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The Qualification of Islamic Insurance Contract

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Abstract

The concept of insurance, which emerged in the West in the fourteenth century, was introduced to the Islamic world in the nineteenth century. The religious ruling of insurance, which became widespread in Muslim countries in a short time, started to be discussed among the faqih. In this process, faqih, who addressed the issue from the perspective of classical contract theory in fiqh, stated that insurance was not permissible due to prohibited elements such as ignorance, gambling, loss, gharar (uncertainty), and interest. This negative opinion on the validity of insurance induce Muslims with interest-sensibility to seek an alternative to conventional insurance. These efforts paved the way for the emergence of the concept of Islamic insurance. Although Islamic insurance has been used in some academic studies for other types of insurance other than conventional insurance, the term “takaful insurance” is meant by this concept in the finance sector today. In Turkiye, however, the concept of “participation insurance” has recently been widely used instead of *takāful*. It is remarkable that the Islamic insurance system, which began on a simple cooperative basis, evolved into a mixed structure in the following period. For this reason, Islamic insurance contracts are considered to be in the category of “compound/complex contracts” in modern economics. In this study, the qualificaiton of Islamic insurance contracts will be analyzed based on the typical contracts in the fiqh literature.

Keywords: Fiqh, Islamic Legislation, Insurance, Conventional Insurance, Islamic insurance, Takāful, Participation Insurance.

Introduction

Due to having social character, human beings may be exposed to unforeseen dangers and risks at any time in daily life. In such a situation, they wish to be able to overcome the dangers without any damage or with the least damage and to continue their life from where they left off. However, they are often helpless in the face of great dangers and need the help of others. This situation has brought out the idea of cooperation and solidarity, which is as old as human history.

In the historical process, cooperation and solidarity have appeared in different formats depending on factors such as time, place, social structure, need, and religion. In Islamic Law, transactions and contracts such as *'āqilah* (the group of people who share the blood-money), *muwālāt/walā* (a risk agreement between two people), *waqf* (an inalienable charitable endowment), *sharikah* (partnership), *wakālah* (proxy), and *kafālah* (bail) are important examples of these. The modern insurance system, which emerged in the West during the fourteenth and fifteenth centuries as a necessary response to such needs and gradually became widespread worldwide while evolving into a complex structure, is one of the systems that comes to mind when concepts such as risk, cooperation, and solidarity are mentioned. Now, insurance has become an irreplaceable feature of life in almost every society throughout the world.¹

According to the general acceptance, the Muslim world met with insurance in the modern sense in the nineteenth century. With developing conditions, the system started to spread in Muslim countries as of the first quarter of the twentieth century, and with its spread, its *fiqhi* ruling has been debated among scholars. At the beginning, the majority of Muslim scholars said that the existing insurance system was contrary to Islam on the grounds that it contained some prohibited features such as deficit, *gharar*, ignorance, gambling and *riba* (interest).² Over time, this resulted in people with religious sensitivities focusing on an insurance system that is fully compliant with Islamic

¹ For detailed information on the history and birth of the idea of insurance see: Nihat Dalgın, *İslam Hukukuna Göre Sigorta* (Samsun: Ondokuz Mayıs University Institute of Social Sciences, Doctoral Thesis, 1994), 18-28.

² For detailed information on the judgement, justifications and analysis of insurance according to Islamic Law, see: Ahmad ez-Zarqā et al. *İslām Düşüncesinde Ekonomi, Banka ve Sigorta*, translator Hayreddin Karaman (Istanbul: İz Yayıncılık, 2017), 187-237; Faruk Beşer, *Sosyal Riskler Sigorta ve İslam* (Istanbul: Nun Yayıncılık, 2016), 135-181; Dalgın, *İslam Hukukuna Göre Sigorta*, 114-214; Hasan Hacak, "İslam Hukukunda Sigorta ve Fıkıh Bilginlerinin Sigortaya Yaklaşımının Genel Bir Değerlendirmesi", *Marmara University International Journal of Theological And Islamic Studies* 30 (2006), 21-50.

principles and serves as an alternative to conventional insurance. As a result, the concept of "Islamic insurance," meaning "compatible with Islam," emerged.³

1. Islamic Insurance

It is a fact that the concept of Islamic insurance is used in some studies for all insurances other than conventional insurances and in some studies for *takaful* insurances. For this reason, it would be appropriate to first determine the conceptual framework of Islamic insurance.

1.1. Conceptual Framework

The type of insurance has a decisive role in determining its conceptual framework, and in this aspect, insurance has been subjected to many classifications.⁴ Here, the division made by Hasan Hacak will be taken into consideration since it is directly related to the subject matter. According to the qualifications of their legal structures, Hacak divides insurance into two categories: commercial insurance provided by joint stock companies and mutual insurance provided by co-operative companies, also known as co-operative/mutual insurance; he stated that it would be difficult to place Islamic insurance in one of these types considering their structures. In order to overcome this difficulty, Hacak divided Islamic insurance into two categories; 1. Simple-classical Islamic Insurance (*al-ta'min al-İslāmīal-basīt*) and 2. Mixed Islamic insurance (*al-ta'min al-İslāmīal-murakkab*), and then emphasised that simple Islamic insurance corresponds to co-operative insurance and that this is the type of insurance permitted in the first *fatwas* on Islamic insurance. Hacak stated that mixed Islamic insurance is the Islamic insurance that is widely practiced today and is also called *takaful*, and said that mixed Islamic insurance can be added to the above mentioned two types of insurance as a third type, and linked the understanding of the concept of Islamic insurance to a large extent to the knowledge of this mixed structure.⁵

Accordingly, when Islamic insurance is mentioned, this mixed structure is understood in today's finance sector. Again, names such as *takāful* and interest-free

³ For a general evaluation of the history of Islamic insurance, see: Alpaşlan Alkış, "İslam Hukukunda Katılım Sigortacılığı", Kahramanmaraş Sütçü İmam University Faculty of Economics And Administrative Sciences Journal 9/1 (2019), 2-4; Hasan Hacak - Yunus Emre Gürbüz, "İslami Finansta Sigorta ve Katılım Sigortası (Tekâful)", Yaşayan ve Gelişen Katılım Bankacılığı, ed. Şakir Görmüş et al. (İstanbul: TKBB Yayınları, 2019), 305-306.

⁴ For example see: Dalgın, *İslam Hukukuna Göre Sigorta*, 29-32; Beşer, *Sosyal Riskler Sigorta ve İslam*, 141-145; Hacak, "İslâm Hukukunda Sigorta ve Fıkıh Bilginlerinin Sigortaya Yaklaşımının Genel Bir Değerlendirmesi", 24-25; Hacak - Gürbüz, "İslami Finansta Sigorta ve Katılım Sigortası (Tekâful)", 300-301.

