

ORIGINAL ARTICLE

Can Tontines Become Fashionable Again?

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Abstract

Tontine insurance, one of the oldest and abstruse but upwardly-mobile types of life insurance, was doomed to be forgotten in the past but its value is currently re-appreciated by insurers. This study, accordingly, is to examine whether tontines can become fashionable again by considering current problems of Turkish insurance law. By doing this, due to the lack of legal arguments and case law in Turkey, comparative methodology was adopted, such as investigating France, where the most modern and common version of the use of tontine is found. Also, cases from Anglo-Saxon law systems were argued to demonstrate the legal nature of tontines. The study reaches a conclusion that the tontine is a very convenient form of insurance in today's condition.

Keywords

Tontine, Turkish Insurance Law, Life Insurance

JEL Classification

K00, I13, G2.

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1. INTRODUCTION

Insurance is a necessary agreement, as it looms large in the functioning and future of the economy (Giarini, 2016, s. 131). Pursuant thereto, there are numerous types of insurance such as multiple birth insurance, alien abduction insurance, and even the lottery insurance, since every measurable risk is suitable to be insured.

Tontine insurance, one of the oldest types of life insurance, was doomed to be forgotten, but its value is currently re-appreciated by insurers. The tontine insurance is an abstruse but upwardly-mobile longevity pooling concept. It is a blue-sky concept in terms of its application even though it is legally recognised. Tontines, which were used to raise money for alleviating the economic burden of the running battles in the 17th and 18th centuries, were later dedicated to other economic purposes till the beginning of the 20th century, when embezzlement scandals were common (Verde, 2017). Other reasons may be listed as (1) the increasing incentive to criminal attempts, (2) the meaningless of being rich for centuries-old people, and (3) relatively inadequate investment returns. Despite all this, tontines have again started to be re-argued with a developed scheme of the original version of tontines (Milevsky, 2018, s.4).

Especially over the past two decades, debates on quasi-tontine longevity pools have intensified in the literature (Piggott, Valdez, & Detzel, 2005, s. 497-520; Goldsticker, 2007, s.63-7; Stamos, 2008, s. 56-68; Donnelly, Guillen, & Nielsen, 2014, s. 14-27; Forman & Sabin, 2014, s. 755-831; Newfield, 2014, s. 37-48).

However, one of the most important initiatives in this context was the press release made by the American Academy of Actuaries in October 2017 through giving particular importance in employer-supported defined contribution plans, longevity pools and similar risk mitigation policies in order to provide managing financial security for retirees in their remaining life (The American Academy of Actuaries, 2017). This statement explicitly calls insurers for establishing neoteric tontine structures.

2. THE CONCEPT OF TONTINE

Tontine is an investment plan that yields profit till its parties' dying days (McKeever, 2009, s. 491). It is a discredited insurance model (Chancellor, 2001, s. 14) defined as a financial instrument in which the last survivor will receive all the income (The Oxford English Dictionary, 1989, s. 231). In other words, it is a joint investment with an 'all-or-none' understanding (Stevenson, 1889; Smart, 1881; Costain, 1995). However, tontines can also be terminated by agreement when the number of parties reach the predetermined threshold (McKeever, 2009, s. 491). Although the tontine is prima facie considered a gamble on death, it is not as harmful as it is painted. Indeed, it is a valuable financial instrument within the scope of modern insurance policies.

The word of Tontine came from its creator Lorenzo de Tonti, a Neapolitan exiled to France. He presented the original version of the tontine to Jules Cardinal Mazarin in the early 1650s for the French King Louis XIV's quest to increase incomes. The reason for France's economic crunch at that time was the economic burden stemming from the 30 Years' War and the consequent obligation to financially support the French rebels called 'Fronde' (Jennings & Trout, 1982, s. 4).

