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# Islamic Insurance and Takaful Insurance Models*

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**Abstract**: Since the early ages, people have developed many institutions related to risk sharing and social solidarity. The most advanced of these is the current insurance system. The existence of social security institutions has been known in Islamic societies since the first day. In Islamic law, there are many practices that recall insurance in the theoretical and historical context. One of the concepts in present day is takaful. Takaful is an insurance system based on Islamic principles. There are several models that enable Takaful insurance to operate. One of them is the hybrid model that combines *mudaraba* and *wakalah*. The participation of the participants in the system and the directing of the income are done as in the previous systems. In the hybrid takaful model, the takaful operator receives a percentage of the participants' donations. This part is like the *wakalah* model. However, it also receives a predetermined percentage of the income from investments. This includes the *mudaraba* takaful, resulting in a hybrid takaful model. Conventional insurance systems are considered contrary to Islamic principles due to haram, interest (*riba*), gambling and risk. For this reason, the conventional insurance system cannot adequately address those who adopt an Islamic perspective. This situation hinders the development of insurance in countries that adopt Islamic principles. In this study, the functioning of takaful insurance in the hybrid model center will be discussed. In addition, the legitimacy of takaful will be examined according to the current insurance system in terms of fiqh.
**Keywords**: Islamic Insurance, *takaful*, *mudaraba*, *wakalah*, hybrid model.

## Introduction: Islamic Insurance in Theoretical and Historical Context

Practices on risk sharing, which are the essence of insurance, date back to before Christ. It is accepted that these are based on Ancient Egypt and Babylon, hence the laws of Hammurabi. In these laws, it was even made a law that all the caravans should pay together by cooperating for the losses incurred by the trade caravans on the way. It is also known that Hindus make a loan agreement in the form of insurance. It can be said that insurance existed as an idea in pre-BC practices. However, it is possible to see the core of today's fixed premium payment insurance concept in Mediterranean maritime trade after Christ. "Sea loan" and "conditional sales establishments" found in Greek and

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Roman maritime trade are such practices. In today's sense, it is accepted that insurance emerged in Italy in the 14th century through maritime trade. Especially in the 18th century, it showed an important development in England. Since the 19th century, insurance has developed a system that includes all kinds of risks and many instruments, including reinsurance institutions. In the 20th century, it has become impossible to trade without insurance.[1]

In the historical context, it is seen that remarkable practices and institutions have emerged in risk sharing from the first day in Islamic societies. Some of them are based on legal theoretical basis, while others are commercial and customary structures. We can easily say that very important social security institutions have emerged in Islamic societies since the first periods. Although these do not fully represent today's insurance, it can be said that there was important theoretical and institutional thought in the fields of risk sharing and social security at that time. Legal concepts and institutions such as *tenasur*, *āqile*, *hilf*, *wala*, which have a strong theory in the background, have an important place in the history of fiqh.[2] One of the most concrete examples of this in the history of Islam is the articles on financial responsibility mentioned in the Medina document based on the *āqile* system. One of the articles in this contract is as follows: "Muslims will not leave anyone under heavy financial responsibilities and burdens among themselves in this state and will jointly help him according to the customs (*ma'ruf*)."[3]

It is also known that in the historical process, the foundation institution also functions as risk sharing in practice. For example, the *Avariz* foundations, which were the most important social security institution for the people of the city and village in the Seljuk and Ottoman periods, are like this. The income of these foundations was used for disasters such as fire, earthquake, flood, epidemic diseases and for the needs of poor widows and orphans. These foundations have become a large institution of social assistance, solidarity, and risk sharing, including some public services. In the Ottoman Empire, *futuwwa* and guild (*akhism*) institutions, which were social assistance associations, were based on social solidarity and risk sharing. All these were performing insurance-like functions in their own time.[4]

While the *Āqile* system was based on the t*riba*l system in the early days, when it came to the Omar period, the divan organization was established and replaced it. As a matter of fact, Hanafis accept that as a result of the search for sustainable social solidarity, after a certain time, the t*riba*l system was abandoned, and the divan system was adopted. In the historical process, this system has turned into professional solidarity. In places where this is not the case, it has been accepted that people can form a unity of solidarity and assistance and organize themselves in *āqile* with their own oaths (*hilf*) and mutual agreements. At this point, Hanafi jurists refer to the practice called *hilfu'l-fudûl*, in which the Prophet participated in his youth.[5]

1 Arseven, *Sigorta Hukuku*, 14; Hacak-Gürbüz, "İslami Finansta Sigorta ve Katılım Sigortası (Tekâfül)", 302-303.
2 Hacak-Gürbüz, "İslami Finansta Sigorta ve Katılım Sigortası (Tekâfül)", 303.
3 Muhammed Hamidullah, *el-Vesâiku's-siyâsiyye*, 59-60.
4 Hacak-Gürbüz, "İslami Finansta Sigorta ve Katılım Sigortası (Tekâfül)", 304-305.
5 Hacak-Gürbüz, "İslami Finansta Sigorta ve Katılım Sigortası (Tekâfül)", 304

