

## PENALTY IMPOSED ON DEBT PAYMENT DELAYING- CAPABLE-CLIENTS: A STUDY ON DSN-MUI'S FATWA No. 17/DSN-MUI/IX/2000

**Maftukhatulosikhah**

*Postgraduate Student of State Institute for Islamic Studies (IAIN) Sunan Kalijaga*

### Abstract

*Islamic banking is an obvious sample of Islamic economic system implementation, and hence, problems around Islamic banks are interesting to study. As a system differing from conventional, both in terms of ontology and epistemology, Islamic banking is expected to be able to offer a truly Islamic system that is in line with the Quran and Sunnah. Therefore, if any problems emerge on it, the solutions will be determined according to Islamic law.*

*One of the problems faced by Islamic banking is the handling of debt payment delaying-capable-clients. Delaying debt payment is an action if permitted to continue will disturb bank's productivity and, indirectly, Islamic banking system as a whole. Moslem scholars have different positions on this matter. National Shariah Council of Indonesian Council of Ulema (DSN-MUI) and several individual jurists contend that it is necessary to penalize debt payment delaying-capable-clients with the obligation to compensate material loss as "overdue fine". Several other jurists however argue the penalty as it is considered similar to forbidden riba, whereas the main argument (raison d'etre) for the establishment of Islamic banking is itself to avoid this kind of riba. Hence, legal-normative perspective in handling debt payment delaying-capable-clients is very interesting to study.*

### PENGANTAR

*Raison d'etre* for the existence of Islamic banking is the assumption that interest, i.e. main instrument in conventional banking operation, is *riba* forbidden by the holy Quran and Sunnah.<sup>1</sup> Hence, every element of *riba* should be avoided in Islamic banking, both in term of its product and its operation.

Islamic banking products can be classified as funding products, financing products, and other banking services, all of them are free from interest.<sup>2</sup> Instead of interest system, an Islamic bank uses profit-sharing system. Through this system, Islamic bank

products directed to enforce investment activities and to impede unproductive funds. Deposited funds reinvested by an Islamic bank to finance clients who having need of funds.<sup>3</sup>

Hence, like a conventional bank, an Islamic bank functions as an intermediary institution, i.e. mobilizing funds from people having excessive funds and channeling it to people having need of funds.<sup>4</sup> In other word, an Islamic bank has two-ways function, as manager that receiving trust (mandate) from depositors, and as investor giving trust to clients. The concept of trusteeship is, thus, closely related to Islamic banking operation.

In implementing its function, the operation of an Islamic bank is not only di-

<sup>1</sup> Abdullah Saeed, *Islamic Banking and Interest A Study of Prohibition of Riba*, (Leiden: Brill, 1996), pp. 3.

<sup>2</sup> Sutan Remy Sjahdeini, *Perbankan Islam dan Keduakannya Dalam Tata Hukum Perbankan Indonesia*, (Jakarta: Grafiti, 1999), pp. 1.

<sup>3</sup> See, Warkum Sumitro, *Asas-asas Perbankan Islam dan Lembaga-lembaga Terkait*, (Jakarta: Rajawali Press, 1997), pp. 24.

<sup>4</sup> Sjahdeini, *Perbankan...*, pp. 1.

rected to maximize profit, but also directed to give mainly socio-economic benefits for Moslems in general.<sup>5</sup> Thus, despite its commercial function, an Islamic bank also implements its social function.<sup>6</sup> To keep Islamic bank's social function and to ensure that it stays hold on to the concept of trusteeship, monitoring to all stakeholders of banking activities is much needed, both in term of religious motivations and institutions. The institution having duty to monitor an Islamic bank is Shariah Supervisory Board (DPS). In national level, the institution having duty to monitor Islamic banking is National Shariah Council of Indonesian Council of Ulama (DSN-MUI). It is this only institution holding authority to make *fatwa* (shariah judgments) related to Islamic banking in Indonesia.<sup>7</sup>

Besides monitoring an Islamic bank, DPS also has a duty to consider business transactions or problems asked by bank and make judgment on them according to Islamic law.<sup>8</sup> One of the problems in banking practice is the existence of debt payment delaying-capable-clients. This problem causes debates among Moslem scholars particularly on the need of imposing penalty on these debt payment delaying-capable-clients. There are Moslem scholars supporting penalty to the clients in the form of "overdue-fine", based on reason to maintain *maqashid al-shariah* (shariah objectives). On the contrary, there are other Moslem scholars opposing it, because of their concern that penalty in the form of material fine contains elements of *riba*.