Tonti has planned to establish funds at 10 different levels. The age ranges were determined accordingly in the form 0-7, 7-14, 14-21, 21-28, 28-35, 35-42, 42-49, 49-55, 55-63 and 63-et al. According to this plan, different annual interest rates have been calculated for all these age groups as the interest rate increases with the increase of age. When the nominated member dies, the interest reserved for them will be distributed equally to the other members of the same group, until only one member remains (the last survival principle). With the death of the last member, all the main capital returns to the state account. Voltaire, in its prominent book of 'The Life of Louis the XIVth' explained this system as follows:

"Emeri succeeded Marshall de la Mellerage, as superintendent of the finances in 1649. An Italian, named Tonti, employed by him, then invented a new loan upon life annuities, chargeable on the national revenues, and divided into shares and classes; the income of each proprietor that died to be shared among the survivors. Hence, familiar loans came to be named after the inventor (Anonymous, 2011, s. 1194)."

To sum up, the Kingdom of France was forced to spend lavishly, due to wars running both inside and outside the territory. For this reason, even the budgets allotted to Paris were cut. All suggestions made to

the council in order to get rid of all this payment burden have been evaluated, and the proposal made by Sir Laurens Tonty was evaluated as the most advantageous method. According to the Tonty's plan, tontine members are required to pay 300 livres (note that the livre is the currency of the Kingdom of France used between 781-1794) per share in order to receive a certain annual pension. Also, investors could also make investments by nominating third parties as tontine members. It was planned to collect 1,400,000 livres in the Hotel de Ville at Paris (Tonti, 1995, s. 1-18; Anonymous, 2011, s. 1194). Nevertheless, although Tonti's proposed tontine system was supported by the Kingdom, this system was not approved by the Paris Parliament (Parlement de Paris) (Jennings & Trout, 1982, s. 8). However, Tonti has made various attempts to put his idea into practice without hesitation, and in the meantime, he has put forward other ideas such as the national lottery (McKeever, 2009, s. 493). Tonti died in 1684, but as a result of all these attempts, he pioneered the creation of the French national tontine for the first time in 1689 (Jennings & Trout, 1982, s. 12). Smith, in his prominent book 'An Inquiry into the Nature and Causes of the Wealth of Nations', mentioned French tontine system as follows:

"Annuities for lives have occasionally been granted in two different ways; either upon separate lives, or upon lots of lives, which in French are called Tontines, from the name of their inventor. When annuities are granted upon separate lives, the death of every individual annuitant disburthens the public revenue so far as it was affected by his annuity. When annuities are granted upon tontines, the liberation of the public revenue does not commence till the death of all annuitants comprehended in one lot, which may sometimes consist of twenty or thirty persons, of whom the survivors succeed to the annuities of all those who die before them, the last survivor succeeding to the annuities of the whole lot. Upon the same revenue more money can always be raised by tontines than by annuities for separate lives. An annuity, with a right of survivorship, is really worth more than an equal annuity for a separate live, and from the confidence which every man naturally has in his own good fortune, the principle upon which is founded the success of all lotteries, such an annuity generally sells for something more than it is worth. In countries where it is usual for government to raise money by granting annuities, tontines are upon this account generally preferred to annuities for separate lives. The expedient which will raise most money is almost always preferred to that which is likely to bring about in the speediest manner the liberation of the public revenue (Smith, 2018, s. 918)."

As to non-French developments about tontine, it is necessary to mention that at the same time as Tonty's proposal in 1653, a similar proposal was made in Denmark. As far as is known, the first known tontine appeared in Kampen, the Netherlands in 1670, and by 1700, more than 200 local tontines were prepared in the Netherlands (Wagenvoort, 1961). Until 1759, 9 more tontines were created, and tontines created after this date have always met the required number of subscribers (Jennings & Trout, 1982, s. 46-7).

Looking at England in the same period, it should be noted that seven tontines were created between 1693 and 1789, but one of them could not be completed because it could not reach the sufficient number of subscribers (Weir, 1989, s. 95, 105; Milevsky, 2014, s. 225; Milevsky, 2015). It is also worth noting that many people nominated King George III of England as part of the last British tontine created in 1789. Although there were patriotic motives in this investment, the nomination of a public figure made the administration of the tontine much easier. King George III, who was only 51 at the time of the presentation of the tontine, lived for 30 more years and became a very profitable investment option among investments for the elderly class (Compton, 1833, s. 12). Likewise, Marie Antoinette, featured in the Irish Tontine in 1777, was one of the members who are nominated as a public figure (McKeever, 2009, s. 495; Clements, 1777, s. 10). Lastly, in terms of the United States of America, a tontine program was proposed by the Treasury Secretary Alexander Hamilton to finance the increasing government debt, especially during the establishment period, but this program was rejected by the Congress (Jennings, Swanson & Trout, 1988, s. 107). However, today, there is no state in the United States that has outlawed tontine, with the exception of the state laws of Louisiana (Statue Title 22, § 445) and South Carolina (Code Ann. § 38-55-90, 38-55-110).

