

## **LEGAL CAPACITY TO CONTRACT OF TAKAFUL: An Islamic Jurisprudential Consideration**

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*There are multiple parties involved in a takaful contract. The present paper provides an analysis on the legal capacities of these contracting parties to takaful operations.*

The main parties involved in a contract of *Takaful* are the *Takaful* operator and the *Takaful* participant or the *Takaful* contributor.

### **Takaful Operator (*Dhamin*)**

An operator is the one who undertakes in consideration of contributions paid by the participant to indemnify or provide a financial securing against an unexpected peril which may happen on the subject matter of the policy. Under Islamic law, an alternative term to the insurer is 'operator', as adopted in today's *Takaful* operations. As for the requirements for carrying on a business as a *Takaful* operator, S.4(1) of the *Takaful Act (Malaysia) 1984* provides:

*Subject to this (Takaful) Act, Takaful business shall not be carried on in Malaysia by any person as Takaful operator except:*

- (a) by a company as defined in the Companies Act 1965; or*
- (b) by a society registered under the Co-operative Societies Act.*

S.4 (2) of the Act again provides:

*No such company or society shall carry on family solidarity business or general business or both in Malaysia as a Takaful operator unless:*

- (a) it is registered under this Act in respect of any class of business or both;*
- (b) in the case of a company as defined in the Companies Act 1965 and a society mentioned in subsection (1)(b), it maintains at all times a surplus of assets over liabilities of not less than the amount as may be prescribed from time to time;*
- (c) it has the deposit required by this Act in respect of it ; and*
- (d) it is a member of a Takaful associations approved by the Minister provided that, this paragraph shall not apply until such an association is established.*

Hence, any individual<sup>2</sup> or a company<sup>3</sup> or a society<sup>4</sup> may have the right to carry out a *Takaful* operation as an operator provided that, he is able to meet the following conditions:

- (i) An individual or a company or a society wishing to operate *Takaful* activities must have contractual capacity provided in the general principles of commercial contracts (*uqud*).<sup>5</sup>
- (ii) For an operator, one should be a Muslim in his capacity as individual or a company, partnership or society which regulate their activities based on the *Shari'ah* rulings. However, a non-Muslim (either an individual or partners in a firm or company's directors or management body or the members of a society) may not have a right to carry out *Takaful* practices as an operator. Such restriction is not meant to discriminate them but it is for the sake of sustainable public interest especially to ensure a fair co-operation in the *Takaful* practices. However, this restriction is justified based on the following two basic reasons:

- (a) *Mandatory restriction:* A *Takaful* policy aims at *inter alia* sustaining a mutual cooperation, brotherhood and solidarity especially among the parties to the policy against an unexpected risk. This mutual cooperation under Islamic Law will naturally be only with those who share over faith. This is because a Muslim is asked to seek help of believers rather than of non-believers especially in the ordinary every day's affairs of business.<sup>6</sup> It is justified based on the following *Qur'anic* sanctions:

*"Let not the believers take for friends or helpers unbelievers rather than believers, if any do that, in nothing will there be help from Allah SWT, except by way of precaution, that you may guard yourselves from them."*<sup>7</sup>

*"Yea, to those who take for friends unbelievers rather than believers. Is it honour they seek among them? Nay all honour is with Allah."*<sup>8</sup>

*"O you who believe! Take not friends unbelievers rather than believers. Do you wish to offer Allah an open proof against yourselves?"*<sup>9</sup>

- (b) *Logical Reason:* In a *Takaful* practice the operator is the dominant party over the entire policy. However, if a non-Muslim is allowed to be an operator of a *Takaful* company (which is governed based on the *Shari'ah* principle absolutely) the operator by his dominating capacity may misuse the *Shari'ah* guidelines and misguide the participants which may contribute to a departure from the principles as well as the chief objective of *Shari'ah* discipline. However, in any aspect of transaction, if one seeks or adopts any guidance other than from the absolute *Shari'ah* principles there is no appreciation from Allah SWT. As He clarified to the effect.

*"If any one desires a religion other than Islam never will it be accepted of him...."*

In the light of the aforementioned *Qur'anic ayat* it is submitted that, the operator in *Takaful* practices plays the dominating role over the participant. Therefore, if a non-Muslim is allowed to be an operator he may tarnish the chief objective of *Takaful* practices under the *Shari'ah* discipline. But if the non-Muslim wishes to be a policyholder in *Takaful* company (which is run by a Muslim operator) there should be no objection as there is no fear of domination over the *Shari'ah* principles. Moreover, if a non-Muslim seeks a co-operation or help from a Muslim there should also be no objection as it is practised within the Islamic spirit. During the period of the second Caliph *Sayyidina Umar (r.a)*, when he commanded his government to help the non-Muslim through the *zakat* fund<sup>10</sup> on the ground that, the word *Masakin* in *ayat 60 Surah at-Taubah*<sup>11</sup> of the *Holy Qur'an* means "destitute" which includes both Muslim and non-Muslim alike.<sup>12</sup> In addition to that if a non-Muslim is allowed to benefit from the co-operation of a Muslim this may change his heart and he may be attracted to the Islamic faith.<sup>13</sup>