This paper will further discuss about penalty imposed on debt payment delaying-capable-clients, and examine DSN-MUI's Fatwa on this matter. The word "client" in

next section of this paper means "debtor" receiving financing facilities or credits based on *shariah* principle, or other financial services regarded as similar to them based on agreement between an Islamic bank and the debtor.<sup>9</sup>

### ARGUMENTS SUPPORTING THE IMPOSITION OF PENALTY ON DEBT PAYMENT DELAYING-CAPABLE-CLIENTS

Recent economic activities experience a very fast improvement. Economic rotation affected by among others capital rotation. In this way, the need of cooperation among capital owners and entrepreneurs, either directly among individuals or indirectly through intermediary institutions such as bank is almost unavoidable. In Islamic economic system, these forms of cooperation are based on trusteeship principle with the objectives of mutual benefits and business risk sharing, and without exploitation from one to another. Here, the agreements that can be used are among others *mudarabah*, *musyarakah*, *murabahah*, and *ijarah*, etc.

In practice, that ideal principle may not prevail as wished. Exploitation usually done by capital owner, i.e. through charging interest, can indeed be avoided using profit-sharing principle.<sup>10</sup> However, damaging action can also be done by capital managers (the clients), e.g. by deferring debt payment from time limit has been agreed. Receiving this matter, there are Moslem scholars deciding the need for imposing penalty on debt payment delaying-capable-clients.

One of Moslem scholars supporting the arguments to impose penalty on debt

<sup>5</sup> Ibid. pp. 21.

<sup>6</sup> Iwan Triyuwono, *Organisasi dan Akuntansi Syari'ah*, (Yogyakarta: LkiS, 2000), pp. 197.

<sup>7</sup> Warkum, *Asas-asas...*, pp. 45.

<sup>8</sup> Ibid, pp. 45.

<sup>9</sup> Such a definition is according to Act No. 10/1998 article 1 point (18).

<sup>10</sup> Profit sharing is based on the assumption that human being cannot ascertain the success of business in the future. See, M. Zuhri, *Riba dalam al-Qur'an dan Masalah Perbankan*, (Jakarta: PT. Raja Grafindo Persada, 1996), pp. 155.

payment delaying-capable-clients is Mustafa Ahmad al-Zarqa, a religious advisor (*Syar'i*) at Center for the Development of Investment Bank Union settling in Riyadh, Kingdom of Saudi Arabia. Zarqa contends that it is legal to impose penalty on debt payment delaying-capable-clients in the form of material loss compensation (*ta'wid*). According to him, giving penalty is far from the elements of *riba* because it is intended to give a lesson. Deferring debt payment from time limit has been agreed can impede creditor's business running, and ultimately will culminate in material loss.<sup>11</sup> This argument supported also by al-Sadiq Muhammad al-Amin al-Darir. However, whereas Zarqa's argument seems to cover individual and non-individual debt payment delaying-capable-clients, according to Darir, penalty should only be imposed on non-individual debt payment delaying-capable-clients, and the amount of loss compensation must be adjusted with the amount of profit when the capital is used by bank.<sup>12</sup>

According to Zarqa, penalty imposed on debt payment delaying-capable-clients is very important, and we need not to worry that it will belong to *riba*, as long as we handle it correctly. Deferring debt payment can be analogized with *gasab*, i.e. utilizing goods without its owner's permission. In *gasab*, Moslem scholars decided the obligation for those doing *gasab* to compensate loss, pursuant to time duration of such deed, because it impedes the owner from the use of his own property. Thus, the responsibility for *gasab* is not only in hereafter.<sup>13</sup>