Contemporarily, two large-scale tontine operators could be exemplified although nor is this all. First, Tontine Trust is a financial technology company supplying tontine pensions, which were granted as a European trademark, via digital platform (<https://tontine.com>). It has a sensational value proposition, as it provides Pan-European personal pensions, and therefore it flouts the taboos in terms of the localisation of tontines. Second, Le Conservateur is a mutualist group, created by Riffault Brothers in 1844 as one of the most influential implementers of a long-term savings system specializing in Tontine. In fact, its aim

is to modernise the tontine system, which was previously introduced by Tonti in the 17th century. The company, Assurances Mutuelles le Conservateur, was established in accordance with Insurance Law (le Code des Assurances) with a specialisation in life insurances. As of 31.12.2020, the company has assembled 580 general insurance agents across France under the same roof and obtained EUR 788 million turnover. In terms of tontines, approximately half of the turnover was derived from 136.000 tontine subscribers (available via <https://www.conservateur.fr/nous-connaître/chiffres-cles>).

3. THE LEGAL NATURE OF THE TONTINE

Although all tontine shares are tied to the founding investor and the nominees, they are highly liquid (easily redeemable) assets. Annual payments specific to tontines are inherently valuable assets for their subscribers. Moreover, as the number of living shareholders in the tontine pool decreases, the income related to the tontine's subscribers increases, becoming more valuable. However, this value also has the risk of becoming completely worthless if the nominated candidate in the tontine dies. On the other hand, if the nominated candidate survives as the last candidate, the tontine can be extremely valuable. For all these reasons, tontines are seen as important derivative tools in secondary markets (McKeever, 2009, s. 497).

The most modern and common version of the use of tontine is found in French law. The concept of tontine is defined as small businesses operating in the form of Joint ownership, which represents a type of real estate based on the last survivor principle (McKeever, 2009, s. 515). In this context, this method is used both to limit the ownership structure and to avoid inheritance tax responsibilities related to the property owned.

For example, the tontine can be applied to a couple living together so that when one of the parties dies, the survivor has the entire property. For another example, given that there is a married couple with children, the house will be shared with both spouse and children in certain proportions, or for an unmarried couple living together, the inheritance may be divided excessively. However, the tontine provides an opportunity to forestall these happenings (McKeever, 2009, s. 515).

From a corporate law perspective, tontine clause (clause d'accroissement) can be incorporated in the articles of association in various ways. The reason for this is to ensure that survivors can continue the company, as well as all the tax advantages (Moerman, 1999, s. 478). Maurice Picard, one of the leading intellectual leaders of French insurance law, mentioned that the entities that offer a tontine system payment are classical companies in the French financial system, and these tontines generally function as a kind of social or pension insurance. In fact, with a slightly sharper expression, he defined the tontine as just a game of betting, not an insurance system (Picard, 1970, s. 443).

In Turkish insurance law, tontine was banned in the first place, but became legal again with the Turkish Commercial Code (TCC) numbered 6102. The past practice on tontines was in accordance with Article 1333 of the abrogated Commercial Law No. 6762, which stated that the insurance made on the condition that the total amounts created as a cumulation of certain instalments by the subscribers are shared among the survivors on a certain date is void. However, with the adoption of TCC, the tontine insurance was legitimised even though there is no example in the practice. According to the Article 1488 of TCC, tontines may be established pursuant to the principle of distributing the assets constituted by contributions amongst the beneficiaries previously designated by the deceased. The legislative intention behind this article is to harmonise the Turkish commercial law with contemporary developments in EU law. In the preamble, it was stated that tontines deemed invalid in Article 1333 of Law No. 6762 (as demonstrated) should be accepted as valid in parallel with Directives 76/580 and 79/267 of the European Community. Although these directives were later abolished in 2002 with Directive 2002/83, the following directives did not change the validity of tontines. The mentioned developments in the European Union have been cited as the reason for the tontines to be accepted as valid in Turkish law. This baseless understanding is open to criticism because there must be a very important need and reasonable grounds in order to allow an institution where the law stipulates the absolute nullity sanction (TürkiyeBarolarBirliği, 2008, s. 44).

