**SOCIOLOGY | RESEARCH ARTICLE**

**Ex gratia as an alternative for settlement of insurance claims outside the court**

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**Abstract:** The ex-Gratia Compensation Scheme was introduced by the Government of Indonesia in 1994 to provide compensation, which is not covered by any prior legislation, for all its workers suffering from injuries and illnesses due to work. This study explores a key aspect of insurance policies in Indonesia, e.g., ex gratia payment to the insured individual by their insurance company. This study argues that several issues still exist in the insurance business in Indonesia that require a change in policies and regulations by the government for the welfare of the Indonesian people, especially the vulnerable. This paper seeks to address the question of how the ex gratia rule can be used to solve insurance claim disputes. In other words, are insurance claims always approved by insurance companies under the ex gratia rule? This study reveals that despite more than 10 years of implementation, the ex gratia claims filing is still minimal and unpopular. This is mainly due to the population’s unawareness of the provisions of ex gratia and its benefits.

**Subjects:** Contract Law & Tort; Legal Theory; Regulation

**Keywords:** contract; insurance company; insurance policy; claim; ex gratia; good faith; alternative dispute resolution

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**PUBLIC INTEREST STATEMENT**

Insurance is a risk transfer agreement between the insurer and the insured and is made in writing as outlined in the policy. A policy is a written deed as proof of insurance participation. The author focuses on the problem of how to settle an ex-gratia claim in an insurance agreement as an implementation of the principle of good faith. The results of the study show that the settlement of claims for ex gratia is an out-of-court alternative dispute resolution. Ex Gratia claims are widely adopted because they are faster, more efficient and are the result of an agreement between the parties by negotiation as prescribed by Article 31 section 3 of Law No. 40/2014 on Insurance. However, although Claims on an ex-gratia basis are intended for a speedy and a win–win solution because it does not involve a third party, but it remains unpopular in Indonesia.
1. Introduction

Insurance is a reciprocal agreement, where the insurer is willing to provide compensation to the insured in the event of a loss of the object of coverage per the provisions of the policy as compensation for premium payments. The agreement between the insurance policyholder and the insurance company is written in a written deed referred to as the policy. An agreement between private parties creating mutual obligations enforceable by law. According to Article 1320 of the Civil Code, the basic elements required for the agreement to be a legally enforceable contract are:

(a) mutual assent, expressed by a valid offer and acceptance;
(b) adequate consideration;
(c) the capacity of the parties to enter into a contract; and
(d) legality.

An agreement is very likely to arise disputes. Dispute resolution can be done through court or out of court. Settlement of insurance claim disputes tends to choose out of court through negotiations between the insurer and the insured, namely the settlement of claims by discretion (ex gratia) as good faith from the insurer/policyholder.

The ex gratia claim is implicitly an application of article 31 point (3) of Law No. 40/2014 on Insurance, which prescribes that insurance companies, sharia insurance companies, reinsurance companies, sharia reinsurance companies, insurance brokerage companies, and reinsurance brokerage companies are required to handle claims and complaints through a fast, simple, accessible and fair process, whereas article 6 section (1) of Law No. 30/1999 on Arbitration and Alternative Dispute Resolution, which says that disputes or differences in civil opinions can be resolved by the parties through alternative dispute resolution based on good faith with the waiver of litigation settlement in the District Court. In connection with this, it is necessary to conduct a legal study on the ex gratia settlement of claims for insurance agreements to determine whether or not it complied with the principles of the rule of law and equal protection under the 1945 Constitution of the Republic of Indonesia.