Concerning *gasab* itself, according to Zarqa, there is no Moslem scholar related it to *riba*.<sup>14</sup> Hence, for debt payment delaying-capable-clients we need to impose penalty. The reason is similar with *gasab*, that the deferring of debt payment impedes capital owner to utilize his property. For instance, property can actually be utilized as productive capital or managed to yield profit. Nevertheless, the property still held by the clients, and therefore, cannot yield profit for the bank.<sup>15</sup> Thus, according to Zarqa, jurists should consider penalty to debt payment delaying-capable-clients with Islamic framework and lay on *maqasid al-syari'ah* and other general rules based on the Quran and Sunnah.<sup>16</sup>

Arguments that can be used as basis for imposing penalty on debt payment delaying-capable-clients are:<sup>17</sup>

1. From the Qur'an

- Q.S. *al-Maaidah* (5): 1

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

This verse makes fulfillment of the agreement made by the two parties as obligatory.

- Q.S. *al-Mu'minun* (23): 8

وَإِذْ يَبِئُتُونَ اللَّهَ عَهْدَهُمْ  
رَأْسًا ثُمَّ يَنْصِرُونَ

- Q.S. *al-Nisa* (4): 58

إِنِ اتَّخَذْتُم مِّنْ أَوْلِيَاءٍ  
فَمَا يَتَّبِعُونَ إِلَّا مَا  
أَنزَلْنَا مِنَ السَّمَاءِ  
مِنَ الْوَحْيِ لَكُمْ

These two verses stress the importance of holding a trusteeship. Here, in case of relationship between an Islamic bank and clients, the clients (debtors) should hold the trusteeship given

<sup>11</sup> Mustafa Ahmad al-Zarqa, "Haul Jawaz Ilzam al-Madin al-Mamatil Bitaw'id Lidda'in", in *Dirasah Iqtisadiyah Islamiyah*, (Jeddah: al-Ma'had al-Islamy Lilbuhus Wa al-Ta'drib al-bank al-Islamy litanmiyah, 1996), Vol. III No. 2 dan Vol IV. No. 1., pp. 9-11.

<sup>12</sup> Ibid. pp. 10.

<sup>13</sup> See, Mustafa al-Khin, *al-Fiqh al-Manhajy*, (Damascus: Dar al-Ulum al-Insaniyah, 1989), VII: 186. Moslem scholars having this opinion are those from mazhab Syafi'i and Hanbali, as they contend that

benefit has intrinsic value. At the same time, according to imam Hanafi, those doing *gasab* have no obligation to compensate loss, as benefit is not wealth. See, al-zarqa, "Haul...", pp.16.

<sup>14</sup> Ibid. h.13.

<sup>15</sup> Ibid. pp. 18.

<sup>16</sup> Ibid. pp. 13

<sup>17</sup> Ibid. pp. 13-16.

by the bank as good as possible, and not do something that can cause loss to the bank.

- Q.S. *al-Baqarah* (2): 188

ولا تأكلوا أموالكم بينكم  
بالباطل

According to most jurists, the word *al-mal* means not only property, but also utility. Thus, impeding one from utilizing his property with no legal reason is belonging to the action of eating one's property by illegal ways.

2. From the Sunnah

- *Hadist* reported by Ibnu Majah from 'Ubadah bin Samit, by Ahmad from Ibnu 'Abbas, and by Malik from Yahya:

لا ضرر ولا ضرار

- *Hadist Sahih mutafaq 'alaih*:

مطل الغنى ظلم

- *Hadist* reported by Nasa'i from Syuraid bin Suwaid, by Abu Dawud from Syuraid bin Suwaid, by Ibnu Majah from Syuraid bin Suwaid, and by Ahmad from Syuraid bin Suwaid:

لى الواجد يحل عرضه وعقْبته

3. From the principles of Fiqh:

The above verses relate to the principles of fiqh, among others:

- أن الامر التشريعي يفيد الوجوب ما لم  
تقم قرنة أو دليل يصرفه عن الوجوب

If this principle is linked with Q.S. *al-Maidah* (5): 1 concerning promise fulfillment, we will conclude that violating an agreement is considered as violating an obligation. Therefore, penalty is legal to be imposed.

Also:

الضرر يزال

that is derived from *hadist*:

لا ضرر ولا ضرار

Since deferring debt payment can harm other people (in the form of loss), thus it must be accounted. To abolish that loss,

it is legal to impose penalty in the form of material loss compensation.

