapse or are destroyed, this will create chaos and disorder in the society. Thus, for the protection of religion, jihad has been validated; retaliation (*qisas*) to protect life; theft, adultery and wine-drinking to protect the well-being of the family and the integrity of human intellect. Reaffirming this, the *Shariah* urges work and trading in order to ensure that individual strives for earning a living and it takes all necessary measures to guarantee that commercial transactions are being carried out smoothly in the market-place. Moreover, in family affairs, the *Shariah* provides guidelines and measures that will ensure that the family is a safe refuge for all its members. Furthermore, the *Shariah* encourages seeking of knowledge which will enhance the intellectual capability of the people which will consequently add to their advancement in arts and civilization (Kamali 1999).

Then *Hajjiyyat* (complementary) are benefits which aim at removing severity and hardship that do not threaten the very survival of normal order. Concessions (*rukhas*) such as shortening of Salah, and taking away fast for the sick and the traveller by the *Shariah* aim to prevent hardship; however, these are not regarded as essential because people can live without them if necessary. Furthermore, certain contracts such as '*salam*' contract and *ijarah* (hire), the *Shariah* allows these contracts because people need them although there are certain irregularities attached to them. Moreover, divorce has been permitted in order to guarantee the happiness of the family and to defend against unbearable disagreement (Kamali 1999). However, where *hajjiyyat* (complimentary) concerns the public at large, it is elevated to the rank of the *daruriyyat* (essential). For example the validity of *ijarah* (hire) may be an essential interest for the public although it may be of secondary importance to individual. Where there is a conflict between different kinds of interest, the higher should be given priority even if the lesser has to be sacrificed. And when it appears difficult to select the best between groups of conflicting interests, then prevention of evil must be given a priority over the acquirement of benefit (Kamali 1999).

Tahsiniyyat (embellishments) seek to achieve improvement and perfection in the conduct and customs of people at all ranks. Thus, the *Shariah* encourages individuals to clean their bodies and use perfume at the time of attending congregational Friday prayer and discourages the consumption of raw garlic. The *Shariah* also urges the giving of charity to the needy besides the obligatory taxes and recommends supererogatory prayers. *Shariah* urges gentleness (*rifq*), pleasant speech and manner (*husn al-Khulq*) and fair dealing (*ihsan*) as well. Thus, *tahsiniyyat* has a special importance as it relates to all other *masalih*. For example a person who performs *solah* with proper concentration and gives all its parts their due attention he will attain both the essential desirable and on the other hand, a person who performs it in a hasty and thoughtless manner will be at least regarded as discharging a duty. This analysis can be extended to almost every area of human conduct and the realization of all the provisions of the *Shariah*. It is therefore clear that *masalih* are not only confined to the provisions of the *Shariah* or religious matters but applies to customary, political, social, economic and cultural affairs etc. This analysis shows that to classify a certain interest and *maslahah* under these categories is likely to be relative (Kamali 1999).

PROTECTION AGAINST CREDITORS

Originally, a statutory trust policy under *Section 23* of the *Civil Law Act 1956* was formulated in order to protect the family of the insured because the policy money is not regarded as part of his estate. According to *Section 23(2) Civil Law Act 1956*, even if the policy was effected with intent to defraud the insured's creditors, the creditors are only entitled to receive out of the sum payable under the policy, a sum equivalent to the premium paid. However, under Schedule 10, Section 130, para 5 (6) of the *Financial Services Act 2013*, this protection no longer exists. Now the creditors

can apply to Court for a declaration that it would not wholly or partly apply to the policy as the policy has been taken in order to defraud the creditors. Thus, at the moment the creditors can claim the entire monies after obtaining a declaration from the Court. Hence, this provision eroded the protection family of the insured enjoys. Therefore, this is against the intention originally devised which is to enable the family continue a reasonable lifestyle after losing their bread winner (Dass 2000). According to the old law, the benefits are the rights of the wife and/or child at all time, no creditor can claim anything from it even if the policyholder takes the loan with the intention of defrauding the creditor. However, the new law allows the creditor to claim whole or part of the benefits if he can prove that the loan has been taken in order to defraud him.

