

Reposition of *Ta'zīr* and *Ta'wīd* on Moral Hazard Behavior in Islamic Banking in Indonesia

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Abstract

Introduction to The Problem: The use of *ta'zīr* and *ta'wīd* in dealing with moral hazards in Islamic banking has been legalized through Bank Indonesia Regulation Number 7/46/PBI/2005 and DSN-MUI Fatwa Number 17/DSN-MUI/IX/2000. However, some scholars do not justify these policies because they are contrary to sharia rules.

Purpose/Objective: This research aims to reposition *ta'zīr* and *ta'wīd* in dealing with moral hazard behavior. The repositioning in this context is to look for alternative ways to deal with customer moral hazard behavior.

Design/Methodology/Approach: This is qualitative research involving secondary data arranged in an inductive-descriptive manner. It is also associated with a case study to obtain a complete picture of *ta'zīr* and *ta'wīd* in preventing moral hazards in Islamic banking. The data collected were analyzed through the stages of (1) data collection, (2) data reduction, (3) data display, and (4) conclusion/verification.

Findings: Based on the results, the repositioning of *ta'zīr* and *ta'wīd* is necessary because, presently, its implementation contains elements of usury, which Islam forbids. Therefore, the proposed form enables customers to pay back debt in two or three installments without increasing its value in one payment. This policy enables customers whose late payment is not due to force majeure but an element of intent or bad faith.

Paper Type: Research Article

Keywords: Repositioning; *Ta'zīr*; *Ta'wīd*; Moral Hazard; Islamic Banking

Introduction

Islamic banking involves the distribution of *muḍārabah* and *musyārahah* products to the general public based on profit sharing and margins. It is another product also owned by conventional banks, namely savings and deposits, with the concept of profit-sharing (Yusmad, 2018).

Irrespective of the fact that these products are issued in accordance with the sharia system, they are inseparable from evil behaviors in the economic field known as a

moral hazard that damages or causes harm to both parties (Brunnquell & Michaelson, 2016; McCaffrey, 2017). This tends to occur when the customer defaults, violates, and deviates from the agreement in the contract, and it is perceived as a form of tyranny against other parties.

The existence of moral hazard gave birth to counter mechanisms, called *ta'zīr* and *ta'wīd*, in Islamic law. *Ta'zīr* is a sanction imposed on customers who can pay but deliberately delay payments. Meanwhile, *ta'wīd* is interpreted as compensation imposed by Islamic banks on financing customers who intentionally or negligently engage in any activity that is detrimental to the bank, thereby leading to actual losses (Syaifullah, 2021). The adoption of these two mechanisms has largely been used to control the issue of moral hazards in Islamic banking (Hidayati & Hidayatullah, 2021; Wahyudi, 2017).

The problem is that the *ta'zīr* and *ta'wīd* concepts implemented in Islamic banks are not in accordance with the provisions contained in the Al-Quran and Sunnah due to the use of wrong analogies (Wahyudi, 2017). Therefore, an alternative is needed to resolve this discrepancy. Repositioning in the context of this research denotes dealing with moral hazards using alternatives other than *ta'zīr* and *ta'wīd*. Based on these arguments, the research problem is related to the efforts required to reposition *ta'zīr* and *ta'wīd* in terms of preventing moral hazards in Islamic banking.

Methodology

This research adopted a qualitative approach to explore and reveal the data's actual meaning in images, words, events, and natural settings (Yusuf, 2017). The data obtained were arranged in a descriptive form using an inductive approach (Rukin, 2019). The case study serves as a model to get a comprehensive picture of the research object, especially *ta'zīr* and *ta'wīd*, in terms of preventing moral hazards in Islamic banking. The analysis technique comprises the following stages (1) data collection, (2) reduction, (3) display, and (4) conclusion or verification.

Results and Discussion

Islamic Banking in Indonesia

The practice of financing carried out through contracts in accordance with sharia demands has been a Muslim tradition since ancient times. Receiving property (*wadī'ah*) related deposits, borrowing money for consumption and business interests, as well as transferring funds known as *urf*, have been engaged by humans since the Prophet Muhammad's era (Nofinawati, 2016).

