

# Shari'ah scrutiny of Islamic Banks' Financial Compensation Fund in Bangladesh: governance principles in the COVID-19 perspective

Islamic Banks'  
Financial  
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Fund

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## Abstract

**Purpose** – The purpose of this study is to critically analyze the Financial Compensation Funds being accumulated by Islamic Banks of Bangladesh in credit-based transactions. In this connection, due to the evolved liquidity crisis amidst the COVID-19, industry opinions are observed that suggest including the compensations or the donation funds directly into the bank's income account. But the Shari'ah does not permit it. Such alternative proposals of using compensation or donation fund during crises are scrutinized under Shari'ah principles to come to a logical conclusion.

**Design/methodology/approach** – The approach followed in the study is textual and discourse analysis through descriptions of ideal Shari'ah-compliant methods for handling late payment of credit and comparison with the industry practices.

**Findings** – It is observed that there are conceptual gaps in the industry as is reflected in the Islamic Banking Guideline of Bangladesh. The funds collected from the debtor due to late payment are named as compensation (Ta'wid) whereas the nature of the transaction is a donation (Tabarru'). The misconception can lead to various Shari'ah non-compliant activities later with the funds. The proposals brought out in the industry to use such compensation/donation funds during a crisis are a consequence of this. The proposals of using such funds for banks' purposes in any situation are not supported by Shari'ah principles and are against the Islamic banking philosophy.

**Originality/value** – The study is very relevant to the current crisis of COVID-19 in the domestic Islamic Banking Industry and also instrumental for the future guidance to stick to the Shari'ah principles in managing compensation or donation funds by the Islamic Banks.

**Keywords** Ta'wid, Gharamah, Al-Itizam bi-al-Tabarru', Penalty clause, Islamic bank, Bangladesh

**Paper type** Research paper

## 1. Introduction

For Islamic Financial Institutions, it is a big challenge to handle the delayed repayments from the debtors. In the light of COVID-19, the situation is crucial. In the conventional system, receiving fines as the addition to the interest payment is an established method. But, the procedure is not justified for an Islamic Financial Institution. So, alternative action plans are necessary. One of the recognized procedures is "Undertaking to Donate" by the borrower in case of delay in the repayments which is made obligatory in the contract. In Bangladesh, there are "Foundations" as subsidiary organizations of the Islamic Banks. The amounts collected by the branches of a bank are directed to the headquarter. The head office directs the money



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then to the foundation. From the foundations, the funds are spent on different charities. Generally, Islamic Banks in Bangladesh have hospitals in the group of companies and the donation funds are used in these hospitals for charity purposes.

Ethically, the Islamic Bank or Financial Institution cannot include this amount in the income. But, during the COVID-19 scenario, due to the evolved liquidity crisis, several opinions in the industry are observed that advise to include the donation from the late repayments in the Bank's income which is completely unacceptable in the Islamic Shari'ah. Again, though as per the feature of procedures-the extra amounts received by Bangladeshi Islamic Banks are "Donations", the guideline of the central bank defined it as "Compensation" (Bangladesh Bank, 2009). Bangladesh lacks a full-fledged Islamic Banking Act. The loopholes and discrepancies in the governance are creating risks in Shari'ah compliance and the practice of Islamic finance techniques.

This study critically analyses the process in the light of Shari'ah principles and sheds light on the governance principles of the Financial Compensation Fund in Islamic Banks and Financial Institutions. Initially, Shari'ah terminologies are discussed in the literary framework to deduce the Shari'ah guidelines along with the scholar opinions and religious text references. Then the industry opinions are scrutinized to arrive at a logical conclusion. The Shari'ah principles are brought out which are to be followed in any case of recovering delayed payments.

## 2. Literary framework

### 2.1 *Ta'wīd* (التعويض)

If anyone's wealth is damaged or anyone is physically harmed, compensation is imposed on the doer. In Shari'ah terminology, it is called *ta'wīd* (التعويض). The root word is '*iwad*' (العوَض) of which lexical meaning is "exchange." According to Islamic economic terminology-compensation is the obligatory exchange against the damage caused – التعويض هو دفع ما وجب من – (Hammad, 2008, p. 142). In Islamic Economics, there are four ways of becoming the owner of wealth. One of them is *al-khalafiyah* which means replacing the ownership with a new one. *Al-khalafiyah* occurs in two forms-

- (1) Inheritance (Inheritor becomes the owner after the death of the former owner);
- (2) Compensation (When somebody's wealth is damaged, the victim becomes the owner of a certain portion of the wealth owned by the doer formerly).

In both cases, the ownership is created later. So, it becomes clear that ownership created through compensation is established later; not declared earlier. That is why, *al-Khalafiyah* is known as late-arrival (Al-Zarqa, 2004, p. 7).

In English, *ta'wīd* (التعويض) is known as "Compensation" (Binti Zulkipli, 2019). According to Hornby and Turnbull (2010) from Oxford Advanced Learners' Dictionary, compensation is something, especially money, that somebody gives you because they have hurt you, or damaged something that you own. To be specific, it is financial compensation that ultimately means the same as *ta'wīd*. The value is determined later as the actual indemnity against the damage or infringement caused.

On the contrary, in Islamic Banking, the excess payable by the debtor (what is received as a donation) is pre-determined. There is no relation between it with the actual damage or infringement because sometimes the debtor is unable to repay in reality. Then he/she is not a transgressor. Therefore, donation or the excess paid by a debtor in Islamic Banking cannot be told Financial Compensation or *ta'wīdātu māliyah* from an academic perspective.

But according to Bangladesh Bank (2009) from the Guidelines for Conducting Islamic Banking, "Compensation means such financial penalty as is imposed by an Islamic Banking

Company over and above the amount of installment when a client fails to repay Bank's investment on due dates as per the agreement executed by him." It is evident that in the guideline provided by the central bank-compensation indicates the financial compensation or the *ta'wīḍātu māliyah*. As per the contract, when the client fails to repay in due time, Islamic Bank imposes this excess amount on the payable amount. The use of the term "Compensation" in this context requires a logical explanation.

## 2.2 Gharamah or penalty

*Gharamah* (الغرامة) is another Arabic term that means– what is obligatory to pay; viz. debt and compensation. In the Qur'ān, it appears as "والغارمين" which means "and those who are indebted" (Qur'an, 9:60). According to Islamic *Fiqh* Encyclopedia, "مال يجب أدائه تعزيراً أو تعويضاً" i.e. such financial liability that is mandatory to pay as compensation or penalty (Ministry of Awqaf and Islamic Affairs Kuwait, 2012).

*Gharamah* is of two kinds (Al-Suwailem, 2009). They are

- (1) *Al-Gharamah al-Ta'zīriyyah* (الغرامة التعزيرية): Penalty or punitive fine which is imposed due to the violation of any law (Binti Zulkipli, 2019). It is generally imposed by the authority or the government and pre-determined against the breach of certain laws. For example, fines were imposed for the violation of the traffic act. In lexical meaning, a punishment for breaking a law, rule or contract (Hornby and Turnbull, 2010).
- (2) *Al-Gharamah al-Ta'wīdiyyah* (الغرامة التعويضية): Compensatory fine which evolves against any real or actual loss. This is the compensation discussed above that is not predetermined (AAOIFI, 2016, p. 243).