From arguments above, we can conclude that debt payment delaying-action can impede an Islamic bank from utilizing its own capital. That delaying action can be categorized as an abuse of trusteeship and a despotic action, because it can harm other people. If such action is let without penalty, it will anxiously be a custom. As one of *maqasid al-syari'ah* is differing *amanah* and *khianat*, or the just and the unfair, then it is necessary to impose penalty on debt payment delaying-capable-clients explicit and proportionally.<sup>18</sup>

Concerning the form of penalty, it can be analogized with *gasab*. According to Zarqa, analogy between the legal status of debt payment delaying-capable-clients and *gasab* is permitted. Earlier Moslem scholars have also ever done such an analogy. For example, in case of found animal (*luqatah*), the finder has the right to hold the animal as guarantee until the owner compensates the caring cost during at the finder's place. In this way, pawning legal status is given to the *luqatah*. Thus, referring to the legal status of *gasab*, debt payment delaying-capable-clients must be responsible for his action and compensates material loss because he has inflicted financial loss to the bank.<sup>19</sup>

Therefore, according to Zarqa, there is no *fiqh* problem concerning the legal status of penalty imposed on debt payment delaying-capable-clients, as long as it is handled correctly and based on shariah principles.

## RULES CONCERNING THE IMPOSITION OF PENALTY

It has been mentioned that penalty imposed on debt payment delaying-capable-clients is material loss compensation. Two alternatives can be used to determine the

<sup>18</sup> Al-Zarqa, "Haul..." pp.15-16.

<sup>19</sup> Al-Zarqa, "Haul...". pp.19.

amount of material loss compensation, i.e. decided in advance or decided through legal courts. However, Zarqa worries about the first alternative as it can head for *riba*. Here, we need assurance that material loss compensation is not belonging to *riba*, because *riba*, which has been agreed in advance in debit and credit, is a despotic way to get profit. In contrast, loss compensation is a mean to uphold the law for those oppressed because of losing right to use their own property. Thus, the best alternative to determine the amount of loss compensation is through courthouse or other authorized legal courts (such as Shariah Arbitration Council).<sup>20</sup>

In determining material loss compensation, the legal courts have to notice things as follow:<sup>21</sup>

1. The legal courts have to ensure that delaying-clients are truly having no legal reason (*uzr syar'i*) to delay their debt payment.
2. The legal courts have to limit the loss compensation, by estimating minimum income usually earned with legal efforts such as *mudarabah*, *muzara'ah*, etc. Here, the legal courts may ask experts' opinions in related fields.

In point one, the legal courts have to ensure that delaying-clients are truly having no legal reason (*uzr syar'i*) to delay their debt payment, such as *force majeure*<sup>22</sup> or economic trouble reasons. If the reason of delaying-clients is economic trouble, then according to Zarqa, the clients will not be imposed penalty and be given looseness to pay the debts until they released from the trouble.<sup>23</sup>

<sup>20</sup> Ibid. pp. 17-18

<sup>21</sup> Al-Zarqa, "Haul..." pp. 18-20.

<sup>22</sup> *Force majeure* is also mentioned as *Quwa Qahira*, or "the God's act", i.e. a situation or a change cannot be predicted before or beyond human being's control. See, Susan E. Rayner, *The theory of Contracts in Islamic Law*, (London, Graham and Trotman, 1991), pp. 259-263.

<sup>23</sup> Al-Zarqa, "Haul...", pp. 19.

Moreover, the legal courts have to decide the minimum time limit for debt payment delaying action because one that can be imposed penalty is time usable to make profit. If time for delaying action is relatively brief and unusable to make profit, then as for writer, delaying clients will not be imposed loss compensation penalty, but administrative penalty.

