

# Takaful (Islamic Insurance) Benefit: Ownership and Distribution Issues in Malaysia

Dr. Azman Bin Mohd Noor<sup>1</sup>  
Dr. Mohamad Asmadi bin Abdullah<sup>2</sup>

## Abstract

*This paper aims at investigating the ownership of the Takaful benefit and the issues of hibah in nomination. The focus is made solely on the Family takāful because this type of policy is singularly related to death. In this regard, the question is raised as whether the money paid by the takāful operator on the death of the participant (death benefit) before the policy matures constitutes the participant's estate or not, and secondly over the validity of making a conditional hibah of that takaful policy to a nominee as a sole beneficiary.*

## Takaful Benefit as a *Mal* (Property)

The Arabic word *māl*, or property, originates from the root word *mawala* that literally means to finance.<sup>3</sup> Ibn Manẓūr defines *māl* as things commonly known and that can be owned.<sup>4</sup> Ibn al-Athīr defines it as everything that one owns.<sup>5</sup> These definitions take into account the customary practice of the Arabs. Originally the Arabs used the term *māl* to refer only to gold and silver, but subsequently its application was extended to include things owned physically, including camels.<sup>6</sup> Al-Zuhaylī defines *mal* literally as being anything a man owns that is in his actual possession and this includes corporeal and usufruct. Gold, silver, animal, plant, money and benefits or usufructs such as the riding of vehicles, the wearing of clothes and the residing in houses are regarded as *māl*. On the other hand, birds in the sky, fish in the water, and mines deep in the earth and plants in the jungle are not literally *māl* on the basis that they are not in the actual possession of a man.<sup>7</sup>

<sup>1</sup> Assistant Professor of Islamic Banking and Finance at Department of Fiqh and Usul a-Fiqh, International Islamic University Malaysia.

<sup>2</sup> Assistant Professor of Islamic Wealth Management and Islamic Law of Succession, Kulliyyah of Laws, International Islamic University Malaysia.

<sup>3</sup> Ba' albakī, Rūhī. *Al-Mawrid*. 4<sup>th</sup> edition. Beirut: Dār al-'Ilm li al-Malāyīn, 1992, p. 1143.

<sup>4</sup> Ibn Manẓūr, Muḥammad. *Lisān al-'Arab*, Beirut: Dār al-Ṣādir, 1990, vol.11, p. 635.

<sup>5</sup> Al-Fayrūzabādī, *al-Qāmūs al-Muḥīt*, Beirut: Dār al-Ihyā' al-Turāth al-'Arabī, 1991, vol. 4, p. 70.

<sup>6</sup> Ibn al-Athīr, *al-Nihāyah fī Gharīb al-ḥadīth wa al-Āthār*, n.p.: al-Maktabah al-Islāmiyyah, n.d., vol. 4, p. 373.

<sup>7</sup> Al-Zuhaylī, Wahbah, vol. 4, p. 40, Badrān, Abū °Aynayn, *al-Syarī'ah al-Islāmiyyah Tārīkhuhā wa Naẓariyyah al-Milkiyyah wa al-'Uqūd*, n.p.: Mu'assasah Syabāb al-

In their attempts to give a technical meaning to the term *māl*, Muslim jurists have provided various definitions. Their different definitions are due to their understandings of what constitutes the basis or foundation of *māl*. To the Hanafīs, *māl* must be something that exists physically and is desirable. According to Ibn ʿĀbidīn, it is whatever human instinct inclines to and also is capable of being stored for the time of necessity.<sup>8</sup> The same definition is given by article 126 of the *Majallah al-Aḥkām*. By virtue of these definitions, it appears that the fundamental elements of *māl* are its storability and desirability. Hence, rights and usufruct are not *māl* according to the Ḥanafīs on the grounds that they are not capable of being stored.