But the practice of Islamic Banking being discussed here cannot be *al-gharamah al-ta'wīdiyyah*, since it is similar to *ta'wīd* i.e. compensatory fine to be determined after the damage. On the other hand, compensation received by the Islamic Bank from the debtor as the donation is predetermined. Moreover, Islamic Bank cannot use the donated money for its use. But, the penalty or punitive fines collected by any authority or government is added to the authority's pool of funds. So, the concept of *al-gharamah al-ta'zīriyyah* is also conventional as the case of Islamic Bank is very much different here.

## 2.3 Al-shart al-Jazā'ī or penalty clause

*Al-Shart al-Jazā'ī* (الشرط الجزائي) is the indenture that binds one party of a contract with some principles at the inception of the contract. Violation of these clauses will compel the party to pay a fixed compensation amount. This is *al-Shart al-Jazā'ī* or Penalty clause (AAOIFI Shari'ah Standards, 2021) [1]. This terminology was not in use during the time of former *fuqahā*. When trade and commerce spread over time, the term evolved through human laws. But the use of such clauses in the contracts is found in classical *fiqh* (Bukhari, 2004, *ḥadīth* no. 2611).

Al-Suwailem (2009) introduced a penalty clause as the condition attached in the main contract which compels any contracting party to compensate provided that they have failed to satisfy the condition without a valid reason. Al-Darir (1985) wrote in this context, both the contracting parties agree that the party responsible for performing the task would compensate for the loss incurred if the task is not performed or delayed. *Al-Shart al-Jazā'ī* is classified in two categories:

- (1) Penalty clause indicating the failure to pay any debt or financial liability in due time. It means, both contracting parties agree that if the debtor fails to pay the debt in due

1. Shari'ah Standards No. 3, Section 2/1/2.

time, s/he will pay a fixed amount of financial compensation over the real debt amount. This is usury.

- (2) Penalty clause attached in regular buy-sell or service-based contracts. For instance-a compensatory fine is payable due to the failure of completing the task in time (AAOIFI Shari'ah Standards, 2021) [2].

The practice of collecting excess amounts in Islamic Bank due to the failure of debt repayment in due time is similar to the first category of *al-shart al-jazā'ī* or Penalty clause. But in a practical sense, this practice cannot be called a penalty clause because this type of penalty clause in money lending contracts is not permissible. It becomes like the conventional banking practice of receiving anything above the debt value-usury dealing.

#### 2.4 Al-Iltizam bi-al-Tabarru' (undertaking by the debtor to donate)

"Iltizam" means making something obligatory on oneself. *Tabarru'* means the donation, charity, etc. So, *al-iltizam bi-al-tabarru'* is making donation compulsory on oneself by anyone. For example-making donation compulsory through taking vow (*manut*). In the *murābahah* investment method, the client takes a one-sided responsibility of donating a fixed amount to the bank's charity fund, in case he/she fails to pay in due time (Usmani, 2011, p. 146). Thus, in *murābahah* mode-if the client fails and there is no valid reason behind the failure, it becomes compulsory for him/her to donate. The rate of donation can be aligned with the conventional bank's interest rate [3]. This whole process is *Al-Iltizam bi-al-Tabarru'* or Undertaking by the Debtor to Donate (AAOIFI Shari'ah Standards, 2021) [4]. In this method, the client is compelled to pay in due time; otherwise, his/her payable would increase which is unacceptable for him/her. This is now evident that the amount collected from the loan defaulter in Islamic banking is *al-iltizam bi-al-tabarru'*; neither compensation nor penalty clause. Other terms except the "Undertaking to Donate" are not appropriate in this context according to Islamic philosophy. AAOIFI also rejected these terms.

#### 2.5 Islam's position regarding the loan defaulters

It is not appropriate to think that Islam relaxes the legal bindings on the loan defaulters, since Islam does not allow the creditors to receive a financial penalty from the defaulters. On the contrary, willingly defaulting is a grave sin in Islam. This is explicitly forbidden to do so.

It appears in the *ḥadīth* being narrated by Abu Huraira Ra.: *Whenever a dead man in debt was brought to Allah's Messenger (ﷺ) he would ask, "Has he left anything to repay his debt?" If he was informed that he had left something to repay his debts, he would offer his funeral prayer, otherwise, he would tell the Muslims to offer their friend's funeral prayer. When Allah made the Prophet (ﷺ) wealthy through conquests, he said, "I am more rightful than other believers to be the guardian of the believers, so if a Muslim dies while in debt, I am responsible for the repayment of his debt, and whoever leaves wealth (after his death) it will belong to his heirs"* (Bukhari, 2004, *ḥadīth* no. 2298).

2. Shari'ah Standards No. 5, Section 2/3.

3. But there are three distinct differences between this rate and the conventional bank's interest rate: (1) this is not a usury contract, (2) this is not interest earning of a bank and also not income in any form; rather a donation or charity, (3) it is one-sided undertaking to donate that has to be performed by the borrower; not a bilateral agreement.

4. Shari'ah Standards No. 3, Section 2/1/8.

In another *ḥadīth* being narrated by Suhaib Al-Khair Ra.: *The Messenger of Allah* (ﷺ) said, “Any man who takes out a loan, having resolved not to pay it back, will meet Allah (SWT) as a thief” (Ibn Majah, 2008, *ḥadīth* no. 2410) [5].

Abu Huraira Ra. also narrated another *ḥadīth* in this context: *The Prophet* (ﷺ) said, “Whoever takes the money of the people to repay it, Allah will repay it on his behalf, and whoever takes it to spoil it, then Allah will spoil him” (Bukhari, 2004, *ḥadīth* no. 2387).

Therefore, there is no chance of reconciliation with the deliberate defaulters. The sin is grave and to recover money from them, it is allowed to take necessary actions. Even, they can be banned from future transactions, foreign travel, etc. But to do so, the application of a Shari'ah-based financial system across all the sectors of the economy is necessary. Charging a fine that is to be paid to the creditor is not the way of Islam to deal with loan defaulters as it is associated with *ribā*.

### 3. Methodology

The research design followed in this study is descriptive under the qualitative method. At first, there are the observation of standard directives according to Shari'ah teachings along with the scholarly opinions and then the observation of industry practice in real scenarios. To analyze the industry practices and the intents, textual and discourse analyses are conducted. The theme of understanding texts and discourses is gradually developed in the form of– what should be and what is being followed– action research approach. The texts and discourses are collected from various primary and secondary sources. The COVID-19 pandemic created a depression in almost all spheres of the economy. Regulators discouraged the Islamic Banks to push the debtors to repay hurriedly. Consequently, banks' respective incomes decreased in the process. The effect ultimately hit two different aspects:

- (1) Profit-share of the depositors,
- (2) Operating and administrative costs of the banks.

