



Research Article

Legal Review of *Tabarru'* Contract in the Refund of Premi in Islamic Insurance

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Abstract

This paper explores the legal framework surrounding the refund of *tabarru'* funds in Islamic insurance. *Tabarru'* represents a donation in which participants contribute to a collective fund for mutual assistance. However, the refund of these funds, particularly when participants discontinue their policies, raises questions about its legal permissibility. Using a qualitative juridical-empirical approach, this study reviews Islamic jurisprudence, Indonesian law, and fatwas issued by the National Sharia Council (DSN-MUI). The study finds that while *tabarru'* is fundamentally a donation, refunds are permissible under specific conditions, particularly when underwriting surpluses are involved. The findings contribute to the ongoing discourse on aligning Islamic insurance practices with Shariah principles while meeting contemporary needs.

Keywords: *Tabarru'*; Islamic Insurance; Refund; Shariah Law; Underwriting Surplus

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Introduction

Islamic insurance, commonly referred to as *takaful*, provides an alternative to conventional insurance by adhering to Shariah principles. Unlike conventional insurance, which transfers risk from the participant to the insurer, *takaful* operates on the concept of mutual cooperation and risk-sharing. Participants contribute to a collective pool known as the *tabarru'* fund, which is designed to assist members who face unforeseen risks. This system reflects the spirit of solidarity and mutual aid, central tenets in Islamic finance (Ali, 2023).

The *tabarru'* contract is a pivotal element of *takaful*, where participants contribute donations to help other members without expecting a financial return. The donated funds are used to cover claims for those in need, with the insurance company acting

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as a manager of the fund rather than a profit-seeking entity. The essence of the *tabarru'* contract is selflessness, aligning with the Islamic principle of supporting the community (Wibowo, 2023). However, practical complexities arise when participants terminate their policies early and seek refunds, leading to debates about whether such refunds are permissible within the Shariah framework.

One of the core issues involves the refund of *tabarru'* funds. Although these funds are intended as donations, refunds often come from underwriting surpluses, which are generated from investments made by the insurance company. This practice raises ethical questions regarding the status of *tabarru'* as a donation and its compatibility with Shariah law. Some argue that returning a donation contradicts its altruistic nature, while others maintain that if the refund originates from surplus rather than the original donation, it remains permissible under Islamic law (Qudsi, 2018).

The refund mechanism highlights the tension between the charitable nature of *tabarru'* and modern financial practices. Participants may view their contributions as both charitable and recoverable, especially when the fund has grown through investments. This dual expectation presents challenges for Islamic insurance companies, which must manage these funds in a way that upholds Shariah principles while meeting consumer demands for refunds or returns (Fadilah & Makhrus, 2019).

This paper aims to explore the legal and ethical dimensions of refunding *tabarru'* funds in Islamic insurance. By examining Shariah guidelines, fatwas from the DSN-MUI, and relevant legal frameworks in Indonesia, the study seeks to clarify the conditions under which refunds may be permissible. In doing so, it contributes to the broader understanding of how Islamic financial practices can evolve to meet modern needs without compromising their ethical foundations.

Methods

This scholarly work employs a qualitative research methodology, utilizing a juridical-normative approach. The analysis integrates various secondary materials to comprehensively understand the subject matter. The type of data used in this research is qualitative, which effectively elucidates and presents the existing issues. Specifically, the data encompasses an examination of the concept of Islamic insurance, the mechanisms for managing funds within Islamic insurance, and their alignment with fatwas set forth by the National Sharia Council-Indonesian Ulama Council (Dewan Syariah Nasional Majelis Ulama Indonesia abbreviated DSN-MUI in Bahasa Indonesia) and relevant legislation.

The sources for this academic writing regarding the Legal Review of the *Tabarru'* Contract in the Refund of Islamic Insurance Premiums are derived from various

materials, including books, academic journals accessed via the internet, and legal regulations, along with the fatwa from the National Sharia Council.