An important concept in this context is the *Mawla'l-muwalat*, which aims to enable new Muslims from non-Arab nations to participate in social solidarity in the Islamic society. This is the vela bond, which is a social institution established by contract. The Prophet said, "The maula (freed slave) of a nation is one of them, and their sworn contractors (*halīf*) are from them."[6] According to Hanafis, the purpose of the sworn contractors (*halīf*) mentioned in the hadith is *mawla'l-muwalat*; because the Arabs confirm the *muwalat* contract with an oath. A person who chose Islam said to a Muslim citizen of an Islamic country, "Be my protector. If I commit a murder, you will pay a blood price (*diyah*) on my behalf, and when I die, you will inherit me", and if he accepts this, it is considered that a mutual agreement has been established between them. Thanks to this contract, the person who holds the right of guardian has the responsibility to pay his blood price (*diyah*) together with his *āqila* in case the contracted mawla commits a crime. On the other hand, in case of death of the mawla, if there are no close relatives, he gets the right to inherit his inheritance. Vela is a kind of social assistance and security institution that enables the new convert to Islam in the early stages of Islamic society to gain a legal status and to benefit from some rights related to t*riba*l solidarity.[7]

*Muvalat* is one of the closest examples to the process of assuming a risk that may occur in the future against a possible price. As a matter of fact, *muvalat* is a contract with the aim of solidarity and risk sharing, and it is a mere donation and the conditions in specific contracts are not sought in this. In addition, the *muvalat* contract was not criticized in terms of *riba* and *garar*, nor was it criticized in terms of the fact that the checker here is for a fee (*daman*). Some researchers accept insurance or risk sharing as a natural and constant need in terms of Islamic law and say that it is legitimate for insurance companies to receive a price for the cost they offer.[8]

This institution, which is accepted as legitimate by the Hanafi school, means that these people are included in the social security and risk sharing network of the society at that time.[9] Thanks to this contract, the person who gives the assurance becomes the heir of the person who gains the assurance, within certain rules, as a reward for the assurance he has given.[10] This contract has been seen as being exchange (*ivad*) in terms of meaning and in the form of a donation in a sui generis. However, if one of the parties pays one of the agreed prices, the contract becomes exchange. However, when approached from the perspective of some contemporary researchers, the probability of *garar* and *riba* in this contract will be higher than in insurance.[11] However, classical Hanafi law accepted this.

Contemporary insurance law has accepted that the things exchanged in the insurance contract are the premium and the insurance protection. The concept of daman in Islamic law evokes the meaning of insurance protection. Ali al-Hafif and some researchers put forward the view that the amounts exchanged in commercial insurance are the compensation responsibility (daman) undertaken by the insurer against the

6 *Müsned*, IV, 340.
7 Şükrü Özen, "Velâ", TDV İslâm Ansiklopedisi, https://islamansiklopedisi.org.tr/vela (18.11.2021).
8 Hacak, "İslâm Hukukunda Sigorta", 47.
9 İbn Adibîn, *Reddü'l-muhtâr*, VI, 119.
10 Hacak-Gürbüz, "İslami Finansta Sigorta ve Katılım Sigortası (Tekâfül)", 304).
11 Hacak, "İslâm Hukukunda Sigorta", 41.

insurance premium, that is, insurance protection in a sense. With this proposal, they wanted to answer the claim that there are illegitimate transactions such as *garar*, *cahalah* and *riba* in the insurance contract. Although daman is of a different nature from the insurance amount, as a result, it is the insurer's commitment to cover or compensate the loss arising from the danger. According to this theory, one of the costs is the premium and the other is the daman, that is, the compensation and guarantee of the loss. The insured does not necessarily demand to buy a property in return for the premium. From this point of view, *riba* cannot be mentioned in this contract since the prices are not of the same type. Again, the claimed *garar* will almost disappear after the insured value and danger are determined in the insurance contract. On the other hand, most researchers argue that insurance is not a exchanged paid contract, but a donation contract, based on the principle that a daman in Islamic law cannot be paid for. Starting from the aqila system, this thought formed the basis of the *takaful* system. In addition, the *kafalah* contract, which is one of the evidences for the legitimacy of *takaful*, is also donated.[12]

One of the contracts used as theoretical evidence for the legitimacy of Islamic insurance is the *kafalah* contract. As a matter of fact, the word *takaful* comes from the same root as *kafalah*. The relationship of the *kafalah* with the *daman* should also be considered here. As a matter of fact, in the contract of *kafalah*, there is a daman on a debt that has already arisen. However, making a *kafalah* contract for a debt that is unknown at the time of the contract and will arise later is considered permissible by most *fiqh* scholars.[13] But, there is a difference between a *kafalah* contract and an insurance contract. While the *kafalah* gives the guarantor the right of recourse, the insurance contract is a new type of contract that is born with the protection of the debt (*daman*) and does not have the right of recourse afterwards. The biggest problem here is that *kafalah* is an unrequited contract made for the sake of Allah and it is not permissible to charge a fee for it. Ali al-Hafif answered this question with the explanation that it would be sufficient for the process to be accepted by being settled in the custom.[14]

