

INSURANCE OF ENDOWMENT' AND ITS TERMINATION LEGAL CONSEQUENCES: A COMPARATIVE STUDY IN ISLAMIC LAW

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Abstract

This research examines the idea of Islamic insurance based on endowing cash. The researcher assesses from an Islamic legal perspective; the legitimacy of this contemporary financial transaction, its legal nature, the ruling of ' *Zakat*' i.e. alms of endowment insurance fund, and the legal consequences of its termination, whether or not there is a deficit. This study comes in the light of studies seeking to develop cooperative insurance and expand its range in practice. Moreover, it attempts to suggest solutions for existing problems, and provide alternatives for its controversial forms.

Keywords: Islamic insurance, cooperative insurance, *Takaful*, endowment of cash, termination consequences.

Introduction

Insurance becomes one of the most important financial issues. This is due to prosperity in contemporary transactions, and the tremendous expansion of economic activities, including the serious risks surrounding them. Muslim researchers have studied commercial insurance on consistent basis, in order to find legal alternatives to it, from the Islamic legal heritage. They have found out that the idea of cooperative insurance is a viable alternative. One of the new ideas proposed to develop the Islamic insurance by benefiting from the established legal formulas; is the cash endowment-based insurance which some contemporary companies have already started to implement in the Islamic world. Since aiding contemporary research is necessary, and studies related to financial transactions and economic operations are vital areas of Islamic studies in the West, it was imperative to study this new transaction. Hence, this paper aims to provide this topic a further investigative research to assess its concept, procedure, legal rulings, and consequences that fail due on its termination.

Literature Review: In reference to the previous studies on this theme, the researcher is of the opinion that there seems lack of research

exerted on studying this type of Islamic insurance; particularly in the Western literature. However, one can argue that there are important studies that addressed this topic. Particularly, the papers that are presented to the cooperative insurance through endowment symposium, held in February, 1429 Hijri - March 2008, at International Islamic University, Kuala Lumpur - Malaysia.

Referring to these studies, the researcher points out that they are introductory, and could be characterized as general. This could be justified by the reason that; they have been presented to a conference, the aim of which is to study the idea and its origin. Consequently, there is still a need for more in-depth assessment of several important issues related to this new topic of research.

Research Problem: Analysis of literature review leads the researcher to identify the gap of research available, which has been adopted by this study. The following questions represent it.

- What are the roles of the administrative company and the legal supervision committee, and the authority of each of them on the gained surplus in the fund after the completion of the insurance operations?

- What is the ruling of alms relating to endowment insurance fund?

- When is it permissible to liquidate the fund, and what are the conditions for performing that legally?

- What is the responsibility of the administrative company before the endowment Fund and policyholders in the event of the inability of the Fund to meet the insurance operations? Is it permissible to borrow cash from it?

- What are the valid ways of distributing the insurance surplus, its rulings and regulations?

- What are the legal methods of liquidating the fund case of inability to remedy the deficit?

Methodology

Research in this new type of Islamic insurance requires analyzing its concept and elements, then tracking and extrapolating relevant legal rulings in the sources of Islamic Law. As for the controversial issues in question, the researcher follows comparative way to assess the different opinions available. This is in order to reach the most authentic ruling and to apply it on the new contract and its details.

Definition of Islamic Endowment-based Insurance

Some researchers in Islamic insurance have suggested the idea of endowment⁷, as a substitute for insurance based on donating premiums. This

⁷ Al -Jurjānī, °A., **Al-Ta°trifāt**, paragraph no. (1629), p. 328.

system has already been implemented by a number of Islamic companies in several countries in the Islamic world. The base of this idea is to treat insurance premiums, paid by subscribers, as endowed cash. This money is allocated for the purpose of Cooperative Insurance '*Takaful*' to indemnify subscribers when in need, according to the risk insured⁸.

Operations of Cooperative Insurance based on endowment

This type of insurance takes the following procedure in practice.

a) Subscribers pay insurance premium as an endowment which is kept in the insurance fund i.e. the endowment fund.

b) Amount of insurance and insured against risk are determined in the contract.

c) The Administrative company undertakes two basic tasks:

1. Managing insurance operations such as; collecting insurance premiums, paying amounts of insurance, checking the validity of insurance requirements and insured risks. In return the company receives a certain wage paid from the fund.

2. Investing part of money of the endowment fund for the purpose of increasing it and achieving profits for both parties i.e. the company and the endowment fund⁹.

The difference between Endowment-based Insurance and Donation-Based Insurance

There are two types of Islamic cooperative insurance that have noticeable difference between them. The first of which is, endowment-based insurance and the second is donation-based insurance. The former is based on endowing insurance premiums, while the latter is based on donating money. In a donation-based insurance one continues to benefit from the money even after donating it¹⁰. Researchers, who have adopted the idea of endowment instead of donation, have found in this new version a solution for the Islamic legal debate in this regard. This debate pertains to scholarly disagreement on the donation-based insurance. As several researchers consider the latter type as being commutative contract, even if it is attributed to cooperation and donation. This requires that it is merely a commercial

⁸ Al-Sharīf, M. *al-Badīlu al-Sharīyyu li al-Ta'mīn min Khilāl al-Waqf*, pp. 16-19. Jakahurā, B. *Tajrubatu Janūb Ifrīqyā fī al-Ta'mīni al-Ta'āwnī 'lā Asās al-Waqf*, p. 1. See also: *The Financial Encyclopedia*: <http://investment-and-finance.net/islamic-finance/c/cash-waqf.html>

⁹ Al-Sharīf, M., *al-Badīlu al-Sharī'u li al-Ta'mīn*, pp. 16-19. Jakahurā, B., *Tajrubatu Janūb Ifrīqyā fī al-Ta'mīni al-Ta'āwnī 'lā Asās al-Waqf*, p. 1.

