

# LIFE INSURANCE IN POSITIVE LAW AND ISLAMIC LAW IN INDONESIA

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**Abstract:** *Life insurance is an agreement made by an insurance company to its customers that if the customer experiences a risk of death in his life whether in the form of an accident or due to illness, then the insurance company will provide compensation with a certain amount of money in accordance with the premiums paid for being a customer of the insurance company to heirs of the customer. Conventional Insurance and Syariah Insurance are both tasked to manage and cope with risk, it's just that in Syariah Insurance the management concept is carried out using a pattern of mutual risk between managers and participants (risk sharing) or called at takaful and at tadhmun. While in conventional insurance the work pattern is to transfer risk from the customer (participant) to the company (manager), which is called risk transfer. So that the risks regarding the participants will be fully borne by the manager.*

**Keywords:** *Insurance, Islamic law, Positive law*

## The Introduction

Human life in modern times is filled with various kinds of risks and dangers. Man does not know what will happen tomorrow and where he will die. The risks that threaten humans are very diverse, ranging from accidents in air transportation, ships, to land transportation, there are even people who can experience work accidents where they work, whether in the form of fire, robbery, theft, disease, even death.

To overcome this, humans took the initiative to make a transaction that could guarantee themselves and their assets, which became known as insurance. This insurance includes contemporary transactions that did not exist at the time of the Prophet Muhammad. Therefore, there needs to be an explanation of the law in Islam.

Insurance comes from the word *assurantie* in Dutch, or *assurance* in French, or *assurance / insurance* in English. *Assurance* means to bear something that is certain to happen, while *Insurance* means to cover something that may or may not happen. Meanwhile, according to some experts, insurance comes from Greek, namely *assecurare* which means to convince people.

In Arabic, insurance is known by the term: at Takaful, or at Tadhmun which means: mutual support. This insurance is also called at-Ta'min, comes from the word *amina*, which means safe, peaceful, and calm. The opposite is *al-khouf*, which means fear and worry. (alFayumi, al Misbah al Munir, p: 21) It is called at Ta'min, because the people who carry out this transaction (especially the participants)

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already feel safe and are not too afraid of the dangers that will befall them with this transaction.

As for insurance according to the terminology as stated in Law No. 2 of 1992:

"Insurance or coverage is an agreement between two or more parties, whereby the insurer binds itself to the insured, by accepting an insurance premium to compensate the insured for loss, damage or loss of expected profit, or legal liability to third parties who may be suffered by the insured, arising from an uncertain event, or to make a payment based on the death or life of an insured person".

According to article 246 Wetboek van Koophandel (Indonesian Trade Code) that insurance is generally an agreement in which the guarantee party promises the guaranteed party to receive an amount of premium as compensation, which the insured may suffer, due to a result of a events that are not yet clear will occur (Wirjono 1986: 1).

Positive Law, is a law that applies to a country in the form of laws and government regulations that have been ratified by Parliament and published in the State Gazette. There are two types of insurance that are known in terms of management. The first is conventional insurance, and the second is Islamic insurance. Many people are familiar with conventional insurance because this type of insurance was the first to exist and is known to be a diversion for risks that may arise to the insured, meanwhile sharia insurance is made to accommodate the guarantor's needs against risks with a more sharia value.

In its existence, there are two differences in the existence of insurance in people's lives. In Islamic law and also positive law, whether this insurance is legalized in Islam or could it be Haram for Muslims, the author will discuss how life insurance is in positive law and Islamic law in Indonesia.