What if a company is registered under any law other than *Shari'ah*, wishes to operate *Takaful* activities as an operator. Can such a company be granted a *Takaful* license? It is submitted that, if such a company can ensure that, it will establish a complete segregated *Takaful* unit whose all activities, management and other material aspects would be controlled by Muslims based on the *Shari'ah* principles and objectives, then it should not be opposed as it may facilitate a better prospects of *Takaful* in the contemporary reality. This is in fact, observed in SPTF (Interest Free Banking Schemes) as allowed for the commercial banks in Malaysia to practice Islamic banking products with a broader scope. However, the above submission may be justified by the guidelines issued by the Central Bank of Malaysia on July 6, 1993 which enables a commercial financial institution to operate Islamic products within the *Shari'ah* spirit.<sup>14</sup>

- (iii) An individual or a company or a society, which intends to operate *Takaful* practices as an operator, must get registered before the commencement of the operation. The requirements for the registration of an operator are based on a logical judgement that *Takaful* practices involve absolute financial transactions, and the operator is in the managerial position in charge of the whole capital. If a person, or body is allowed to take responsibility of such a management without binding him by law there will certainly be fear of risk of deceiving or mismanagement of the fund by such a trustee (operator). Therefore, registering or licensing the operator is to avoid malice activities (e.g. fraud, mismanagement or any form of deceives) which may be used by an operator to sustain his *Takaful* practice. This argument is justified based on the tradition of the Holy Prophet (SAW) in which he prohibited dishonesty or undesired behaviour or deceit in a transaction.

*"The Holy Prophet (SAW) forbade from najash (dishonesty, bad behaviour and deceiving in transaction)."*<sup>15</sup>

In another tradition, the *Holy Prophet SAW* disapproved cheating in transactions. He *SAW* said:

*"Narrated by Abdullah bin Umar (R ), a person come to the Prophet (SAW) and told him that he was always betrayed in purchasing. The Prophet (SAW) told him to say at the time of buying, "No cheating."*<sup>16</sup>

*The Takaful Act (Malaysia) 1984*, therefore, requires an operator to be registered first before the operation of any kind of policy takes effect.<sup>17</sup> Section 5 of the Act provides that, a person who operates any kind of *Takaful* business as a *Takaful* operator without being registered shall be guilty of an offence and on conviction shall be liable to a fine of RM20,000 or to imprisonment for the term of twelve months or both.<sup>18</sup> The Director General (the Governor of the Central Bank of Malaysia by virtue of S. 54 (1) of the *Takaful Act* of the *Takaful operations* has the right to refuse an applicant for registration for the operation of *Takaful* business in the following circumstances as S. 8 (4) of the *Takaful Act* provides: *The Director General shall refuse to register an applicant if, after appropriate inquiry, he is satisfied that the name of applicant is by its resemblance to the name of any other body likely to deceive.*

Section S (5) of the Act again provides to the same effect:

*The Director General (the Governor of Central Bank) shall also refuse to register an applicant unless he is satisfied:*

- (a) that the aims and operations of the Takaful business which desires to carry on will not involve any element which is not approved by the Shari'ah; and*
- (b) that there is in the Article of Association of the Takaful operator contains the provisions for the establishment of a Shari'ah Supervisory Council to advise an operator on the operations of its Takaful business in order to ensure that, it does not involve in any element which is not approved by Shari'ah.*

In some cases, despite an operator having been registered its license may be cancelled if the operator is found to be involved in its operation any element contrary to the *Shari'ah* principles. One of the fundamental characteristics of *Takaful* practices is that it should be operated based on the *Shari'ah* principles. Therefore, the *Qur'anic* sanction provides that, whoever desires to adopt an un-Islamic element in his transaction or personal life will not be appreciated by *Allah SWT*. He *SWT* says to the effect:

*"If any one desired a guidance other than Islam never will it be accepted of him."*<sup>19</sup>

*The Takaful Act (Malaysia) 1984* empowers the Director General (Governor of the Central Bank) of *Takaful operations* to cancel the registration of any operator in the following circumstances. Section 11(1) of the Act reads to the effect:

*The Director General (the Governor of the Central Bank) may be ordered to cancel the registration of an operator either wholly or in respect of a class of business, as the case may be, if he is satisfied that:*