¹⁰ See: *ibid.*

transaction which is based on uncertainty, which is an illegal element in the commutative contracts in Islamic Law, which is different than the donating one. However, endowment is a kind of donation which is based on solid reference in Islamic Law. This is due to the fact that; the idea of endowment is based on suspending the ownership of assets and attributing it to God, Allah the Almighty. Then, the collected benefits and outcomes are facilitated for distribution and benefiting people, i.e. they are spent in favour of beneficiaries. At the same time, although they have lost their ownership, the endowers are granted the right to determine both the beneficiaries and ways of endowment¹¹.

Legitimacy of Endowment Insurance in Islamic Perspective

Jurists of Islamic Law agree upon the legitimacy of endowment¹². They substantiate by a tradition of the Prophet to prove. Thereupon, He (Allah's Apostle) said to the companion °Umar bin al-Khattāb: "If you like, you may keep the corpus intact and give its produce as charity '*Sadaqah*'. He said: °Umar gave it as charity declaring that property must not be sold, or inherited or given away as gift. In consequence, °Umar devoted it to the poor, to the nearest kin, aired in the way of pleasing Allah and guests. In addition, there is no sin for someone, who administers it, if he eats something from it in a reasonable manner, or if he feeds his friends and does not hoard up goods (for himself)¹³.

Ruling of endowment legitimacy relates to two issues. The First of which is legitimacy of endowing insurance premiums, i.e. cash money. The second is ruling of endower benefiting from endowed premiums, who is at the same time the insurer paying premiums. The following is an assessment of the two issues.

Ruling of Endowing Cash Premiums

Since endowment insurance is suspending insurance premiums, which is money, the legal ruling must be based on the ruling of endowment of money. Jurists have disagreed on the permissibility of

¹¹ See: Ibn °Abdīn, M. **Raddu al-Muhtari °alā ad-Durī al-Mukhtār**, vol. 4, p. 495. Al-Khurashī, °A. **Al-Khurashi °alā Mukhtaṣar Sīdī Khalīl**, vol. 7, p. 81. Al-Huṣnī, T., **Kifāyatu al-Akhiyārī fī Ḥālī Ghāyati al-Ikhtisār**, vol. 1, p. 306. Al-Bahūtī, M. **Kashshāfu al-Qinā° °an Matīni al-Iqnā°**, vol. 6, p. 290. Al- Bahūtī, Mansūr bin Yūnis. **Sharḥu Muntahā al-Irādāt**, vol. 2, p. 410.

¹² Ibn Qudāmah, °A. **al-Mughnī**, vol. 6, p. 207.

¹³ An authentic narration which is greed by al-Bukhārī and Muslim: al-Bukhārī, M., **ṣaḥīḥu al-Bukhārī**, Kitāb Al-Shurūṭ, Bāb al-Shurūṭ fī al-Waqf. Hadīth no. (2586), vol. 2, p. 982. Muslim, **ṣaḥīḥ Muslim**, Kitāb al-Waṣīyyah, Bāb al-Waqf, Hadīth no. (1632), vol. 3, p. 1255.

endowing cash. They have two opinions regarding this issue; the first permits and the other one forbids.

Causes of Disagreement; can be referred to the way they perceive the degree of eligibility of movables, including cash, for endowment and suspension of ownership. Those who see them eligible for endowment; as their existence is related to the existence of their corpus and can be benefited from and utilized, state that it is legally acceptable to endow them. On the other hand, those who consider them non-perpetual¹⁴, as they cease to exist and exterminate, state that it is not permissible to endow them. Elaboration on the two opinions is as follows:

The First Opinion is the selected opinion of Hanafī school¹⁵, the Maliki school¹⁶, one of the two opinions of Shafi'i school¹⁷ and Ibn Taymiyyah from the late Hanbali jurists,¹⁸ states that cash is legally accepted to be endowed. They justify their opinion by stating that it is movable that can be utilized. Therefore, it is legally accepted to endow it, so as to achieve the objectives of legislation of endowment in addition to materializing interests.

The Second Opinion: based on the opinion of Abu Yūsuf from Hanafī school,¹⁹ the most authentic opinion of the Shafi'ī school²⁰ and the authentic narration of the of Hanbalī school²¹, which states that it is not legally accepted to endow cash. Adversely, the opinion of Malikī school does not recommend endowing it²².

Hanbalī scholars justify this by saying that endowment is suspending the procession of monetary assets

¹⁴ See Al-Zuhilī, Wahbah, al-Fiqhu al-Islāmiyyu wa Adillatuh, vol. 8, p. 164.

¹⁵ Ibn °Abdīn, M., **Raddu al-Muḥtar**, vol. 4, p. 363.