These various banking practices were also performed by individuals, especially those closest to the Prophet Muhammad. For example, the Prophets Muhammad and Khadijah had practiced the *muḍārabah* contract. Khadijah, at that time, was the *ṣāhibul māl* (owner of capital), while Rasulullah SAW acted as *muḍārrib* (fund manager). The capital provided by Khadijah was then used for a business venture



managed by the Prophet Muhammad. The profits obtained were divided based on the initial agreement in the contract. This implies that although banking had not emerged then, its practice has been in existence and is carried out by many people, thereby causing it to become a tradition (Nofinawati, 2016).

The emergence of banking with an Islamic economic system started with the establishment of Mit Ghamr Local Savings in 1963. The Egyptian Government later took over, and its name was changed to Nasser Social Bank in 1972 (Islahi, 2018; Sari, Bahari, & Hamat, 2016). Islamic banking was then developed in the Middle East region, followed by countries in the European continent, such as Switzerland, Denmark, and Southeast Asia, where the majority of the population is Muslim (Hasyim, 2016). In 1983, Malaysia established a sharia bank for the first time under the name Bank Islam Malaysia Berhad (BIMB) (Ariff, 2017), this was followed by Indonesia in 1991 (Marlina, Rusydiana, Hidayat, & Firdaus, 2021; Nurhayati & Wasilah, 2015).

The issuance of Law Number 7 of 1992 concerning Banking is the first step adopted in forming a profit-sharing system. Law Number 10 of 1998, which is an improvement to the previous Banking Law, further emphasizes the creation of opportunities for implementing a dual banking system in Indonesia (Utama, 2019).

Although the regulation that monitors establishing a dual banking system had been implemented since 1998, the introduction phase had existed long before its enactment. The real manifestation of an institutionalized interest-free bank concept was initiated concerning the publication of the December 1983 Package (Pakdes 1983). This contained several banking sector regulations, namely policies permitting banks to give credits with 0% interest. Furthermore, the Minister of Finance, Radius Prawiro, issued a policy contained in the October 1988 Package (Pakto 88). The essence was to ensure that banking deregulation provided various facilities for establishing new ones, thereby causing this industry to experience healthy growth (Hidayatullah, 2020; Majid, 2021; Umam, 2020; Umam & Faruq, 2016).

After waiting a long time, Bank Muamalat Indonesia (BMI) was established as a commercial financial institute. It was the only one that executed its businesses based on the profit-sharing principle. This proposal was realized during the workshop "Interest in Banks and Banking" organized by the Indonesian Ulema Council from 18 August to 20, 1990, in Cisarua. The idea was later reaffirmed when this same council held the IV National Deliberation at the Sahid Jaya Hotel, Jakarta, from 22 August to 25, 1990. The need to establish an Islamic Bank in Indonesia was recommended (Umam, 2020; Umam & Faruq, 2016).

Initially, the emergence of Islamic banking was perceived as a response to several economic elements and Muslim banking practitioners who tried to embrace the pressure from various parties that wanted financial transaction services in accordance with moral values and Islamic sharia principles. They were embarrassed

by the conventional practices that promoted usury, *maysir*, and *gharar* (obscurity) (M. Yusuf, 2015).

The current growth and development of the banking industry require various innovations to discover new products to attract prospective customers. Based on this, Islamic banking needs to be able to attract market shares in Indonesia because the number of Muslim communities is the largest in the world. Therefore, it is necessary to discover various business products that are attractive and highly competitive. Islamic banking can always ensure these are in accordance with sharia principles (Yarmunida, 2020).

Forms of Moral Hazard in Islamic Banking

The issuance of legality regarding the operation of Islamic banking has to be accompanied by applying norms that are in accordance with sharia values. This indicates that every Islamic banking product and business activity executed by Islamic Financial Institutions must experience a fatwa issued by the National Sharia Council-Indonesian Ulema Council (DSN-MUI) (Sainul & Afrelian, 2015). The fatwa later became a special and differentiating measure of the operational basis of Islam with Conventional Financial Institutions (Hadi, 2011).