⁵ Hasan Hacak, "İslami Sigorta (Tekâful) Ticari Sigortadan Farklı mıdır?", *Tekâful (İslamî Sigorta) Teori ve Uygulama*, ed. Süleyman Kaya et al. (İstanbul: Ensar Neşriyat, 2017), 94-98.

insurance are used for the mixed structure in the finance sector together with Islamic insurance. In Türkiye, the concept of “participation insurance” began to be used in the financial literature after private financial institutions were renamed as participation banks in 2005 with the Banking Law No. 5411; this concept was formalised with the Regulation on the Working Procedures and Principles of Participation Insurance published in the Official Gazette on 20 September 2017.⁶ Therefore, what is meant by concepts such as *takaful* insurance, interest-free insurance, and participation insurance in the finance literature is actually Islamic insurance.⁷ This type of insurance is different from mutual insurance provided by co-operative organisations. It is seen that the Islamic insurance system, which initially emerged, and which was implemented with the idea of co-operative insurance, has developed into a mixed structure today.⁸

As insurance products, Islamic insurance operators can offer services in all of the religiously legitimate elementary (commercial) majors offered by conventional insurance companies, as well as life, and health *takaful*, and *family takaful*.⁹ In other words, majors that are classified as life, and non-life in conventional insurance are classified as *family takaful* and *general takaful* in Islamic insurance, respectively. Accordingly, life insurance in conventional insurance corresponds to *family takaful* in Islamic insurance

⁶ Sinan Okumuş, *İslami Sigorta (Takaful) Türkiye Uygulaması* (Istanbul: Türkmen Kitabevi, 2014), 7; Yunus Emre Gürbüz, “Tekâfûl (Katılım) Sigorta Sistemi ve Teorisi”, *Tekâfûl (İslamî Sigorta) Teori ve Uygulama*, ed. Süleyman Kaya et al. (Istanbul: Ensar Neşriyat, 2017), 9, 23; Burçin Başoğlu, “Türkiye’de Sigorta Sektörüne Katkıları Açısından Katılım Sigortacılığı Prim Üretimi Analizi”, *Trakya University Journal of Social Sciences* 22/2 (18 December 2020), 1045-1046.

⁷ Kenan Dede, *Katılım Bankalarında Sermaye Ürünleri ve Sermaye Piyasası* (Istanbul: TKBB Yayınları, 2017), 244; Mehmet Ali Aksoy, “Türkiye’de Katılım Sigortacılığı”, *Ankara Hacı Bayram Veli University Journal of Faculty of Law* 22/2 (16 February 2019), 5. The name “katılım sigortacılığı/participation insurance” has been an appropriate choice for this system since it does not fully overlap with the word *takaful*, which essentially expresses mutual assistance, and solidarity, and the concept of “İslami sigorta/Islamic insurance” may cause some misunderstandings and exploitation.

⁸ For an analysis of the differences between *takaful* (Islamic) insurance, and co-operative insurance, see: Hacak, “İslami Sigorta (Tekâfûl) Ticari Sigortadan Farklı mıdır?”, 100-103. Müveddet Elmacı states that as an example of the first Islamic (*takaful*) insurance, the insurance company that started operations in Sudan in 1979 adopted the principles of co-operatives, and the basis of *takaful* was clarified by the Islamic Fiqh Academy in Jeddah in 1985. See: Müveddet Elmacı, “Sigorta Kooperatifçiliği, Tekâfûl ve Türkiye İçin Tekâfûl Kooperatifçiliği”, *Tekâfûl (İslamî Sigorta) Teori ve Uygulama*, ed. Süleyman Kaya et al. (Istanbul: Ensar Neşriyat, 2017), 143-145. Also see, Okumuş, *İslami Sigorta (Takaful) Türkiye Uygulaması*, 14.

⁹ İbrahim Ünal, *İslami Sigortacılık Sisteminin Türkiye’de Uygulanması Hakkında Ampirik Bir Analiz* (Konya: Necmettin Erbakan University Institute of Social Sciences, Master's Thesis, 2019), 51. Ünal states that the products in *takaful* insurance and traditional insurance products are identical, but there is nothing surprising in this since the main purpose of both insurances is to protect people from the losses they are exposed to.

and non-life insurance corresponds to *general takaful*. *Family takaful* is also divided into sections.¹⁰

Although the basic logic of the Islamic insurance system is the same, there may be some differences in practice among Muslim countries. Therefore, analysing the characteristics of the Islamic insurance contract as a whole would complicate the limits of the study. For this reason, Islamic/participation insurance practices in Türkiye have been taken into consideration since it is possible to access more reliable information and data, and its subject has been limited to the *general takaful* branch. In other words, the study discusses the qualifications of general participation (non-life) insurance contracts issued by participation banks operating in Türkiye from an Islamic legal perspective in the context of typical/named contracts in the *fiqh* literature.

1.2. Definition, Features and Functioning of Islamic Insurance Contract

In order to correctly present the qualifications of the Islamic insurance contract, it is important to know some issues related to the definition, features and functioning of this contract.

1.2.1. Description

There are different definitions of this type of insurance in the studies that engage in Islamic insurance. For example, the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI)¹¹ defines Islamic insurance in its 26th standard as follows: "Islamic insurance is a transaction in which the insurers undertake the obligation to make donations to be used for their own benefit, and is managed by a board elected among the insurers or by a company authorised to carry out insurance activities through a paid proxy, and protects the whole of the insurance holders who form a fund through contribution payments."¹² and the Islamic Financial Services 2013 (IFSA)¹³ defined Islamic insurance as "a system based on mutual cooperation, responsibility, and protection among participants." While the Islamic Financial Services Board (IFSB)¹⁴ defined it as "a system in which individuals and entities come together to mutually guarantee each other against specified risks."¹⁵ The definition of Neova Participation Company, which initiated Islamic insurance for the first time in Türkiye, is as follows: "It is a co-operation between different individuals to compensate the losses of the participants who are exposed to

¹⁰ For detailed information, see. İsmail Aydemir, "Hayat Sigortacılığında Tekâfûl (Katılım Sigortacılığı)", *Tekâfûl (İslamî Sigorta) Teori ve Uygulama*, ed. Süleyman Kaya et al. (İstanbul: Ensar Neşriyat, 2017), 52-53; Dede, *Katılım Bankalarında Sermaye Ürünleri ve Sermaye Piyasası*, 246.

¹¹ Accounting and Auditing Organization for Islamic Financial Institutions.

¹² Gürbüz, "Tekâfûl (Katılım) Sigorta Sistemi ve Teorisi", 17.

¹³ Islamic Financial Services Act 2013, It is an organisation serving in Malaysia.

¹⁴ Islamic Financial Services Board, It is an organisation serving in Malaysia.