¹⁶ Al-Khurashī, °A., **Sharh al-Khurashī °alā Mukhtaṣar Sidī Khalīl**, vol. 7, p. 80. Al-Shādhilī, Abū al-Hasan °Alī al-Mālikī, **Kifāyatu al-Tālibu Al-Rabbāni li Risālati Abī Zaydīn al-Qayrawānī**, vol. 2, p. 343.

¹⁷ Al-Nuwawī, Y., **Rawḍatu al-Talibīn**, 1405 AH, vol. 5, p. 315.

¹⁸ Ibn Taymiyyah, A., **Majmū°u al-Fatawah**, vol. 31, p.234.

¹⁹ Al-Damad Afandī, °A., **Majma°u al-Anhur**, vol. 1, p. 739. Al-°Amadī, M., **Risālah fi Jawāzi Waqfi al-Nuqūd**, p. 18.

²⁰ Al-Sharbīnī, M., **Mughnī al-Muḥtaj**, vol. 2, p. 377. Al-Anṣārī, M. **Ghayatu al-Bayāni Sharḥu Zubad Ibn Raslān**, p.230. Al-Nuwawī, Y., **Rawḍatu al-Talibīn wa °Umdat al-Muftīn**, vol. 5, p. 315.

²¹ Al-Mardāwī, °A., **Al-Inṣāf fi Ma°rifati al-Rājiḥi min al-Khilāf**, vol. 7, p. 10. Al-Ruḥibānī, M., **Maṭālib**, vol. 4, p. 280.

²² Al-Ḥaṭṭāb, M., **Mawāhibu al-Jalīl**, vol. 6, p. 22. Al-Shādhilī, °A., **Kifāyatu al-Tālibu Al-Rabbānī**, vol. 2, p. 343.

and distributing their benefits. However, ownership of cash cannot be suspended, due to its movable nature²³.

The Selected Opinion; is the first opinion adopting the permissibility of endowing cash. This is due to the reason that, there is no evidence that endowment is meant for the non-circulated or exclusive to immovable assets. However, evidence points out to the condition of perpetualness of donating cash. Moreover, the statement of the Prophet to the companion ^{Umar} in relation to his land endowment: "If you like, you may keep the corpus intact and give its outcome as a charity" ²⁴ does not necessarily mean excluding exhaustible resources. The origin of the ruling is perpetuating charity as long as the corpus exists, for the purpose of disseminating and sustaining benefits rather than perpetuating endowment of the asset itself. The fact that Islamic texts related to endowment are connected to assets explicitly, does not mean this excludes movables from the ruling of permissibility. Hence, there is no evidence in the Islamic Law on the impermissibility of endowing movables. Nevertheless, the objective of legislation is achieved on the two cases; i.e. both of endowment of assets and movables, and not the first of them in particular. Besides, the possibility of damage of cash is applicable also to any object that can be endowed including fixed assets, as they are subject to exhaustion after a certain period of time.

Hence, it is permissible to set up cooperative insurance on endowing cash insurance premiums based on the selected opinion that permits monetary endowment. Therefore, this type of insurance is considered as being legitimate, in accordance of Islamic Law.

Ruling of Insurers Benefiting from their Own Endowment:

There is a debate in Islamic Law concerning the question that: Is it permitted for insurers to benefit from the compensation which is paid from their own cash endowment? This is in the view of the fact that; the compensation they receive originates from the insurance premiums which they have endowed for their benefit and the other beneficiaries. However, jurists disagree on the ruling of endowing in favour of personal benefit. The first of which permits this, while the other one prohibits it.

Reason of disagreement relates to the way every group regards endowment in terms of its sense and legal objective. Those who look at it

²³ Al-Ruḥaybanī, M., **Maṭalibu Ulī al-Nuhā**, vol. 4, p. 280.

²⁴ Agreed upon, narrated by ^{Umar} (may Allāh be pleased with him) and reported by: al-Bukhārī, **ṣaḥīḥu al-Bukhārī**, Kitābu al-Waṣāyā, Bāb: Hal Yantafī^u al-Waqīfu bi Waqfih? Hadīth (2586), vol. 2, p. 982. Muslim, **ṣaḥīḥ Muslim**, Kitāb al-Waṣīyyah, Bāb al-Waqf, Hadīth no. (1632), vol. 3, p. 1255.

from the viewpoint of texts, point out that the endower has the right to specify the beneficiary in general. This includes him or her as well. However, those who conclude that endowment is legislated as a charity for the poor, i.e. does not belong to the owner anymore after the endowment, declare that it is legally unacceptable for owners to benefit from it. The reason can be attributed to the fact that it is not specifically endowed in their favour, or their heirs. The two opinions are described as follows:

The First Opinion: according to the selected opinion of Abu Yusuf from Hanafī school²⁵, which is the most authentic,²⁶ the opinion of Shāfi'ī school²⁷ and the implemented opinion of Hanbalī school,²⁸ it is legally acceptable for individuals to endow in favour of their personal benefit i.e. to be the endower and the beneficiary at the same time.