2. Material and methods

This is a socio-legal study drawing on qualitative data, primary data obtained directly through interviews and focus group discussions with relevant parties at a national general insurance company and some legal experts in Jakarta. Respondents consist of government officials, members of the House of Representatives or Dewan Perwakilan Rakyat (DPR-RI), insurance company representatives, insurance policyholders, and legal scholars and skilled legal practitioners at some law firms in Jakarta. The research was conducted from January to June 2021 in Jakarta, the Capital City of Indonesia. After informed consent was received from respondents, face-to-face interviews were conducted using pre-determined open-ended questions related to respondents’ knowledge/awareness of ex gratia and its existence within the Indonesian law of contracts. Interviews were also supported by focus group discussions with experts such as lawyers and policy-makers. The qualitative research method used in this research is intended to help study the experiences, views, or beliefs of the insured individuals/insurance policyholders on the concept of ex gratia and its practice in insurance claims settlements in Indonesia. Semi-structured interviews (a combination of structured and unstructured interviews) are used to help the researchers get a deeper understanding of the problems involved in the implementation of ex gratia. The study also relies on secondary data derived from official documents, legal materials, such as statutes, court rulings, legal papers, research results in the form of reports, and also tertiary legal materials that provide instructions and explanations for primary and secondary legal materials including magazines, newspapers, and information accessed through internet media. Data were analyzed through the interpretation of legal facts gathered from the field. The study mainly draws on claim dispute cases between parties by relying on legal philosophy, legal theories, and rules.
3. Understanding ex gratia

Ex gratia is Latin for “by favor” and is most often used in a legal context. When something has been done ex gratia, it has been done voluntarily, out of kindness or grace.\(^1\) In law, an ex gratia payment is a payment made without the giver recognizing any liability or legal obligation. In terms of governance, the concept of ex gratia means a relief payment made by the State granted only if there is no legislative, regulatory, or policy instrument to make such payment. Payment is made in the public interest for losses suffered or expenses incurred in cases where the State has no legal or other obligation or where the claimant is not entitled to any payment or form of compensation (Government du Canada, 2021). It is a payment made in the public interest for an expense incurred or a loss suffered and for which the State is not legally responsible (DOAD \(^{7006\_1},\) 2003). It is a payment without legal consideration. Ex gratia payments differ from legally-mandated payments because ex gratia payments are voluntary. Because of this, ex gratia payments are not very common (Banton, 2021).

4. Ex gratia in insurance

In the insurance world, ex gratia is a settlement of a claim that an insurance company agrees to honor even if it considers that it is not legally obliged to do so to avoid more costly legal costs. Ex gratia compensation payments are made if a government or organization is voluntarily willing to compensate victims of an event such as an accident or similar but not to admit liability for paying compensation or for causing the event. If a policyholder suffers an injury that is covered by the terms of their insurance policy, the insurer is legally obligated to pay for the claim. This type of payment is not voluntary. It is the result of a legal obligation, and it typically carries with it an admission of liability. In contrast, an ex gratia payment is a gesture of goodwill (Imadasari, 2013). The type of payment is made following a specific loss or damage to property; an ex gratia payment does not carry with it an admission of liability. A company providing a one-time credit to its customers would not be considered to be making an ex gratia payment because the payment is not related to a specific loss. However, a company that provides a credit after a service disruption would be considered to be making an ex gratia payment based on a claim. Usually, the claims include claims for damages suffered or expenses incurred by the state or a claimant, including requests or suggestions for the state to make an ex gratia payment.

Complaints do not include those covered by other policy or policy instruments such as:

1. contractual disputes;
2. loss and recovery claims;
3. loss or damage to personal effects; and
4. bodily injury sustained at work.

5. Some famous cases of ex gratia

When the USS Vincennes fired upon Iran Air Flight 655 in 1988, killing some 290 people, the US President decided that the United States would offer compensation, on an ex gratia basis, to the families of the victims. In a more routine context, Suffolk County Council’s document Ex-Gratia Payments for Loss of or Damage to Personal Property shows how an education authority compensates victims for damage but without accepting liability to do so (Suffolk County Council Education, 2002). Following the 1994 Black Hawk shootdown incident, on 26 August 1994, the US Department of Defense announced that it would pay $100,000 in compensation to the families of each of the non-US personnel killed in the friendly-fire incident.