Under family *takaful*, according to the Islamic Financial Services Act 2013, where the *takaful* benefits are paid under a conditional *hibah*, if it is proved that the *takaful* certificate was effected and the *takaful* contributions were paid with the intention to defraud a creditor of the *takaful* participant, the creditor shall be entitled to receive from the *takaful* benefits payable under the *takaful* certificate a sum equal to the contributions paid under that *takaful* certificate (Islamic Financial Services Act 2013: Schedule 8, Section 140, Paragraph 3(3)).

Now we are going to discuss *Shariah* aspect of the issue. Under the *Shariah*, asking for a loan or borrowing if someone has a genuine reason is allowed, as long as he/she has the intention to pay back. As mentioned in al-Fatawa al-Hindiyyah: “There is no problem in one taking loan if there is a genuine need, provided one has the intention of paying back. However, if one takes a loan without intending to repay, will be consuming unlawful (*haram*) wealth” (al-Fatawa al-Hindiyyah 1310H).

On the virtues of lending loan to the person who needs it, the Prophet (peace and blessings of Allah upon him) was reported to have said that a Muslim is the brother of another Muslim. He should not oppress his brother or hand him over to the enemy. The individual who fulfils the need of his Muslim brother, Allah (May he be exalted) will fulfil his need. That individual who removes a difficulty from his Muslim brother, Allah will remove his difficulty on the Day of judgement (Sunan Abu Dawood 2: 314). Again, Anas bin Malik narrated that the Prophet (peace and blessings of Allah upon him) stated that during the journey of *Me'raj*, I saw written on the door of Jannah: The one who gives charity is rewarded tenfold. The one who gives a loan is rewarded 18 fold. I asked Jibrail (peace be upon him): “Why does the one who gives a loan get rewarded more?” Jibrail (peace be upon him) replied: “The one who gets charity (they usually possess a small amount already) and the one who seeks a loan does so when he is in dire necessity” (Ibn Majah t.th).

The companions of the Prophet (peace and blessings of Allah upon him) were very concerned in settling their loans because they were aware of the warnings related

to those who do not pay their loans. Hence, they used to settle their loans as soon as possible. In case they were unable to settle their loans in their lifetime, they would leave a will for their relatives to settle on their behalf after their death. Abdullahi Ibn Umar (may Allah be pleased with him) related that the Prophet (peace and blessings of Allah upon Him) said “All the wrongs of a martyr are forgiven, except his debts (Sahih Muslim 12: 1312)”. In the last moments of the life of Umar (may Allah be pleased with Him), after he was stabbed in the Masjid of the Prophet (peace and blessings of Allah upon Him), he called his son, Abdullah ibn Umar (may Allah be pleased with him) and said to him the first thing you must be sensitive to is the repayment of my loans. They are to be settled by my family. If they are unable to settle them, seek assistance from Adi bin Ka’b. If he cannot assist, seek help from the Quraysh (al-Bukhari 1349). When Abdullahi bin Amr bi Haram (may Allah be pleased with him) went to participate in the battle of Uhud, he called his son Jabir (may Allah be pleased with him) and told him “I am going to be martyred in this battle, whatever debts I have remaining, settle them”. Jabir (may Allah be pleased with him) carried out this request of his father and he would say “I am pleased if I do not return to my family with even a date, after having settled my father’s debt in full” (al-Bukhari 1349).

It is considered a grave sin to delay the payment of debt when the time is due. Abu Hurairah (may Allah be pleased with him) narrated that the Messenger of Allah (Peace and blessings of Allah upon him) said “Delay in repaying debts by a wealthy person is oppression” (al-Bukhari 1349). Moreover, the Prophet (peace and blessings of Allah upon him) also denounces the person who delays paying back his loan without a legitimate excuse. He said “The delay of a well-off person (in paying off his debt) subjects him to punishment and disgrace” (al-Bukhari 1349).