¹⁵ Aydemir, "Hayat Sigortacılığında Tekâfûl (Katılım Sigortacılığı)", 47-48.

losses. The money collected in this system is accumulated in a premium pool called a mutual aid fund or risk fund, and the losses of the participants (shareholders) who suffer losses are compensated from this pool."¹⁶ Additionally, "Islamic insurance is the sharing of risk through mutual assistance through voluntary donations among group members."¹⁷ Likewise "*Takaful* can be briefly defined as Islamic insurance or interest-free insurance. This type of insurance, also known as *takaful insurance* system, is expressed as mutualisation or mutual insurance. Mutual insurance is a co-operation between different individuals in order to compensate the damage of the disaster that one of them will be exposed to."¹⁸

In the Regulation on the Operating Procedures and Principles of Participation Insurance dated 20 September 2017, which formalised Islamic insurance as "participation insurance" in Türkiye, it was defined as "an insurance system based on principles of cooperation and solidarity, where risks are shared among participants.". However, in sub-paragraph (d) of Article 4 of the Regulation on Insurance and Private Pension Activities within the Framework of Participation Principles, dated 19 December 2020 and numbered 31339, which completely repealed this regulation, participation insurance is defined in general terms as "insurance activity carried out according to participation principles", and participation principles are explained in sub-paragraph (ç) as "the procedures and principles determined by the advisory committee based on the relevant provisions in order to ensure that insurance or private pension activities are carried out within the framework of this Regulation".

It is possible to multiply the definitions of Islamic insurance. With these definitions which explain Islamic Insurance from different perspectives, a sufficient idea of the system may be gained. It is seen that the different definitions alludes to issues, such as solidarity, donation, contribution, common fund, and risk sharing in relation to Islamic insurance. It is an important detail that IFSA characterises it as a charity-based contract. It is understood that the expression "... is a transaction" in the definitions of AAOIFI and IFSB is used in the sense of contract when the whole definition is considered. It is noteworthy that this contract, which is established for the purpose of mutual assistance, is not a mere donation contract.

1.2.2. Features

There is a significant similarity between the elements of an Islamic insurance contract and the elements of a conventional insurance contract.

¹⁶ Neova Insurance, "Participation Insurance", Access Date: 20.02.2021, 11:20.

¹⁷ Okumuş, *İslami Sigorta (Takafül) Türkiye Uygulaması*, 8.

¹⁸ Dede, *Katılım Bankalarında Sermaye Ürünleri ve Sermaye Piyasası*, 244.

The elements of a traditional insurance contract are the insurer, the policyholder, the insured, the insurance benefit, the insurance cost (compensation), the premium (insurance fee), the risk (risk, hazard), and the time. The insurer is the side that undertakes to compensate for the benefit provided by the insurance contract and, by law, maybe a joint stock company or a co-operative organisation. The shareholder is the side who undertakes the insurance premium. The person whose interest is secured is called the insured. The shareholder and the insured are usually the same person, but sometimes may also be different. Any interest that can be measured by economic value can be insured. The possibility of events that may damage the interest is called risk. Premium is the price to be paid by the shareholder in return for the assurance provided by the contract. The amounts collected in the premium pool are the property of the joint stock company. The amount to be paid by the insurer in case of realisation of the risk is called compensation. The contract concluded between the sides is for a period of time. The shareholder is obliged to pay the premium within the term and the insurer is obliged to pay the indemnity in case the risk is to happen. Together with the contract, the shareholder is given an insurance policy on which the premium amount, indemnity rates and duration are written.¹⁹

These features are generally included in the Islamic insurance contract. However, there are some differences between them, although not fundamental. In the Islamic insurance contract, the insurer and the shareholder are the same side. In other words, the one who pays the premium is also the insurer. Therefore, the shareholder is called a member or participant.²⁰ Since the insurance company is considered an operator that manages the fund in return for a determined fee in the system, the fund management model is also among the features of the contract. The risk is not under the responsibility of the operator company; in case the risk is realised, the compensation is covered by the risk fund. It is expressed as a premium, participation share or donation since the contract is made on the basis of cooperation and risk sharing.²¹

1.2.3. Functioning

According to the studies of both those who are involved in this business (the ones who are working in the field of Islamic Insurance) and those who have researched the

¹⁹ Hacak - Gürbüz, "İslami Finasta Sigorta ve Katılım Sigortası (Tekâful)", 301; Aksoy, "Türkiye'de Katılım Sigortacılığı", 9-10.

²⁰ Due to some relevant regulation in Türkiye, it is called "katılımcı/participant".

²¹ Hacak - Gürbüz, "İslami Finasta Sigorta ve Katılım Sigortası (Tekâful)", 301; Aksoy, "Türkiye'de Katılım Sigortacılığı", 10-12.

subject at the academic level, the functioning of the Islamic insurance contract is in a general and simple expression as in the following:²²

In order to share possible risks and to help each other, a number of people come together to form a mutual aid fund. They authorise a company specialised in insurance to manage this fund on their behalf. The company also has its own (shareholders) stock and creates a separate fund for this purpose. Participants form a contract with the operator company for the management of the fund, either as a proxy, *mudaraba* or both as a proxy and *mudaraba*. The operator company manages the savings fund according to this contract and receives a certain fee for its work. The company manages the fund under the name of technical and financial operations. In the context of technical operations, it carries out transactions directly related to insurance such as policy production, claim payments, proxy fee, staff salaries, agency establishment and termination, reinsurance/*re-takaful* agreements, and authorised service agreements. All expenses related to this are covered from the so-called risk or savings fund, which is paid by the participants as a contribution fee. If the amount of money in the fund is insufficient, additional money can be asked from the participants, and the insurance company can also make a benevolent loan to the fund on the condition to be collected from the money accumulated later. In fact, the principle is to leave an amount in the savings fund for the costs of technical operations, and the remaining are transferred to the other fund for investment purposes. The company operator utilises both these funds and the capital belonging to the shareholders', in financial transactions in the areas deemed appropriate by the advisory board. After the investment, the necessary savings will be made in the fund according to the terms of the contract through the approval of the advisory board.