Overall, a liquidity crisis is observed across the industry. On the other hand, there is ample idle money accumulated in the Donation Funds (named as compensations) of the banks which have not been donated for long. Under this circumstance, in a seminar conducted by the Central Shari'ah Board for Islamic Banks of Bangladesh (CSBIB), different proposals have been brought out to tackle the liquidity crisis (CSBIB, 2020). But there are Shari'ah non-compliance risks associated with the proposals which question the existence of the banking principles of Islamic Banks. At this point, the motive behind this study was created. The notable proposals brought out in the discussion of the industry professionals:

- (1) Proposal 1: In case of exceptional need, the money accumulated in the Compensation Fund can be added to the Income Account.
- (2) Proposal 2: Directly adding the compensation to the bank's income and declaring it as a usury percentage during the income declaration through financial statements. It will be accounted as usury so that the depositors can donate the *ribā* portion from their share of profit.
- (3) Proposal 3: The donated money by the debtor would be utilized by the bank in act of charities to its poor clients or customers.

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5. According to Imam 'Abd al-Qawī Mundhirī, there is no problem in the *sanad* of this *ḥadīth* (Mundhirī, n.d., *ḥadīth* no. 2687).

- (4) Proposal 4: The loss bank incurs due to the late payment of debt or delay in the repayments would be collected from the defaulting clients.
- (5) Proposal 5: Compelling the debtor to donate by the central bank or any third party, where the bank itself will not take part.

The study ultimately evaluates the justifiability of the above proposals in exceptional situations like COVID-19.

#### 4. Shari'ah inference of the terminologies

##### 4.1 Ta'wīd or compensation

Islam preserves everyone's life and wealth from others. None is permitted to harm or occupy another person's wealth and property. It is stated in Surah An-Nisa, "*Do not consume one another's wealth unjustly but only [in lawful] business by mutual consent*": لَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ مِنْكُمْ (Qur'an, 4:29). It appears in the Sahih *Hadith*, "*All things of a Muslim are inviolable for his brother in faith: his blood, his wealth and his honor*": كل المسلم على المسلم حرام دمه وعرضه وماله (Muslim, n.d., *hadith* no. 2564). Therefore, receiving *ta'wīd* or compensation against the loss of life or wealth is valid in Shari'ah. In another *hadith* it is told – لا ضرر ولا ضرار – "*There should be neither harming nor reciprocating harm*" [6] (Ibn Hanbal, 2008, *hadith* no. 2865) [7]. In this context, compensation will be compulsory on three fundamental conditions:

- (1) The infringement is proved against the law whether it is obvious in statement or custom (AAOIFI, 2016, p. 220).
- (2) Harm is caused. It can be financial or physical (AAOIFI Shari'ah Standards, 2021) [8].
- (3) Loss is incurred. It should not be based on any possibility (AAOIFI Shari'ah Standards, 2021) [9].

One important consideration here is that the discussion's focus is business-related loss. In economics, the loss is of two kinds. One is actual and another is opportunity loss. Opportunity loss or cost is a foregone investment. Here the value of the loss is a possibility that could have happened. Mufti Taqi Usmani defined opportunity loss – الفرصة الضائعة – as the profit could have gained by the bank if an amount was invested (Usmani, 2009, p. 226). Islam does not recognize such opportunity loss. That is why, if someone's money is thieved, the exact amount is to be paid back along with other punishments. But, the opportunity loss would not be considered in repayment (Usmani, 2011, pp. 143–144). Similarly, when a *murābahah* client refuses to purchase a product later, the actual loss can be received by the bank. For instance– the product purchased by the bank for *murābahah* was sold at a lower value than cost. Here, the lost amount can be recovered as compensation from the first or original client who refused. But the opportunity cost

6. In the explanation of this *hadith*, Shaykh Al-Zarqa told, punishing a criminal is not against this *hadith* because the punishment for criminals is executed to eliminate harm. "Nor reciprocating harm" means one should not harm another's wealth because of his wealth being harmed by the other; rather he should take the justified compensation from the man who harmed. See more at the book- Al-Madkhal Al-Fiqhī Al-'Āmm, Section 81/18.
7. The *hadith* is Hasan according to Shaykh Al-Zarqa RAH. and Shaykh Shuaib Al Arnaout RAH. See more at the books- Al-Madkhal Al-Fiqhī Al-'Āmm, Section 81/18 and Musnad Al-Imam Ahmad Ibn Hanbal, Vol. 5 (Ibn Hanbal, 2008, p. 55).
8. Shari'ah Standards No. 5, Section 2/2/1.
9. Shari'ah Standards No. 8, Section 6/8/2.

of selling the product to the first client in profit, cannot be asked as compensation (AAOIFI Shari'ah Standards, 2021) [10]. Similarly, the opportunity cost of not buying the product rather investing the amount in any other project is also not to be considered.

#### 4.2 Gharamah or penalty

The first type of Ghaaramah, *al-gharamah al-ta'ziriyah*, or the punitive fine is imposed due to the violation of the law. It is imposed in various forms like physical punishment, financial penalty, etc. The financial penalty is called *ta'zir bi-al-māl*. Classical *fuqahā* differed in their opinion on the permissibility of *ta'zir bi-al-māl* and most of them did not allow it. Oppressive rulers can illegally occupy general peoples' wealth by this mean for own purposes. But Imam Ahmad RAH (780 AD–855 AD), Imam Abu Yousuf RAH (738 AD–898 AD) approved it. Many present *fuqahā* support it (Al-Zarqa, 2004, p. 50). But the execution of this punishment should be done by the court according to state law. The money will be delivered to the state's treasury. Without the interference of the court, none can impose such financial penalty on anyone and it will not be valid.

Therefore, when a person is found to delay in repayments for no reason, the court can impose such punishments on him. It is told in the *ḥadīth*, "If one who can afford it delays repayment, his honor and punishment become permissible": *لي الواجد يحل عقوبته وعرضه* (Ibn Hanbal, 2008, *ḥadīth* no. 17946) [11]. The punishment mentioned in the *ḥadīth* is not specific. So, it is not necessarily to be a financial penalty. It can also be physical. If the financial penalty is imposed, then it has to be executed by the court and directed to the state's treasury (Usmani, 2011, p. 143). The creditor cannot receive the financial penalty.