In classical *fiqh* works, it is not directly encountered with a type of contract that has the nature of insurance in today's technical sense or is exactly similar to it. For this reason, there is no clear verdict regarding the provision of such a contract. However, there are some types of contracts and risk sharing that are similar to different types of insurance. In the current sense, the first information in the *fiqh* literature on insurance was revealed by Ibn Abidin (d. 1252/1836). In relevant places, Ibn Abidin did not analyze the nature of the insurance system in depth but looked at the issue from the point of view of fatwa and evaluated the issue in the context of the transactions of the non-Muslim insurance agency, which is *musta'men* (receiving a temporary residence visa) in an Islamic country. It was not permissible for these agencies to borrow money to pay insurance compensation when the risk occurred, and for a Muslim to receive the insurance fee from the insurance agency, as Islamic law could not base it on the classical contract theory. Therefore, he did not try to analyze the issue from a technical point of view and explain it theoretically. This fatwa of Ibn Abidin, which had a

12 Hacak, "İslâm Hukukunda Sigorta", 42, 46.
13 Ali el-Hafîf, *et-Te'mîn ve hükmühû*, 56.
14 Ali Hafif, *et-Te'mîn ve hükmühû*, 20, 54-55; Hacak, "İslâm Hukukunda Sigorta", 46.

negative view on insurance, was influential in the Islamic world for decades. Although there were those who expressed an opinion in the direction of permissiveness in Egypt in the 1900s, the in-depth analysis of the issue was delayed. In this regard, Ali al-Hafif and Mustafa Ahmed ez-Zerkâ were the first to deal with the issue in its real nature, both in its historical context and theoretically within the framework of Islamic Law contract theory.[15]

Today, possible commercial risks and protection systems against these risks have also differentiated. With these changes, people started to apply for different social security models. Insurance contracts are one of these modern applications. It is seen that Muslims do not prefer this type of insurance system because the current conventional insurance system poses some problems in terms of Islam. This situation has enabled the Muslim community to develop alternative insurance systems that are suitable for them over time. Islamic insurances produced in the process appear as an alternative to conventional insurance systems with the names of participation insurance or *takaful* insurance.

*Takaful* insurance is an insurance system based on Islamic principles. There are many models that enable *Takaful* insurance to operate. One of these models is the hybrid model that incorporates the *mudaraba* and *wakalah* model. The hybrid model operates as a mixture of *mudaraba* and *wakalah* models. The inclusion of the participants in the system and the directing of the income work as in the previous systems. In the hybrid *takaful* model, the *takaful* operator receives a percentage of the participants' donations. This part is similar to the *wakalah* model. However, it also receives a predetermined percentage of the income from investments. This includes the *mudaraba takaful*, resulting in a hybrid *takaful* model. Conventional insurance systems are seen as contrary to Islamic principles because they carry *riba*, gambling and *garar*. For this reason, the conventional insurance system cannot adequately address those who adopt an Islamic perspective. The contradiction of the conventional insurance system with Islamic principles prevents the development of insurance in countries that adopt Islamic principles. In this study, the functioning of the *takaful* model will be discussed. In terms of fiqh, the advantages or disadvantages of the current insurance system will be examined. There are many previous studies on *Takaful*.[16]

## I. Insurance

Insurance, as its word origin, comes from the Italian word "sicurta". It started to be used as "sigorta" in Turkish.[17] Insurance has been subject to different definitions as a concept. Insurance, in the first sense as a legal term, means that the insurer undertakes to pay compensation or to make other actions due to certain events occurring in the life span of one or more persons or in case of a possible danger that violates a monetary interest of the insured in return for the premiums paid by the insured (Turkish Commercial Code, art. 1263). However, there was no consensus on the definition of insurance contract.[18] One of the main reasons for this situation can be seen as the fact

[15] İbn Âbidîn, *Reddü'l-muhtâr*, IV, 170; Zerkâ, *Akdü't-te'mîn*, 21-23; Hacak, "İslâm Hukukunda Sigorta", 32-35; Hacak-Gürbüz, "İslami Finansta Sigorta ve Katılım Sigortası (Tekâfül)", 305.

[16] Türkiye'de takâful literatürü için bk. Mahmut Samar, "Türkiye'de Katılım Sigortacılığı (Tekâfül) Literatürü", *İlahiyat Akademi: Altı Aylık Uluslararası Akademik Araştırma Dergisi*, 2021, sayı: 13, 97-122.

[17] Arseven, *Sigorta Hukuku*, 3.