For example, Zarqa proposes six principles that must be noticed by an Islamic bank when handling debt payment delaying action:<sup>24</sup>

1. Delaying action will be assumed done if the clients cannot pay installments three times, or being late to pay until a half period pass after time limit for debt payment (in case of payment that is not paid in installments), and the bank has to be able to show evidence stating the delaying action.
2. It is prohibited to requisite additional payment in the form of loss compensation if there is delaying action when transaction was being made.
3. If a client delays installment payment over nine days after time limit, the bank will be allowed to continue giving debt with *domanah* or mortgage agreements.
4. If the bank decided that delaying-capable-clients must pay compensation, the compensation may not exceed 10% from debt counted per month.
5. Bank has to maintain the objectives of imposing penalty, by making special counting (separate account) and moving compensation into bank's head office cash.
6. Funds originated from material loss compensation can be utilized for social objectives, such as social funds.

From Zarqa's argument, there are at least two problems emerge in ascertaining that material loss compensation does not contain elements of *riba*:

<sup>24</sup> Al-Zarqa, "Haul...", pp. 30-31.

First, Zarqa's argument, stating that loss compensation penalty imposed on delaying-capable-clients must be decided through legal courts, head for inefficiency and ineffectiveness. In general, legal court process tends to be complicated and requires much time and costs. Therefore, legal court process should be taken as the last effort when there is a dispute between the bank and the client. Effort possibly done is by deciding general regulations that can be a manual for Islamic banks in handling debt payment delaying problem. It is further DPS' duty to supervise the implementation of such regulations by an Islamic bank. It will be better here if the general regulations are formalized in an act regulating Islamic banking, so that they have binding legal power.

Second, there is an inconsistency in Zarqa's opinion when he asserts that funds originated from material loss compensation are not given to the bank, but donated as social funds. Whereas he told that the reason of imposing penalty on delaying-capable-client is to give material loss compensation. If funds originated from material loss compensation are donated, the purpose of imposing penalty will not be fulfilled. Moreover, Zarqa himself has asserted before that material loss compensation is not similar with *riba*, even exactly a justice implemented to avoid an Islamic bank from material loss caused by clients ignoring their obligation.<sup>25</sup>

#### ARGUMENTS OPPOSING THE IMPOSITION OF PENALTY ON DEBT PAYMENT DELAYING-CAPABLE-CLIENTS

Despite those supporting the imposition of material loss compensation penalty on delaying-capable-clients, there are other Moslem scholars opposing such a position, among others Nazyah Humad and 'Abdullah bin Bayh. Among the arguments are:<sup>26</sup>

1. The prohibition of imposing material loss compensation penalty has been stated in *nash syara'* (e.g. *al-Baqarah* 2: 275). This *nash* does not differentiate whether the man imposed extra payments (*ziyadah*) is capable or not. Based on this *nash*, most Moslem scholars have prohibited all extra payments (*ziyadah*) irrespective of it is requested in advance or executed as custom. It is this reason is explaining why Moslem scholars do not consider material loss compensation in a specific manner.
2. Analogizing the legal status of debt payment delaying action with *gasab* is unacceptable. The reason is that, according to Moslem scholars' agreement, *nuqud* can not be rent, and therefore illegal to request payment (*ujrah*) for the delaying time as has been determined on *gasab*.
3. The analogy of material loss compensation is invalid because of *nash* prohibiting extra payments as has mentioned in point 1 above. Such an analogy can be categorized as *fasad al-i'tibar* by *ussuliyin*.
4. Punishment in the form of material penalty is prohibited. According to Imam al-Zarqany, punishment (*ta'zir*) by taking one's property was allowed in early Islam, but it has later been corrected (*naskh*) and the legal status is forbidden.
5. Judgment (*fatwa*) on the imposition of such penalty will only bring disadvantages (*mafsadah*) rather than benefits (*maslahah*), because of the elements of *riba* contained in the compensation.
6. Hence, the benefits (*maslahah*) used as argument for the judgment are belonging to meaningless benefits (*maslahah mulgah*).

Thus, it can be concluded that the disagreement on the imposition of penalty on debt payment delaying-capable-clients are based on the assumption that material

<sup>25</sup> Al-Zarqa, "Haul...", pp. 19

<sup>26</sup> 'Abdullah bin Bayh, "Ta'liq 'ala Bahs Haul..." pp. 47-53.

loss compensation is similar or even belonging to *riba* and bringing more disadvantages than benefits. Punishment for debt payment delaying action will, according to these Moslem scholars, be adequately given in the hereafter.