#### 4.3 Al-shart al-jazā'ī or penalty clause

At present, in different financial transactions, a penalty clause is included in the contracts from the beginning. The main objective of this clause's inclusion is to complete the task associated with the transaction. Another usefulness is loss can be recovered without any legal proceedings. For example, if the cloth is not delivered on the due date a hundred pennies are deducted from the wage. Such penalty clauses are applied in two aspects:

- (1) Transactions where product or services are received; viz. contractual service agreements, *istisnā'*, *salām*, *ijārah*, etc. Using the penalty clause in these transactions is valid. It is similar to the above example. But no such obstacle can be placed which is unavoidable so that the deduction in wage becomes obvious from the beginning (AAOIFI Shari'ah Standards, 2021) [12].
- (2) Transactions in loan or any payment like failure to pay the creditor in time are associated with the penalty of paying extra money as fine. This is not acceptable at all in Islam. This is the obvious usury (AAOIFI Shari'ah Standards, 2021) [13]. In a resolution by the International Islamic Fiqh Academy, Jeddah, it is stated clearly that it is invalid whether paid in currency or any form of wealth [14]. In such contracts,

10. Shari'ah Standards No. 8, Section 4/2.

11. The *ḥadīth* is Ḥasan (Ibn Hajar al-Asqalani, n.d., p.61).

12. Shari'ah Standards No. 3, Section 2/3. See more at the Shari'ah Standards of the book- Abḥāth Hay'at Kibār al-'Ulamā' (Hay'at Kibār Al-'ulamā' (Saudi Arabia), 1991, p. 105).

13. Shari'ah Standards No. 3, Section 2/1/2.

14. Resolution No. 51, Section 6/1/193 (cited in Hammad, 1985, p. 110; AAOIFI, 2016, p. 247). This is also the decision of the International Islamic Fiqh Academy, Makkah (AAOIFI, 2016, p. 249). It has to be remembered that this is not the appropriate application of Al-Shart al-Jazā'ī as per the AAOIFI Shari'ah Standards No. 3, Appendix B (AAOIFI, 2016, p. 102).

even if the collected extra money i.e. fine is donated without consumption, the sin of contracting prevails [15].

#### 4.4 *Al-Iltizam bi-al-Tabarru'* (undertaking by the debtor to donate)

This is taken from the *Maliki fuqahā's fiqh* principles, currently followed in Islamic Banking. It came through several stages to the current form. Initially, this undertaking was not in the practice of Islamic Banking. The best way to handle a person who defaults willingly is to punish him centrally. This central punishment is executed by the central bank or the government by banning him/her from the banking facilities for good. Thus, the practice of defaulting willingly would decrease. But the precondition to implementing this step is to ensure Islamic Banking all over the country which is absent now. Banned individuals would move to conventional banking to get banking facilities. Later penalty clause comes into discussion. But due to the resemblance of a type of usury in the penalty clause, it was rejected by the scholars. Then this undertaking or *al-iltizam bi-al-tabarru'* was proposed as a one-sided promise by the debtor. To implement *al-iltizam bi-al-tabarru'*, two fundamental conditions are provided:

- (1) If a person fails to repay debt due to financial inability within time, then firstly, s/he has to be given the chance to repay within additional time. No financial pressure can be imposed on him.
- (2) When the failure to repay occurs without any reason rather due to the irresponsibility of the debtor, then donation through *al-iltizam bi-al-tabarru'* can be collected as per the advice from the Shari'ah Board of the Islamic Bank for the Charity Fund. The bank will not be able to use the donation for its purpose (Usmani, 2009, pp. 280–281).

But nowadays, the first condition is waived and not followed. By and large, with every client in *murābahah* contract, “Undertaking to Donate” is attached. Then the donation is collected from everyone irrespective of being unable or irresponsible to repay. Though as per the contract, there is no wrong here in practice, collecting donations in such a way without verifying the real cause does not match with the vision of Shari'ah principles. Again, some Islamic Banks waive the donation provided that the debtor appeals to the bank stating the inability to repay in due time. This is worthy of appreciation, although it is necessary to ensure that the bank takes the responsibility to investigate the reasons for defaulting and waive the incapable individuals. There is no alternative to implement the Shari'ah principle in each segment of the Islamic Banking procedure. The derailments from the Shari'ah principles in any part of the Islamic Banking procedure is a disgrace to the establishment of the whole Islamic Financial System and its divine philosophy of justice in every financial transaction. If the second condition, directing the donations mandatorily to the bank's charity fund, is waived then the whole system will be corrupted and the bank's income will be contaminated.

*al-iltizam bi-al-tabarru'* was approved by the following experts:

- (1) The Council of Present Issues in Pakistan (*Majlis-e-Tehqeeq Masail-e-Hazira*) approved *al-iltizam bi-al-tabarru'* in 1992 AD (1412 AH). The then Islamic Scholars and Banking experts participated in a conference and passed a resolution together where the eighteenth resolution was on “Undertaking to Donate by the Debtor” (Ludhyanvi, 2003, p. 111).
- (2) The *Fatwā* and Shari'ah Supervisory Board of Kuwait Finance House approved it [16].

15. But in a resolution of the Al-Baraka Symposium, the penalty clause is considered valid provided that the penalty money is donated. But again, this is self-contradictory, hence, not acceptable (AAOIFI, 2016, p. 252).

16. *Fatwā* No. 520 from the book: *Al-Fatawa Al-Shar'iyyah Fi Al-Masa'il Al-Iqtisadiyyah*, Vol. 1 (cited in AAOIFI, 2016, p. 251).

- (3) It was also the decision of the sixth Al-Baraka Symposium which approved the undertaking by the debtor (AAOIFI, 2016, p. 252).
- (4) Accounting and Auditing Organization for Islamic Financial Institutions, Bahrain also approved it in their different Shari'ah Standards [17].

## 5. Scholar opinions on the actual financial compensation concept

This discussion on charging fine or extra money from a defaulting client in the name of recovering loss is not new at all. Almost for more than two decades, scholars have been discussing the issue to find out a Shari'ah-compliant way to handle such events. Conventional banks increase the interest rate at the occurrence of default of the due date being over. Since no such provision is possible in Islamic Banking, opportunist clients started to skip payments in *murabahah* agreements. In a country where the whole economy is run under Islamic Financial System, there enacting laws binding the defaulters within legal actions is easier. But in the mixed economy, things are difficult to implement. These clients can shift toward conventional banking easily whenever they need it. To get control over the situation the present scholars proposed two measures which are:

- (1) Receiving actual financial loss on certain conditions;
- (2) One-sided compulsory donation agreement.

### 5.1 Conditions on receiving actual financial compensation

The validity of the second measure is already understood from the aforesaid discussion of *al-iltizam bi-al-tabarru'*. But the first one needs a detailed focus here. The question arises if there is any financial loss that incurs due to the late payment or not. First, the opinion of collecting actual loss is an isolated view of five/six individuals amongst a large assembly of scholars (Binti Zulkipili, 2019, p. 194) [18]. Second, the conditions they provided on the execution of this measure are nearly impossible. The conditions are as follows:

- (1) The client is not unable to repay i.e. s/he is delaying for no valid reason. The proof of this can be brought out in various ways, like– self-incrimination (testification), witness, information on his/her investments in other institutions, possession of other wealth, etc.
- (2) There is no Shari'ah approved, the valid reason behind the delay; viz. if the client is poor, then the measure cannot be applied.
- (3) One month of extended period is allowed even after the due date is over. During the extended period, notice and letters from the bank are to be mailed stating the possible actions against him/her (Usmani, 2011, p. 140).
- (4) There has to be an actual financial loss on the bank's part incurred at the delay of repayment by that particular client; otherwise, the measure cannot be executed. To prove this, profits against all liquid assets of the bank have to be realized. Only then, it will be proved that, in absence of that particular client's money, a certain amount of profit is missed by the bank. On the contrary, even if at that time, there exists no profit in the bank's income and liquid assets remain under the bank's holding, it will be

17. Shari'ah Standards No. 3, Section 2/1/8.

18. Shaykh Abdullah bin Sulaiman Al-Manea, Shaykh Mustafa Ahmad Al-Zarqa, Dr. Mohamad Akram Laldin, Dr. Wabwah Mustafa al-Zuhayli, Dr. Abdul Hameed Al Baali.

considered as no loss incurred at the bank's side (AAOIFI, 2016, pp. 263–266; Usmani, 2011, p. 140).