4. BEST-KNOWN ANGLO-SAXON CASES ABOUT TONTINE INSURANCE

This section is to demonstrate most fundamental examples in regard to tontines. As far as is known, the

Anglo-Saxon law is home to tontine insurance cases. One of the most important and influential decision was made by the English Court of Chancery (one of the five divisions of the British Supreme Court at that time) in 1869 regarding the 1777 Irish Tontine. According to this case, Mrs. Browne, an investor, died in 1842 by leaving four debentures to her children from the 1777 Irish Tontine. Mrs. Browne's only son inherited half of the income from the tontine, whereas the remaining income was shared by her five daughters (10% share per each from the inheritance). However, at the time of Browne's death, his interests in the tontine had not yet been shared. The tontine directors were only responsible to make payments to the bequests from time to time and to present financial accounts of their investments. As the value of the tontine increased considerably, the Chancery tried to determine whether the proceeds would be the personal property of the married girls or the property of their husbands as per the law of the period. According to the decision made by Lord Romilly in *re Browne's Will* [1869], the tontine was accepted as a derivative investment instrument by stating that it should be exempted from the conditions related to marriage in this context. In other words, although the case is about the law of inheritance, it is also important in terms of explaining the legal nature of the tontine. With this lawsuit, the personal investment-based tontine system offered by Tonty has turned into an easily sellable and liquid product.

The Doncaster Universal Tontine, which was presented in 1788, was specifically designed to be annulled after the income of each surviving beneficiary reached £1000. This £46,000-worth tontine, which was originated by its 364 founding members purchasing government bonds called "consols", regularly distributed 3 percent interest to its members every year. By 1860, only 46 members remained and the final distribution process was initiated. This distribution led to legal disputes, which was solved in the case of *Oldfield v. Preston* [1862]. This case was related to the collection of Succession Duties on the shares to be distributed upon the termination of the tontine. The Chancery has decided that there is no room for levying succession duties, as the tontine entails only contractual obligations but not a right of inheritance.

It is also possible to assign a different meaning to tontines. In the course of time, they were used for financing large projects in the UK and US. For example, they have been used as a tool to finance the urban transformation of municipalities. In 1834, six precious buildings designed with the Georgian architecture in Pery Square, Limerick, Ireland, were built through the instrument of a tontine. As of 1841, the tontine shares were created by Edmond Pery, the First Lord of Limerick, who bought 18 of them (by nominating different people between the ages of 2 and 27). The predicted long-term return of this tontine was that each of the last 6 survivors was entitled to have a house (McCahon, 1999). Likewise, the Covent Garden Theatre in London was one of the important structures established through a tontine (Clements, 2018). Another important example of tontine is the "Tontine Coffee House", which is a symbolic building as it has a central location connecting Wall Street and Water Street., in Manhattan, New York (Teweles & Bradley, 1998, s. 109; McKeever, 2009, s. 500). This tontine was proposed in 1790 and completed in 1792. A total of 203 shares were accordingly created, and each share was sold at \$200. It was established in advance that the tontine would go into liquidation when the number of surviving candidates would decrease to seven. As of November 18, 1870, the number of candidates decreased to the specified number, and after a long delay caused by valuation problems, the relevant property was sold on January 11, 1881, for \$138,550, with a value far below the expectations (McKeever, 2009, s. 500; The Tontine Association, 1881).