In India, the Deshmukh\(^2\) granted ex gratia payments of 100,000 rupees (about US$2,000) to the next in the kinship line of those who died in the 11 July 2006 Mumbai train bombings. Those injured would be given ₹50,000 (about US$1,000) each (Dora and Gadi 1992). The prime minister of Malaysia, Datuk Seri Abdullah Haji Ahmad Badawi, announced in June 2008 undisclosed ex gratia payments to the judges who were affected during the 1988 Malaysian constitutional crisis.
Malaysia Airlines offered an ex gratia condolence payment of US$50,000 to the families of each passenger aboard the missing (assumed crashed) flight MH370, but those affected have considered the conditions unacceptable and have asked the airline to review them. In 2016, the New Zealand government awarded David Bain an ex gratia payment of NZ$925,000. While Bain had been acquitted of murdering his family in a retrial held in 2009, the defense had failed to prove his innocence (Bayer and Davison, 2016). This analysis shows that the use of the ex gratia concept in the settlement of insurance claims is a global practice, it is not only limited to Indonesia.

6. Discussion

6.1. Insurance laws and policies in Indonesia

Insurance companies in Indonesia are regulated by Article 5 section 1 of Law No. 40/2014 on Insurance, which classifies insurance businesses into three categories, namely General Insurance Business, Life Insurance Business, Sharia General Insurance Business, and Sharia Life Insurance Business. The more insurance agreements/contracts are made automatically, the more possibilities for claims and insurance agreement disputes that occur. In Indonesia, normative law allows dispute resolution to be carried out through a judicial process (litigation) or outside the court (non-litigation) (Sari, 2019).

In principle, the dispute resolution process for an insurance agreement or contract provides a framework that benefits the parties as long as they agree on the settlement process. Sometimes, insurance claims are settled through a negotiation process referred to as ex gratia claim settlement. This settlement is not widely known to the public in Indonesia whereby the existing statutes and regulations have not explicitly provided for the procedures for the settlement of insurance claims in a discretionary manner (ex gratia). Law No. 40/2014 on Insurance and Law No. 30/1999 on Arbitration and Alternative Dispute Resolution remain silent on the issue. Only article 31 sections 3 and 4 of Law No. 40/2014 on Insurance provides some legal basis for ex gratia by prescribing that insurance companies are required to handle claims and complaints through a fast, simple, accessible, and fair process. This article also says that insurance companies are prohibited from taking actions that can delay the settlement or payment of claims (Hidayatulloh, 2021).

In the Indonesian insurance system, several insurance policies are detrimental to Indonesian workers (TKI), including the ex gratia mechanism, namely the company’s obligation to pay the actual claims that are not dependent on the company. As a form of responsibility for the provision of parties, insurance cannot pay completely the claim to the policyholder/insured. For many respondents, this is not only a violation of the rights of the policyholder but also and more importantly it is a violation of human rights. They believe that Insurance Business Law No. 2/1992 does not provide for the practice of ex gratia as it makes no mention of its mechanism (Sari, 2019). This makes workers vulnerable as it provides insurance companies reasons to either deny or not make a full payment to claims made by policyholders. By law, insurance brokers in practice receive a fee of 50% of the total sum paid by the insured/policyholder. This fee rule is also not regulated in the law mentioned above, which makes the mechanism unclear and ambiguous. This is considered very detrimental to workers (Hidayatulloh, 2021). For example, out of the Rp. 400,000,00, ($27.00) premium paid by the worker, half goes to insurance brokers yet policyholders find it difficult or even impossible to get their approval. Such a practice is not only extortion and a violation of the rights of workers but it is also a denial of equal protection by the government (Hidayatulloh, 2021).

6.2. Implementation of ex gratia in insurance claim dispute resolution

Some of the factors causing the settlement of insurance agreement claims to be resolved ex gratia include the insured being a loyal customer (having covered insurance with the same insurer for years), the insured being a priority customer, namely customers who have contributed large premiums to the insurer and the insured has good and promising future business prospects. Considering the good relations that have been developed so far or to prevent the case from
going to court, the insurer pays the claim on an ex gratia basis. Insurance agreement claims whose settlement is ex gratia are usually not paid in full at the value of the claim adjustment or financial loss experienced by the insured, but lower and based on the approval of the insurer.