- (5) Compensation to be received must equal the actual loss incurred; it cannot cross the actual amount. That is why the compensation to be received cannot be fixed at the inception of the contract. It will be determined at the occurrence of default.
- (6) The bank cannot keep any type of asset as a mortgage to recover the debt amount. Also, there cannot be any guarantee for the debt. If there are, then the measure is unnecessary and cannot be executed (AAOIFI, 2016, p. 287).

SAC BNM (Shari'ah Advisory Council of Bank Negara Malaysia) passed a Shari'ah resolution in this context on May 20, 2010. The actual loss recovery method is described in that resolution as said above (Binti Zulkipli, 2019, p. 188).

### 5.2 Assessing the actual financial loss

How the actual loss would be determined, that needs further discussion. Notable opinions of some scholars are as follows:

- (1) One way is the profit margin gained by the bank for the number of days, the payments are delayed, at that rate compensation can be imposed. For example—payment is delayed for 3 months and for that three months, the bank's profit was shared with the depositors at 5%. Then the bank can receive compensation at a 5% rate from the actual defaulters (AAOIFI, 2016, pp. 264–280). This is the opinion of Shaykh Al-Siddiq Mohammad al-Amin Al-Darir and also Dr. Ali Ahmad As-Salus (AAOIFI, 2016, p. 293).
- (2) Some scholars emphasized the court interference. It is stated in the civil law of Jordan (AAOIFI, 2016, p. 291). Dr. Wahbah Mustafa al-Zuhayli emphasized this opinion in several articles written for AAOIFI (AAOIFI, 2016, p. 341).
- (3) Shaykh Abdullah bin Sulaiman Al-Manea was told to determine the loss in currency value. For example, "B" owes "A" US\$1 million. The last date to repay is May 1. When the debt was issued, one dollar was BDT 80. On May 1, the value became BDT 75. Money was asked on May 1 by "A," but "B" skipped the payment for no reason. When the compensation was about to be executed, it was observed that the per dollar value was reduced to BDT 70. So, "A" incurred a loss of BDT 5 per dollar due to the irresponsible behavior of client "B." It would be considered as an actual loss (AAOIFI, 2016, p. 293).
- (4) SAC BNM in another resolution approved to receive compensation up to a maximum of 1% of the debt value.

### 5.3 Evidence presented to support actual financial compensation

Though the view of receiving actual compensation is isolated from a large number of other scholars, some Shari'ah evidence is presented by the scholars who advised this method. According to AAOIFI (2016) by and large the evidence or *Dalil* that is presented them is the aforesaid *hadith*- لا ضرر ولا ضرار – "Neither harm nor reciprocating harm" (Ibn Hanbal, 2008, *hadith* no. 2865). Their stand on this is the only way to recover the loss incurred due to the defaulter's action is by imposing actual compensation on him/her. Financial loss has to be recovered by financial compensation, not otherwise (AAOIFI, 2016, p. 274).

Besides, another *hadith* is also taken as evidence – لي الواعد يحل عقوبته – "Delay in payment on the part of one who possesses the means makes it lawful to dishonor and punish him" (Ibn Hanbal, 2008, *hadith* no. 17946). In the light of this *hadith*, the permissibility of punishing the

defaulter is inferred. Punishment can be in many forms where actual financial compensation is also included (Usmani, 2011, p. 143).

#### 5.4 Reasons behind the refusal of actual compensation concept by the majority of scholars

It is the established, recognized, and by and large accepted opinion that at the maturity of debt accepting any form of financial compensation from the defaulter is invalid and illegal. It would be considered usury or *ribā*. Shaykh Mufti Taqi Usmani discussed this opinion in detail stating that the majority of the scholars or Ulama did not accept the first opinion that permits acceptance of financial compensation. The proposal neither goes with the Sharī'ah principles nor antidotes the defaulters' behaviors (Usmani, 2011, p. 141).

So, curiosity arises about what could be the majority's evidence against this method. Association of *ribā* in imposing anything extra in advance with the return of the original debt value is a universally recognized concept across all schools of thought. From the opinion of Imam Al-Jassas which defines *ribā* as—هو القرض المشروط فيه الأجل وزيادة مال على المستقرض i.e. such a debt where both maturity period and excess return from the borrower is conditioned (Al-Jassas, 1980, p. 557). Lending anyone with the condition of excess return in association with a maturity date is known as *Ribā al-Qard*. Another type of *ribā* that was in vogue during the *jāhiliyya* (age of ignorance) is *Ribā al-Dayn* which is increasing the maturity date in credit sales and loan repayments with the condition of excess return in payments. Both the forms were in vogue before Islam had arrived.

Generally, during the *jāhiliyya*, when debtors failed in repayments on the due date, excess money had been collected from them. Then it was told to the defaulters—إما أن تقضى وإما أن تربي i.e. either pay now or pay in excess after increasing time (Imam Malik Ibn Anas, 2017, *ḥadīth* no. 1380). Shaykh Ibn Taymiyyah (1228 AH–1263 AH) stated clearly on this issue—أما المعاملة—التي يزداد فيها الدين والأجل فهي معاملة ربوية i.e. the transaction where debt value and credit period is increased is a usury associated transaction (Ibn Taymiyyah, 1997, p. 439). It becomes evident here that taking excess as financial compensation against the debt payment is similar to *ribā al-dayn* of the *jāhiliyya*. Here, what is received as excess is not important, rather important is receiving anything excess in the credit transactions. No classical explained as such that taking financial compensation would not be considered as *ribā*.

On the other hand, for the approval of financial compensation in credit dealings, it is said that the *ribā* of *jāhiliyya* has no resemblance with it and that was used to be imposed in every default case. But here, the financial compensation is to be imposed on only the deliberate defaulters even after they are provided a month of extra credit period so that his/her financial status is revealed to the bank.