5. REDRESSING THE TONTINE AS A RESPONSE TO CURRENT ISSUES OF TURKISH INSURANCE LAW

Tontine insurance splits countries down the middle: while EU Member States and some states in the US allow tontine insurances, some other states in the US such as Louisiana and South Carolina, and the UK (after the enactment of the 1982 Insurance Companies Act) didn't allow such insurances. In terms of Turkish insurance law, tontine insurance was prohibited in the former Commercial Code no. 6762, as it was seen as an application that did not comply with the Civil Code or other customs and traditions. More particularly, the concept that savings of those who died early were left to their partners, not their heirs does not fit well with the Turkish family structure. However, while the New Turkish Commercial Code (TCC) numbered 6102 was adopted, tontine insurance was also allowed in order to comply with the affiliated EU directives. Although tontine insurance is completely valid as per TCC, there are no examples in practice yet and there is no tontine insurance type provided by insurance companies. This section, accordingly, demonstrates current issues of insurance law by proposing the application of tontine insurance as

a remedy. The first issue is the obligation of the insurer to pay despite the suicidal death of the insured. According to Article 1503 of TCC, "In insurance contracts against the risk of death in effect since at least three years including renewals, if the insured commits suicide or dies as a result of an attempted suicide after this period, the insurer shall be obliged to pay the insurance sum. If the suicide or the death of the insured as a result of attempt to commit suicide has resulted from a disorder in its mental faculties before the expiry of three years, the insurer shall pay the insurance sum." This might lead to a problem by motivating people to commit suicide after 3 years of the insurance contract. In tontines, this risk is automatically averted. The second issue is the murder of the insured by the policyholder or beneficiary. According to Article 1504 of TCC, "If the policyholder killed the insured or was the co-conspirator of that crime with intent to cause the payment of the insurance sum, the insurer shall be discharged from liability. If the beneficiary killed the insured or was the co-conspirator of that crime in any manner, it shall be deprived of the benefit of the insurance and the insurance sum shall be paid to the inheritors of the deceased." This could also be averted by its very nature through the application of tontines. The third issue is about the possibility of insurer's bankruptcy, which is regulated in Article 1506 of TCC as follows: "In insurances taken out for a period longer than one year, if at the date the insurer is declared bankrupt the risk had not materialised yet, the mathematical reserves as at the date, on which the insurer was declared bankrupt, and if upon the occurrence of the risk the insurance sum had not been paid yet the mathematical reserves as at the date, on which the risk materialised, shall be paid to the entitled persons. Where the risk is materialised, any portion exceeding the mathematical reserves shall be paid from the securities constituted by the insurer and any deficit shall be included in the list of priorities in bankruptcy." Indeed, there is always a risk of the bankruptcy of the insurer. However, the tontine supported by states does not cover such risks. Fourthly, tontine allows its members to leave the tontine anytime by selling their subscription to someone else. However, article 1506 of TCC, as it stands, requires at least one-year payment to terminate the insurance contract to get the surrender value in accordance with the generally accepted actuarial principles. Finally, article 1499 of TCC encumbers insured parties an obligation to give information, which can affect the aggrieved risk, but the tontine averts several transaction costs relating to duty of disclosure during the contract, as there is no need to give notice unless the nominee dies.

6. CONCLUSION

Tontine insurance, which was offered as a solution to the potential problems specified in Turkish insurance law, is a form of insurance that will potentially be mentioned a lot in the future (Meerten & Hooghiemstra, 2017, s. 43-50). Potential reasons why tontines have not been addressed, no even once, might be stemmed from the lack of sufficient auxiliary statues. The most likely reason that the application of tontines is available in accordance with the TCC is to take required steps in the EU accession period. However, tontines are not able to march out of step with the Turkish legal system, as there is no single clue from the history in terms of their applications. Against all the odds, the tontine is a very convenient form of insurance in today's condition such that it is an advantageous system to apply for people living alone or couples who are not married but living together (i.e. those who do not have heirs). The tontine is a structure with risks on longevity (Donnelly & Bernhardt, 2019). In this context, given that average lifespan increases, it is especially useful for long living people's economic difficulties, with its annual pension-like payments. The purpose of modern tontines is to make regular and incremental payments to shareholders throughout their lives. The ability to predict the minimum annual return is one of the most important factors for investors. Tontine insurance can be brought to the agenda to collect large funds and resources as a way out of the economic crisis that has deepened especially with the Covid-19 pandemic. It can be one of the most convenient ways to gather large sums of money; meanwhile, it provides savings to its members by making ever-increasing payments over time at predetermined intervals, although not in large amounts.

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