However, is it right that the imposition of loss compensation penalty (here means imposing extra payments penalty from principal debt) belonging to forbidden *riba*? Examining carefully, we will find that spirit contained in the prohibition of *riba* is the prevention from exploiting or utilizing the other's property illegally. In case of debt payment delaying action, exploitation by utilizing the other's property illegally is exactly done by the clients. It is hence reasonable to impose penalty with an obligation to compensate loss.

Argument that punishment (*ta'zir*) by taking one's property allowed in early Islam has later been corrected (*naskh*) seems to be minority. Punishment by taking one's property is still appearing in many books concerning Islamic criminal law. Besides, argument that the imposition of such penalty will bring more disadvantages (*mafsadah*) rather than benefits (*maslahah*), seems to have less foundation. In fact, if such a harm action is let, it will likely be jurisprudence and custom damaging the system. It is therefore appropriate according to the principle of *ta'zir*,<sup>27</sup> that the delaying action should be punished.

Thus, Moslem scholars' contention allowing the imposition of penalty on debt payment delaying-capable-clients is more robust and acceptable. However, in its practice, the fairness and justice for all should remain be paid attention

<sup>27</sup> The root of the term *ta'zir* is *al-man'u* (prevention), and then to be more known as *al-ta'dib* (teaching), meaning to prevent one from repeating his action or other people from doing the similar action. See, Wahbah al-Zuhayli, *Al-Fiqh al-Islam Wa Adilatuh*, (Damaskus: Dar el-Fikr, 1996) VI: 197.

## COMMENTS ON DSN-MUIS' FATWA

With the validation of Act No. 10 Year 1998, the development of banking with Islamic principle is increasingly promising. Clients' interest to utilize Islamic banking service increases, particularly those intending to use financing facility, because of the inexistence of unilateral risk in case of the project funded is fail or experiencing loss. Here, temptation for clients to make violation is much likely happen.<sup>28</sup>

One of the violations is the action to delay debt payment from time limit that has been agreed in advance. If the debt has been repaid, the funds can further be channeled by bank to other people having need of financing. Thus, debt payment delaying-action can be categorized as harm, particularly for the bank and the other people involved in banking activities. Concerning this problem, Islamic banks have requested judgment from National Shariah Council of Indonesian Council of Ulema (DSN-MUI). Recalling arguments can be used (as also used by Zarqa) DSN-MUI issues their *Fatwa* No. 17/DSN-MUI/IX/2001 stating that:

*First:*

### General Regulations

1. Penalty stated in this judgment is penalty imposed by Islamic Financial Institutions (LKS) to delaying-capable-clients.
2. Clients incapable/not yet capable to pay caused by *force majeure* should not be imposed penalty.
3. Delaying-capable-clients and or clients having no intention to pay their debt can be imposed penalty.
4. Penalty is based on the principle of *ta'zir*, i.e. to make clients discipline in executing their obligation.
5. Penalty can take the form of money, and the amount is determined based on agreement made in advance.

<sup>28</sup> Sjahdeini, *Perbankan...*, pp. 206.

6. Funds originated from material loss compensation are used for social funds.

*Second:*

If one party does not execute his obligation or there is a dispute between the two parties, solution will be decided through Shariah Arbitration Body (*Badan Arbitrase Syariah*).

*Third:*

This judgment is in effect since it is decided, with a stipulation that if there are mistakes, it will be changed and corrected.

Compared to Zarqa's opinion, DSN-MUIS' *Fatwa* has similarities and differences. Among the similarities are:

- Penalty can only be imposed on capable clients, whereas those in *force majeure* cannot be imposed.
- Penalty is determined in the form of material loss compensation.
- The fund originated from material loss compensation is used for social fund.

The differences are:

- According to DSN-MUI's *Fatwa*, loss compensation penalty is determined based on agreement in advance. Concerning this, what is worried is that, since the penalty has been determined in advance including the nominal, or has been covered in the agreement between a Islamic bank and the clients, then clients with their weak bargaining position will be harmed.<sup>29</sup> Besides, material loss compensation that has been determined in advance is anxiously head for *riba*, whereas the main argument for opposing the imposition of penalty is that penalty is similar with forbidden *riba*. Different from DSN-MUI, according to Zarqa, penalty should not be de-

termined in advance, rather than decided through legal courts.