In the Islamic insurance system, savings in the fund are made according to one of these; proxy, *mudaraba* or mixed/hybrid system. To be more precise, Islamic insurance

²² See: İsmail Yıldırım, "Tekafül (İslami) Sigortacılık Sisteminin Dünyadaki Gelişimi ve Türkiye'de Uygulanabilirliği", *Organizasyon ve Yönetim Bilimleri Dergisi* 6/2 (01 Aralık 2014), 50-53; Abdurrahman Çalık, "Katılım Bankalarında Sigorta Uygulamaları ve Tekâfül Sigorta Sistemi", *Finans Politik & Ekonomik Yorumlar* 51/587 (Ocak 2014), 98-104; Dede, *Katılım Bankalarında Sermaye Ürünleri ve Sermaye Piyasası*, 244-247; Gürbüz, "Tekâfül (Katılım) Sigorta Sistemi ve Teorisi", 21-23; Aydemir, "Hayat Sigortacılığında Tekâfül (Katılım Sigortacılığı)", 48-60; Abdullah Durmuş, "AAOFII Standartlarında Tekâfül Sigortacılığı", *Tekâfül (İslamî Sigorta) Teori ve Uygulama*, ed. Süleyman Kaya, et al. (İstanbul: Ensar Neşriyat, 2017), 120-122; Servet Yazıcı, "İslam'da Sigorta ve Tekafül Sigortası", *İslam İktisadi ve Finansı*, ed. Hakan Sarıbaş (Zonguldak: Bülent Ecevit University Publications, 2017), 178; Muhammed Hadin Öner, "Katılım Sigortacılığı Yönetmeliği Perspektifinde İslami Sigortacılığın Gelişimi", *JOEEP: Journal of Emerging Economies and Policy* 3/1 (30 June 2018), 76; Begüm Terzioğlu, *Sigorta Acentelerinin Konvansiyonel ve Tekafül Sigorta Pazarlamasına Yaklaşımları Üzerine Uygulama* (İstanbul: Marmara University, Institute of Banking and Insurance, Master's Thesis, 2019), 13-20.

has another model deemed appropriate by the advisory board. However, the insurance is operated according to one of these three models due to being widely used today.

1. The Proxy Model: The management of the pool formed by the participation shares is carried out by the insurance operator as a proxy. The operator company performs both technical and financial transactions as a proxy and receives a predetermined fee for its services. The agency fee may be fixed or proportional. The operator company does not have any share in the profit from the investment.²³

2. The Mudaraba Model: The *mudaraba* model is based on profit-loss partnership. After technical costs, the remaining amount is utilised by the operator company in the investment. The income is distributed between the entrepreneurial company and the participants according to a predetermined proportion. In the *mudaraba* model, the insurance company cannot receive a proxy fee (commission) since it is a profit-loss partner in the entrepreneurial status.²⁴

3. The Mixed Model: The mixed model, also known as the hybrid or combined model, is based on both *wakālah* (proxy) and *mudaraba*. Accordingly, the operator company receives a proxy fee from the participation fund for technical and financial transactions. In addition, it has a *mudaraba* partnership in the fund divided for investment; it has a share in the income obtained after the investment at the proportion specified in the contract. As it is seen, the operator company has three separate revenues, one from technical transactions, one from financial transactions, and one from investment share which generate two Proxy fees and one investment share. Since it has more income items, the most widely applied model in the field of Islamic insurance today is the mixed model.²⁵

²³ See: Yıldırım, “Tekâfûl (İslami) Sigortacılık Sisteminin Dünyadaki Gelişimi ve Türkiye’de Uygulanabilirliği”, 50-53; Dede, *Katılım Bankalarında Sermaye Ürünleri ve Sermaye Piyasası*, 244-247; Gürbüz, “Tekâfûl (Katılım) Sigorta Sistemi ve Teorisi”, 21-23; Aydemir, “Hayat Sigortacılığında Tekâfûl (Katılım Sigortacılığı)”, 48-60; Durmuş, “AAOFII Standartlarında Tekâfûl Sigortacılığı”, 120-122; Yazıcı, “İslam’da Sigorta ve Tekâfûl Sigortası”, 178.

²⁴ See: Çalık, “Katılım Bankalarında Sigorta Uygulamaları ve Tekâfûl Sigorta Sistemi”, 98-104; Dede, *Katılım Bankalarında Sermaye Ürünleri ve Sermaye Piyasası*, 244-247; Gürbüz, “Tekâfûl (Katılım) Sigorta Sistemi ve Teorisi”, 21-23; Durmuş, “AAOFII Standartlarında Tekâfûl Sigortacılığı”, *Tekâfûl (İslamî Sigorta) Teori ve Uygulama*, 120-122; Yazıcı, “İslam’da Sigorta ve Tekâfûl Sigortası”, 178; Öner, “Katılım Sigortacılığı Yönetmeliği Perspektifinde İslami Sigortacılığın Gelişimi”, 76.

²⁵ Hakan Aslan explains this through the modified hybrid model after stating that the revenue channels of the operator companies have increased over time and that the companies have determined a model to maximise their own interests rather than those of the participants. See: Hakan Aslan, “Tekâfûl Uygulamalarının Güncel Sorunları: Türkiye Piyasası İçin Bir Değerlendirme”, *Tekâfûl (İslamî Sigorta) Teori ve Uygulama*, ed. Süleyman Kaya, et al. (İstanbul: Ensar Neşriyat, 2017), 160-161.

As stated in article 5 of the 26th standard of AAOIFI and as generally applied in the Islamic insurance system, the money remaining in the fund can be distributed among the participants in accordance with the opinion of the advisory board, or it can be set aside as a reserve against possible risks, reflected as a discount on the participation share in the following year, or it can be used for a charity on behalf of the participants.²⁶

The key features and principles of the Islamic insurance system include focusing on charity rather than profit²⁷, investing funds in interest-free instruments to support the interest-free capital market, excluding coverage for assets considered religiously impermissible or immoral, avoiding *gharar*, *riba*, and gambling, and having an advisory board to oversee *Shariah* compliance and approve products and investments. Therefore, companies that will operate in the field of Islamic insurance should pay attention to these issues.²⁸

Although there are differences in the details, the Islamic insurance system is generally as it is mentioned. However, it is very difficult to say that the theory is reflected in practice as it is. To be more clear, it is very difficult to say that this theoretically written and explained information is applied exactly in practice. This is because neither a number of individuals come together to form a fund for the purpose of solidarity and risk sharing, nor does the insurance company fulfill this service without the aim of profit. The person who wants to receive insurance services against possible risks applies to the agency and purchases the insurance product they deem appropriate, and becomes the owner of the insurance policy by paying the premium. Although the company from which the product is purchased is a company providing services in the field of participation insurance, the customer often does not even realise this. The purpose of

²⁶ Aslan, "Tekâfûl Uygulamalarının Güncel Sorunları: Türkiye Piyasası İçin Bir Değerlendirme", 160; Öner, "Katılım Sigortacılığı Yönetmeliği Perspektifinde İslami Sigortacılığın Gelişimi", 69.