The definitions of the Mālikīs, Syāfiʿīs and Ḥanbalīs appear the same as far as the foundations upon which a thing can constitute *māl* are concerned. To the Mālikīs, as stated by al-Syāḥibī, *māl* is anything on which ownership is conferred and, which entitles the owner complete freedom of enjoying it by preventing others from any kind of interference.<sup>9</sup> The Syāfiʿīs define it as constituting things that can give benefit to a human being. Imām al-Suyūfī states that *māl* refers to anything that is valuable and exchangeable, and in the case of its destruction, the destroyer is liable to pay compensation. He continues by stating that *māl* must be something that is desired by a human being's inclination, such as money.<sup>10</sup> The Ḥanbalīs define it as constituting things that contain a benefit and are capable of being used in normal situations.<sup>11</sup>

The classification of *māl* by Dr. Muhammad Daud Bakar, which is suitable to the modern context, appears to adopt the majority's definition. According to him, *māl* or property can be classified into three types:

- a- tangible assets like landed property, present items and stock including Islamic bonds that are asset-based such as *ijārah*, *musyārahah* and *muḍarabah* bonds.

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Jāmiʿah, p. 286, and Khafīf, ʿAlī, *al-Milkiyyah fī al-Syarīʿah al-Islāmiyyah maʿa Muqāranatihā bi al-Qawānīn al-ʿArabiyyah*, Beirut: Dār al-Nahdah al-ʿArabiyyah, 1990, p. 25.

<sup>8</sup> Ibn ʿĀbidīn, vol. 4, p. 501.

<sup>9</sup> Al-Syāḥibī, Abū Iṣḥāq Ibrāhīm bin Mūsā al-Gharnati, *al-Muwāfaqāt fī ʿUṣūl al-Syarīʿah*, Cairo: n.d., vol. 2, p. 17.

<sup>10</sup> Al-Suyūfī, Jalāl al-Dīn ʿAbd al-Raḥmān, *al-Asybah wa al-Nazāʿir*, Beirut: Dār al-Kutub al-ʿIlmiyyah, 1983, p. 327.

<sup>11</sup> Bakar, Mohd. Daud, "Konsep dan Matlamat Harta dalam Pembangunan Ummah", *Seminar Pentadbiran Harta Menurut Islam*, jointly organized by IKIM and Institut Tanah dan Ukur Negara (INSTUN) Kementerian Tanah dan Pembangunan, 16<sup>th</sup> – 17<sup>th</sup> November 1998 at IKIM, p. 8. See also Islam, "Muhammad Wohidul, al-Mal: The Concept of Property in Islamic Legal Thought", *A.L.Q.*, (1999), p. 363.

b- intangible assets such as copyright and royalty, trade name, trademark, industrial design, etc

c- financial rights (*haqq māliyy*) such as rights to receive (receivable) that include Islamic bonds, deferred dowry & maintenance, right to damages, the right to takāful compensation, etc.<sup>12</sup>

It can be concluded that in the modern application, takaful benefit is also treated as *mal* (property). According to Sec.2 Takaful Act 1984, takaful benefit includes any benefit, pecuniary or not which is secured by a takaful certificate, and “pay” and other expressions, where used in relation to takaful benefits, shall be construed accordingly. However, it is observed that the clause does not differentiate between participant personal account which represent his savings and investment, and participant special account which aims at making donation. It does not also segregate between the participant’s savings and the death benefit (contribution from other participants to cover the sum insured/scheme).

### **The Proceeds and the Nominee**

In Malaysia, the *fatwās* issued by the Islamic Religious Council appear to be inconsistent. There have been *fatwās* issued on the illegitimacy of conventional life insurance but at the same time, there is a *fatwa* stating that money paid by conventional insurance must be distributed among the insured’s legal heirs. On 15<sup>th</sup> June 1972, the National *Fatwā* Council issued a *fatwā* invalidating the conventional life insurance contract. However, on 20<sup>th</sup> September 1973, the same council issued a *fatwā* that clearly states that it is the responsibility of the nominee appointed by the insured to distribute the money according to the *farā`id* law.<sup>13</sup>

However, the Malaysian High Court in the case of *Re Bahadun bin Haji Hassan* did not follow the later *fatwā*.<sup>14</sup> In this case, the Court decided that it was a complete gift from the insured to the nominee when he nominated the latter in his life insurance policy. The principle of binding precedent was strictly applied and the Court followed the principle laid down in *Re Man Bin Minhat*,<sup>15</sup> even though the case was decided prior to the issuance of the *fatwā*. In this case, the High Court decided that when a person takes out a life insurance policy amounting to RM40,000 and nominates his wife as the receiver of the benefit, the wife is fully entitled to the insurance money when the insured person dies.