Results and Discussion

The Concept of Islamic Insurance

The concept of Islamic insurance, often referred to as *takaful* or *ta'amin*, embodies several fundamental principles. *Takaful* signifies mutual assistance among individuals as social beings, while *ta'amin*, derived from the Arabic word for trust, implies the provision of protection, tranquility, and safety from various threats. Islamic insurance encompasses the notion of coverage or mutual protection (Manan, 2017, p. 7). Contemporary scholars of Islamic jurisprudence, such as Wahbah Az-Zuhaili, define Islamic insurance as *at-ta'min at-ta'awuni*, which translates to cooperative insurance. This definition reflects an agreement among a group of individuals to contribute a specific sum of money to compensate any member who experiences misfortune. This framework underscores the principles of mutual support or guarantee among participants, wherein each individual contributes financially through what is termed *tabarru'* (Anwar, 2007).

In 2006, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) issued guidelines regarding Islamic insurance, characterizing it as a mutual agreement among individuals facing specific risks to mitigate the impact of such risks through binding charitable contributions, resulting in the formation of a *tabarru'* fund. This fund serves the purpose of providing compensation to participants of Islamic insurance according to agreed-upon terms. The management of this fund is overseen by a board appointed by the policyholders or by a service company acting under the *wakalah* contract, which authorizes them to manage and return the fund.

According to DSN-MUI Fatwa No. 21/DSN-MUI/X/2001 concerning Islamic insurance guidelines, the contracts utilized encompass *tijarah* and *tabarru'*. The *tijarah* contract pertains to the principle of *mudharabah*, whereby the company functions as the *mudharib* (manager) and the participants are the *shahibul mal* (capital owners). Conversely, the *tabarru'* contract represents a donation in which participants provide contributions intended to assist other members who encounter misfortunes, while the insurance company acts solely as the manager of these charitable funds (Tarmizi, 2019).

Yusuf Qardhawi equates *tabarru'* with a gift (Qardhawi, 2000), emphasizing that within the framework of the *tabarru'* contract, participants voluntarily contribute resources to assist others affected by calamities, without the expectation of profit. Consequently, this pooled fund is designated exclusively for the benefit of participants facing adverse events. Any use of these funds for other purposes would

constitute a violation of the contract's stipulations. Furthermore, a participant who has contributed to aid others is not precluded from receiving assistance if they themselves experience a misfortune. Thus, the principle of mutual aid in Islamic insurance serves as a foundational tenet for the management and distribution of funds, positioning Takaful as a viable alternative aligned with Islamic values (Anwar, 2007, p. 36).

Mechanism of Fund Management in Islamic Insurance

The savings product system incorporates elements of savings and requires each participant to pay a regular premium to the company. The amount of the premium is contingent upon the participant's financial capacity; however, the company establishes a minimum premium that must be paid. Each premium paid by participants is allocated into two separate accounts.

The first account is the participants' savings account, which consists of funds that belong to the participant. These funds are accessible when the agreement concludes, if the participant resigns, or in the event of the participant's death.

The second account is the *tabarru'* account, which represents a pool of goodwill funds contributed by participants for the purpose of mutual assistance and support. Disbursements from this account occur in the event of the participant's death or upon the conclusion of the agreement, contingent upon the availability of surplus funds.

This system exemplifies the implementation of *takaful* and *mudharabah* contracts, ensuring that Islamic insurance remains free from elements of *gharar*, or uncertainty, as well as *maisir*, or gambling. Additionally, these pooled funds are invested in accordance with Islamic law. The profits generated from these investments, after deducting insurance liabilities, including claims and premiums, are distributed according to the *mudharabah* contract. The profit-sharing percentage is established through a fixed ratio agreed upon in the cooperative agreement between the company and the participants.