²⁷ It is frequently emphasised that the aim of the Islamic insurance system is not to make profit, but to provide mutual guarantee through cooperation and risk sharing. For example see: Okumuş, İslami Sigorta (Takafül) Türkiye Uygulaması, 8; Aydemir, "Hayat Sigortacılığında Tekâfûl (Katılım Sigortacılığı)", 47; Durmuş, "AAOFII Standartlarında Tekâfûl Sigortacılığı", 120. In fact, it is not unusual for a company providing insurance services to do this business for profit. However, disguising this purpose or declaring the opposite brings contradiction. As a matter of fact, Ustaoglu states that the definition of Islamic insurance as an insurance based on mutual assistance cannot fully explain the practices of profit-motivated companies. See: Murat Ustaoglu, "Alternatif Faizsiz Sigortacılık Uygulamaları ve Gelir Seviyesine Göre Kamu Bilincinin Değerlendirilmesi: Ampirik Analiz", Research Journal of Politics, Economics and Managements 2/2 (01 Nisan 2014), 116.

²⁸ Dede, *Katılım Bankalarında Sermaye Ürünleri ve Sermaye Piyasası*, 244; Öner, "Katılım Sigortacılığı Yönetmeliği Perspektifinde İslami Sigortacılığın Gelişimi", 68. See also: Servet Yazıcı, *Tekâfûl Sigortacılığında Ürün Geliştirme* (İstanbul: Marmara University Social Sciences Institute, Master's Thesis, 2015), 84; Neova Insurance, "Aboaut Us" Date Accessed: 26.02.2021, 08:12.

purchasing the insurance product is not to come together with others who are exposed to certain risks like them and share the risk faced by one of them, but to compensate for his losses when he is exposed to risk. From this point of view, it is difficult to say that the participants come together to create a charity fund with the motive of solidarity, and it is also very difficult to claim that the purpose of the company working in the field of Islamic insurance is not to make a profit. The proxy and *mudaraba* model, which is widely used in this system, is one of the commercial methods used for profit in trade. The fact that companies engaged in participation insurance activities increase their market share, premium production, and contribution rates in the insurance sector every year,²⁹ and that foreign (Non-Islamic) companies also operate in the field of Islamic insurance³⁰ are the most obvious indicators of this.

Indeed, Hacak emphasizes that descriptions have been made to prove that elements such as *riba*, *gharar*, ignorance, and gambling, which are claimed to exist in conventional insurance, do not exist in the Islamic insurance contract. However, he points out that we should question how well these descriptions match the true nature of the Islamic insurance contract.³¹ According to Hacak, Islamic insurance has started to implement almost all of the commercial insurance by adapting it to its own system. Those who operate in this field declare that their aim is not profit, so as not to look like a commercial insurance company, but they are structured as a commercial company and their main aim is profit and gain. Compared to commercial insurances, they undertake less risk and earn more profit. The main purpose of the participants in this type of insurance is not charity, but to protect themselves from the harm of dangers and to obtain insurance protection at a more favorable price.³²

As Hacak states, the Islamic (*takafül*/participation) insurance system -especially in practice- stands before us as a form of conventional insurance that has been purified from the parts that do not comply with Islamic principles. Indeed, other studies have emphasized that Islamic insurance in its current form is not an alternative but an enrichment and is not fundamentally different from its counterparts. It is a type of

²⁹ For data see: Başoğlu, “Türkiye’de Sigorta Sektörüne Katkıları Açısından Katılım Sigortacılığı Prim Üretimi Analizi”, 1054-1059.

³⁰ Okumuş, *İslami Sigorta (Takafül) Türkiye Uygulaması*, 7; Hacak - Gürbüz, “İslami Finansta Sigorta ve Katılım Sigortası (Tekâfül)”, 310.

³¹ Hacak, “İslami Sigorta (Tekâfül) Ticari Sigortadan Farklı mıdır?”, 100-102. Hacak characterises such efforts as financial perception engineering (see, same article, page 100). On the other hand Yazıcı, states that all products in practice in Islamic insurance are intertwined with *gharar* and uncertainty. See: Yazıcı, *Tekafül Sigortacılığında Ürün Geliştirme*, 84.

³² Hacak, “İslami Sigorta (Tekâfül) Ticari Sigortadan Farklı mıdır?”, 94, 98, 99, 100; Also See: Hacak - Gürbüz, “İslami Finansta Sigorta ve Katılım Sigortası (Tekâfül)”, 307-310.

insurance designed according to Islamic rules based on interest concerns.³³ In addition, some practical issues have been addressed and solutions and alternative applications have been suggested,³⁴ emphasizing that this system should be based on cooperative principles.³⁵

2. The Nature of the Islamic Insurance Contract

The theory and practice in the field of Islamic insurance diverge from each other. For this reason, analysing the nature of the Islamic insurance contract only from the theory or only from the practical aspect will not lead us to a sound conclusion. Considering the difference between theory and practice, it would be more appropriate to address the issue under two separate headings as "the nature of the Islamic insurance contract in theory" and "the nature of the Islamic insurance contract in practice".

2.1. The Nature of the Islamic Insurance Contract in Theory

Theoretically, the Islamic insurance system is a contract based on donation and solidarity. The equivalent of this in the classical contract theory of Islamic law is the contract of grant (*hibah*). However, even though the system is established on the basis of *hibah* (grant)³⁶ and cooperation, the contract is not completed in this way. When the transaction is analysed in detail from a *fiqh* point of view, it is seen that the system does not have a single/simple structure, but a mixed/compound structure. For this reason, before moving on to the qualifications of the contract, we will introduce the grant, proxy,

³³ See: Serdar Demirci, "Sigortacılıkta Yeni Bir Yaklaşım: Katılım Sigortacılığı", *İnönü University Law Review - IULR* 10/1 (2019), 26; Terzioğlu, *Sigorta Acentelerinin Konvansiyonel ve Tekâfül Sigorta Pazarlamasına Yaklaşımları Üzerine Uygulama*, 34-35. Terzioğlu states that there are some criticisms in the Islamic insurance system, especially against the *mudaraba* model. According to him, since the company acts as a working capital, the donation function is lost, the relationship between policyholders and operators loses its transparency, and therefore the system does not comply with Islamic principles. (Same article, s. 19).

³⁴ See: Yazıcı, *Tekâfül Sigortacılığında Ürün Geliştirme*, 81-86; Aslan, "Tekâfül Uygulamalarının Güncel Sorunları: Türkiye Piyasası İçin Bir Değerlendirme", 156-171.

³⁵ See: Elmacı, "Sigorta Kooperatifçiliği, Tekâfül ve Türkiye İçin Tekâfül Kooperatifçiliği", 49; Aslan, "Tekâfül Uygulamalarının Güncel Sorunları: Türkiye Piyasası İçin Bir Değerlendirme", 156. In addition, in the 12'th article of the final declaration of the workshop held by ISEFAM under the name "Tekâfül (İslami) Sigortacılık: Teori ve Uygulama", it was emphasized that the alternative of cooperative insurance, which operates according to Islamic principles, should be developed Türkiye as well. See: *Tekâfül (İslami) Sigortacılık: Teori ve Uygulama*, 176.