<sup>12</sup> Bakar, Daud, *Islamic Property Management: An Overview*, Seminar on Islamic Financial Planning, organized by Centre For Research and Training (CERT), The Quality Hotel City Center Kuala Lumpur, Malaysia, 29<sup>th</sup> – 30<sup>th</sup> July 2002.

<sup>13</sup> [1974] 1 MLJ x.

<sup>14</sup> [1974] 1 MLJ 4.

<sup>15</sup> [1965] 2 MLJ 1.

Analysing the judgments in the above cases, it appears that the judges understood that the insurance money belongs to the insured. Rather than it being divisible according to the *farā'id* law because it constitutes part of the insured's estate. The judges decided that the money should pass in its entirety to the nominee on the basis that it is a complete gift or *hibah* made by the insured to the nominee prior to his or her death. From these facts it can be seen that there is indeed no difference in essence between the 1973 *fatwā* and the judges' understanding pertaining to the ownership of the insurance money by the insured. According to the 1973 *fatwā*, the nominee must distribute the money to the insured's heirs and this means that the money is part of the insured's estate. The 1973 fatwa is silent about the permissibility of making conditional *hibah* where the policy holder makes *hibah* to the nominee if he passes away, if not the *hibah* shall not happen and he will benefit from the policy upon maturity. Interestingly the fatwa does not allow the nominee to be the sole beneficiary.

In May 1996, an announcement was made by the former Minister in the Prime Minister's Department, YB Datuk Dr Abdul Hamid Othman, that the *farā'id* principles had been incorporated in the Insurance Bill, which had been previously tabled in the Dewan Rakyat.<sup>16</sup> Section 167(1) of the Malaysian Insurance Act 1996<sup>17</sup> therefore provides that when a Muslim nominee receives the policy moneys upon the death of the policyholder, he or she receives it as an executor and the money payable constitutes part of the estate of the policyholder which is subjected to the payment of any debts. Furthermore, section 167(2) provides that the nominee is under a responsibility to distribute the policy moneys in accordance with Islamic law. Here, it is not clear whether the 'Islamic law' stated in section 167(2) is the Islamic law of succession as no further statutory explanation is given. However, taking into account the statement of the former Minister as well as the position that the money payable is part of the estate of the deceased policyholder as stated in section 167(1), it is reasonable to assume that the term refers to the Islamic law of succession.

With regard to the Family *takaful* policy, it is observed that the majority of contemporary Muslim jurists around the world agree on the legitimacy of this type of transaction as an alternative to conventional insurance. No single opinion can be found opposing the validity of the money paid by the *takaful* operator on behalf of other participants on the basis of *tabarru'* as an assistance to the participants who suffer loss. The question regarding the heritability of the money i.e. *takaful* benefit payable by *takaful* operator is more acceptable compared to compensation payable under conventional life insurance due to the difference in the nature of the transactions in terms of their operation.

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<sup>16</sup> See *The Sunday Star*, 26<sup>th</sup> May 1996.

<sup>17</sup> The Insurance Act, 1996. (Act 553)

As it is generally practised in the industry, for the Family takaful, there are two accounts, namely the Participant Account and the Special Participant Account. The premium paid by the participant is paid into both accounts based on a ratio agreed by the takaful operator and the participant. The Participant Account is considered to be the deposit account of the participant whereas the Special Participant Account is for the sole purpose of making donations. When a participant dies, there is therefore no question regarding the heritability of the money in the Participant Account as it is part of the deceased's estate. However, with regard to the money payable by the takaful operator taken from the Special Participant Account for the death benefit is still questionable.

It is a standard practice in Malaysia that when a participant of an Islamic insurance policy dies, the participant's legal heirs inherit the money paid by the takaful operator. In other words, the payment of the money by the takaful operator to the nominee appointed by the deceased participant is subsequently distributed among the participant's legal heirs in accordance with the *farā'id* law. This arrangement takes place even though there appears to have been no Islamic legal ruling or *fatwā* issued by any *fatwā* council in Malaysia either at national or state level regarding the position of the money payable as compensation by the takaful operator on the occurrence of the death of a participant.

The distribution of the proceeds among the legal heirs of the deceased participant has seemingly become standard practice in Malaysia. Section 65(1) of the Malaysian Takaful Act, 1984 stipulates that the payment of takaful benefits is made to the proper claimant. Section 65(4) explains that the 'proper claimant' is a person who claims to be entitled to the sum in question as executor of the deceased or who claims to be entitled to that sum under the relevant law.