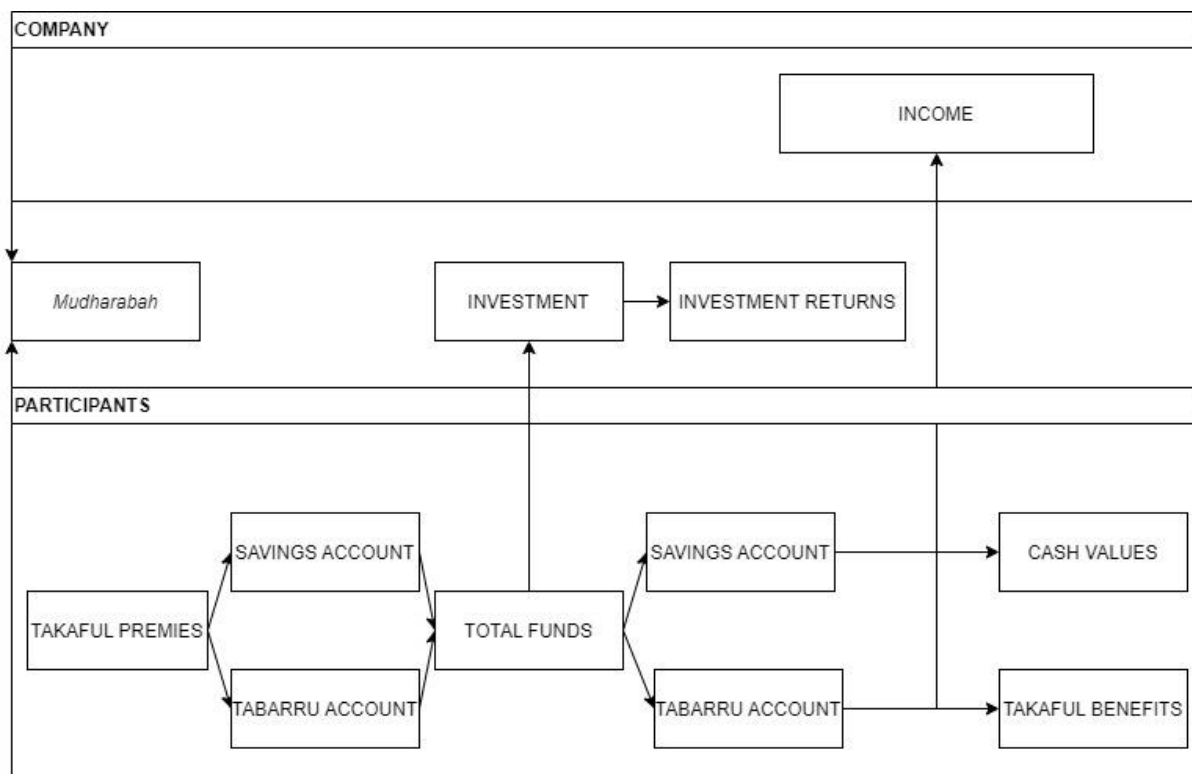


Figure 1. System on saving products (there is an element of savings)
(Sula, 2004)

The system devoid of savings elements allocates each premium paid by participants into the company's *tabarru'* account. This account constitutes a pool of funds that participants have contributed for the purpose of mutual assistance and support. Disbursements from this account occur in the event of the participant's death or upon the conclusion of the agreement, contingent upon the availability of surplus funds (Soemitra, 2012, p. 281).

Fund management represents the operational framework of an insurance company, which involves overseeing the collected premiums by investing them in various financial institutions to serve as reserves for future claims. In essence, the *tabarru'* funds are developed to anticipate potential losses that may arise in the future.

Each period of managing the *tabarru'* fund can yield two possible outcomes: surplus underwriting and deficit underwriting. Surplus underwriting occurs when the total funds collected exceed the total claims and other expenses within a specific period. Conversely, deficit underwriting arises when total claims and expenses surpass the accumulated funds.