Furthermore, the fatwa has stated various signs that need to be obeyed by these Institutions. Therefore, when issuing business activities, they should be in accordance with the dynamics of an advanced society (Mudzhar, 2014) but must remain within the framework of the rules contained in the fatwa. Hardi (2019) stated that in 2015, DSN-MUI issued relatively 116 fatwas related to products and Islamic financial institutions in Indonesia. These were believed to be one of the reasons for the growth and development of Islamic banking in the country.

The fast pace of Islamic banking should be balanced with the moral strengthening of the actors involved, both customers and bank managers. This implies that the potential for crimes that usually occur in conventional banks should be zero. This is because Islamic banking also bears the name sharia, synonymous with its implemented theological, moral, and business ethical values. Actions that can tarnish its good name are feared to create some perception between interest-based and profit-sharing banking systems.

Crimes committed in Islamic and conventional banks are known as moral hazards. The indication of fraud or asymmetric information results in the absence of transparency between the two parties who have collaborated. In Islamic banking, problems related to asymmetric information are usually in the form of non-transparent profit sharing or other activities that are not in accordance with the ethical concepts, principles, and norms of sharia (M. Yusuf, 2015).

Moral hazards tend to occur due to regulatory problems and weak laws and regulations, thereby creating a gap between aspects of deposit and credit guarantees.



However, if left unchecked, it poses a serious threat to the progress of businesses and organizations. Moral hazards can slowly destroy responsibility and accountability in the banking sector. These also impact productivity and reduce performance, causing the company to lose competitiveness (Anisha, 2016).

Repositioning of *Ta'zīr* and *Ta'wīd* to Prevent Moral Hazard in Islamic Banking

Ta'zīr is known in the realm of Islamic criminal law as a legal sanction with no provisions from *syara'*, although the punishment depends on the judge's decision, form and execution. This indicates that the judge does not decide the legal sanctions for each *jarīmah ta'zīr*, but only determines it from the lightest (minimum) to the most severe (maximum) (Adil & Abdullah, 2016; Haqqi, 2019; Nuraisyah, 2021).

According to the Indonesian language, *ta'zīr* means *ta'dīb*, which is giving lessons. It is also interpreted as *ar-raddu wal man'u*, which implies to refuse and prevent. *Ta'zīr* is the prohibition and prevention of reprimand, punishment, and reproach (Afrianty, 2018; Aziz, 2018; Tarigan, 2017). In this context, Islamic law gives some form of punitive sanctions to state authorities against criminals based on the weight of their crimes. This aims to destroy hostility, create a conducive and controlled situation, and protect the community from any condition and anywhere. The various forms of *ta'zīr* sanctions are highly dependent on the present situation and conditions, the level of community education, and various other factors that greatly influence the changing times and places (Irfan & Masyrofah, 2016).

The terminology *ta'zīr* was originally known in Islamic criminal law, but it has also been applied in the economic field, especially in the banking sector. Fatwa Number 17/DSN-MUI/IX/2000 led to the emergence of this term in Islamic banking, and it aimed to prevent unwanted behaviors, and sanctions must be placed on customers who delay payments (Harmoko, 2019).

Based on the fatwa, there is a shift in the value of *ta'zīr*, which previously existed in criminal law. However, this has been changed and used in *mu'amalah*, especially in Islamic banking. This denotes that the fatwa MUI Number 17/DSN-MUI/IX/2000 stipulates that *ta'zīr* is interpreted as a fine. It is intended only for customers who are able to pay their debts but delay the payment, which is not permitted in sharia (Wahyudi, 2017).

The basis for the obligations of the parties to fulfill the provisions contained in the contract is QS. Al-Maidah verse 1, namely:

يَأَيُّهَا الَّذِينَ ءَامَنُوا أَوْفُوا بِالْعُقُودِ أُحِلَّتْ لَكُمْ بَهِيمَةُ الْأَنْعَامِ إِلَّا مَا يُتْلَى عَلَيْكُمْ غَيْرِ مُحِلِّي الصَّيْدِ وَأَنْتُمْ حُرْمٌ إِنَّ اللَّهَ يَحْكُمُ مَا يُرِيدُ

Meaning: "O believers! Honour your obligations. All grazing livestock has been made to obey you—except if otherwise is hereby announced during a pilgrimage. Indeed, Allah commands what He wills."