The reality differs from the rebuttals of the supporters of financial compensation. All the conditions mentioned to execute the financial compensation method are difficult to implement. Because each of the defaulters claims himself to be unable to pay and it is also hard to establish by a bank that a defaulter is not unable without the help of legal proceedings. It not only will create a lengthy event just to prove the defaulter's ability but also incur bank additional costs which may outgrow the actual loss of the bank in the case of default. The only hassle-free way to understand the inability by the bank is that a defaulter is unable when he/she declares himself/herself bankrupt. This is also a rare phenomenon and then the conventional banks also waive charging interest on him/her. The conditions are not valid from the reality perspective (Usmani, 2011, p. 142).

Another rebutting argument comes from the supporters of financial compensation – in the *ribā* of *jāhiliyya*, the excess return is predetermined. There is no relation to the actual loss incurred. But in imposing financial compensation, the value would not be determined during the inception of the contract, rather it will be evaluated at the occurrence of default.

But the fact is, the actual financial loss that has been mentioned in the proposal is completely vague and invalid from the Islamic point of view. Because the dealers of a usury claim usury in credit dealings from the loss-recognizing perspective. The arguments presented usually for the support of *ribā* by the usury dealers or the conventional capitalistic finance experts mainly focus on the excess return that compensates the forgone profit that could have been realized if the money was not left at the borrower's or the debtor's end. So, this fades the distinction line between the conventional interest-seeking financial system and the Shari'ah-compliant Islamic Financial System.

Even if the payments arrived on due time, it would not be ensured that the amount could have earned profit. The concept of this opportunity cost is a possibility, not a sure thing (Hammad, 1985, p. 110). According to Islam, no type of loss is acceptable against credit dealings. It is a wrong concept that loss must occur due to the delay in payments. In Islamic Economics, the money price is not acceptable and only profit is not fixed in business transactions. Usury concept brings the idea of only profit at transactions and price for money in lending. That is why, fundamentally, *ribā* is a forbidden concept in Islam (Hammad, 1985, p. 110). Therefore, financial compensation cannot be accepted in Islamic Finance.

The international forums on *Fiqh* Study also rejected the financial compensation concept. The mentionable decisions are the following:

- (1) International Islamic Fiqh Academy, Jeddah: Resolution no. 53 (Hammad, 1985, p. 110).
- (2) Kuwait Finance House: *Fatwā* no. 932 (AAOIFI, 2016, p. 272).
- (3) AAOIFI Shari'ah Standards No. 3, Section 2/1/2.

#### 5.5 Rebutting the evidence for the actual compensation concept

How the evidence used for financial compensation is refuted is also to be discussed. The *ḥadīth* presented for financial compensation – “Neither harm nor reciprocating harm” – only states that harm cannot be caused. But to understand what is harmful and what is not, other pieces of evidence from Shari'ah are to be taken into consideration. The events where compensations are valid are also to be determined based on Shari'ah. That is why, *ḥudūd*, penal codes, etc. are not considered as loss or harm; although these are also harming in a sense. But Shari'ah does not declare these as harms (Atasi, n.d., p.25).

Moreover, the loss considered against the delay in payments is not recognized in Shari'ah as an established loss. Otherwise, usury would have been approved in Islam. The way of compensating Shari'ah also needs to be under the Shari'ah principles. There is a *ḥadīth* that tells us about the punishment of defaulters – *لي الواد يحل عقوبته وعرضه* – “If one who can afford it delays repayment, his honor and punishment become permissible” (Ibn Hanbal, 2008, *ḥadīth* no. 17946). In this *ḥadīth*, punishment is mentioned in not specific, rather vastly comprehensive. It is not necessarily to be in the form of financial compensation. It can be physical punishment too. Though financial compensation is a kind, in reality, punishment can only be imposed by the state or the court and the amount must be directed to the government treasury. The creditor cannot impose any punishment on the debtor without court interference (Usmani, 2011, p. 143).

In addition, the losses considered to implement financial compensation are directly opportunity costs. It has already been evident that opportunity cost is not supported by Shari'ah and it is the source of usury-based thoughts. Therefore, based on Islamic *Fiqh* and its comprehensive principles, the concept of actual financial compensation has to be rejected.

Here, the second opinion of one-sided undertaking to donate is prominent. If the financial compensation is allowed, the process will be generalized in every financial transaction

gradually and ultimately *ribā* will appear practically in vogue. Dr. Rafic Yunus al-Masri said in this context: إن هذه الاقتراحات أخشى أن تتخذ ذريعة في التطبيق العملي إلى الربا، فتصبح الفائدة الممنوعة نظريا تمارس عمليا باسم العقوبة "جزاء التأخير"، وينتهي الفرق إلى فرق في الصور والتخريجات فحسب، وأرى أن هذا الاقتراح i.e. من جنس اقتراحات أخرى عصرية مماثلة تحوم حول الحمى، وربما تؤول إلى الدخول من النوافذ بعد أن أقفل الباب *these vague proposals warn us that these would be used as the media of receiving usury in practice. The forbidden ribā would be introduced newly as late penalty, like the interest in today's finances. Ultimately, the difference between fine and usury would exist in names only. What I suppose, the inclusion of such proposals fundamentally insecure the central concept of Islamic Finance. It is just like making entry through the window when the main entrance is closed* (AAOIFI, 2016, p. 271). Dr. al-Masri here brought out the reality in a nutshell.

## 6. Comments on the fund management proposals in the light of Shari'ah

The proposals arose in the banking community regarding the fund management in the COVID-19 crisis are inspected in the light of Shari'ah:

### 6.1 Proposal 1: In case of exceptional need, the money accumulated in the compensation fund can be added to the Income account

- (1) It has already been discussed that the precondition behind the approval of receiving compensation, which is *al-iltizam bi-al-tabarru'*, cannot be directed to the bank's usable accounts. If it goes to the bank's funds, it would be obvious usury.
- (2) When offer and acceptance are performed in contract, then it becomes complete i.e. legally the contract is established. But in *Tabarru'*-based contracts such as *Hibah*, *Sadaqah* and *Wasiyyah* "Qabz" or constriction is simultaneously important to make a contract complete. In this connection, the principle of Islamic *Fiqh* is— لا يتم التبرع إلا بالقبض – “volunteered contract becomes completed by constriction” (Al-Zarqa, 2004, p. 13) [19].

So, after the contract has been completed, there remains no way other than sending the money to the charity account. Here, the owner of the money is neither the bank nor the client/debtor. The bank is the agent to spend the money. Therefore, using the fund by the agent is misconduct and will be considered as theft and unauthorized possession.

### 6.2 Proposal 2: Directly adding the compensation to the bank's income and declaring it as a usury percentage during the income declaration through financial statements. It will be accounted as usury so that the depositors can donate the *ribā* portion from their share of profit

This is also against the Shari'ah principles. Receiving usury is itself a sin and an illegal act. Moreover, here it is going to be done through declaration which is defiance towards Shari'ah. On the other hand, donating the *ribā* portion by the depositors is uncertain and it does not soothe the sin of taking part in a *ribā*-based contract. The whole process of this proposal is unacceptable.

### 6.3 Proposal 3: The donated money by the debtor would be utilized by the bank in act of charities to its poor clients or customers

This is unjust again. The donation from the debtors cannot be used by the bank for its purpose. Clear guidelines should be stated in the Shari'ah governance of the compensation fund of Islamic banks.