- (a) the operator is pursuing aims or carrying on operation involving any element which is not approved by the Shari'ah;*
- (b) the operator has not commenced business within twelve months after being registered;*

- (c) *the operator has ceased to carry on Takaful business in respect of any class of business;*
  - (d) *the operator has failed to maintain a surplus of assets over liabilities in accordance with subsection (2) (b) of Section 4;*
  - (e) *the operator has neglected or refused to observe an order to the Director General to make good any deficiency, whenever its Takaful fund shall have become impaired;*
  - (f) *the operator proposes to make or has made any composition or arrangement with its creditors or has gone into liquidation or has been wound up or otherwise dissolved;*
  - (g) *the operator carrying on its business in a manner likely to be detrimental to the interest of its participants;*
  - (h) *the operator is unable to meet its obligation;*
  - (i) *the operator has failed to effect satisfactory re-Takaful arrangements;*
  - (j) *the operator is contravening or has contravened the provisions of this Act or any of the regulations or any conditions imposed or any directions given by the Director General under this Act;*
  - (k) *the operator has been convicted of any offence under this Act or any of its officers holding a managerial or an executive position, has been convicted of any offence under this Act.*
  - (l) *the operator has furnished false, misleading or inaccurate information, or has concealed or failed to disclose material facts in its application for registration; or*
  - (m) *it is in the public interest to cancel the registration.*
- (iv) To be an Islamic insurance (*Takaful*) operator, it is also precondition before having a registered license to prove a capacity of having adequate assets to enable the operator to operate its business as an able operator. An operator is supposed to handle a large amount of financial fund. If one does not have adequate capacity of having assets to operate his business it may be logically submitted that it is quite impossible to run a financial institutions (like a *Takaful* business). The *Takaful Act of Malaysia* 1984 therefore, provides that, an operator must be able to show that, it at all times is able to maintain a surplus of asset over liabilities of not less than the amount as may be prescribed from time to time,<sup>20</sup> which may depend on the economic conditions of the country.
- (v) Finally, an operator has to make a deposit before obtaining a license for his operations. Such a deposit is required depends on the nature of the business that the operator wishes to operate. It is kept for the security against an unexpected bankruptcy, which might be suffered by the operator. This security may also be regarded as a co-operation against unexpected risk to the operator, which is in line with the *Qur'anic* sanction:

*“And co-operate you one another in righteousness and piety.”*<sup>21</sup>

Thus, the *Takaful Act* Malaysia 1984 rules out that the Director General shall not register an applicant for the *Takaful* operation as an operator unless the applicant made a deposit required by the Act<sup>22</sup> as determined from time to time by the Minister of Finance.<sup>23</sup>

## **Takaful Participant (*Mua'mman 'Alaih*)**

In *Takaful* policy, the participant (who subsequently becomes the insured against a defined risk) pays regular contributions to the *Takaful* operator for the purpose of future security of the subject matter at risk, while the operator undertakes in consideration of the paid contribution to indemnify the participant (insured) against loss or damage accidentally caused to the subject matter of the policy.

Theoretically, everybody regardless of the age, class, religion, sex or any form of identification may have a natural right to buy a policy for the material security of property, life or even business ventures which are at unexpected risk or danger. Such a natural common right may be vested in everybody in the society is justified by the *Qur'anic* sanction in which every one has the common right to be benefited through the means of mutual cooperation, solidarity and brotherhood. Allah (*swt*) commanded:

*“And co-operate you one another in righteousness and piety.”*<sup>24</sup>

But in practice, the right of mutual co-operation may not be rendered to some people in the society because of some reasons<sup>25</sup>, which do not permit them to exercise an equal right of mutual co-operation. Such a restriction is for the public interest as a whole so as to ensure that proper co-operation, solidarity and brotherhood in all sphere of mankind are sustained.

Relying on this fact, it is submitted that, there may be certain persons who because of some objectionable elements associated with them are disqualified from buying or having a policy so to uphold the chief objective of *Takaful* i.e. mutual co-operation and solidarity. To sustain solidarity with a convenient life is justified by the *Qur'anic ayat*:

*“... Allah SWT intends every facility for your, He does not want to put you to difficulties.”*<sup>26</sup>

However, the persons who are incapable of being a party to a transaction are also basically incapable of being the participants in a policy relying on the general principles of contract. A *Takaful* policy is a form of contract and, therefore, the determinations of the legal capacity of the parties as has been made based on the law of contract. The factors of impediment to a policy are itemized as follows:

### *The Age Factor (al-'umr)*

A minor is not able to be a contracting party nor be entrusted to manage his own property unless one has reached the age of *rushd* as ruled out in the *Holy Qur'an*:

*“If then you find sound judgement in them, release their property to them...”*<sup>27</sup>