In the event of surplus underwriting within the *tabarru'* fund, the company, acting as the fund manager, is empowered to determine the distribution of the surplus in accordance with agreements made with the participants (Minister of Finance Republic of Indonesia Regulation Number 18/PMK.10/2010, Article 13, Paragraph 1). However, if a deficit occurs due to a high volume of claims, the company is

obligated to have the capacity to provide loans in the form of *qardh* to the *tabarru'* fund by depositing cash into the *tabarru'* account. The repayment of this *qardh* occurs once the *tabarru'* fund achieves surplus underwriting (Iqbal, 2017).

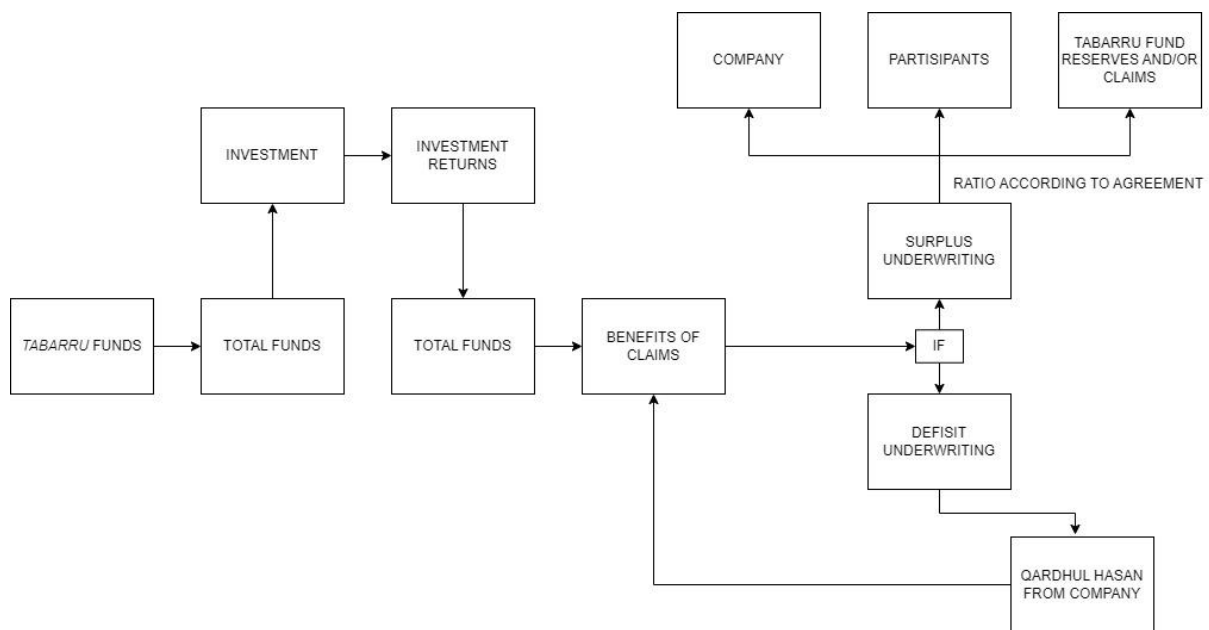


Figure 2. Management of Tabarru' Funds
(Wirdyaningsih, Perwataatmadja, & Dewi, 2005)

The Concept of Tabarru' (Donation) in Islamic Insurance

The *tabarru'* contract refers to various agreements involving non-profit transactions. The purpose of the *tabarru'* contract is to facilitate mutual assistance in the pursuit of good deeds, as *tabarru'* is derived from the Arabic word "*birr*," which means goodness. In this context, the party performing the act of kindness does not have the right to demand any compensation from the other party. The reward for the *tabarru'* contract comes solely from Allah SWT, rather than from human sources (Karim, 2013).