[18] Kender, *Türkiye'de Hukuki Sigorta Hukuku*, 163.

that conventional insurance is not a uniform insurance system and that it can be made in different ways.[19] There is no common definition among the world's doctrines regarding the insurance contract.[20] Article 1401 of the sixth book of the Turkish Commercial Code, titled Insurance law, is defined as follows: "Insurance contract is a contract in which the insurer undertakes to compensate for a danger, risk, which harms the person's measurable interest in money, in return for a premium, or to pay a money or take other actions due to the life span of one or more persons or due to some events that occur in their lives."[21] According to the Insurance Association of Turkey, the definition of insurance is as follows:

"Insurance is a risk transfer system in which the amount collected through the payment of a certain amount of money by people facing the same type of danger is used only to cover the losses of those who actually suffered losses as a result of the realization of that danger. Thanks to this system, people share their measurable monetary losses, which may be caused by the dangers they face, through the premiums they have paid in relatively small amounts."[22] Based on these definitions, insurance; It can be summarized as "a contract made by a person who wants to secure himself to be protected from possible risks in return for the premium paid". It is possible to evaluate the main insurance elements that should be emphasized in the definition as insurance premium, danger-risk, indemnity paid to the insured as a result of problems, and contract. Now we can briefly explain them. Premium is the amount of money that the insurer pays the indemnity to the insurer in case of the realization of the danger that is the subject of the insurance, or the debt that forms the basis of the price, to the insurer at once or in installments. This is also called the insurance fee. By law, the premium must always be paid in cash.[23]

One of the important elements in insurance is the concept of risk (danger). For an insurance contract to take place, there must be foreseen risks. In the absence of any risk, an insurance contract is not formed and there is no need for such a contract.[24] The risks-hazards that must be present in the thing to be insured have certain characteristics. These hazards must be hazards that are likely to occur. The hazards must not have occurred before the contract of insurance. The hazard must not be specific to a particular area. And the probability of the danger occurring should not be too high.[25] There were some who grouped risks according to their differences and diversity. For example, a distinction is made between economic risks and physical risks. The first refers to the dangers to the property of the person, and the second to the physical existence, that is, to the health.[26]

The amount to be paid by the insurer as a result of the realization of the risk subject to the insurance contract is the compensation amount. This amount varies according to the degree of fault of the parties. For example, in the event of the

19 Çeker, *Sigorta Hukuku*, 57.
20 Kender, *Türkiye'de Hususi Sigorta Hukuku*, 163.
21 Özbolat, *Temel Sigortacılık*, 84.
22 https://tsb.org.tr/tr (Erişim Tarihi: 22.09.2021.)
23 Kender, *Türkiye'de Hususi Sigorta Hukuku*, 235.
24 Atalay, *Türk Hukukunda Sigorta Sözleşmesi*, 35.
25 Atabek, Reşat, *Sigorta Hukuku*, 6.
26 Beşer, "İslâm Şeriatı Açısından Sigorta", 845.

realization of the risk, the insured must notify the insurer without delay. If the insured delays the notification without any force majeure, this situation is considered as the fault of the insured.[27] The contract, the source of debt, is the most important of the legal transactions and covers an important part of the actions of the people that are the subject of law. Contracts, which constitute one of the oldest legal institutions recognized by humanity, are accepted as an important indicator of the course of freedom given to the will of the individual in terms of the development of the history of civilization.[28]

## II. Islamic Insurance/Takaful Models

Islamic insurance is a form of insurance known as participation insurance or *takaful* insurance. *Takaful* is an Arabic word derived from the root "k-f-l" and means mutual assurance, assistance, solidarity.[29] As a term, *takaful* is "an agreement made by a group of individuals to form a non-profit fund with its own independent account in order to share the losses of possible dangers."[30] The term *takaful* is used as the equivalent of Islamic insurance systems in the financial literature. The definition of Islamic insurance systems by AAOIFI is "Islamic Insurance is the agreement of persons who are exposed to certain risks on the compensation of losses that will arise from the realization of these risks."[31] As a result, *takaful* is based on risk sharing, not risk transfer.

*Takaful* insurance is an Islamic insurance system and operates on the basis of cooperation and assistance. There are different models that enable the operation of this insurance system. *Takaful* insurance is an Islamic insurance system that can be applied in many different ways. *Takaful* insurance, which adopts the cooperative model, has types that adopt the *mudaraba* model, the *wakalah* model and the *waqf* model. In our country (Turkey), *mudaraba*, *wakalah* and hybrid models are actively used. A brief evaluation of the existing models is as follows:

### A. *Takaful* with the *Mudaraba* Model

*Mudaraba* is referred to as a labor-capital partnership in the jurisprudence. A partnership is established when one of the parties to the contract puts forth its efforts and the other party gives its capital.[32] The profit obtained as a result of the partnership is shared as determined by the parties at the beginning. If a loss occurs as a result of the partnership, it is lost from the labor of the mudarib and from the capital of the shareholder. Material loss is covered by the shareholder, mudarib does not contribute to the material part of the loss.[33] This contract continued to be used actively in the period of the *Sahaba* and in the first generations without any discussion.[34] Recently, it has started to be used actively in current trade areas as well as its classical usage.