19. Al-Madkhal Al-Fiqhī Al-‘Amm, Section 30/13.

*6.4 Proposal 4: The loss bank incurs due to the late payment of debt or delay in the repayments, would be collected from the defaulting clients*

From the Shari'ah analysis above, this proposal of compensation that is incurred is not acceptable. Even if the opinion is accepted for the sake of debate, is it possible to use the compensations in the light of the COVID-19 situation?

The answer here is a no. Because the funds created in Islamic Banks in Bangladesh at present are created through donation contracts. Here the contracts are completed through donations and banks are not the owner of those funds. The money newly to be received by the banks in the name of financial compensation cannot be mixed with the present funds, also named as compensation, although these are the funds that came via one-sided undertaking of donation by the debtors. So, the banks have no funds previously as financial compensation practically and the approval to receive financial compensation now cannot suffice the necessary measures of tackling the liquidity crisis of the Islamic Banks.

Moreover, in reality, the opinion of financial compensation is an isolated view of few scholars. It cannot be implemented by going against the united views of the internal forums of scholars which are Shari'ah compliant. Also, the preconditions associated with the execution of the method are much more to be compliant. Still, Bangladesh does not have a versatile Shari'ah compliance guideline for all the sectors of the economy. Islamic Banking system has no separate government act too. Under this circumstance, it is not possible to prove a defaulter able to repay as per the Shari'ah. The patronizers of the financial compensation concept were divided in their opinions in evaluating the compensation value. So, another discrepancy is evident in the method. Above all, conduct where the possibility of association with usury is higher and Shari'ah compliance risk is increased must be avoided to preserve the Shari'ah compliance in Islamic Banking.

*6.5 Proposal 5: Compelling the debtor to donate by the central bank or any third party, where the bank itself will not take part*

This proposal does not make the compensation valid, though by contract bank is not asking for compensation or fine due to the failure to repay. When any third party is getting involved in collecting the compensation externally for such a transaction where the third party itself is not a party at all, then the third party is acting as the agent of the bank. So, ultimately the money is being asked by the bank as fine or compensation via its agent whether it be the central bank or any other authority. Moreover, it is evident in the Shari'ah principles that no additional cost or loss is recognized against the delay or failure in repayment by the debtor. So, involving a third party in collecting compensation is a vague idea.

## 7. Recommendations

### *7.1 Shari'ah compliant directives to tackle the crisis*

The steps that should be followed in general without deviating from Shari'ah principles and tackling any crisis soon:

- (1) Cutting on those expenditures which are not necessities for the bank and its employees.
- (2) Taking necessary steps for the sale of existing mortgages, but before that, the related client must be informed first.
- (3) Banking experts and Shari'ah scholars jointly can research to find out new ways to tackle liquidity crises. A combined effort can lead to a better solution.
- (4) Applying for *Qard al-Hasan* to the Central Bank during a crisis.

- (5) Asking to clear the earlier debts before letting the defaulters get any new loan facility from the incentives received from the government or the central bank.
- (6) Arranging consultancy for the defaulters from the bank's Shari'ah team so that their problems are understood and the Shari'ah teachings become clear to them in financial dealings.
- (7) Using blockchain technology to maintain the client data so that if a defaulter was irresponsible in repayments s/he can be brought under formal actions to clear his/her debts.
- (8) When nationally, it is told to relax the payment collection during the crisis period; the guideline must focus on the unable debtors. The able and irresponsible debtors who delay in repayments must be taken into action to fasten their debt clearance process during the crisis period. Relaxing the system for all types of clients is a wrong decision. The central bank should be careful in implementing such guidelines in the industry. Shari'ah's principles also tell to allow chances for the unable and incapable debtors, not the able and irresponsible ones.
- (9) Reducing investments in the *murabahah* method in the export-import deals along with *Bay' al-Istijrar* (supply contract), *Musharakah* and *Mudharabah*. These modes come with increased investment risk in export-import contracts. *Istisna'*, *Salam* and *Ijarah* modes are to be increased to mitigate risks. These methods are allowed to use the penalty clause as per the Shari'ah principles. Before introducing any new financial deal in the banking practice, consultation with the Shari'ah board is a must.

#### Alternative proposals to withstand the COVID-19 situation

- (1) The institutional defaulters can be proposed to provide equity share with the bank if they are unable to repay. The bank sells the share later to recover its own money. According to Shari'ah, it goes under the Sale of Debt category; i.e. Sale of Debt by the Debtor. The debtor here transfers the debt to the creditor in exchange for his other wealth. This method is valid. In Shari'ah Terminology, it is known as *Bay' al-Dayn min-al-Madyun*- بيع الدين من المدين (AAOIFI Shari'ah Standards, 2021) [20].
- (2) Another way is keeping a certain percentage of institutional clients' company shares as mortgage to the bank and providing power of attorney over those mortgaged shares to the bank. In case of necessity, the bank can cash the shares and recover money. This is also valid according to Shari'ah.

#### 7.2 Shari'ah governance principles of the compensation fund

The donations collected by Islamic Bank as *al-iltizam bi-al-tabarru'* are to be managed as per the Shari'ah principles. The Shari'ah governance principles in this context are stated below-

- (1) Strict measures of not including the donated fund into the income account have to be taken in each Islamic Bank. Moreover, the money cannot be used for any purpose of the bank. Even, it cannot be proxied for the provisional reserve requirements. If it is done, in extreme cases, the bank might use the funds to take back the depositor's money which would be illegal and unjust. The bank is not the owner of the funds

20. Shari'ah Standards No. 59. According to this standard, the condition of Sale of Debt being valid is- Ribā cannot evolve in this transaction. That is why, values of debt and wealth must be equal and the transaction must be in cash; not in credit.

accumulated through *al-iltizam bi-al-tabarru'*. So, taking control in the name of compensation is not valid.

- (2) The donated money should be directed to any third party other than the bank. That organization should not be related to the bank in any form of financial dealings. It will act as the trustee and the control over the donation fund must not remain under the jurisdiction of the bank. This was the decision made in 1992 by the Shari'ah scholars in association with the then bankers. This was indeed a foresighted decision that is evident by this time as the deviation from Shari'ah principles is observed in the practice. As the control remains with the bank nowadays, the chances of misusing and violating Shari'ah are increasing.
- (3) The take care organization shall donate from the fund directly to the poor and for the humanitarian activities amongst the Muslim community according to the philosophy of Islam. If the fund is used in any business activity, the profit earned also must be donated. Shari'ah scholars also warned to not donate on behalf of the bank i.e. the bank's name must not come in the mass donation since the bank is not the owner of the fund as discussed in the previous sections (Usmani, 2009, pp. 280–281).
- (4) The trustee organization can use the fund for *qard al-hasan* to appropriate needy individuals (Usmani, 2011, p. 77).
- (5) In practice, it is observed that the date of the last payment is not accounted as the expiry date, rather the date is recorded as deferred and the donation amount is accounted as the original value of the transaction. It must be stopped because of associated usury.
- (6) The bank also should not receive the donation fund as a loan for tackling any crisis. Though the bank is not the owner of the donation/compensation fund, the money is being directed through the bank from the debtors. So, receiving loans from the fund by the bank itself is also risky in case of any evolved association of any form of *ribā*.