Consequently, this contract is not intended for the pursuit of commercial profit. Logically, if a *tabarru'* contract is conducted with the intention of seeking commercial gain, it ceases to be classified as *tabarru'* and becomes a *tijarah* (commercial transaction). To maintain its status as a *tabarru'* contract, no benefits or commercial profits may be derived from it. Moreover, participants are not obligated to bear any costs arising from the execution of the *tabarru'* contract (Asro & Kholid, 2011). According to Dr. Yusuf al-Qaradawi, the *tabarru'* funds are considered haram to withdraw, as they can be equated with *hibah* (gift) (Ismanto, 2009).

According to DSN-MUI Fatwa No. 21/DSN-MUI/X/2001 regarding the Guidelines for Islamic Insurance, the contract used in Islamic insurance is the *tabarru'* contract, which is classified as *hibah*. Most scholars define *hibah* as a contract that results in the ownership of property without compensation, voluntarily given by one person to another while the giver is still alive. The Hanbali school of thought defines *hibah* as

the transfer of ownership of property from one person to another, allowing the recipient to perform legal actions regarding the property, whether it is specific or general. The transfer occurs while the giver is still alive, without any expectation of reward. Both definitions convey the essence of giving property directly to someone without anticipating any compensation, except as a means to draw closer to Allah SWT (Dahlan, 2002).

According to Wahbah al-Zuhaili, *hibah* is an agreement to give ownership to another without any return, performed voluntarily while the giver is alive. *Hibah* encompasses gifts and donations, as *hibah*, charity, gifts, and '*athiyah* share nearly the same meaning. If someone intends to draw closer to Allah by giving something to those in need, it is considered charity. Conversely, if something is given to an individual deserving of a gift as a mark of respect or to foster closeness, it is classified as *hibah*. '*Athiyah* refers to gifts given by someone who is ill and approaching death (Az-Zuhaili, 2011).

The Compilation of Islamic Law defines *hibah* as the voluntary and uncompensated giving of an object from one person to another while both are alive (Kementerian Agama Republik Indonesia, 2018).

In simple terms, the concept of *tabarru'* in Islamic insurance can be explained as a fund designated for mutual assistance among policyholders, which must not be converted into *tijarah* funds. For instance, it cannot be used for the company's operational costs or claimed as company profit. The *tabarru'* fund should only be utilized for matters directly related to the interests of the policyholders, such as claims, *tabarru'* reserves, and Islamic reinsurance. This fund represents the participants' contributions made through premiums or contributions, specifically reserved for policyholders facing misfortunes, and is stored in a dedicated account. When invested, the returns generated from these investments also contribute back to the *tabarru'* account.

The *tabarru'* fund must be established from the contributions of policyholders from the outset of the Islamic insurance or reinsurance agreement (Regulation of the Financial Services Authority of the Republic of Indonesia No. 69 of 2016, Article 56, Paragraph 3). The position of *tabarru'* within *takaful* is an integral part of the contract. In the *takaful* agreement, the profit-sharing terms based on *al-mudharabah* are agreed upon, alongside the participants' commitment to allocate a specific portion of their contributions into a joint welfare fund designed to assist policyholders. This agreement is formulated based on the concept of *tabarru'*. Therefore, *tabarru'* is inherently integrated into the *takaful* agreement, clearly delineated within the contractual terms. In *takaful* insurance, participants' consent to the *tabarru'* is incorporated into the contract and articulated at the time they join the *takaful* scheme (Dewi, 2007).

The Legal Review Concerning the Return of Tabarru' Funds (Donation) according to Scholars

Several scholars permit the return of tabarru' funds (gifts) in insurance. Ibn Qayyim argues that a donor who should not retract their gift is one who gives it freely and without expectation of compensation. Conversely, a donor who may retract their gift is one who gives it with the intention of receiving a reward or compensation, but the recipient fails to reciprocate. This perspective allows for the comprehensive implementation of the Sunnah of the Prophet Muhammad (peace be upon him) without conflict between its various aspects. This is supported by a hadith narrated by Salim from his father, stating that the one who gives a gift is entitled to it as long as they have not received compensation for it (Sabiq, 2012). The hadith states, "Whoever gives a gift has the most right to it as long as he has not received compensation for it" (HR. Bukhari).