According to writer, the best choice is to standardize general regulations from DSN-MUI's *Fatwa*, so that the result can be used as guidance by Islamic banks. Thus, despite the inclusion of such point in the agreement, it would not head for despotism by bank. Here, the supervision is DPS' duty in each bank. Pursuant to DSN-MUI's *Fatwa*, and for the sake of efficiency and effectiveness, process through legal courts is the last alternative only.

- According to Zarqa, whether a client is capable or not, it will be decided by the legal courts. However, Zarqa does not mention the criteria for "capable" clients, so that the decision is likely subjective or much depended on judge's subjectivity.

DSN-MUI's *Fatwa* in contrast does not mention the party having authority to decide whether a client is capable or not. This may be referring to the regulation in article 8 Act No. 10/1998 stating that, in deciding financing facility, bank has to examine professionally. Thus, Islamic banks' clients are considered as "capable" when the agreement is made. If they delay their debt payment and are not evidenced to be in *force majeure*, they will be imposed penalty as stated in DSN-MUI's *Fatwa*. Here, problems arise, for example, in case of delaying clients caused not by *force majeure* but their unhealthy business, whether these clients can be imposed penalty or not. However, as mentioned in DSN-MUI's *Fatwa*, such problems can be solved through Shariah Arbitration Body, though it should be better if further explained.

- Argument for the imposition of penalty on delaying-capable-clients, according to Zarqa, is that their action harms other party (i.e. Islamic banks), and therefore,

<sup>29</sup> See Sjahdeini, *Perbankan...* pp. 205. Since the bank has determined the standard agreements, then there is a tendency that the agreements are more benefiting bank. Hence, regulation on the standardization is needed according Sjahdeini.

material loss compensation is imposed. Funds originated from material loss compensation are further used for social funds and not for the harmed banks. According to DSN-MUI, penalty is based on the principle of *ta'zir*, i.e. to make clients discipline in executing their obligation. With this argument, DSN-MUI decides that funds originated from loss compensation are used for social funds. Here, DSN-MUI's *Fatwa* seems to be more consistent than Zarqa's opinion. Nevertheless, as has been mentioned, DSN-MUI can actually decide that funds originated from material loss compensation are used for the bank as they are bank's rights (and need not to be worried as *riba*), and benefits for the society particularly depositors saving money in the bank.

Unfortunately, both DSN MUI's *Fatwa* and Zarqa's opinion still leave problems to further elaborate. Among others are the criteria for "capable" clients.

DSN-MUI's *Fatwa* seems too general and needs to be further elaborated. As has been mentioned, to lessen the probability of violation in Islamic banking practice, binding regulations are needed (including the penalty). In other words, we need a comprehensive Islamic banking act.

For a while, DPS in each bank should execute their function to supervise the implementation of DSN-MUI's *Fatwa*, so that Islamic banks do not collide with it, or avoided from the tendency head for *riba*.

From the explanations above, it can be concluded that there is no legal problem concerning the imposition of penalty on delaying-capable-clients in *fiqh* perspective. Here, opinion stated by Zarqa and *Fatwa* issued by DSN-MUI seems to be more advance than that by the opposing Moslem scholars, though Zarqa and DSN-MUI themselves impressed to be over cautious. Indeed, it is the time for Moslem scholars or

other party having authority to issue *fatwa*, not to over fix in enchantment of classical *fiqh*, and conversely, to produce new *ijtihad* more appropriate to current situation. Here, the most important is to live the spirit of basic value contained in holy Quran and Sunnah, by such as enhancing fairness and eliminating injustice.

#### CLOSING NOTES

In their operation, Islamic banks face many problems as commonly faced in conventional bank practices. However, in handling the problems, Islamic banks have to follow rules determined by Islamic law.

Although there is still debate among Moslem scholars, the imposition of penalty on debt payment delaying-capable-clients has in principle not collided with Islamic law. However, in its practice, the fairness and justice for all should remain be paid attention. It is important; to avoid critics that Islamic banking in its operation exactly collides with its initial concept, i.e. to eliminate *riba*.

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