### **Research Methods**

This type of research is qualitative research with descriptive methods. The data used are secondary data consisting of primary, secondary and tertiary legal materials. The data in this study were collected by conducting a literature study

### **Discussion and Results**

#### **Types of Insurance in terms of Aspects**

Experts differ in opinion in mentioning the types of insurance, because each one looks at certain aspects. Therefore, this paper will mention the types of insurance in terms of various aspects, both from the aspect of participants, coverage, and aspects of the system used:

1. Insurance in terms of participant aspects, divided into:

- a. Personal Insurance (Ta'minFardi): i.e. insurance carried out by someone to guarantee from certain dangers. This insurance covers almost all forms of insurance, in addition to social insurance.
  - b. Social Insurance (Ta'minIjtima'i), which is insurance (guarantee) given to certain communities, such as civil servants (PNS), members of ABRI, retired people, people who cannot afford and others . This insurance is usually held by the government and is binding, such as Health Insurance (Askes), Pensioners and Old Age Insurance (PT Taspen), Astek (Workers 'Social Insurance) which then turns into Social Security (Workers' Social Security), Asabri (Social Insurance specifically ABRI), vehicle insurance, education insurance and others.
2. Insurance in terms of shape  
Insurance in terms of form is divided into two:
- a. Takaful or Ta'awun Insurance (*at Ta'min at Ta'awuni*)
  - b. Commercial Insurance (*atTa'min at Tijari*) includes: general insurance and life insurance.
3. Insurance in terms of coverage or object insured  
Types of insurance in terms of coverage are as follows:
- a. General Insurance or General Insurance ( *Ta'min al Adhrar* )  
Loss Insurance is insurance that provides compensation to the insured (people who have agreed to participate in or pay a sum of money as insurance contributions) who suffer loss of goods or their belongings, this loss occurs due to a disaster or other danger, whether the loss is in the form of loss of use value or the lack of value or loss of benefits expected by the insured, for this incident insurance coverage can be held or used benefits.  
The insurer does not have to pay compensation to the insured if during the term of the object agreement, the insured does not experience a disaster or the insured risk and cause harm to the insured. *Asuransi Jiwa. (Ta'min al Askhas)*
  - b. Life insurance is an agreement made by an insurance company to its customers that if the customer experiences a risk of death in his life whether in the form of an accident or due to illness, then the insurance company will provide compensation with a certain amount of money in accordance with the premiums paid for being a customer of the insurance company to heirs of the customer.
4. Insurance in terms of the system used  
The types of insurance in terms of the system used consist of insurance as follows:
- a. Conventional Insurance
  - b. Sharia Insurance, which is a risk management arrangement that complies with Sharia provisions, this is a type of insurance, please help mutually involving participants and operators.

### Insurance Law

Insurance law in Islam differs from one type to another, as for the details as follows:

#### 1. *Ta'awun* Insurance

Ta'awun insurance is permissible in Islam, the reasons are :

- a. *Ta'awun* insurance is a *barru'* contract (voluntary donations) that aims to work together in dealing with distress, and to take part in taking responsibility when disaster strikes. The trick is that some people donate a sum of money that is allocated for compensation for the person affected by the loss. The *ta'awun* insurance group does not aim at commercial purposes or seek profits from the property of others, but only aims to alleviate the threat of danger that will befall them, and to be together in facing it.
- b. *Ta'awun* insurance is free from usury, both usury and rice usury, because there is no element of usury and the premium collected by members is not invested in institutions that smell of usury.
- c. The ignorance of the insurance participants regarding the certainty of the amount of compensation to be received is not something that affects, because in essence they are donors, so that here does not contain elements of speculation, obscurity and gambling.
- d. The existence of several insurance participants or representatives who invest funds collected by participants to realize the objectives of the establishment of this insurance, both voluntarily, and with a certain salary.

## 2. Social Insurance

As with *ta'awun* insurance, social insurance is legally permissible for the following reasons:

- a. Social insurance does not include the contract *mu'awadlah* (buying and selling), but is a partnership to help each other.
- b. Social insurance is usually held by the Government. The money paid by members is considered as tax or contribution, which will then be invested by the Government to cope with disasters, calamities, when suffering from illness or assistance in retirement and old age and the like, which in fact is the duty and obligation of the Government. So in a contract like this there is no element of usury and gambling.