### **The Legitimacy of the Ownership of Takaful Benefit**

In Islamic law there are two categories of ownership, namely absolute and non-absolute ownership. Absolute ownership is where the property exclusively and absolutely belongs to the owner and is not subject to limitations of time.<sup>18</sup> The owner has the absolute right to deal with the property and no one else has any share in it.<sup>19</sup> In this respect, the owner has exclusive power to dispose of the property as he wishes. Islamic law provides four legitimate means for acquiring absolute ownership:<sup>20</sup>

- a) The contract of exchange such as trading and leasing contracts, and unilateral contracts such as *waṣiyyah*, *hibah* and *waqf*

<sup>18</sup> Al-Zuḥaylī, vol. 4, p. 59.

<sup>19</sup> Al-Qaraḍāwī, Yūsuf, *Fiqh al-Zakāh*, Beirut: Mu'assasah al-Risālah, 1997, vol.1, p. 130.

<sup>20</sup> Al-Zuḥaylī, vol. 4, pp. 68-77. See also Bakar, Mohd Daud, *Islamic Property Management: An Overview*.

- b) The replacement, or *khalafiyyah*, i.e. inheritance, the payment of *diyyah* and compensation
- c) The control over permissible things such as fish in the sea and birds in the sky, and
- d) The growth and the production of things owned such as chicken's eggs, cow's milk, etc.

Those categories implies that ownership is established with *sabab/tasabbub* where one is entitled for ownership because of particular causes either with his own effort like in sale and purchase, taking control of permissible things as mentioned in (c) or the effort of others like the unilateral contracts or being and heir. *Takaful* benefit falls under the second part of the first category, i.e. unilateral contract (*tabarru'at*).

It could be contended that without the participation of the policyholder, the *takaful* operator would never pay the money. On this basis, the effort of the participant by joining the policy and paying the monthly premium suffices to constitute the proceeds as *tarikah*. In other words, it is the contract entered into by the policyholder for family *takaful*, which generates the benefits. This contention is based on the fact that one's effort becomes a justification for ownership. As a result, the money is divisible among the heirs of the policyholder according to the law of *farā'id*.

### **Should the Takaful Death Benefit be constrained to Tarikah, or it can be gifted to a sole beneficiary as it is in the conventional insurance upon death of the policy holder?**

The payment of *takaful* benefits upon the death of the policyholder before the maturity of a plan seemingly belongs to the deceased policyholder's legal heirs on the grounds that it is the product of the deceased's effort and hence is part of his *tarikah*. Even though the money comes into existence only after the participant's demise, it is the effort of the participant by entering into the contract, which realizes the financial assistance in favour of his legal heirs upon his death. This is relatively analogous to the case of the fish netted by the deceased or the animal caught in the trap fixed by the deceased, which occurs after his death. The fish or the animals are part of the deceased's *tarikah* because it is the deceased's effort that has caused the ownership.

Having said that, it should be noted that there are differences between the cases of animals or fish trapped after the deceased's death and the concept of financial assistance in the family *takaful* and life insurance business. The animal or fish trapped or netted is the immediate product of the deceased's effort. This is a kind of activity that directly generates wealth in favour of the deceased.

The proceeds of family takaful and life insurance can not be treated as being exactly the same as the above examples. Takaful contracts realize the obligation upon the company to pay. They do not create wealth in the insured's ownership, but rather they create an obligation to ease the burden suffered due to the losses of fellow participants.<sup>21</sup> The participant's contribution is his or her donation for the good of others, not for himself and is therefore different from the case of a trust, which is deliberately fixed by the deceased for his own gain.<sup>22</sup> The proceeds payable belong to the fund on behalf of the participants, not the takaful operator.<sup>23</sup>

Therefore, even though it is the deceased's effort, the money is more appropriately to be regarded as an obligation upon the takaful *tabarru'* fund to pay on behalf of other participant as financial assistance to the insured's family in case of death. This is the importance of considering a legal and financial entity for the fund. This monetary obligation is directly based on the agreement or promises of mutual assistance stated in the contract. In other words, the *tabarru'* fund managed by the takaful operator on behalf of the participants agrees to pay the proceeds, and the matter of to whom they are paid should be freely and totally left to the agreement or the stipulation made by the policyholder to the company. This is similar with the stipulated condition made by the performer of *wakf* as he stipulated condition is binding. As the contribution made by the policy holder through the premiums is considered as *tabarru'* act (donation) just like in the case of *wakf* contract, he can also put condition to whom the financial assistance should be paid as sole beneficiary or as a trustee/executor.