Ibn al-Humām from the Hanafī school states that: "Abu Yusuf is of the opinion that if the endower suspends the outcome in his favour, or appoints himself as a supervisor of the endowment"²⁹

A support of this opinion is the Prophet tradition narrated by al-Bukhārī who state that: "Umar sets up a condition: it is not a sin for who administers the endowment to eat from it. The guardian can be the endower himself or anyone else. Moreover, he who endows a camel for the sake of Allāh, can benefit from it just like other people do, even though he does not require that". Moreover, the tradition '*Hadīth*' states that in the same chapter. The Prophet sees a man leading a camel, so He addresses the man by saying: 'Ride it. The man replies: 'Our Prophet! It is endowed'. The Prophet replies :woe unto you, ride it"³⁰.

The Second Opinion: which is an analogy of the opinion of Muhammad Ibn al-Hasan from Hanafī school³¹, the opinion of Mālikī school³², the stated opinion of al-Shāfi'ī school³³ and Hanbalī school³⁴. This

²⁵ Ibn Al-Humām, M., *Sharḥ Faṭḥ al-Qadīr*, vol. 6, p. 225.

²⁶ Ibn Nujaym, I., *al-Baḥru Al-Rā'iq*, vol.5, p. 238.

²⁷ Al-Nuwawi, Y., *Rawḍatu al-Tālibīn*, vol. 5, p. 318

²⁸ Al- Bahūtī, M., *Kashshāfu al- Qinā'ī* , vol. 4, p.247. Al-Ruḥaybānī, M. *Maṭālibu Ulī al-Nuhā*, vol. 4, p. 285.

²⁹ Ibn Al-Humām, *Sharḥu Faṭḥ al-Qadīr*, vol. 6, p.225.

³⁰ Al-Bukhārī, *ṣaḥīḥu al-Bukhārī, Kitābu al-Waṣāyā*, Bāb: Hal Yantafī'u al-Wāqifu bi Waqfihī? i.e. chapter: Does the endower have the right to benefit from his own endowment? *Hadīth* (2604), vol. 3, p.1012.

³¹ Ibn Al-Humām, *Sharḥu Faṭḥ al-Qadīr*, vol. 6, p.225.

³² Al-Khurshī, *Sharḥ al-Khurashī 'lā Khalīl*, vol. 7, p. 84. Al-Dardīr, A., *al-Sharḥu al-Kabīrī*, printed with *Ḥashīyatu al-Dusūqī*, vol. 4, p. 80.

³³ Al-Ramlī, M., *Nihāyatu al-Muḥtāj*, vol. 5, p. 368. Al-Nuwawi, Y., *Rawḍatu al-Tālibīn*, vol. 5, p. 318. Al-Sayutī, J., *Al-Ashbāh wa al-Naẓā'ir*, pp. 156-157.

³⁴ Al-Bahūtī, M., *Sharḥu Muntahā al-Irādāt*, vol. 3, p. 402. See also: Ibn al-Qayyim, M., *I'lām al-Muwaqqi'īn*, vol. 3, p.290.

opinion stipulates that individuals are not permitted to endow in favour of themselves as endowment will be rendered void.

Ibn ʿAbdīn from the Hanafī school, declares that it is illegally acceptable for individuals to endow *Dinārs* or *Dirhams* -money- in their favour. Although, Muhammad states that endowment is legally accepted in addition to the permissibility of endowment on oneself according to Abu Yusuf, it is not legally accepted to combine the two opinions and fabricate a new one. In this matter, Ibn ʿAbdīn says: "...endowment of movables in favour of personal benefit is not declared by one of them (i.e. Abu Yusuf and Muhammad). Therefore, the ruling is a fabrication of the two opinions. Hence, a fabricated ruling is invalid in consensus³⁵.

Malikis resort to reasoning evidences. They argue that; when individuals endow in their favour, they limit endowment to themselves and their offspring after they die, which is not acceptable. Al-Khurshī states that: "endowment on oneself is rendered void, as it is limited to oneself and heirs after ones death³⁶.

Hanbalis justify this by stating that endowment is; either an ownership of a benefit, or an asset. In both cases endowment must not be in favour of the owners themselves. As well as, individuals are not permitted to buy from themselves. Al-Bahutī says:" According to the majority, endowment in favour of oneself is not valid. As far as I know, endowment is a suspension made for the sake of Allah. It is either an ownership of a benefit, or an asset. Therefore, it is not permissible to be owned by individuals for personal advantage. Moreover, it is not permissible for individuals to buy from their own property"³⁷.

Discussion and Selected Opinion

After reviewing opinions of jurists in this matter, the researcher adopts the first opinion of them as the selected. This opinion has supporting evidence at *Sahīh Al-Bukhārī*, which is the statement of ʿUmar Ibn al-Khattāb: "There is no sin on the person who administers it, if he eats something from it in a reasonable manner, or if he feeds his friends and does not hoard up goods (for himself)³⁸". If the guardian who administers the endowment is permitted to benefit within reasonable manner, i.e. not exceeding the limits of custom, the priority of benefiting from the endowed corpus will go to the owner of the endowment.

³⁵ Ibn ʿAbidīn, M., **Raddu al-Muhtāri**, vol. 4, p. 363.

³⁶ Al-Khurshī, **Sharh al-Khurshī**. Beirut: Dār al-Fikr, n. d., vol. 7, p. 84.