The Hanafis contend that the gift contract is not binding, thus allowing the donor to retract their gift. They base their argument on the saying of the Prophet Muhammad (peace be upon him): "The one who gives a gift has more right to it as long as the gift is not accompanied by compensation" (HR. Ibn Majah, ad-Daruquthni, at-Thabrani, and al-Hakim). The conditions for reclaiming a gifted asset include the absence of any barriers and a mutual agreement between the giver and the recipient or a judicial decree at the outset of the contract. This implies that the return of *tabarru'* funds is permissible if the underwriting process of collective participants agrees to the return of *tabarru'* funds for insurance participants who withdraw before the contract period ends and if there is a surplus from the underwriting results of managing the *tabarru'* funds.

According to the Malikis, it is obligatory to reciprocate a gift if the donor imposes no limitations. Gifts from individuals in similar conditions necessitate reciprocity, such as when a poor person gifts something to a wealthy individual, unlike gifts exchanged between individuals of unequal status. The supporting hadith indicates that the Prophet Muhammad (peace be upon him) accepted gifts and reciprocated them. A hadith narrated by 'Aisha states that the Prophet used to accept gifts and would return a favor, highlighting the practice of reciprocating gifts: "The Messenger of Allah (peace be upon him) would accept gifts and would respond to them" (HR. Bukhari). This hadith provides evidence that the Prophet used to accept gifts and subsequently return them. This can be used as evidence for the obligation to return gifts, as it represents a habit of the Prophet that requires the obligation to return gifts (Al-Asqalani, 2001).

Dr. Erwandi Tirmidzi posits that the return of funds in insurance can be retracted if the gift has not yet been received by the recipient (in this case, the insurance participant). This is grounded in the principle that the gift contract is incomplete

until the gifted item is received, as stated in the principle "A donation is not complete except with acceptance" (لَا يَتِمُّ النَّبْرُغُ إِلَّا بِالْقَبْضِ). In Shariah-compliant insurance, once the gift is handed over to the managing company, the funds do not belong to the company but remain part of a fund, with portions allocated to those experiencing covered risks while the remainder is retained. Thus, any remaining funds given back to contributors are not considered a retraction of their contributions (Tarmizi, 2019).

Scholars from the Shafi'i and Hanbali schools maintain that it is impermissible for a donor to reclaim their gift, except for a parent concerning their child (Az-Zuhaili, 2011). This is based on the narration from the Prophet Muhammad (peace be upon him): "The one who retracts their gift is like a dog that regurgitates and then licks its vomit" (HR. Bukhari and Muslim). The Prophet further emphasized that it is not fitting for them to use a negative comparison regarding someone who retracts a gift: "It is not appropriate for us to liken the one who retracts their gift to a dog that regurgitates and then licks it up" (HR. Bukhari). Additionally, the Prophet conveyed that it is not lawful for a Muslim to give a gift and then take it back, except for a parent concerning what is given to their child (HR. Ahmad and the Four Imams, Tirmidhi, Ibn Hibban, and al-Hakim considered it authentic) (Al-Asqalani, 2001).

The Examination of Positive Law Concerning the Return of *Tabarru'* Funds (Gifts)

The examination of the legal framework surrounding the return of *tabarru'* funds (gifts) in insurance involves both the Civil Code (KUH Perdata) and the regulations set forth by the Financial Services Authority (OJK) in Indonesia.

According to the Civil Code, specifically in Part 4 regarding the Revocation and Cancellation of Gifts, Article 1688 states that a gift cannot be revoked and therefore cannot be canceled, except under specific conditions. These conditions include situations where the recipient does not fulfil the stipulations of the gift, if the recipient is guilty of attempting to murder or committing another crime against the giver, or if the giver falls into poverty and the recipient refuses to provide for them. Furthermore, Article 1689 stipulates that the giver can reclaim the gift without any burdens or mortgages that may have been placed on the gifted item by the recipient. The giver also retains the right to pursue claims against third parties holding the gifted immovable property in the same manner as against the recipient.