If the participation in the takaful activity renders the participant the right to the proceeds as his financial right, as claimed by contemporary scholars,<sup>24</sup> it would mean

<sup>21</sup> Yusof, Mohd. Fazli, *Takaful; Sistem Insurans Islam*, p. 7.

<sup>22</sup> Bakar, Mohamad Daud, interview on 11<sup>th</sup> September 2003. He is the President/CEO of International Institute of Islamic Finance (IIIF) Inc. (BVI) and Amanie Business Solutions Sdn. Bhd. Prior to this he was the Deputy Rector of Student Affairs and Development and an Associate Professor at the International Islamic University Malaysia. He is the authority in Islamic Legal Theory and Islamic Finance in Malaysia. He is currently a member of the Central Syari'ah Advisory Council of the Central Bank of Malaysia and Securities Commission of Malaysia. He is also a member of Syari'ah board of Accounting and Auditing Organization for Islamic Financial Institution (AAOIFI) (Bahrain), International Islamic Financial Market (IIFM) (Bahrain), and Dow Jones Islamic Market Index (New York). See International Institute of Islamic Finance, Inc., Events [online], available from: [http://www.iiif-inc.com/iiif/eve\\_04.php](http://www.iiif-inc.com/iiif/eve_04.php) [accessed 31<sup>st</sup> October 2005].

<sup>23</sup> Ibid.

<sup>24</sup> According to Dr. Mohamad Daud Bakar, there are some Muslim scholars who claim that the right to the proceeds is a financial right of the policyholder. In his article, he argued that the family takaful benefits constitute the participant's estate as stated in sections 65(1) and (4) of the Takaful Act, 1984 that the proper claimant would claim the money on his capacity as an executor and not as the beneficiary. See Bakar, Mohd Daud,

that by merely joining the takaful plan, the participant is engaging in a business which entitles him or her to financial benefits in terms of wealth creation in his or her or the family's favour. This would also mean that simply by joining the scheme, the participant is entering into a contract that would in return provide an amount of money exceeding the amount contributed.

This assertion however can be criticised that it would amount to a *ribāwī* transaction and undoubtedly be unlawful. This is because it is similar to buying a policy where the contract is a (*muawadhat*) transaction i.e. a contract of exchanging two counter values. This type of contract should abide with the rules of muawadah which among others there should not be any uncertainty for the counter values, and the serious one is the counter values are money. It is exchanging money with money, buying money with money which should follow its particular rules which is at par and on spot for the same denomination and being on spot for different denomination. This in turn would make the whole *takaful* contract invalid according to Islamic law. Being a *ribāwī* transaction, there would be no issue regarding the succession of the money payable because the money received by the participant or his beneficiaries clearly constitutes '*haram*' and therefore not subject to inheritance, apart from the premiums the participant has paid. At the same time, it would be equivalent to a gambling activity in the sense that the policyholder enters into the contract with the hope of gaining more than he or she contributes based on chance.

### **The Analogy to the Payment of *Diyyah* or *Ḍamān***

It is assumed that the payment of money in favour of the dead insured's or participant's legal heirs as compensation is analogous with the payment of *diyyah* in the case of murder in Islamic law. The *diyyah* (blood-wit) or monetary compensation imposed against the murderer is paid in favour of the legal heirs of the victim.<sup>25</sup>

It should be noted that the payment of *diyyah* to the heirs of the victim in the case of an intentional killing for example, is based on an Qur'ānic injunction and is apparently different from the payment of benefits under the Family takaful. The entitlement of legal heirs to the *diyyah* is based on their relationship with the victim, whereas the objective of the takaful when paying benefits is to provide financial help and assistance for the purpose of easing the burden of the insured's dependants. In

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"Kedudukan Hibah Di Dalam Perundangan Islam dan Sivil (Rujukan Khas Untuk Takaful Keluarga)", *the closed seminar on Hibah: It's Model and Application in Takaful Perspective*, on 12<sup>th</sup> March 2003 at Parkroyal, Kuala Lumpur.