Therefore, based on the above authorities, paying back loan is compulsory for a Muslim, even if the loan will consume all the estate he left behind after his death. The above hadith show how the companions of the Prophet (May Allah be pleased with them) were very concerned in settling their loans to the extent that they will make a will that settling their loans shall be given priority over all matters. This clearly appears in the statement of Jabir in one of the hadiths mentioned above “I am pleased if I do not return to my family with even a date, after having settled my father’s debt in full”. Thus, the traditional law that allows paying back the creditor from the whole or part of the policy benefits is in line with the *Shariah*. Thus, paying back loans from the policy benefits achieves the *Maqasid Shariah* of protection of religion and property. Religion is protected because Allah commands paying back loan and that will save the deceased’s from Allah’s punishment for not settling his loan and property is protected because the creditor will get back his right from the policy benefits. Therefore, both the traditional law and the *Shariah* support paying back loan from the policy benefits even if nothing will be left for the beneficiaries/ legal heirs

INDEMNITY AND NO CLAIM BENEFITS (NCB)

In an insurance policy the issue of indemnity arises only after payment of the first premium by the insured. However, there are situations where the insurer is not obliged to pay the indemnity to the policyholder. One of these situations is where the policyholder has committed a breach of *uberrimae fidei* (a Latin phrase which mean 'utmost good faith') (Joel v Law Union & Crown Insurance Co [1908] 2 KB 863) or the policyholder discontinues the payment of premiums in spite of the 'grace period' (Is an extra or extended period of time that one has to pay their insurance payment, such as their life insurance payment). In these circumstances the policyholder cannot claim any benefits under the policy. However, if the breach of the *uberrimae fidei* is from the side of the insurer and the policyholder avoids the policy as a result of that, then he should be able to claim the paid premiums (Refuge Assurance Co Ltd v Kettlewell [1909] AC 243). Furthermore, in case of death of the policyowner at any time within the 'grace period' the insurer is under obligation to pay the sum insured, but after deducting the unpaid premiums that are due (ER Hardy 1980). Under the Common law, if the risk occurs to the life of the insured in a life insurance policy, after the policy has commenced but before it matures, the beneficiary (s) is entitled to claim the whole amount stated in the policy and the insurer must indemnify the insured based on the agreed value in the policy, regardless of how much premiums the insured has paid (Billah 2007). This means even if payment of the premiums by the insured was done only once.

Regarding the issue of 'indemnity' under the *Shariah*, it has been recommended that at the time of the conclusion of the *takaful* contract, a particular fixed amount may be stated in the policy as the maximum value for the 'indemnity', but that does not mean the operator must pay that exact amount at the occurrence of the risk as the main purpose of *takaful* is mutual cooperation not a chance to hope for more gain (Billah 2007) as claiming for bigger sum may amount to *riba* (Sahih Muslim 212 & Musnad Ibn Hanbal 156). Therefore, even if that particular amount is named in the policy, the operator is only bound to provide a reasonable and just indemnity after the occurrence of the risk. But if the operator decides to give more to the participant as a means of encouraging more people to buy the policy he is allowed to do that provided it is taken from the operator's own capital. This may encourage a large number of people from the society to participate in the mutual financial cooperation (Billah 2007).

Although, the above recommendation is reasonable, it may be suggested that if the *takaful* operator is not sure of paying the participant the exact amount mentioned or at least an amount closer to it then it is advisable not to mention that big amount as 'indemnity' at the time of entering into the contract. This is because what was said that claiming for bigger amount may amount to *riba* can also be said here, as mentioning an amount the operator is not certain to pay is also misleading

and the *Shariah* prohibits that in any kind of contract. Moreover, with regard to the issue of *uberrimae fidei*, according to Syed Khalid Rashid, the principle of *uberrimae fidei* is emphasized equally under the Islamic law of contract and its rules regarding honesty, full disclosure, truthfulness and utmost good faith. Non-compliance of these makes the contract un-enforceable and it applies fully to any *takaful* contract; in (Rashid 1993). Thus, discontinuing the payment of premiums by the insurer, under the *takaful*, this shall not be a ground upon which the *takaful* operator will rely on to deny payment of the ‘indemnity’ to the participant as this will amount to consuming other people’s property unjustly al-Quran, Nisa 4:29). If the *takaful* operator incurs any complexity as a result of the participant’s action he can seek a redress from a court of law but cannot be a reason for denying the indemnity.