In addition to the Civil Code, the regulations issued by the Financial Services Authority (OJK) further govern the return of *tabarru'* funds. Under OJK Regulation No. 72/POJK.05/2016, the return of *tabarru'* funds to policyholders is derived from underwriting surplus. However, the distribution of surplus cannot occur under certain conditions, which include the presence of a loan (*Qardh*) within the liabilities of the *tabarru'* fund, the solvency level of the *tabarru'* fund being below the internal solvency target, failure to meet investment sufficiency levels, or if the distribution of

the underwriting surplus would result in conditions mentioned in the previous points.

This interplay between the Civil Code and OJK regulations illustrates the complexities of managing *tabarru'* funds in accordance with both legal and Islamic principles, ensuring that the rights and obligations of all parties involved are respected while promoting fairness and transparency in financial transactions.

The Review of the Return of *Tabarru'* Funds according to Fatwa of The National Sharia Council-Indonesian Ulama Council (DSN-MUI)

According to DSN-MUI Fatwa No. 53/DSN-MUI/III/2006 regarding *tabarru'* in Islamic insurance, the return of surplus *tabarru'* funds is permissible within the framework of Islamic insurance. This fatwa establishes that *tabarru'* funds, which are essentially donations that have transferred ownership, can be returned by the fund managers, specifically the insurance companies. This is allowed considering that the fund managers are permitted to take actions related to the funds, including investing them and returning the surplus generated from these investments.

The fatwa outlines several key points regarding the management of insurance within the context of *tabarru'* agreements. Firstly, the management of Islamic insurance and reinsurance can only be conducted by institutions that function as trustees. Secondly, the accounting of *tabarru'* funds must be separated from other funds to ensure transparency and proper tracking of resources. Thirdly, the returns generated from the investments of *tabarru'* funds belong to the collective rights of the participants and must be recorded in a dedicated *tabarru'* account. Finally, the insurance and reinsurance companies can earn a share of the profits based on *mudharabah* agreements or receive a fee based on *wakalah bil ujah* agreements.

Additionally, DSN-MUI Fatwa No. 81/DSN-MUI/III/2011 states that *tabarru'* funds in Islamic insurance can be returned if the process is conducted collectively. This collective action is recognized as one of the rights and authorities of the participants, allowing them to establish regulations regarding the use of *tabarru'* funds. This includes the right to submit requests for the return of *tabarru'* funds by individual participants who discontinue their participation before the end of the contract period, as stated in the relevant provisions.

Consequently, it can be concluded that Islamic insurance companies, as fund managers, do not have the authority to return *tabarru'* funds when requests are made individually. The return of contributions or donations will only occur if the requests are made collectively, with the agreement of all participants. However, it is important to note that the return will not be the full amount paid from the beginning; instead, it will be a partial return, deducting administrative costs, policy issuance fees, and other related expenses incurred.

Conclusion

The legal review of the refund of *tabarru'* funds in Islamic insurance highlights several key points. Firstly, while *tabarru'* is a donation with no expectation of return, some scholars permit refunds under specific conditions, particularly when the funds have not been received or when there is mutual consent. Secondly, Indonesia's Civil Code allows for the cancellation of gifts under certain circumstances, and the Financial Services Authority (OJK) regulates that the refund of *tabarru'* funds may come from underwriting surpluses. Lastly, the DSN-MUI fatwa permits the return of *tabarru'* funds if done collectively and if agreed upon by the participants. Therefore, the refund of *tabarru'* is possible under both Shariah and legal frameworks, provided it adheres to these guidelines.

Conflict of Interest

The authors declare no conflict of interest.

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