<sup>25</sup> Al-Quran al-Nisā' (4): 92 which reads "Never should a believer kill a believer, but (if it so happens) by mistake, (compensation is due); if one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely."



other words, if the money payable by the takaful policy is distributed among the legal heirs following the *farā'id* law, the basic purpose and objective of takaful might be defeated because the money could possibly be distributed in favour of heirs who are not really affected financially by the insured's or participant's demise.

It should be observed that a legal heir is not necessarily dependent on the policyholder. The dependants of the deceased are normally those who depended financially for their lives and maintenance on the deceased. This may include adopted sons and daughters who might be in real need of the deceased's financial support for things such as education. It may also include relatives who are not heirs but, due to his or her generosity, the deceased voluntarily supported them especially in terms of education. These are examples of people who are *de jure* excluded from inheritance according to the *farā'id* law. If the payment is distributed according to the *farā'id* law, these people would receive nothing whereas they are the people who are most affected by the demise of the policyholder. In other words, excluding these dependants from receiving any benefit from the payment, and including those who are not affected financially by the death would contradict the purpose of the takaful activity.

In the case of compensation paid by a government or employer to the employee's family upon his or her death, it is in the nature of financial help rather than a legal obligation. Interestingly, there was a *fatwā* issued by the National Fatwa Council of Malaysia on 19<sup>th</sup> September 2000 that monetary compensation does not constitute a part of the deceased's estate. A similar fatwa was issued by the Terengganu *Fatwā* Council stating that monetary compensation does not constitute the estate of the deceased.<sup>26</sup>

One can suggest if all kinds of compensations regardless of their underlying nature are divisible according to the *farā'id* law, it might prevent a government or employer from paying such compensation due to the fact that the money would not necessarily reach the actual affected people. It is not an exaggeration to note in this context that the same idea should apply to the takaful benefit in the sense that it is a kind of financial help and hence limiting its distribution to the heirs of the deceased would defeat the purpose of the activity.

### **The Objectives of the Family Takaful Policy**

The primary objective of the takaful policy is to provide financial assistance to the participant's or insured's family. If the payment is payable strictly only to the heirs of the participants or insured, it implies that it is the property of the deceased. If this is

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<sup>26</sup> See [www.islam.gov.my](http://www.islam.gov.my) in the category of Wang Pampasan and also Wang Ganjaran Perkhidmatan.

so, the money is subject to the fulfilment of certain rights that must be carried out before distribution to the heirs, such as the payment of burial expenses and the deceased's debts. This would mean that the compensation is not being used to ease the burden of the family but rather it seems that other fellow participants are under an obligation to settle the debts of the dead participants. In this regard, the creditors would have prior rights over the participant's dependants. The dependants would only receive the benefits after the creditors' claims have been satisfied.

As such, inserting a clause legally and strictly imposing a duty on the appointed nominee to distribute the money among the legal heirs of the dead participant seems to contradict the objective of both the takaful. Inserting such a clause as currently practiced in Malaysia is not based on valid arguments.

Furthermore, by considering it an estate for inheritance purposes, the takaful and insurance activity becomes a source of income. This is contradictory to the purpose of takaful i.e mutual cooperation to ease a burden. Moreover, rendering it a source of income may encourage a participant to deliberately undertake activities that could endanger his or her life in order to realise the income. This is in fact an attitude that clearly contradicts the aim of insurance. A life can not be exchanged for money.

### **Can the Takaful Benefit be absolutely assigned to a Sole Beneficiary?**

There is no dispute to regard takaful benefit as the deceased's estate which shall be distributed according to the rules of mirath. Interestingly there are a number of contemporary fatwas allowing the distribution of takaful benefit to a particular beneficiary which is the common practice in the conventional insurance.

Dallah al-Barakah in *Fatawa Nadawat al-Barakah* issued a ruling pertaining to distribution of compensation for life (family) insurance:

“It is permissible to distribute the (takaful) death benefit according to the law of *mirath* (Islamic law of succession), as it is also permissible to distribute the payment to a particular individuals or parties as specified by the participant on the basis that the benefit is the contribution of other participants to the beneficiary as specified by the participant and not his estate”.<sup>27</sup>

The Shariah Advisory Council of Bank Negara in its 34 meeting held on 21<sup>st</sup> april 2003 resolved:

1. Takaful Benefit can be used for hibah since it is the right of the participants. Therefore the participants should be allowed to exercise their rights according to their choice as long as it does not contradict with Shariah.