## 3. Business or Commerce Insurance

For Commercial Insurance, the law is haram. As for the arguments forbidden by Commercial Insurance (Business), among others, as follows:

- a. Business Insurance Agreement is included in the financial compensation agreement which is speculative in nature, and therefore contains a distinct element of *gharar*. Because the participants at the time of the contract did not know for certain the amount of money he would give and he would receive. Because it could be that, after paying dues once or twice, an accident occurred so that he is entitled to the allotment promised by the insurance company. But sometimes an accident never occurs, so he pays the entire amount of the contribution, but gets nothing. Likewise, the insurance company cannot determine the amount that will be given and will be received from each contract separately. In this case, there is the hadith of Abu Hurairahra, that he said:

نَهَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ بَيْعِ الْحَصَاةِ وَعَنْ بَيْعِ الْعَرَرِ

*“Rasulullah saw forbade buying and selling by hashah (buying and selling by throwing pebbles) and other methods that contained an element of deception.”* (HR Muslim, 2787)

- b. Business Insurance Agreement is a form of gambling (gambling), because it contains an element of mukhatarah (speculation of risk taking) in monetary compensation, also contains (al ghurm) harms one party without error and without a cause, and contains an element of profit taking without reward or with unequal rewards. Because the participant (insurance recipient) sometimes only pays one insurance contribution, then an accident occurs, the company is forced to bear the loss because they have to pay the total amount of insurance without compensation. Conversely also, there could be no accident at all, so the company takes advantage of all premiums paid by all participants for free. If this kind of ambiguity occurs, then a contract like this includes a form of gambling that is prohibited by Allah SWT, :

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رَجْسٌ مِّنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ  
*“verily (drink) khamar, gamble, (sacrifice for) idols, draw lots of fortune with arrows, are abominable acts including devils. So stay away from these actions so that you get good luck.”* (QS. Al-Maidah: 90).

- c. Business Insurance Agreement contains elements of usury fadhal and usury nasi'ah at the same time. Because if the insurance company pays compensation to the participant (the recipient of the insurance service), or to the heirs in excess of the amount of money they have deposited, it means it is usury fadhal. If the company pays the insurance money after some time, then that includes usury rice. If the insurance company only pays the customer the amount he has deposited, it means that it is only usury rice. And both types of usury have been forbidden based on the text and ijma 'the scholars.
- d. Business Insurance Contracts also contain an element of prohibited (betting). Because it contains elements of uncertainty, fraud, and gambling. The Shari'a do not allow betting unless it benefits Islam, and raises its syllables with hujjah and guns The Holy Prophet has given relief to this bet on a limited basis on only three things, as in the hadith of Abu Hurairahra,Rasullulaah, SWT, Said

لَا سَيْقَ إِلَّا فِي خُفِّ أَوْ فِي حَافِرٍ أَوْ نَصْلٍ

*“there is no competition except in animals that have feet (camels), or hoofs (horses), and archery.”*(Hadits Shahih Riwayat Abu Daud, no : 2210)

Insurance is not included in that category, it is not even similar at all, so it is forbidden.

- e. Business Insurance Agreement includes taking people's property without compensation. Taking property without compensation in all forms of trade is forbidden, because it is prohibited in the word of God:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَن تَرَاضٍ مِّنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

*“do not eat one another's possessions in a false way, except in the way of trade that applies with equal conscience between you.*

*And do not kill yourself; surely Allah is Most Merciful to you.”(QS.An-Nisa’: 29).*

- f. Business Insurance Agreement contains a mandatory element that is not required by sharia. ' Because the insurance company has never created a hazard and has never been a cause of danger. There is only a form of agreement to the participants receiving the insurance, that the company will be responsible for the dangers that are likely to occur, in return for a sum of money paid by the participants receiving the insurance services. Though here the insurance company did not do any work for the recipient of the service, then the act was clearly forbidden.

### **Difference between Sharia and Conventional Insurance.**

The differences between the two sides of Islamic and conventional insurance are as follows

#### **1. Basic Principles**

Conventional Insurance and Sharia Insurance are both tasked to manage and cope with risks, it's just that in Syariah Insurance the management concept is carried out using a pattern of mutual risk between the manager and participants (risk sharing) or referred to at takaful and at tadhamun. While in conventional insurance the work pattern is to transfer risk from the customer (participant) to the company (manager), which is called risk transfer. So that the risks regarding the participants will be fully borne by the manager.