In the *Takaful* system, the insurer (insurance company) puts forth labor, and the insured (insurance investors / fund management) puts forth capital. In this way, the

27 Kender, *Türkiye'de Hususi Sigorta Hukuku*, 280-284.
28 Karaman, *Mukayeseli İslam Hukuku*, 2/51; Karaman, "Akid", *DİA*, 2/251.
29 Fîruzâbâdî, *Kamus Tercümesi: el-Okyanüsü'l-basît fî tercümeti kâmûsi'l-muhît*, 4742, 4743.
30 Karadâğî, *et-Te'mînü't-tekâfülî ell-İslâmî*, 213.
31 AAOIFI: *Faizsiz Bankacılık Standartları*, çev. Mehmet Odabaşı, İshak Emin Aktepe, TKBB Yayın No: 2, 2012, 523.
32 Kallek, "Mudarebe", *DİA*, 30/359-363.
33 Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, 387.
34 Kallek, Cengiz: "Mudarebe", *DİA*, 30/359-363.

parties become partners in profit and loss. This model can be explained simply as follows. First, a *takaful* insurance company is established by the shareholders. This company starts issuing insurance policy and starts to accumulate donations received from the participants in the fund. The duty of *Takaful* company is to make profit by using the collected fund in investment fields. At the end of the period, the ratio of the surplus value to be shared in the fund should be determined by contract at first. In the *mudaraba* model, the company is responsible for the collection of contributions, their operation and administration. Direct and indirect damage expenses and re*takaful*/reinsurance expenses incurred during the period are covered by the participant funds, while other expenses are covered by the capital of the company.[35]

**B. *Takaful* with the *Wakalah* Model**

In the dictionary, *wakalah* is known as "to trust someone, to hand over the job to someone reliable and take responsibility".[36] In fiqh, it refers to the authority of a person to take legal action on his own behalf and this authority.[37] In a sense, a power of attorney (*wakalah*) is an agreement made by assigning another person to represent him/herself. The most important feature of the contract is the transfer of the power of representation to another person.[38]

The operation of *Takaful* insurance with the *wakalah* system is divided into two as paid *wakalah* and unpaid *wakalah*. When the *wakalah* is used as an absolute, the free version is usually understood. In this type of *wakalah* contract, mutual consent of the parties is sufficient. However, sects have different approaches to paid attorneyship. Paid and free *wakalah* are different from each other. All sects are in agreement that the express agreement of the attorney is not required in the free *wakalah*. However, according to Shafiis, in paid *wakalah*, the agent must clearly declare that he accepts the contract.[39] In this type of contract, the proxy is likened to a kind of co-worker (*acir mushtarak*) and the provisions of *icare* are applied. In the *takaful* model based on the paid *wakalah*, the *takaful* company receives an attorney's fee for the technical transactions it performs and also for the operation of the *takaful* fund. The attorney's fee received must have been determined at the beginning.[40]

The fact that the paid *wakalah* we mentioned above is accepted as a co-worker (*acir mushtarak*) is also valid in terms of AAOIFI standards. According to these standards, *takaful* can be done by proxy for a predetermined fee. If the fee is not determined, the payment of the attorney is made based on the fees given to the similar work.[41] In the *takaful* method, which is made with the free *wakalah* method, the company does not receive an additional attorney's fee. For this reason, it is not a preferred proxy method. In addition, in both types of *wakalah*, the loss is covered from the *takaful* fund.[42]

35 Aydemir, "Hayat Sigortacılığında Tekaful (Katılım Sigortacılığı)", 55.
36 Fîrûzâbâdî, *el-Kâmûsu'l-muhît*, 4/452.
37 Semerkandî, *Tuhfetü'l-fukahâ*, 3/227; Aybakan, "Vekâlet", TDV İslâm Ansiklopedisi, https://islamansiklopedisi.org.tr/vekalet (21.11.2021);
38 Zerkâ, *el-Medhal*, 1/430; Karaman, *Mukayeseli İslam Hukuku*, 195.
39 Aybakan, "Vekalet", *DİA*, 43/1-6.
40 Karadâğî, *et-Te'mînü't-tekâfüliyyü'l-İslami*, 355.
41 *el-Meayîru'ş-Şeriyye (AAOIFI)*, 327.
42 Karadâğî, *et-Te'mînü't-tekâfüliyyü'l-İslâmî*, 356.