³⁶ It is understood that donation, which is sometimes referred to as *tabarru*, is used in the sense of grant in Islamic insurance contracts. Since all of the transactions such as will, waqf, acquittance, release, alms, commodate, gift, including donation, are all *tabarru'ât* contracts, but they are different from each other. Among them, the closest to the logic of donation in Islamic insurance contracts is the grant contract. For the differences between them, see: Abdulkadir Şener, "İslam Hukukunda Hibe ve Diğer Teberru Çeşitleri", *Diyanet İlmî Dergi [Diyanet İşleri Reislîji Yıllığı]* 20/2 (1984), 7-11.

and *mudaraba* contracts, which holds an important place in the structure of the system, according to the contract theory of Islamic law.

1. The Contract of Grant: Grant, which means to give and donate without return, is to give something (property or benefit) that can be utilised to someone else. The granted property ceases to be the property of the grantor. The grant can be one-sided or mutual. When it is one-sided, the grant is not binding. If it is conditional on being mutual, it takes the form of a collusion contract and becomes obligatory/binding for both sides.³⁷ Although it is permissible to withdraw from a donation, it is not permissible to withdraw in some cases such as mutual donation and the death of one of the sides.³⁸

2. The Contract of Proxy/Agency: The term "proxy," which means to delegate or assign a task to someone else, refers to the act of entrusting a legally permissible task that a person is authorized to perform to another individual for completion. After the contract is made, the proxy obtains the right to dispose of the proxy. The property left to the disposal of the agent is in the form of a trust, so the agent does not compensate for the damage that occurs without his fault. The agent can undertake the task for a fee. In this case, the proxy becomes a contract of *ijāra* (service) and the conditions of *ijāra* are valid in the contract. Accordingly, the contract becomes binding even though it was previously non-binding. The agent also takes on the status of "*al-ajir*", which means

³⁷ If there is no condition of reciprocity, the donation becomes a charity, and if there is a condition, it becomes a contract with a price (*uqūd muavazāt*). The return given without a condition does not make the grant a charity. See. Ayhan Hıra, "Klasik Fıkıh Kaynaklarında Hibeden Dönme Meselesine İlişkin Temel Yaklaşımlar, *The Journal of Academic Social Science Studies (JASSS)* 58 (2017), 238-239.

³⁸ Abū Ishāq Jamālūddīn Ibrāhīm b. 'Alī al-Shīrāzī, *al-Muḥazzab* (Lebanon: Dāru al-Kutūb al-'Ilmiyya, 1416/1995), 2/233-236; Abū al-Hasan Burhān al-Dīn al-Mergīnānī, *al-Hidāya sharḥ Bidāyat al-mubtadī*, ed. Muhammad Tāmīr (Cairo: Dāru al-Salām, 1433/2012), 3/1255, 1261-1263; Abū al-Walīd Muhammad al-Qurtubī, Ibn Rushd al-Khafīd, *Bidāyah al-mujtahid wa nihāyah al-muqtasid*, ed. Alī Muhammad Muawwaz (Lebanon: Dāru al-Kutūbī al-'Ilmiyya, 1425/2005), 709-714; Bahā al-Dīn 'Abd al-Raḥmān b. Ibrāhīm al-Maqdisī, *al-'Udda Sharḥ al-'Umda*, ed. Abdurrezzāq al-Mahdī (Beirut: Dāru al-Kitābi al-Arabī, 1429/2008), 375-376; Orhan Çeker, *İslām Hukukunda Akidler* (Istanbul: A.H.İ. Yayıncılık, 2006), 272-273. In the Hanafī madhhab, it is not permissible to withdraw from a grant made to one of the mahrams and one's spouse, but it is permissible to withdraw from a grant made to others. In the Mālikī, Shāfī and Hanbalī madhhabs, it is permissible to withdraw from a grant made to a child and grandchild, but not to others (See: *al-Muḥazzab*, 2/335; *al-Hidāyah*, 3/1262; *Bidāyah al-Mujtahid*, 713; *al-'Uddah*, 376). Hıra states that the principle in this regard is to withdraw from the grant in the Hanafī madhhab and not to withdraw from it in the other three madhhabs. For detailed information, see. Hıra, "Klasik Fıkıh Kaynaklarında Hibeden Dönme Meselesine İlişkin Temel Yaklaşımlar", 239-248.

"employee/worker". Consequently, the agent and the labourer are subject to different provisions in Islamic law.³⁹

3. The Contract of Mudaraba: The *mudaraba* contract, known as a profit partnership, is a partnership contract in which one of the sides gives capital and the other side operates and shares the profit between them. The side who operates the property is called *mudarib*. In this contract, the owner of the capital deserves the profit through his property and the *mudarib* deserves the profit through his labour. The capital is entrusted in the hands of the *mudarib*; when the *mudarib* operates the capital, a proxy comes into question. The *mudaraba* contract is one of the nonbinding contracts like other partnership contracts. However, the side who will leave the partnership must notify the other side beforehand. If each of the sides participates in the partnership with their own capital, it is not a *mudaraba* partnership, but a partnership of property (*sharikah al-amwâl*). A property partnership in which there is complete equality in capital and savings is called *mufawada* (*sharikah al-mufawadah*), while a property partnership in which there is no equality is called *'inân* (*sharikah al-'inân*). One of the sides can participate in the property partnership only through his capital and the other side can participate through both his capital and labour (management), and the partners deserve the profit according to the contract. Company property is in the form of a trust. The partners can make all kinds of legitimate transactions on the capital such as buying, selling, renting, *mudaraba*, etc. in order to earn profit.⁴⁰

Based on these contracts in Islamic law, when we look at the Islamic insurance contract in theory, we see a picture: Participants create a fund for mutual aid. In the process, the loss of the participant who is exposed to risk is compensated from this fund. Therefore, the participants and insurer are both insured. At this point, it is seen that the system is built on a co-operative basis. Participants give proxy to an expert company for the professional management of the fund. This company carries out the transactions related to the fund as a proxy for a certain fee. In other words, a proxy contract is made between the participants and therefore the company. However, according to *fiqh*, this transaction is not a contract of proxy, but a contract of *ijarah*, and the company is not an agent, but an *ajîr*.

³⁹ Shîrâzî, *al-Muhazzab*, 2/164-166, 167; Marghînânî, *al-Hidâyah*, 3/1129, 1153; Ibn Rushd al-Hafîd, *Bidâyah al-Mujtahid*, 685-686; al-Maqdisî, *al-'Udda Sharh al-'Umda*, 345-347; Orhan Çeker, *Fikih Dersleri* (Konya: Ensar Neşriyat, 2005), 156-160, 178-184.