³⁷ Al-Buhūti, M., **Sharḥu Muntahā al-ʾIrādāt**, vol. 3, p. 402.

³⁸ The same references of footnote no. (7) of this paper.

The evidence of Hanbalīs not accepting endowment for personal advantage is authentic in terms of commutative contracts. This is because ownership for personal advantage is redundant, while endowment is not. Owners' utilization of the outcome of endowment with others is considered a utilization of facilitating the benefit and the outcome of the endowment after relinquishing its ownership. It accomplishes the objective of endowment and does not contradict with its legitimacy. Moreover, there is no legal evidence on its non-permissibility.

According to the previous discussion, legitimacy of cooperative insurance by endowing premiums paid by insurers who then benefit from insured premiums is obviously selected. This is based on the selected opinion pertaining to the previous two issues.

The Legal Nature of Endowment Insurance and Surplus in Accordance with Islamic Law

The General Legal Nature of Endowment-based Insurance

By analyzing the concept of cash endowment insurance, one can argue that; it is a cooperative type of insurance. The insurer party is all participants as a whole and the insured party is each individual of the subscribers independently.

As long as, this transaction is based on endowing cash premiums, therefore, its rulings are referred to endowment in general and cash endowment in particular.

Furthermore, the legal relationship of the company administrative to the fund and its endowment insurance operations is based on a hiring contract. Moreover, the company's investment of part of the fund is governed by *al-Mudārabah* contract, which is a kind of corporation between two parties, the first provide a capital and the second provides labour³⁹. It is aimed to provide profit for the two parties and for the insurance fund, as it is a supportive element for its existence.

The Legal Nature of Surplus, in Case of Endowment Insurance.

The surplus of endowment insurance is the extra cash remained, after distributing the insurance compensations and paying all the duties due on the insurance fund, at the end of the insurance year.

As long as the legal basis of this type of insurance is based on endowment, so in this case, the surplus of the insurance is considered as being an endowment property.⁴⁰ Therefore, its legal nature is related to the

³⁹ See: Al-Sharīf, M., *al-Badīlu al-Shar'īyyu li al-Ta'mīn*, 14-18. Jakahurā, B., *Tajrubatu Janūb Ifrīqyā fī al-Ta'mīni al-Ta'āwnī 'lā Asās al-Waqf*, pp. 5-7.

⁴⁰ See: Al-Shubaylī, Y., *al-Ta'mīnu al-Takāfuli min Khilālī al-Waqf*, pp. 12-22, p. 36. Jakahurā, B., *Tajrubatu Janūb Ifrīqyā fī al-Ta'mīni al-Ta'āwnī 'lā Asās al-Waqf*, p. 3.

rulings of endowed cash. Consequently, it is no longer owned by subscribers; as it is endowed for the sake of Allah the almighty starting from the point of paying premiums⁴¹.

Further, as it is agreed upon by jurists that endowment must comply with the instructions of endowers⁴²; i.e. according to what is required and determined. This is in terms of specifying beneficiaries of the endowment, methods of benefiting from it, and methods of distribution its outcome. Therefore, it is permissible to make consensually in the contract of endowment insurance on the method of distributing the surplus, and the beneficiaries of that. It is permissible as well to agree upon benefiting subscribers – endowers - themselves as previously mentioned.

The Role of Administrative Company and the *Sharʿī* Supervisory Committee, and their Authority on the Endowment Insurance Fund:

The administrative company plays the role of the administrator of the endowed cash of the fund insurance. The tasks of the administrative company are to manage, maintain and distribute the outcome of this fund. Its role is determined according to the requirements of endowers. Thus, the contract including its conditions, details and the bylaw of the fund determines the framework of the administrative company and the limits of its authority over the Fund⁴³.

The *Sharʿī* Supervisory Committee; neither has an authority over the Fund, nor the insurance operations. However, it monitors the performance of the administrative company, the progress of insurance and its operations. Hence, the role of this committee is merely restricted to supervise the compatibility of management of the administrative company, for the endowment insurance processes, with Islamic Law⁴⁴. This is taking the bylaw of the company and what is stipulated in the contract into consideration in its judgment⁴⁵.

Rulings Relating to Endowment Insurance Fund After the Termination of its Operations.

The annual financial calculations of the fund are performed by deducting what is paid as compensations against the insured risks during the

⁴¹ Refer to: Al-Zaylaʿī, °U., **Tabyīn al-Ḥaqāʾiq**, vol.3, p. 325.

⁴² See: Ibn °Abidīn, **Radd al-Muḥtar**, vol.6, p. 290. Al- Bahūtī, M., **Sharḥ Muntahā Al-Irādāt**, vol. 2, p. 410. Al-Ḥamawī, A. **Ghamzu al-°Uyūnī wa al-Baṣāʾirī**, vol. 1, p. 333.

⁴³ See: al-Shubaylī, Y., **al-Taʾmīn al-Takāfulī min Khilālī al-Waqf**, p. 22.

⁴⁴ Refer to: Al-Qurrah Dāghī, °A., **al-Taʾmīn al-Islāmī: Dirāsātun Fiqhiyyah Taʾsiliyyah**, pp. 451-452.