The word *rushd* in the aforesaid *ayat* has been interpreted by the jurists as the age of prudence or puberty<sup>28</sup> or age of majority.<sup>29</sup> The sign of *rushd* in a minor is established through either discovery of one's natural emission<sup>30</sup> or calculation of the calendar years. As far as the mode of determination of the age of *rushd* through calendar years is concerned, the Islamic jurists have different views. According to the majority of *Fuqaha* (Islamic jurists), among them *Abu Hanifah, Shafii, Muhammad as-Shaibani, Abu Yusuf,*

*Ibn Qudama, Imam Nawawi*, and also the compilers of *al-Majelle*, who share the same view, that, the age of *rushd* occurs only when a minor (regardless of sex) reaches the age of fifteen years.<sup>31</sup> There are some weak reports of *Abu Hanifah* which claims that, the age of *rushd* for male is nineteen or eighteen or seventeen years and seventeen years for the female.<sup>32</sup> *The Hedaya* sets the minimum age of *rushd* for male at twelve years while for female it is nine years.<sup>33</sup> *Mahmasani* claimed that, a minor (below the age of *rushd* or fifteen years) is not able to be a party to the contract unless the contract is proven to be for his/her advantage and ratified by the guardian.<sup>34</sup>

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2 Who has a legal contractual capacity, and is able to meet other requirements, i.e. having registered  
licence, deposits, assets, etc. See *The Takaful Act (Malaysia)* 1984 S. 4(2)

3 See *The Takaful Act, loc. cit.* S. 4(1) (a).

4 *Id.* at S. 4 (1) (b).

5 For example, an infant, insane person, bankrupt and so on may not have a contractual capacity.  
See Niazi, Liatat Khan, *Islamic Law of Tort*, Research Celldayal Singh Trust Library, Lahore,  
1991, p. 733ff; and also Rayner, S.E., *The Theory of Contract in Islamic Law*, Graham & Trotman,  
London, 1991, pp. 121-30.

6 This views has expressed by Abdullah Yusuf Ali in *The Meaning of the Holy Quran*, Amana  
Corporation, U.S.A., 1992 at n. 373 at p. 134.

7 *al-Quran, Surah Al-Imran*, 3:28.

8 *al-Quran, Surah an-Nisa*, 4:139.

9 *al-Quran, Surah An-Nisa*, 4:144.

10 *al-Jassas*, Abu Bakar Ahmad b. Ali al-Razi, *Akhamul Quran*, Cairo, 1928 at pp. 46-62.

11 *al-Quran, Surah Al-Imran*, 3:85.

12 Abu Yusuf, *Kitabul Kharaj*, Cairo, 1382 AH at p. 144.

13 Ibn Qudama, *Al-Mughni*, Cairo, 1382 AH Vol. 1 at p. 370.

14 See generally *Guidelines on Skim Perbankan Tanpa Faedah (SPTF) for Commercial Banks*,  
Bank Negara Malaysia, July 6, 1993 at pp. 7-11.

15 *Sahih al-Bukhari, Kitab al-Buyu'* (trans.) *op. cit.*, Vol. III, No. 352, p. 199.

16 *Sahih al-Bukhari, Kitab al-Buyu'* (trans.) *op. cit.*, Vol. III, No. 352, p. 199.

17 See *Takaful Act (Malaysia)* 1984, at S. 4 (2) (a).

18 *Id.*, at S. 5.

19 *al-Quran, Surah Al-Imran*, 3:85.

20 *The Takaful Act (Malaysia)* 1984, S. (4) (2).

21 *al-Quran, Surah al-Mai'diah*, 5: 2.

22 *The Takaful Act (Malaysia)*, 1984, S. 8(7).

23 *Id.*, S. 13 (1).

24 *al-Quran, Surah al-Mai'diah*, 5: 2.

25 Such as infancy, insanity, etc.

26 *Al-Quran, Surah al-Baqarah*, 2:185.

27 *al-Quran, Surah An-Nisa'*, 4:6.

28 See Rayner, S.E., *The Theory of Contract in Islamic Law, op. cit.*, p. 122f.

29 See Hamilton, C., (trans.) *The Hedaya*, Book XXIII, premier Book House, Lahore, 1982, p. 530.

30 *Ibid.*

31 *Ibid*, See also Ibn Qudamam, *Al-Mughni*, Cairo, 1367 AH, Vol. IV, p. 460; See also *The Mejelle*  
Art, 986.

32 *The Hedaya, op. cit.*, p. 529.

33 *Id.*, p. 530; See also *The Mejelle*, Article 982.

34 S. Mahmasani, *al-Nazriyah al-ammah lil mujibat wal-uqud fil Shari'atil Islamiyyah*, Beirut,  
1948, Vol. 2, p. 104.