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<sup>27</sup> Collection of al-Barakah Fatwas 1981-1997, p. 173

2. The status of hibah in takaful plan does not change into will (*wasiah*) since this type of hibah is a conditional hibah, in which the hibah is an offer to the recipient of hibah for only a specified period. In the context of takaful, the takaful benefit is both associated with the death of the participant as well as maturity of the certificate. If the participant remains alive on maturity, the takaful benefit is owned by the participant but if he dies within such period, then hibah shall be executed.
3. A participant has the right to revoke the hibah before the maturity date because conditional hibah is only deemed to be completed after delivery is made (*qabadh*)
4. Participant has the right to revoke the hibah to one party and transfer it to other parties or terminate the takaful participation if the recipient of hibah dies before maturity; and,
5. The takaful denomination form has to be standardized and must stipulate clearly the status of the nominee either as a beneficiary or an executor (*wasi*) or a trustee. Any matter concerning distribution of takaful benefit must be based on the contract. Participants should be clearly explained on the implication of every contract being executed.

### **Shariah and Legal Issues in Making Hibah the Takaful Benefit to a Sole Beneficiary**

There are a number of unsettled issues over sole beneficiary, among others:

1. How to make hibah of something which not yet realized, i.e. there will be no death benefit if the policy holder is alive until the maturity of the policy?
2. If it is a hibah, can the policy holder retract the hibah because he/she takes the policy for his/her own benefit upon maturity?
3. In a valid hibah, the ownership is transferred to the recipient. What if the recipient dies? It becomes his/her estate. Can the recipient be replaced?
4. If a husband is paying a policy for his wife, can he be the recipient of the benefit or he can only be a trustee/executor and takaful benefit should be treated as her estate which shall be distributed according to rules of *mirath/faraid*?
5. Hibah which is tied up with death is a will (*wasiyyat*). It is not allowed to make wasiyyat to inheritor (*waris*). Another issue is that it may not serve the purpose of taking protection to a particular recipient.
6. How far the procedure is recognized by the law.

### **Alternatives**

Takaful operators have come up with some alternatives to overcome those Shariah issues. Among others:

1. To regard takaful benefit as the deceased's estate. As such, for Muslim participants the first nominee is the recipient of hundred percent takaful benefits as prescribed under Section 65 Takaful Act 1984. The first nominee is responsible to distribute the benefit in accordance to faraid. If the first nominee shall predecease the participant, hundred percent of the benefit shall be paid to the second nominee and so forth. The nominees shall distribute the benefits in accordance to faraid.
2. Absolute Assignment. In this case the hibah is a real hibah where the policy holder will not recall the hibah and the ownership of policy is regarded to have been transferred to the beneficiary. The hibah includes whatever proceeds in the policy whether it is the policy holder personal saving or the donation account. There will be no issue of recalling the hibah or replacement of the assignee by the policy holder in the case of death of the assignee. The assignee however can reassign the policy to other party.
3. Proposed Beneficiary. The policyholder only proposes the beneficiary to the takaful fund. It is the takaful operator on behalf of takaful who is giving hibah the takaful death benefit to the beneficiary. However there is another form for the participant's personal account where the nominee is regarded as the wasi or executor.

### **Conclusion**

There is no Shariah and legal dispute to regard takaful benefit as the deceased's estate and to treat a nominee as an executor. But, there are many unsettled Shariah and legal issues pertaining to hibah (give) the takaful benefit to a sole beneficiary. According the industry practises in Malaysia, to resolve this, some takaful operators consider "absolute assignment" (absolute hibah) to give away the takaful benefit and its proceed to the recipient where it becomes irrevocable. Other takaful operators consider "proposing hibah" by proposing the name of the sole recipient to the takaful operator to receive the contribution from the takaful solidarity fund (takaful benefit) on behalf of other participants (which is not the deceased participant's own money). As to the deceased's saving portion, it shall be distributed according to the rules of Fara'id where nominee is only and executor.

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