### C. *Takaful* with Hybrid Model

The hybrid model operates as a mixture of *mudaraba* and *wakalah* models. In this model, the *takaful* operator receives a percentage of the donations from the participants. This part is similar to the *wakalah* model. *Takaful* operator also receives a percentage share of the profit from investments. In this respect, a partnership is formed between the *takaful* company and the participants. In this respect, it is similar to the *mudaraba* model. This method has been named as the hybrid model because it incorporates both the *wakalah* and *mudaraba* models. This model is actually a *wakalah* method and only in return for the operation of the fund, the *takaful* company receives a share from it as a mudarib. In the *wakalah* method, after the company receives a certain attorney's fee, the remaining contribution is directed to investment and the company also receives a share from the investment incomes realized through the *mudaraba* method. It has become a preferred model in recent years. Although it is discussed in terms of Islamic principles, it has been stated that it is more legitimate than other models.[43]

According to the regulation numbered 60186 published in the official gazette in Turkey in 2017, the hybrid model is defined as follows: "The hybrid model is the model in which the company receives an attorney's fee in exchange for risk fund management and other technical and legal transactions related to insurance. In this model, the entire technical profit is distributed to the participants; but the investment profit is shared between the participant and the company at a predetermined rate."

In this model, the *wakalah* method is adopted for technical, that is, insurance transactions, and *mudaraba* method is adopted for financial investment transactions. Expenses are covered from the fee agreed for the company to receive at the time of the contract. After deducting the expenses from the fee received, the company invests the remaining fee using the *mudaraba* method.[44]

## III. Takaful Insurance: Objections and Answers from a Fiqh Perspective

As a result of the discussions, three different approaches have emerged in the subject of insurance today. The first is those who are against insurance in all its forms. This group, whose numbers are very few and gradually decreasing, argues that all insurance transactions are haram, regardless of whether they are commercial or cooperative (participation). The second group is those who make a sharp distinction between commercial (conventional) insurance and cooperation (participation) insurance and argue that commercial insurance is haram and mutual insurance is legitimate. The majority of researchers expressing their opinions on this issue are in this group. The third is those who claim that there is no significant difference between commercial insurance and mutual insurance, contrary to what is supposed. Therefore, they argue that not only mutual insurance but also commercial insurance does not contradict Islamic principles, and that they are all risk sharing institutions. This view has been expressed by contemporary Islamic jurists such as Mustafa Ahmet al-Zerkâ, Ali al-Hafif, Muhammed al-Bahiy, Muhammed Necatullah Siddiki.[45] Since the majority

[43] Aydemir, "Hayat Sigortacılığında Tekaful (Katılım Sigortacılığı)", 57-58.
[44] Yıldırım, "Tekafül (İslamî) Sigortacılık Sisteminin Dünyadaki Gelişimi Ve Türkiye'de Uygulanabilirliği", 53.
[45] Hacak, "İslâm Hukukunda Sigorta", 37-38.

opinion among these views is preferred in almost all the Islamic world, alternative mutual assistance insurance has been sought and as a result, a type of Islamic insurance called *takaful* has emerged. *Takaful*, which is based on cooperative insurance in terms of basic logic, has reached an institutional dimension by developing the idea of cooperation. In recent years, it has also introduced some new models integrated with Islamic financial institutions.

### A. *Garar* and *Cahalah*

*Garar* literally means error, risk, uncertainty.[46] Although there are different definitions for the meaning of the term, it has been defined concisely as "the contracting relationship is based on an insecure and uncertain situation and the end is uncertain."[47]

In the classical period, fiqh scholars found evidences from the Qur'an, sunnah and ijma that contracts of sale involving *garar* were prohibited, and applied the prohibition of *garar* to all contracts with a common cause by qiyas.[48] In legal transactions, and especially in contracts that impose debts on both parties, the subject of the contract must be known and specific. In the Qur'an and Sunnah, the principles of openness, honesty and trust have been emphasized in contracts.[49] Although ignorance is used in the same sense as *garar* in many fiqh works, there is a nuance that distinguishes ignorance from *garar*. *Garar* is something that is unknown whether it can be obtained or not. *Cahalah* is the state without uncertainty about its attainment. However, its attributes express what is unknown. There is a generality-property relationship between *garar* and ignorance. That is, each can be found alone, or both can be found together.[50]

There are two different opinions among today's Islamic scholars about whether insurance contracts are contracts containing *garar* or not. According to the vast majority, the insurance contract is accepted as a mutual contract and since the risk subject to the contract cannot be fully foreseen, the insurance contract is accepted as a contract with *garar*.[51] Those who accept the insurance contract as a paid and commercial contract see it as a contract with a *garar*, while those who accept it as one of the mutual assistance and current social security contracts accept it as a contract that does not contain a *garar*. The main difference here is the definition of the insurance contract and the separation in the method of acceptance.