#### **2. The contract**

In certain parts of the ausransi sharia the contract is tabarru '(humanitarian donations) and ta'awun (please help), as well as wakalah and mudharabah (profit sharing) contracts. Whereas in conventional insurance, the contract is the sale and purchase of al Gharar (speculative).

#### **3. Fund Ownership**

In Conventional Insurance the funds paid by customers to the company (premiums) become the property of the company in full, especially if the participant does not make any claims during the insurance period. While in Syariah Insurance these funds are still the property of the participants, after deducting the company's financing and fees (ujrah). Because in Sharia Insurance, the company is only a trustee (representative) that is paid by the participant, or often referred to as al Wakalah bi al Ajri. It could also be a company as a fund manager (mudarib) in a mudharabah (profit sharing) contract. There are even companies that return the underwriting account management surplus to participants as long as there are no claims during the insurance period. Or the company as a fund manager.

#### **4. Object Syariah**

Insurance only limits its management to halal insurance objects and does not contain doubt. Therefore it should not make its object on things that are haram or doubtful, such as buildings that are used for immorality, or liquor and cigarette factories, even non-sharia hotels. As for Conventional Insurance does not distinguish objects that are haram or halal, which is important to bring profit.

#### **5. Investment Funds**

Funds from the collection of premiums from participants as long as they have not been used, by Syariah insurance companies, are invested in Islamic financial institutions or in halal projects based on wage or profit sharing systems. The conventional insurance management of investment in the interest system that contains a lot of usury and speculative (gharar).

6. Payment of claims

In Syariah insurance, payment of claims is taken from the Tabarru 'account (social funds) of all participants, which from the beginning intended to be used for mutual benefit help in case of disaster for some or all participants. Whereas in conventional insurance, payment of claims is taken from company funds because from the beginning of the agreement that all premiums belong to the company and if a claim occurs, it will automatically become a company expense.

7. Supervision

Syariah insurance there is a Syariah Supervisory Board (DPS), something that is not found in conventional insurance.

8. Zakat, infaq and sadaqah funds.

In Syariah insurance there is an obligation to issue zakat as stipulated in Islamic law. As for conventional insurance the term zakat is not known.

The first conventional life insurance in Indonesia was NILIMIJ, which was founded by the Dutch government in 1859 AD, then in 1912 native Indonesians established OL-Mij, which was essentially the development of NILIMIJ. Ol-Mij finally became PT Asuransi Jiwa Bersama Bumi Putra. Since then, conventional insurance has grown rapidly until 2005, with 157 companies registered. The rate of growth (1%) has been recorded annually. Among the existing life insurance are: American International Group Lippo (AigLippo), Eka Life Life Insurance, IndolifePensiantama Life Insurance, Metlife Sejahtera Life Insurance, TuguMandiri Life Insurance, PT. BNI Life Insurance.

The first Syariah insurance in Indonesia appeared on February 24, 1994, namely the Takaful Corporation. Even so, the development of Sharia insurance is much faster than conventional insurance, because until 2005 there were 29 companies registered, so the growth rate of up to (8%) in one year. Even now there are 34 more companies.

The average Syariah insurance referred to above, is the incarnation of conventional insurance that moves into total Shariah insurance or has two programs, namely selling conventional and sharia products at one time. Those who truly established themselves as shari'ah insurance are PT Asuransi Takaful Keluarga which was established on August 4, 1994. Other examples of shari'ah insurance companies are PT Asuransi Al Mubarakah which was founded in 1997 and PT MAA Life Assurance, while for conventional insurance companies that have syariah products are: PT Asuransi Jiwa Manulife Indonesia, PT Asuransi Jiwa Sinar Mas.

Among Muslim scholars and scholars there are 4 (four) opinions about insurance law:

1. Forbidden in all kinds and forms today, including life insurance
2. Allow all insurance and current practice;
3. Allow social insurance and forbid insurance that is purely commercial in nature;
4. Assume subhat.