⁴⁰ Shîrâzî, *al-Muhazzab*, 2/226-228; Mergînânî, *al-Hidâyah*, 2/907-912, 3/1223-1225; Ibn Rushd al-Hafîd, *Bidâyah al-mujtahid*, 631-634; al-Maqdisî, *al-'Udda Sharh al-'Umda*, 348-349; Ömer Nasuhi Bilmen, *Hukuk-ı İslâmiyye ve Istilâhât-ı Fikhiyye Kâmusu* (Istanbul: Bilmen Basım ve Yayınevi, undated.), 7/79-81; Çeker, *İslâm Hukukunda Akidler*, 208-210, 215-218.

On the other hand, the participants give a proxy to the company to invest the remaining money after the expenses incurred/to be incurred for the technical transactions related to insurance and transferred to the other fund, and the company operates the fund based on this proxy. Depending on whether the company has capital in this fund, the transaction is subject to different provisions in terms of *fiqh*. If there is no capital belonging to the company and the contract is based on operating the capital and sharing the profit, the transaction is a classical *mudaraba* contract. At the end of the contract, the capital is wholly owned by the participants and the profit is divided between the company and the participants.⁴¹ In this case, the operator cannot receive an agency fee because the company is a profit partner. If the fee was initially determined under the name of a proxy, the transaction is a contract of *ijāra*. Accordingly, the company is entitled to the wage in return for operating as an *ajir* (payment) but has no share in the profit. However, if the fund contains the capital of both the participants and the company, and the contract is also established in the form of the company's management of the capital and the sharing of the profit, then it is a partnership in *inān* (*sharikah al-'inān*), and the disposition of it must be according to the contract of *inān*. Therefore, the company is entitled to a share of the profits in exchange for its capital and work, the participants are entitled to a share in exchange only for their capital, and the principal belongs to the owners.⁴² However, due to the structure of the system, the money accumulated in the fund can be left as a reserve, to be used as a discount on the insurance fee in the following year, used for charity or distributed among the participants. The insurance company determines the type of savings in the fund; participants do not have any preference. The most appropriate option is to distribute the money accumulated in the fund between the participants in accordance with the partnership contract. Although the other three options make sense within the integrity of the system, they do not coincide with the spirit and structure of the partnership contract in terms of *fiqh*.⁴³

There is another problem here from an Islamic legal point of view: Although the fund, which is left for investment and where partnership is in question, the total amount

⁴¹ 'Abdullah b. Mahmūd al-Mawsilī, al-Ihtiyār li ta'lili l-Muhtār, ed. Muhammad Adnān Dervīsh (Beirut: Dāru al-Arḡam, undated.), 3/25.

⁴² According to the established rule in *fiqh*, a person can have a share in the profit in return for merchandise (capital), labor (work) or *damān* (risk). See. Alā al-Dīn Abū Bakr Ibn Masūd al-Kāsānī, *Bedā'iu's-sanā'i fī tartīb al-sharā'i* (Cairo: Dāru al-Hadīs, 1426/2005), 7/522; Muwaffaḡuddīn Abū Muhammad b. Qudāma al-Maḡdisī, al-Mughnī (Lebanon: Dāru al-Kutūb al-'Ilmiyya, 1429/2008), 4/95; Bilmen, *Hukuk-ı İslāmiyye ve Istilāhāt-ı Fikhiyye Kāmusu*, 7/84, 86.

⁴³ The problem can be overcome by giving the participants the right to choose one of these options when preparing the insurance policy and making savings according to the preference at the end of the contract.

of capital belonging to the company and the participants in this is known, it is not known which participant participated in the fund with how much money and how much each participant's share in the capital is. For this reason, the system involves a high degree of ignorance (*jahālah fāhishah*) from the participant's point of view.⁴⁴ However, according to *fiqh*, the amount of capital in a partnership contract must be known in order to prevent any controversy.⁴⁵

2.2. The Nature of the Islamic Insurance Contract in Practice

The priority and important thing for individuals in society regarding insurance is the premium amount (insurance fee) to be paid for the insurance policy and the service to be received in return for the policy. For this reason, any individual in need of insurance applies to the agency and pays the premium and obtains the policy after receiving the necessary information. The needy do not have any idea of creating an assistance fund with people who may be exposed to risk (like himself/herself) and utilising the money left in the fund. The needy one's thought is only to be compensated for his losses when he is exposed to risk. Regardless of the insurance system, it can be confidently stated that this is nearly always true in the society we live in.⁴⁶

When the Islamic insurance contract is considered from this point of view, it is obvious that the money collected in the fund is not a donation but participants deposit money into the fund in order to guarantee their risk, and that is obviously an insurance premium. The premiums are accumulated in a fund previously opened by the company who carries out insurance activities and whose criterias are determined.⁴⁷ The fact that the company is specialised in the field of insurance and operates in this field demonstrates that the company does this business as principal and for profit, not by proxy.⁴⁸ Therefore, the system is not based on the principle of donation and charity, but on the principle of guaranteeing the risk for the participant and making a profit for the company. For this reason, the Islamic insurance contract, as Hacak correctly points out,

⁴⁴ It is an unanimously accepted fact that excessive ignorance (*al-jahālah al-fāhishah*) will invalidate the contract. See: Mahmut Samar, *İslamî Finans Ürünlerinde Akitlerin Birleştirilmesi* (Istanbul: Hikmetevi Yayınları, 2019), 158.

⁴⁵ Kāsānī, *Bedā'iu's-sanā'i* 7/517; Ibn Qudāma, *al-Mughnī*, 4/103; Bilmen, *Hukuk-ı İslāmiyye ve İstilāhāt-ı Fıkhiyye Kāmusu*, 7/82-103.

⁴⁶ In fact, it can be said that this situation is valid for all societies since the basic logic of insurance, the system, the view of insurance and the need for it are approximately the same all over the world.

⁴⁷ Hacak states that the premiums are actually collected by the company and that the fund, which is shown as a legal entity within the company, is included in the company's budget (Hacak, "İslami Sigorta (Tekâfül) Ticari Sigortadan Farklı mıdır?", 104).

⁴⁸ Hacak, "İslami Sigorta (Tekâfül) Ticari Sigortadan Farklı mıdır?", 100, 104, 109.

is a contract with consideration and depends on the provisions of the contract of sale.⁴⁹ In this case, the aspect of the contract is security⁵⁰, and it has a simpler structure compared to the Islamic insurance contract that is in theory. However, since the transaction takes place between many people, the contract is not a single and simple structure in the classical sense, but again has a complicated structure because the contract does not end when the customer pays the premium and receives the policy. When the risk is exposed, issues related to the assurance such as the detection and compensation of the damage continue during the guarantee period. In addition, compensation is covered by a fund consisting of premiums paid by people. After the end of the contract period, if the company distributes the remaining amount among the participants or counts it as a discount on the following year's premium, this is a donation/treat of the company to its customers.