*Takaful* insurance, on the other hand, is a donation contract based on more reliable foundations. Considering the meaning of the word, the way it is applied and the aims of the companies that implement it, it is seen that there is a large amount of cooperation agreement. The opinion that the hybrid *takaful* model is a donation-help contract (even if there are contrary opinions) is dominant. In addition, in this model, making a *wakalah* for the management of the risk fund and other technical transactions also reduces the probability of *garar* in the contract. The risk fund in insurance contracts is the main reason why the contract has the *garar* feature. In the hybrid *takaful* model, on the other hand, since the *takaful* operator is a proxy (wakil) in the management of the fund, the

46 Zebîdî, *Tâcu'l-arûs*, "ğ-r-r", 13/216, 233; Erdoğan, *Fıkıh ve Hukuk Terimleri Sözlüğü*, 154.
47 Apaydın, "Fesâd", *DİA*, 12/419.
48 Güney, *Satım Akdi Özelinde İslam Borçlar Hukukunda Garar*, 63.
49 bk. Bakara 2/188; Nisâ 4/29.
50 Dönmez, "Garar", *DİA*, 13/366-361.
51 Dönmez, "Garar", *DİA*, 13/366-361.

probability of *garar* between the parties is reduced. In addition, the insurance company does not undertake the realized risks, funds are loaded under the management of the company. *Takaful* company, which performs the risk fund management as a proxy, distributes the existing fund to the participants in case of excess in the fund. Or, as a company, it has the authority to evaluate this fund in different ways included in the *takaful* contract, provided that it does not receive a share from the surplus fund.[52]

### B. Insurance Risks and Problem of Contract Subject

According to Islamic law, for a contract to be valid, three elements of the contract must be present. These are two parties and the declaration of will and the subject of contract (*mahal*). The subject of the contract has three conditions. Accordingly, the subject matter of the contract must be deliverable (*makduru't-taslim*), must be known, and must be suitable for the implementation of the provision of the contract.[53] In this case, it is open to discussion in our opinion that the risks in insurance contracts are present, deliverable and clearly defined issues. Risks in insurance contracts do not exist yet, they are possible dangers in the future.

According to Islamic law, it is problematic whether a danger/risk is accepted as the subject of a contract or not. Because in Islamic law, it is not permissible to sell something that does not exist (*madum*). This situation, on the other hand, can be evaluated as the sale of the assurance of the danger that does not exist yet, and can be seen as the sale of the thing that does not exist yet. The main reason why Islamic jurists regard the sale of non-existent things as invalid is to protect the contract from *garar*. Because the fact that the thing subject to sale is not available at the time of the contract is considered as a big *garar* to invalidate the contract. This situation once again explains that commercial insurance contracts are contracts containing *garar*.[54]

### C. Insurance and *Riba*

The interest element in insurance contracts is discussed from two perspectives. The first is that the contract itself is an interest-bearing transaction, and the second is that the premiums collected are used in interest-bearing transactions. The basis of those who accept insurance contracts as an interest-bearing transaction is as follows. Insurance contracts are contracts that create mutual debt, in this case, the subject of the contract and the mutual costs should be known and there should be an equivalence between the costs. The mutual obligations in the insurance contract are the insurance premium and the insurance cost, and this contract is perceived as the sale of money for money. According to these claimants, in the insurance contract, if the insurer gives more money than the premiums paid to the insured, there is an excess *riba* (*riba'l-fadl*), and even if he pays an equal amount, there is a delay *riba* (*riba'n-nasie*) due to the delay in between.[55]

Although the claim that there is *riba* in insurance contracts seems justified at first glance, there must be a "conditional surplus" at the beginning of the contract to be able

[52] Aksoy, "Türkiye'de Katılım Sigortacılığı", 7, 19; Aydemir, "Hayat Sigortacılığında Tekaful (Katılım Sigortacılığı)", 58-59.
[53] Karaman, "Akid", TDV İslâm Ansiklopedisi, https://islamansiklopedisi.org.tr/akid (21.11.2021).
[54] Gürbüz, "Tekafül (Katılım) Sigorta Sistemi ve Teorisi", 11-12. Deliller için bk. Şevkânî, *Neylu'l-evtâr*, 5/244.
[55] Sağlam, "Sigortanın Sosyal ve Özel Sigortalar Şeklindeki Taksiminden Hareketle Ticâri ve Yardımaşma Sigortalarını İslam Hukuku Açısından Değerlendirilmesi", 13

to talk about this. However, it is unclear whether the risk condition will be fulfilled in the insurance contract. In this respect, all contracts containing *garar* and gambles should be considered as *riba*, as the prices will differ. However, these are different prohibitions.[56] The ulema agree that it is not permissible to use insurance premiums in interest-bearing transactions. Even the scholars who consider commercial insurance permissible say that these contracts are permissible if they are not used in interest-bearing transactions.

As a matter of fact, the final decision of the Religious Affairs High Council of the Presidency of Religious Affairs is in this direction. In 2005, according to the decision number 64 of the High Council of Religious Affairs, it was accepted that the insurance contract is permissible, within three conditions, according to the principle of permissibility, which is the main thing in contracts. These conditions are as follows:

1. In general, social insurance, mutual insurance and commercial insurance are permissible.

2. In the cumulative life insurance and private pension savings and investment system, which works according to the profit share, it is permissible to use the premiums in religiously appropriate areas.