Furthermore, the imposition of sanctions for customers who delay payments is called *ta'wīd*, and it is derived from the word *'iwād*, which means to replace or compensate. It is funds or money that is perceived as a burden to the customer to compensate for the losses suffered by the bank due to their negligence or defaults on the terms agreed on when the contract was signed. *Ta'wīd* literally infers compensation, and its legal basis is stated in the Quran Surah Al-Maidah verse 1 (Binti Zulkipli, 2020; Hanifuddin, 2020; Norazlina & Ridzwan, 2019).

The narration contained in the Al-Maidah verse emphasizes that parties are expected to fulfill their respective rights and obligations when they enter into a contract or agreement. This implies that each debtor is obliged to pay their debts. In Islamic law, compensation is part of the parties' responsibilities. Any party who defaults causes harm to the other one.

Ta'wīd or compensation is legally applied in accordance with Bank Indonesia Regulation Number 7/46/PBI/2005 concerning Funds Collection and Distribution Agreements for Banks Conducting Business Activities Based on Sharia Principles Article 19 concerning Provisions for Compensation. The contents are as follows:

1. Banks can impose compensation (*ta'wīd*) only on customers who intentionally or due to negligence deviate from the provisions of the contract and causes losses to the bank.
2. The amount recognized as income is in accordance with the value of the actual losses related to the bank's efforts to ensure payments are made by customers and not expected losses due to lack of opportunity (*al-furṣah al-dā'iah*).
3. Compensation is only imposed on *ijarah* and contracts that give rise to debts (*dain*), such as *salam*, *istiṣnā'*, and *murābahah* where payment is made in cash.
4. Compensation in *muḍārabah* and *musyārahah* contracts may only be imposed by the bank as *ṣāhibul māl* if the customer does not pay the clear share of its profits as *muḍarrib*.
5. The clause on the imposition of compensation has to be clearly defined in the contract and ensure it is understood by the customer.
6. The amount for real losses is determined based on an agreement between the bank and the customer.

The DSN-MUI Fatwa Number 43/DSN-MUI/VIII/2004 concerning compensation (*ta'wīd*) also regulate policies monitoring Islamic financial institutions that determine the obligation to reward customers using their products which are in tune with the principles of Islamic law.

Although the legality of *ta'zīr* and *ta'wīd* already exists in Bank Indonesia regulations and DSN-MUI fatwas, many scholars forbid these practices' imposition based on various arguments. The Fiqh Division, Rabithah Al-Islamy through the Decree of *Majma' Al-Fiqhy Al-Islāmiy*, stated that (Kumala, 2018):



“If the creditor imposed some sort of condition on the debtor regarding the payment of a particular amount referred to as a fixed monetary penalty or a certain ratio, should the payment be delayed beyond the agreed period, then it is an invalid condition or stipulation which need not be fulfilled whether the stipulator is the bank or somebody else because it is the usury of *jāhiliyyah* (pre-Islamic period of ignorance) which the Qur'an prohibits.”

This explains the requirements of payment obligations with a predetermined amount or a certain percentage. When the debtor delays paying the debt that has matured, the rules set by the creditor become invalid according to Islamic law. The requirements are not limited to the creditor but include the debtor or other parties. It is referred to in the aforementioned provisions as part of the usury of ignorance that Allah SWT has forbidden through the Qur'an.

This provision is contained in the hadith of the Prophet Muhammad narrated by Imam Bukhari that:

“Sulaiman bin Harb told us that Shu'bah from Sa'id bin Abu Burdah from his father. I visited Medina and met 'Abdullah bin Salam r.a. He said: "You shouldn't visit my house, then I will serve you food made of flour and dates, and you enter the house." Then he said again: "Indeed, you are now in a land where usury is rampant. If you owe someone else a loan, then the person who is being owed provides hay, wheat, or animal feed, do not take it because it is usury." An-Nadler, Abu Daud, and Wardah did not mention it from Shu'bah about the "house" (Narrated by Imam Bukhari) ([Al-Bukhari, 1894](#)).