⁴⁵ Cf.: Al-Ghunaymī, °A., **al-Lubāb fi Sharḥi al-Kitāb**, vol. 2, p. 184. Ibn Al-Najjār, M., **Muntahā al-Irādāt**, Beirut: Muʾassasat al-Risālah, vol. 1, p. 412.

year, taxes paid on money from the total insurance premiums paid by subscribers and profits earned from the invested money of this fund by the administrative company. At the end of the year, money in the fund is calculated by adding the surplus premiums to the earned profits after deducting the spent compensations and the paid taxes. There are two outcomes expected of the insurance process⁴⁶. The first of which is to have surplus resulted from the non-exhaustion of premiums. The second is to have a deficit in the fund, due to exceed of distributed compensations to the premiums received and earnings gained in the fund⁴⁷. This section is dedicated to study the legal consequences arising from the two cases as follows:

Legal Consequences of Endowment Insurance Fund Surplus:

This part focuses on studying rulings of the implications of having excessive money in the endowment fund in addition to the ruling of alms; whether or not it fails due on this money.

Legitimacy of Handling Surplus Money of the Endowment Fund:

As excessive money in the insurance fund is considered endowed, it follows the ruling of endowment. The ruling is spending money as per the requirements of the endower. Therefore, the money remains in the fund without being attributed to a specific owner. Instead its outcome is spent according to what the endower has determined. This can be specified by reference to what has been stipulated in the contract⁴⁸.

Ruling of Distributing Surplus Cash of the Endowment Insurance Fund:

Researchers on this type of insurance agreed not only on the permissibility of this method, but on adopting it as well as a basic rule of handling the surplus. Some of them suggest distributing 75% of the surplus on all subscribers without exceptions⁴⁹. This is based on the permissibility of setting up requirements on endowment, and permitting endowers to benefit from their own endowments. Some have chosen it to enhance the status of cooperative insurance, and distinguish it from the commercial one⁵⁰.

The researcher is of the opinion that, this method is permitted in the case where; it is stipulated explicitly in the contract, or the administrative

⁴⁶ See: Sabbagh, A., *al-Fa'īdu al-Ta'mīnī fī Sharikāti al-Ta'mīn al-Islamiyyah*, p. 2, and 11.

⁴⁷ See: Haydar, H., *al-Fā'īdu al-Ta'mīnī*, pp. 12-14.

⁴⁸ Al-^cUthmānī, M., *Ta'sīl al-Ta'mīn al-Takāfulī 'alā Asās al-Waqf*, pp. 12-14.

⁴⁹ Refer to: Muhammad, al-Sayyid Hāmid Hasan, *Ṣiyaghtu Idārati Makhātīr wa Istithmār Aqṣāt al-Ta'mīn al-Ta'āwunī*, p. 102.

⁵⁰ Abū Ghuddah, ^cA., *Niẓamu al-Ta'mīnī al-Takāfulī min Khilālī al-Waqf*, p. 11.

company is authorized to choose the appropriate method of distribution in general. However, the priority should be given to the goal of this type of insurance –endowment-, which is solidarity in the face of the risks. Thus, this method has lesser priority than other ones. Moreover, the mentioned percentage is relatively high and does not fit that goal.

But, if it is stated in the contract that; the cash of the fund should not be distributed, in order to maintain it, and there is no authorization for the company to distribute that money, it is not permissible to give that money to anyone and it should be kept in the fund itself.

In the case nothing is stipulated in the contract in this regard, subscribers will be basically ineligible to receive any amount of the surplus. Instead, this money will be allocated for the purpose of maintaining the financial solidarity of the fund. Besides, there is no impact for whether the client has received an insurance compensation, or not, on the right of obtaining the cash. This is so, unless it is stipulated explicitly in the contract that he or she does not deserve it in the case of obtaining compensation. If this is stipulated; the condition must be undertaken accordingly. This is due to the fact that, this insurance is based on forgiveness; as it is a type of donation contract the aim of which is to strengthen continuous charity.

Ruling of Reducing the Insurance Premium for the Following Year as a Result of Excessive Money in the Fund:

Based on the previously mentioned permissibility of distributing a percentage of the excessive insurance money on subscribers, it is permissible to deduct part of the insurance premiums that are due on subscribers for the following year instead of deducting their share of the surplus. This method is with greater reason to be followed due to the fact that insurance is based on endowment⁵¹, whereas the insurance fund maintains that money. This enhances the aim of endowment. At the same time, the targeted facilitation of the endowment becomes more effective. This is because, it reduces the amount of premiums paid by insurers.

The Impact of Subscribers 'Withdrawal or Non-Renewal of Insurance on their Share Entitlement of the Surplus:

As this insurance is based on endowment, subscribers are originally not entitled to receive the surplus, unless it is stipulated in the contract. As well as, subscribers can not withdraw their subscription before the end of the year. This is because it is endowed, so it is not owned to them anymore. However, they are entitled to their share of the surplus, if this is stated in the

⁵¹ Al-Qirri, M., *al-Fa'id al-Ta'mini*, p. 15. Shubayli, Y., *al-Raqabah al-Shar'iyah 'ala Sharikat al-Ta'min al-Ta'awuni*, p. 41.

contract, as the endower has the right to stipulate the beneficiaries of the endowment, as it is mentioned previously⁵².