The first opinion was supported by SayidSabiq, Abdullah al-Qalqili, Mufti of Jordan, Muhammad Yusuf al-Qardhawi and Muhammad Bakhit al-Muth'i on the grounds;

1. Insurance is essentially the same or similar to gambling.
2. Contains unclear and uncertain elements
3. Contains elements of usury.
4. Contains elements of exploitation.
5. Premiums that have been paid by policyholders are played in the practice of usury.
6. Arusansi includes sharfi contract, meaning that buying or selling or exchanging currencies is not for cash.
7. Human life and death are made into objects of business, which means to precede the destiny of Almighty God. (SayidSabiq 1981: 302-304).

Supporting the second opinion, among others; Abdul WahabKhallaf, Mustafa Ahmad Zarqa, Muhammad Yusuf Musa, Abdurrahman Isa with reason :

1. There is no Al Qur'an and Hadith that prohibits insurance.
2. There is agreement / willingness of both parties.
3. Mutually beneficial to both parties.
4. Contains public interest (maslahah 'ammah), because the premiums collected can be implemented for productive projects and for development.
5. Insurance includes mudharobah contract, meaning that the profit sharing agreement between the policy holder (the capital owner) and the insurance company plays the capital on the basis of profit and loss sharing (PLS).
6. Insurance including cooperatives (syirkahta'awuniyah).
7. Be analogous (analogy) with the pension system, such as Taspen. (MasjfukZuhdi 1991: 129)

Supporting the third opinion, among others; Muhammad Abu Zahra. The reason they allow social insurance in general is the same as the second opinion reason; whereas the reasons for prohibiting commercial insurance are generally the same as the first opinion. (Ibid.,: 129). The reasons for those who consider insurance doubtful, because there are no arguments syar`i which clearly forbids or justifies insurance. If the insurance law is categorized as doubtful, then the consequences of the Islamic Ummah are required to be careful about insurance and are only allowed to take out insurance if in an emergency or hajj / need.

The above description can be interpreted that the problem of insurance is a matter of ijthadiyah which contains differences of opinion among scholars, there are those who agree and those who disagree. A Muslim should study and ask experts to further determine



attitudes carefully. He must take a convincing opinion and not hesitate in determining his attitude. The difference in opinion of the scholars on the issue of insurance is that the difference in terms of *furu'iyah* (branches) is not a matter of *ushuliyah* (the main points of Islamic teachings).

Aligning one opinion is justified, not blaming the other party's opinion. The author tends to the second opinion that allows all insurance in current practice, including life insurance, because in addition to the reasons that have been described, can be strengthened by the reasons stated below:

1. In accordance with the rules of Islamic law; In principle the contracts are allowed, so there are arguments forbidding them.
2. In accordance with the main objectives of Islamic law to seek benefit and reject damage / loss.
3. In accordance with the rules of Islamic law; If there are two hazards / risks that are confronted, then the light hazard comes first.
4. Insurance is not the same as gambling, because insurance aims to reduce risk, and is social in nature.
5. Insurance has been calculated mathematically profit and loss for insurance companies and for those who hold a policy, no party is absolutely harmed.
6. In accordance with the principles and principles of Islamic law: Eliminating the narrowness and hardship and living together.

Given the reality in the Islamic community, there are still many diverse opinions about life insurance, while avoiding this difference of opinion being banned, the insurance company should take steps to innovate the management and insurance system by reducing the factors that make objections / doubts among scholars and Islamic scholars and ummah, with the meaning adapted to Islamic principles and values.

### **Conclusion**

From the description explained above, it can be concluded that basically all insurance, including life insurance, may be in the view of Islam and positive law. For insurance societies to the majority of the Islamic community, it is necessary to innovate management and insurance systems that are aligned with Islamic legal values. . Funds collected from premiums paid by policyholders should be used by insurance companies for productive projects. Part of the profits from the insurance business, it should be used for social and religious interests. The Central Indonesian Ulema Council as channeling the aspirations of Indonesian Muslims should issue a legal fatwa on insurance so that Muslims in Indonesia adhere to a more solid and convincing view.

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