The hadith narration implies that when someone gets the required payment from the debtor, it is usury. This is because the one owing to the debt benefits from the excess, as stated in the hadith, for example, by bringing hay, animal feed, or wheat. *Ta'zīr* and *ta'wīd*, even though they are intended for social purposes, basically provide certain benefits for the bank ([Kumala, 2018](#)).

Shaykh Abdullah bin Mani', Al-Qarh Daughi, Fahmi Abu Sunnah, and Iyadh al-Anzy, are the scholars who forbid *ta'zīr* in debt. They agree that in this context, it is perceived as usury given for social purposes. Fortunately, their opinion is contained in command of Allah SWT in the QS. Al-Baqarah verse 278 obliges every believer not to engage in the usury practice and not to impose it on debtors. They stated that *ta'zīr* in this condition is usury which indirectly benefits Islamic banking ([Kumala, 2018](#)).

Similarly, the scholars also have different opinions regarding the imposition of *ta'wīd* as *ḥaram* (forbidden). Its use is allowed because of the detrimental harm, therefore it needs to be eliminated immediately. When a debtor defaults either intentionally or due to negligence, thereby causing losses to the creditor. For example, by deliberately delaying payments when he is able, his actions are detrimental to the bank, as stated in the hadith of the Prophet Muhammad SAW, which allows the imposition of penalties for debtors who deliberately delay their payments.

The use of *ta'wīḍ* is based on the concept of loss in Islam, namely *ḍammān* (Kumala, 2018). Moreover, equating it with *ḍammān* also deserves to be questioned because the concept arises due to damaged goods, leading to losses. This signifies that *ḍammān* possesses certain elements, namely the existence of damaged goods and the occurrence of losses. Based on this concept, the analogy of debt is different. Rasulullah SAW has provided several provisions and even clear regulations, especially those related to usury which is often associated with debts.

The majority of the scholars stated that *ta'wīḍ* is forbidden in their fatwas. *Majma' Al-Fiqh Al-Islāmiy* Number 51 of 1990 stated that the debtor is forbidden to pay debts that have reached maturity. However, this practice is forbidden by Sharia because it does not allow the creditor to determine the existence of *ta'wīḍ* when the customer does not pay off his debt (Kumala, 2018).

The Accounting and Auditing Organization of Islamic Finance (AAOIFI) has also issued a fatwa that “debtors delay payment due to certain obligations” in paragraphs 2/1.b and c in the Guidelines for Islamic Financial Institutions. This does not essentially allow the provision of *ta'wīḍ* in the form of fines, money, or in-kind to the debtors (Kumala, 2018).

Therefore, the use of *ta'zīr* and *ta'wīḍ* in resolving non-functional financing in Islamic banking does not yet meet sharia principles. Based on these arguments, it is necessary to review the provisions related to the issue of debtors delaying the payment of their debts to Islamic banking. Even though the funds are used for social purposes, there is still a need to pay attention to the elements of *maysir*, *gharar*, and usury, which are important in implementing Islamic banking.

Ta'zīr and *ta'wīḍ* were implemented as a type of sanction to create legal uncertainty for the customer. This is caused by a discrepancy in the legal requirements, which are usually related to the needs of Islamic bank customers, ensuring they are not entangled with usury transactions.

Therefore, repositioning the use of *ta'zīr* and *ta'wīḍ* in dealing with moral hazards is inappropriate. There is a need to employ a new concept to replace these practices, such as asking the customer to pay two or three installments without increasing the debt in one payment. This imposes on those whose late payment of their debts is not due to *force majeure* but because there is an element of intent or bad faith. Similarly, the imposition of two or three times debt installment payments does not contain an element of usury, and it is imposed because the customer turns out to be negligent, therefore there is no amount of compensation that is equivalent to the damaged goods.

Conclusion

In conclusion, the repositioning of *ta'zīr* and *ta'wīḍ* is absolutely a necessity because its implementation to a larger extent contains elements of usury, which is forbidden



in Islam. Therefore, indebted customers are recommended to pay in two or three installments without increasing the debt in one payment. The imposition on those whose late payment of their debts is not due to force majeure but because there is an element of intent or bad faith.

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