Therefore, even if the participants commit a breach of good faith or any other the operator shall not refuse to pay the ‘indemnity’ to the participant (Hamilton 1975). The reason is that the paid contributions are the legal rights of the participant; hence there is no justification to forfeit them even if he commits evil acts. When a participant commits any evil act, he can be charged under a different law; however, that evil act must not be a ground of forfeiting the already paid contributions. The contributions paid by participants are trust *al-Amanah* to the operator which only the participants can claim. According to Islamic law, a trustee should not refuse to give what he has been entrusted with.

On the other hand, the issue of NCB arises if no risk occurs to the subject matter within the policy period and the insured has not made any claim against any risk throughout the policy period. In this case the insured has the right to claim for NCB after maturity of the policy. In a life policy, the practice is that, the insured claims for the full value named in the policy plus the interest depending on the terms and conditions stated in the policy (Hamilton 1975).

Under the *Shariah*, since in family *takaful* policy, a part of the paid contributions is regarded as the capital for *al-Mudharabah* agreement, there is a mutual understanding between the participant and the operator that the part deposited in the personal account of the participant is regarded as capital, in which the participant himself or his beneficiaries are entitled to a share of the loss or profits, as well as the total amount of the paid contributions. Thus, it is suggested that in a family *takaful* policy, if the operator recognizes that no claim was made by a particular participant against the risk during the policy period, then upon the maturity of the policy he may give out a notice to the participant inviting him to come and collect the NCB within a reasonable time. The NCB in the family *takaful* policy may include the following; (a) Whole amount of contributions paid during the policy period (not including the amounts of the charitable account), (b) The share of profits of the total paid contributions if any, (c) The dividends depending on the operator’s policy, (d) A bonus based on the company’s policy and (e) The amount of appreciation that the company (operator) intends to give to the participant (Hamilton 1975). Arguably, this is just

and fair as takaful is a contract of mutual cooperation, but because of the Participant's Account (PA) which is considered as investment account by the participant, the takaful operator should give the participant the whole amount of contributions paid during the policy period (excluding the amount of the charitable account), the share of profit of the total paid contributions if any the dividends depending on the operator's policy and the amount of appreciation that the company (operator) intends to give to the participant.

Therefore, as suggested, the indemnity under takaful should not be as big as that in the traditional law. And under the *Shariah*, unlike the traditional law, *uberrimae fidei*, or suspending payment of premiums shall not be grounds for refusing to pay the indemnity. Moreover, he suggested that NCB should be paid under family takaful just as it is being paid under the life insurance of the traditional law. However, payment of the NCB under family takaful is different from life insurance because, the latter is mainly based on *al-Mudharabah* profit sharing, whereas the former involves a form of uncertainty *gharar* and interest. Therefore, payment of the indemnity and the NCB will ensure the protection of the policyholder's or participant's property which one of the *Maqasid Shariah*.

CONCLUSION

The research reveals that both the traditional law and the *Shariah* assert that creditors have priority over the life policy and family takaful benefits even if the beneficiaries will get nothing from it. Again, under both systems, it is submitted that although 'Indemnity' and 'No claim benefits' are paid but the *Shariah* does not allow forfeiture of the indemnity because of lack of utmost good faith *uberimae fidei* or discontinuing payment of the premiums/contributions by the policyholder or participant. It is further submitted that under takaful the No Claim Benefits (NCB) should be paid based on *al-Mudharabah* agreement and not interest and uncertainty. And all these ensure protection of religion and property.

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