The researcher points out that, the latter issue has lack of application for the essence and meaning of endowment legislation. This is due to the reason that, it is legislated for the advantage of the beneficiaries continuously, without expecting a return from them. Hence, this is not achieved, if there is a differentiation between the clients who subscribe and the others who withdraw.

Ruling of Alms, 'Zakāt', of Endowment Insurance Fund:

Since the cash of this fund is endowed, its ruling concerning alms liability follows the ruling of alms of endowed money. Jurists have disagreed in this issue and hold three opinions in its regard. The first of which tends to consider alms as non-obligatory, the second one states that alms is obligatory in general, and the third of which considers it as being obligatory in the case where endowment is determined in favour of a certain party in specific.

Reasons of disagreement: can be referred to the viewpoint of jurists with regard to the extent of full ownership requirement as a condition for alms. Those who consider it as a condition, point out that it is not obligatory in this case, due to the fact that individual ownership is not available in endowment. As for those who do not take ownership into consideration as reference of this issue, they conclude that alms due on it obligatorily, exactly as any other type of money. Below is the discussion of the opinions of the jurists.

The first opinion: is of the Hanafī school⁵³, and the most authentic opinions of Shāfi'ī school⁵⁴ states that *al-Zakāh* is not obligatory on the endowed property.

They substantiate by the evidence that there is no ownership for the cash, as its endowment suspends it for the sake of Allah the Almighty. Hence, *al-Zakāh* cannot fail due on non-owned subject⁵⁵.

The Second opinion: is of Mālikī school which tends to regard alms as being obligatory on the endowed cash⁵⁶. Thus, this duty should be paid by the endower or his/her administrator⁵⁷.

⁵² Refer to footnote no. 36 of this paper.

⁵³ Al-Kāsānī, °A., **Badā'ic al-ṣanā'ic fī Tartīb al-Shrā'ic**, vol. 2, p. 9. Also see: Ministry of *Awqāf* and Islamic Affairs, **al-Mawsū'ah al-Fiqhiyyah**, vol. 44, p. 172.

⁵⁴ Al-Nawawī, Y. **Rawḍatu al-Talibīn wa °Umdat al-Muftīn**, vol. 5, p. 315.

⁵⁵ See: Ibn °Abdīn, M., **Raddu al-Muhtār**, vol. 2, p. 262. Also see: Al-Shuybaylī, Y., **al-Ta'mīnu al-Takāfulī min Khilālī al-Waqf**, p.30.

⁵⁶ Al-Dusuqī, **Ḥashiyatu al-Dusuqī**, vol. 1, p. 485.

⁵⁷ Al-Dardīr, A., **al-Sharḥu al-Kabīri °lā Mukhtasar Sidī Khalīl**, printed with: **Ḥashiyatu al-Dusuqī**, vol. 1, p.485.

The Third opinion: is that of Shāfi'ī⁵⁸ and Hanbalī schools⁵⁹ say alms are obligatory on money, if it is endowed on a specific party otherwise it is not obligatory. Hanbalī's evidence is related to their opinion that basically cash is not permissible to be endowed. Therefore, alms is obligatory in consequence.

Personal Assessment and Selected Opinion: After studying the previous three opinions, the researcher adopts the first opinion which states that alms are non-obligatory on the endowed money. This is due to the absence of ownership which is an important condition for this duty to fail due. Accordingly, absence of ownership renders its obligation void. It is worth mentioning that, several contemporary scholars adopt this opinion as well⁶⁰. There is no evidence on distinguishing between endowment in favour of a private or a public party. This ruling applies on the money of the endowment insurance fund; since it is suspended and relinquished by endowers, and becomes property of Allāh the Almighty. Therefore, alms are not obligatory⁶¹.

The Legal Consequences for Deficit in the Insurance Fund and Proposed Remedy Solutions.

Ruling of Distributing the Cash of the Fund in the Event of Liquidating the Company.

It is possible that insurance fund encounters sharp deficit to the extent that it becomes difficult to continue its operations, due to lack of cash available in front of the needs. The researcher is of the opinion that, the ruling of this case should be derived from that one of the case of termination of estate endowment, due to its damage and lack of eligibility to achieve its objectives. The selected ruling in this case is that the remained property is distributed as a donation in the charity was and it is not turned back to the former original owner⁶². Yet, it is more preferred to donate it to similar endowment which undertakes the same aim of the former, as it is a means of emphasising the same objective⁶³. Accordingly, there are two options for the ruling of the remained cash. The first of which is be spend it in the ways of

⁵⁸ Al-Zarkashī, M., *al-Manṭhur fī al-Qawā'id*, vol. 2, p. 64.

⁵⁹ Al-Ruḥaybānī, M., *Maṭālibu Ulī al-Nuhā*, vol. 4, p. 280.

⁶⁰ See: Al-Shubaylī, Y., *al-Ta'mīnu al-Takāfuliyya min Khilālī al-Waqf*, pp. 29-30. Al-Zahīlī, Wahbah, *Qaḍāyah al-Fiqh wa al-Fikrī al-Mu'āsir*, vol.1, p.126. See also: Al-Būtī, Muhammad Sa'īd Ramadān, *Qaḍāyā Fiqhiyatun Mu'āsiratun*, vol. 2, p. 112.