3. It is not permissible to make or have insurance on religiously prohibited matters.[57]

The High Council of Religious Affairs has decided that commercial insurance is permissible if the insurance investments are not used in an interest-bearing transaction. However, it is obvious that there is an alternative to participation insurance today. In this case, instead of preferring commercial insurance companies, it would be more appropriate to prefer *takaful* insurances with less risk of *garar*. Today, there is no necessity to prefer commercial insurance, and it would be appropriate in our opinion to encourage and expand *takaful* insurance.

**D. Insurance and Gambling**

Transactions based on games of chance are referred to as gambling, *maysir* and *mukhatara*. Gambling can be defined as "betting on the outcome of an event or competition or an uncertain event in which luck and skill are involved together or alone and thereby gaining a profit". *Maysir* means convenience in the dictionary. Gambling is mentioned in the Qur'an as *maysir*.[58]

The relationship of insurance contracts with gambling is made by linking them with risks. The main element of commercial insurance is risks. Some of today's Islamic scholars, on the other hand, considered this as a luck-based transaction since it is not clear whether the risk in insurance contracts will materialize or not. For this reason, they said that it is not permissible by considering commercial insurance within the scope of the gambling ban. However, it is obvious that there is a serious difference in nature between insurance contracts and games of chance. While gambling is a game of chance

[56] Güney, "Sigorta Akdi Bağlamında Tartışılan Garar, Kumar, Faiz ve Haksız Kazanç Unsurlarının Fıkhi Açıdan Değerlendirilmesi", 21.
[57] https://kurul.diyanet.gov.tr/Karar-Mutalaa-Cevap/3656/sigortanin-dini-hukmu (Erişim Tarihi: 01.09.2021)
[58] Bardakoğlu, "Kumar", *DİA*, 26/364.

played to earn more money, insurances are used as a social security tool especially for the insured. In games of chance, while the parties aim to get rich without labor, they (insureds) aim to preserve the current situation in insurance contracts. As such, it seems a little difficult to establish a relationship between insurance contracts and gambling. As a matter of fact, the High Council of Religious Affairs declared in its decision no. 65 in 2005 that insurance contracts do not resemble gambling, for similar reasons.[59]

*Takaful* insurance, on the other hand, is evaluated within the scope of donation contracts in addition to commercial insurances. There is almost no possibility of gambling in *takaful* insurance based on cooperation since no gambling transaction is aimed at helping each other. In addition, in commercial insurance, the insurer indemnifies the insured if it is realized by assuming the risk. In the hybrid model, if the risk materializes, the compensation amount is paid from the risk fund collected from the participants. Participants are considered to have cooperated with each other from the common fund. In case of an increase in the risk fund, the remaining balance is redistributed to the participants. It also undertakes the risk partnership with the *mudaraba* part based on the labor capital partnership.[60]

**Conclusion**

The main purpose of the religion of Islam is the protection of religion, life, mind, property, and progeny. Different social security methods have been applied throughout the history of Islam for the protection of life and property. It is possible to mention the *muahat*, *zakah* and *fitra*, *qard-i hasan*, *kasama*, which started to be applied in the time of the Prophet, and the foundation and *āqile* methods, which became more common in the following years, among the social security studies applied throughout the history of Islam.

Throughout history, different social security methods have been applied. Today, commercial insurance and *takaful* insurance, which is mostly adopted by Islamic circles, are applied as an alternative. The most basic claim of *Takaful* insurance is that it abides by many rules that are found in conventional insurance but prohibited by Islam. The fact that commercial insurances are contracts containing *garar* and that they contain gambling, *riba* and unjust gains because they are met with hesitation by Islamic circles. *Takaful* insurances based on cooperation solve many of the problems seen in commercial insurances. *Takaful* insurance is a cooperative and participation insurance system based on risk sharing. In the current situation, *takaful* insurance and the hybrid model have minimized the problems in question by eliminating the possibility of *garar* and the possibility of interest as a result of directing the investments to Islamic funds, since it is a contract based on donations and donations. In our opinion, it is more suitable to be preferred and encouraged than commercial insurances in this form.

*Takaful* insurance, which has been constantly developing and expanding over the years, has different application areas. These include *mudaraba*, *wakalah*, hybrid, family *takaful*, etc. count the models. For example, the hybrid model operates as a mixture of *mudaraba* and *wakalah*. In this model, the *takaful* operator receives a certain percentage from the donations of the participants, this part is like the *wakalah* model. *Takaful*

[59] https://kurul.diyanet.gov.tr/Karar-Mutalaa-Cevap/3656/sigortanin-dini-hukmu (Erişim Tarihi: 1.10.2021)
[60] Aydemir, "Hayat Sigortacılığında Tekaful (Katılım Sigortacılığı)", 58-59.

operator also receives a percentage share of the profit from investments. In this respect, it is like the *mudaraba* model.

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