The advantage of the ex gratia claim settlement of insurance agreement claims is that it is cost-efficient when compared to other out-of-court claim settlements, such as mediation, conciliation, or arbitration. Even though involving third parties such as mediators and arbitrators would increase the costs of the settlement as additional fees would be paid to mediators/arbitrators, ex gratia is an alternative remedy for insurance claim disputes as it is less stressful and time-efficient (Afrizal, 2021). Because this settlement is more of a negotiation between the disputing parties, the settlement agenda will be easier, faster, and more confidential because the settlement is only carried out by the disputing parties (Abdul, 2021) for business actors including insurance to maintain the good image and reputation of the company in the eyes of the community. Many insurance experts believe that the implementation of ex gratia settlement provides more confidence and certainty as to the outcome because it is the result of the agreement of the parties for a win–win solution (Kurniawan, 2021).

Law No. 40/2014 on Insurance and Law No. 30/1999 on Arbitration and Alternative Dispute Resolution provide the legal basis for ex gratia but do not solve the issues arising therein. For some experts in the insurance business, ex gratia settlement of the insurance agreement claims benefits from both parties based on the theory of utilitarianism. They also believe there is a legal certainty even though ex gratia is not explicitly regulated in Law No. 40/2014 on Insurance, it is implied in Article 31 section 3 of the same law that says that insurance companies, sharia insurance companies, reinsurance companies, sharia reinsurance companies, insurance brokerage companies, and sharia reinsurance brokerage companies are required to handle claims and complaints through a process that is fast, simple, accessible and fair. This indirectly implies that the ex gratia settlement of insurance agreement claims is one of the insurers’ efforts in resolving claims quickly, easily, and fairly (Kurniawan, 2021). In the world of business or commerce, apart from written rules, there are also customary laws that are used by the business world to solve complicated business problems. Settlement of insurance agreement claims at discretion is a form of customary law in the insurance business in resolving insurance claims appeals submitted by the insured. However, not everyone shares this view about ex gratia settlement as discussed earlier.

7. Conclusion
Ex gratia is used in the settlement of insurance claims in many countries around the world, including Indonesia. It is a way of settling claims made over injuries/losses not specified in the terms of the insurance contract. In Indonesia, the settlement of insurance claims by ex gratia agreement is a part of non-litigation dispute resolution as per Law No. 40/2014 on Insurance and Law No. 30/1999 on Arbitration and Alternative Dispute Resolution. In other words, Law No. 40/2014 on Insurance and Law No. 30/1999 on Arbitration and Alternative Dispute Resolution constitute the legal basis for ex gratia in insurance claim settlement in Indonesia. For some, ex gratia is beneficial based on the theory of utilitarianism. However, based on the theory of legal certainty, ex gratia is not explicitly regulated in Law No. 40/2014 on Insurance but is implied in Article 31 section 3 of the same law. This creates confusion, injustice, and unfair treatment.

Nevertheless, it is important to note that, despite more than 10 years of implementation, the ex gratia claim submission is still unpopular mainly due to the population’s unawareness of the existence of its provisions and its benefits. Despite all the good promises and guarantees, insurance claim settlement through ex gratia is still viewed as a biased process by many insurance policyholders, especially Indonesian workers known as Tenaga Kerja Indonesia (TKI). More steps need to be taken toward to improvement of the legislation and policies dealing with this very important area of insurance to ensure legal certainty and equal protection as per the 1945 Constitution of the Republic of Indonesia.
This study is limited in sampling and research area coverage. We suggest and encourage future studies that would include as many other regions of Indonesia as possible to provide a nationwide and more inclusive representation of the implementation of ex gratia on the massive archipelago.

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Notes
1. See ex gratia”. Oxford English Dictionary (Online ed.). Oxford University Press.
2. Deshmukh is a rule providing historical titles to individuals who were granted a territory of land in some regions in India.

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