Even if the premiums paid by the participants are said to be donations, this contract will not go beyond being a conditional donation, which is inevitable to turn into a contract with consideration and then into a partnership contract with the payment of compensation during the process. In this case, the contract is not in a single and simple structure; it has a mixed structure that includes transactions such as conditional donation, sale, contract of leasing (contract of *'ijara*), and contract of partnership. According to this mixed structure, the contract starts with a conditional donation,⁵¹ and when the participant is exposed to risk and compensated for the loss, it turns into a contract of *mu'awadah* (*'aqd mu'awadah*). When the company utilises the remaining money after expenses in a separate fund for investment purposes, a partnership contract is established between the participants and the company. As above, after this stage, the contract, which should be operated according to the principles of partnership, operates according to the criteria determined by the company due to the structure of the system.

⁴⁹ Hacak, "İslami Sigorta (Tekâfül) Ticari Sigortadan Farklı mıdır?", 105. Hacak states that, this contract is subject to the provisions of the contract of sale as a rule, in other words, it is an equivalent contract and it is not possible to save it from being like that; and even according to the most optimistic approaches, the contract is evaluated as a "mutual donation/gift in exchange for equivalent".

⁵⁰ Zarqā, et al. *İslâm Düşüncesinde Ekonomi, Banka ve Sigorta*, 224, 269; Beşer, *Sosyal Riskler Sigorta ve İslam*, 170-171. Even though the topic of contract of insurance is safety is criticised by faqihs who do not allow the insurance contract because it is not considered as a merchandise, Zarqā and Bashar state that safety is an important benefit, and that is considered as a *mutaqawwim* merchandise by the majority of faqihs (same article). Especially in our century, the acceptance of safety as a benefit and the benefit as a merchandise is a suitability with the basic principles of fiqh; otherwise, it is a contradiction.

⁵¹ In fact, the logic of donation in this system and in fiqh do not coincide with each other since according to fiqh, the donated goods completely leaves the ownership of the donor after the completion of *ijab* and acceptance, but in this system, the ownership continues. In addition, according to fiqh, the donation of goods is unrequited, whereas here, the goods are donated with the expectation of provision.

3. Evaluation

When all this information is taken into consideration, it is seen that we are faced with a very complex and mixed contract that includes interrelated transactions and starts with a conditional donation, turns into a contract with consideration and a partnership contract during the process, has a contract of *ijārah* at every stage. Therefore, it would be extremely difficult to place the Islamic insurance contract among the named/typical contracts in the classical contract theory in *fiqh*, and would be wrong to evaluate its qualities according to the classical contract theory.

In the beginning, the principle of singularity of the contracts was adopted in Islamic law as a principle as in all legal systems.⁵² However, today, where globalization and digitalization are dominant and imposing in every field, economic life and commercial relations have taken on a multi-dimensional and complex structure due to social and technological developments. Even though contracts continue to exist in a single and simple structure in modern economic life, contracts especially in the financial sector have a complex structure. This mixed structure is known as compound/combined financial contracts in the sector. Compound contracts are defined as combining more than one typical financial contract, without prejudice to their qualities, that the existence and validity of one depends on the other.⁵³ These contracts arise from the merger of at least two or more typical contracts, without changing their qualities and making the validity of one dependent on the other. It includes a bond that binds together pledges and typical contracts aimed at achieving a financial goal, harmoniously and progressively, as a single contract.⁵⁴

It fits with financial contracts consisting both in theory and practice of Islamic insurance contract features and qualities. For this reason, evaluating the Islamic insurance contract within the extent of compound financial contracts will lead to more accurate results while dealing with aspects such as conditional donation, sales contract, proxy, *ijārah*, partnership contract, *mudaraba*, *gharar* and ignorance. It is important to consider from this perspective the permissibility and its compatibility with Islam. Since, like other products in the interest-free finance sector, this product arose due to a need. As in Beşer's words, the new, modern, complex and compound contracts brought by these arising products should be considered in terms of purpose and macro dimensions. Such

⁵² Ahmet İnanır, “İslâm Hukuk Düşüncesinde Bileşik (Mürekkep) Mâlî Sözleşmeler”, *International Journal of Islamic Economics and Finance Studies* 3/1 (01 March 2017), 10; Samar, *İslamî Finans Ürünlerinde Akitlerin Birleştirilmesi*, 196.

⁵³ İnanır, “İslâm Hukuk Düşüncesinde Bileşik (Mürekkep) Mâlî Sözleşmeler”, 12; Samar, *İslamî Finans Ürünlerinde Akitlerin Birleştirilmesi*, 137.

⁵⁴ İnanır, “İslâm Hukuk Düşüncesinde Bileşik (Mürekkep) Mâlî Sözleşmeler”, 12.

contracts should be considered in accordance with *fiqh*, as long as they do not contain features that invalidate the contract such as interest, *gharar*, loss, deceiving, or ignorance.⁵⁵

Conclusion

Islamic insurance, which emerged as an alternative to conventional insurance, refers to *takaful* insurance in today's financial sector. In Türkiye, with the use of the concept of participation insurance instead of *takaful* insurance in the relevant regulation, this concept has become widespread in the insurance sector. Therefore, what is meant by Islamic insurance is *takaful* or in another name, participation insurance.

Islamic insurance initially started with a simple and straightforward structure on a co-operative basis, but over time it has developed into a complex structure. With this complex structure, it differs from the mutual/cooperative type insurance established on the basis of mutualization.

There is no fundamental difference in origin between the Islamic insurance system, which is said to be based on donation and mutual aid and has no profit motive. In its current form, Islamic insurance is a system purified from the un-Islamic features of conventional insurance.

The Islamic insurance contract, which started in a simple structure based on need and as a result of interest sensitivity, but today it has different characteristics in terms of theory and practice. However, in any case, this contract has a mixed structure that includes many interconnected transactions such as conditional donation, sale, partnership and *ijārah*. Although each of the contracts within it is considered a typical contract when considered individually, the Islamic insurance contract with its mixed structure has no equivalent in the category of typical/named contracts in *fiqh*. In terms of its structure, it is more similar to the contracts known as compound/combined contracts in modern economics. For this reason, the Islamic insurance contract is not a typical and singular contract; it is an atypical and compound contract, and these qualities should be taken into consideration when dealing with aspects such as its religious ruling, structure, and features.

In addition, it is clear that those who are active in this field should put forward a contract structure that deserves the name "Islamic" in every aspect, taking into account the criticisms against the Islamic insurance contract.

⁵⁵ Zarqā et al. *İslâm Düşüncesinde Ekonomi, Banka ve Sigorta*, 209-210; Beşer, *Sosyal Riskler Sigorta ve İslam*, 151-152; İnanır, "İslâm Hukuk Düşüncesinde Bileşik (Mürekkep) Mâlî Sözleşmeler", 9; Samar, *İslamî Finans Ürünlerinde Akitlerin Birleştirilmesi*, 327-328.

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