### 7.3 Shari'ah prescribed ways to recover late payments

Failing in repayment at the due time can be due to two possibilities:

- (1) Being unable to repay,
- (2) able to repay but irresponsible in repayment.

In the Qur'an, it is stated—*وَإِنْ كَانَ دُوْ عُسْرَةً فَنُظِرَةٌ إِلَىٰ مَيْسَرَةٍ وَأَنْ تَصَدَّقُوا خَيْرٌ لَّكُمْ إِنْ كُنْتُمْ تَعْلَمُونَ*—“If it is difficult for someone to repay a debt, postpone it until a time of ease. And if you waive it as an act of charity, it will be better for you, if only you knew” (Qur'an, 2:280). So, if a person is unable, he has to be allowed additional time to repay until he becomes able financially. This is divine order from the Creator.

Now, what is the touchstone to understand whether a person is unable or not? In a resolution of Islamic Fiqh Academy, Jeddah, it is declared—*ضابط الإعسار الذي يوجب الإنظار ألا يكون للمدين مال زائد عن حوائجه الأصلية، يفى بدينه نقداً أو عيناً* i.e. the level of inability which will be appropriate to provide additional time for the debtor is having no excess wealth in any form (cash or non-cash, tangible or intangible) under the debtor's ownership with which the debt can be cleared [21]. According to *Fatwā* no. 993 of Jordan Islamic Bank, the person will be considered capable if he/she has any tangible and intangible asset (AAOIFI, 2016, p. 287).

21. Majallat Majma' al-Fiqh al-Islāmī, 7/2/218 (cited in AAOIFI, 2016, p. 287).

When the case is opposite, being irresponsible in repayment, it has been prohibited in Islamic Shari'ah. This is the real defaulting in loan repayments. In the *hadith*, it is written—مطل الغني ظلم —“Procrastination (delay) in paying debts by a wealthy man is injustice” (Bukhari, 2004, *hadith* no. 799). Also, it is mentioned in another *hadith*—لي الواجد يحل عفوبته وعرضه —“If one who can afford it delays repayment, his honor and punishment become permissible” (Ibn Hanbal, 2008, p. 388).

Therefore, based on the above considerations, a creditor, bank or any financial institution can take the following necessary steps in recovering debt from the real defaulter who is irresponsible in debt repayments as per the Shari'ah:

- (1) Repeatedly asking for repayments when the time is over.
- (2) If the actual defaulter has any deposit account with the same bank, the bank can debit the account with the exact amount of debt without any approval.
- (3) The court can order the debtor to settle debt with similar wealth s/he owns now. This is also possible with assets that are dissimilar to the debt. The bank can sell the dissimilar assets to recover the debt at the court's approval or lease to recover the payment amount.
- (4) Such irresponsible debtors can be blacklisted in the industry to save the economy from unethical practices in the future. Using debtor's historical information through blockchain technology can be of great help here.
- (5) Also, his ability to testify in any legal proceedings can be limited by the jurisdiction of the court. His/her discretion of financial transactions can be limited by the court. Such legal actions are valid and can help to improve the overall integrity of the financial dealings.
- (6) An irresponsible defaulter can be imprisoned, punished and restricted from foreign tours.
- (7) His/her installment facilities in the existing transactions can be revoked by the court and declared as payable in cash.
- (8) The cost of legal proceedings and processes associated with loan recovery from such defaulter can be collected from the same defaulter. But such amounts must be incurred not corrupted [22].
- (9) If such a defaulter is engaged in a *murābaḥah* contract, his/her product can be taken back by the bank provided that certain conditions are fulfilled. According to the AAOIFI Shari'ah Standards No. 8, Section 5/4; it is permissible to not register the product with the buyer until full payment is done. So, the ownership stays with the bank. Alternatively, the bank can sell the product to the third party on behalf of the defaulter to recover the unpaid balance. In both alternatives, the conditions are the product has to be intact or in its original form and the product has not been handed over. When the bank is retaining the product to itself (taking back), it has to return the exact received amount from the buyer. When the bank is selling to the third party, it has to keep only the due balance of the repayment value from the sales proceed and return the rest amount to the original buyer.

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22. AAOIFI Shari'ah Standards No. 3, Section 2/1/4.

- (10) The provision of “undertaking to donate” in case of failure during the inception of the financial contract is already discussed. It can be used as a precaution to avoid legal proceedings. If the client defaults due to one irresponsibility, s/he has to donate an amount to any *Tabarru'*-based Islamic Insurance company from where anyone can be benefitted (AAOIFI, 2016, p. 238).

## 8. Conclusion

The problems of delayed repayments from the debtors and ensuing liquidity issues that arose in Islamic banking due to the COVID-19 are not only important for the sake of COVID-19 but also for the associated problems prevailing for long in the industry. It was important to find out the loopholes in the system to fix them as early as possible so that any future crisis can be tackled vibrantly. The ideological promotion of Islamic Finance needs to be spread all over the economy. *Mushārah* and *muḍārah* based financing processes need to be addressed more. The risk of default is reduced in these methods. The general public should be acquainted with the profit-loss based *muḍārah*. This has to be accustomed in the society. Islamic financial literacy is another necessary issue to be taken care of. Without knowledge and awareness against *ribā*, the general masses cannot comprehend the concealed harms of usury and the grandeur of Islamic Banking in following Shari'ah. Also, the desired behavior of Muslims in financial transactions and the teachings of *mu'āmalāt* can be disseminated through proper literacy programs. Bangladesh needs a completely separate Islamic Banking Act to implement Shari'ah governance in Islamic Financial Transactions and Shari'ah-compliant organizations. To speed up the loan repayment legally, the Shari'ah compliant ways other than the compensation (donation in practical form in Bangladesh) should also be followed. The necessity of a separate law is felt here too. The transactions where financial penalties, legal as per the Shari'ah, can be practiced in the industry at an increased rate are *Istisnā'*, *Salam*, *Ijārah*, etc.

An individual's wealth is secured from others in Islamic Shari'ah. Each individual is entrusted with each individual's wealth and life. No harm can be caused without any valid reason. The term compensation used in vogue in Bangladesh is *al-iltizam bi-al-tabarru'* (undertaking to donate). It is approved globally with certain conditions. This donation fund needs to be governed by strict Shari'ah principles, otherwise, misuse may arise in the process. The original concept of collecting actual financial compensation is not supported by Shari'ah principles and is rejected by the international *fiqh* forums. Willingly defaulting on credit payment is a grave sin in Islam. It must be avoided by a Muslim and the banks must take Shari'ah-compliant steps to tackle this.

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