⁶¹ Ibn Rajab, A. *al-Qawā'idu fī al-Fiqh al-Islāmī*, p. 454.

⁶² Al-Ghunaymī, °A. *al-LubAbū fī Sharḥi al-Kitāb*, vol. 2, p. 184. Ibn al-Najjār, M. *Muntahā al-Irādāt*, vol. 1, p. 412.

⁶³ Ibn Taymiyyah, A. *Fiqhu al-Kitābi wa al-Sunnati wa Raf'ū al-Haraji °an al-Ummah*, p. 211.

goodness and kindness as a charity. The second is to be affiliated to another endowment insurance fund, so as to strengthen its position, achieve its objectives, which are the goals adopted by the first fund. The latter option is the most preferred, to the researcher, as it opens a new door of continuous charity, which enhances solidarity on which the first insurance fund has been based⁶⁴.

The Proposed Solutions in Case of the Occurrence of Deficit in the Endowment Insurance Fund.

After studying the nature of the endowment insurance; the following solutions can be proposed to deal with the financial deficit that may occur in this fund.

Increasing Premiums.

It is a proposed solution to bridge the deficit in this fund is to increase insurance premiums of the subsequent year on all current insurers. This is based on a well-established base of Islamic Law i.e. the maxim which states that: "as we gain, we should give, in return", *al-Ghunm bi al-Ghurm*"⁶⁵. Hence, as the fund insures the subscribers against risks, and provide for them when they are in need, subscribers should have a moral obligation to participate in bridging the deficit therein. Especially in the view of the fact that, the payoff of these premiums will return with benefit on them. It will also sustain the fund in order to achieve its benevolent objectives.

Borrowing from the Administrative Company to Contribute Without Interest.

Legally speaking, nothing prevents the administrative company from lending the endowment Insurance fund the needed amount of money to bridge the deficit occurring for one year or more. This is based on the condition of reimbursing money from the future fees of the fund and the profit of the future investment. This is provided that, it is according to free interest loan, '*al-Qarḍ Hasan*'. This is so, as Islamic Law forbids usury and allows this type of loan, which is based on objective of achieving social solidarity. Allāh, the Almighty, says in the Holy Qur'ān: "loan Allāh a goodly loan"⁶⁶.

⁶⁴ See: Al-Shubaylī, Y. *al-Ta'mīnu al-Takāfuliyyu min Khilāl al-Waqf*, p. 109

⁶⁵ Committee of scholars, *Majallat al-Ahkām al-Adliyyah*, no. 87, p. 26. See also: Ibn 'Abdīn, M., *Raddu al-Muhtar*, vol. 4, p. 270.

⁶⁶ Sūrat al-Muzzammil, Ayah 20

Stipulating a Penalty Clause on Administrative Company in the Case of Management Default.

The *Shar'ī* Supervisory Committee could come to a conclusion that; deficit in the endowment insurance fund is a result of trespass or negligence of the administrative company in carrying out insurance tasks. In this case, it is no objection to enjoin the company with a compensation based on penalty clause previously mentioned in the statute. The *Shar'ī* Supervisory Committee determines this clause with the help of specialized experts in this field⁶⁷.

Conclusion

This research shows that the cooperative insurance grows and develops rapidly; whether from the theoretical or the practical side. Further, the transaction in question enhances cooperation and offer an acceptable tool from the Islamic legal perspective, for tackling the major need for insurance. The researcher concludes from the previous discussion the following.

1. The contract of endowment insurance is based on endowing the premiums in a cash fund aiming to insure the participants. All insurance operations are governed by a separate administrative company in return to a specified wage.

2. This contract is considered as being valid according to Islamic Law. This is according to the selected opinion for the jurists concerning the permissibility of cash endowment. This is in addition to the opinion adopting the legality of utilizing the endower from his or her endowment.

3. The rulings of endowment are the reference for the insurance fund. Therefore, the rulings of the former are applied on the administration of the latter, and the procedure of dealing with it. The rulings of cooperative insurance are the reference for both sides of beneficiaries and administrative company.

4. The role of the *Shar'ī* Supervisory Committee is merely to assess whether or not the insurance procedures and the performance of administrative company are in accordance with Islamic Law.

5. The endowers have the right to specify the consequences of the termination of the insurance process. Hence, the specifications of the contract are the reference in this concern. Subsequently, it is acceptable to distribute the entire insurance surplus, or part of it, or keep it for future procedures. It is permissible also to deduce part of the premiums of the next year in exchange for it.

⁶⁷ See: The Council of Islamic Fiqh, decision no. 109 (3/12), vol. 2, p. 91.

6. *Al-Zahah*, alms, is not failed due on the insurance fund. This is due to the fact that, its condition of ownership availability is not met, as it is endowed.

7. In the case where deficit is resulted on the termination of insurance process, so as an endowment; the remained cash should be spent in the welfare sides. Preferably, it should be spent in the similar endowments that hold the same insurance goals.

8. There are several suggested solutions for eliminating the deficit in the insurance fund. The first of which is to increase the premiums in a manner that it fits the coming insurance needs. The second is to borrow money from the administrative company. The third is to stipulate a penalty clause on the administrative company, in the case of negligence or trespass in carrying out the insurance procedures.

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