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A Normative Juridical Analysis of *Ta'widh* and *Gharamah* in Islamic Financial Transactions: A Sharia Economic Law Perspective Based on DSN-MUI Fatwa No. 43/DSN-MUI/2004

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Abstract:
This article analyzes the normative juridical framework governing the implementation of *Ta'widh* (compensation) and *gharamah* (penalty fines) in Islamic financial transactions in Indonesia, with particular attention to the legal and Sharia foundations established under DSN-MUI Fatwa No. 43/DSN-MUI/VIII/2004. The main research problem concerns the tension between the classical Islamic prohibition of riba and the contemporary need for effective financial discipline mechanisms in Islamic banking, especially when debtors fail to fulfill contractual obligations due to negligence or intentional default. This study aims to examine the legal basis, conceptual distinction, regulatory structure, and practical application of *Ta'widh* and *gharamah* within the Indonesian Islamic financial system, while identifying the risks, limitations, and implementation challenges arising from their use. The research employs a normative juridical method through doctrinal legal analysis, supported by library research using primary legal materials, including the Qur'an, Sunnah, DSN-MUI fatwas, Bank Indonesia regulations, and Financial Services Authority provisions, as well as secondary and tertiary legal sources relevant to Islamic economic law. The results show that *Ta'widh* is permissible under Sharia principles only when it is limited to actual, direct, and documentable losses caused by debtor misconduct, thereby functioning as compensation rather than an additional profit for the creditor. In contrast, *gharamah* serves as a disciplinary penalty intended to deter deliberate payment delays, but its proceeds must be allocated to social or charitable purposes and must not become income for Islamic financial institutions. The study further finds that unclear calculation standards, weak documentation of losses, and insufficient governance of penalty funds may create risks of Sharia non-compliance. Therefore, stronger regulatory harmonization, transparent reporting, and clearer supervisory mechanisms are required to ensure legal certainty, institutional accountability, and consistency with the objectives of Islamic economic law.

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Introduction

The rapid growth of Islamic finance globally, particularly in Indonesia as the world's largest Muslim-majority nation, has created an urgent need for legal frameworks that reconcile traditional fiqh principles with modern financial realities. Among the most contested issues is the treatment of debtor default and the mechanisms through which Islamic financial institutions may be legitimately compensated when customers fail to fulfill contractual obligations in a timely manner (Wiley & Pte Ltd, 2011).

Classical Islamic law maintains a profound suspicion of any mechanism that allows lenders to profit from the mere passage of time, a prohibition encapsulated in the comprehensive ban on riba. Yet modern commercial finance demands effective deterrence against willful default and adequate compensation for documented losses. This tension has generated substantial scholarly debate among contemporary Islamic jurists and legal academics, producing varied regulatory responses across jurisdictions (F et al., 2022).

In Indonesia, the National Sharia Board of the Indonesian Council of Religious Scholars (Dewan Syariah Nasional Majelis Ulama Indonesia DSN-MUI) has played a pivotal regulatory role in defining the boundaries of permissible financial practice. DSN-MUI Fatwa No. 43/DSN-MUI/VIII/2004 on *Ta'widh* stands as one of the most significant normative instruments in this domain, providing a framework that balances Sharia compliance with the functional requirements of a modern financial system (Mualim et al., 2026).

Ta'widh derived from the Arabic root *'awadha,* meaning compensation or indemnity refers to the financial remedy available to Islamic financial institutions when they sustain actual, documentable losses due to debtor negligence or willful default. *Gharamah*, by contrast, refers to financial penalties imposed upon debtors, the proceeds of which are directed toward charitable purposes rather than enriching the creditor. While conceptually distinct, the practical application of both instruments has proven remarkably complex within Indonesia's developing Islamic financial regulatory architecture (Mega Mustika et al., 2026).

This article employs a normative juridical methodology to analyze the legal basis, theoretical foundations, and practical implications of *Ta'widh* and *gharamah* in Indonesian Islamic financial transactions. The analysis draws upon classical fiqh texts, contemporary fatwas, statutory regulations, and academic commentary to construct a comprehensive account of the current regulatory landscape and to identify areas requiring further legal development.

The significance of this inquiry extends beyond doctrinal analysis. As Indonesian Islamic banking continues to mature, the proper calibration of default compensation mechanisms carries profound implications for financial stability, investor confidence, and the legitimacy of Islamic finance as a genuinely distinct and ethically grounded alternative to conventional banking (Mawardi et al., 2024).

The expansion of Islamic finance in Indonesia has generated significant legal concerns, particularly regarding compensation mechanisms in instances of debtor default. Within this framework, *Ta'widh* and *gharamah* have emerged as key instruments in Islamic financial practices, especially following the enactment of DSN-MUI Fatwa No. 43/DSN-MUI/VIII/2004 (Akram Laldin & Furqani, 2013).

The study further reveals a number of implementation challenges in Indonesia, particularly in relation to regulatory consistency, transparency, and institutional oversight. Accordingly, there is a pressing need to strengthen regulatory harmonization and Sharia compliance frameworks in order to enhance legal certainty and reinforce public trust in Islamic financial practices.

Methodology

This study adopts a normative juridical (doctrinal legal) research approach (Majeed et al., 2023), analyzing legal norms governing *Ta'widh* and *gharamah* in Indonesian Islamic financial transactions. Data were collected through library research, drawing on three layers of legal materials: primary sources (the Quran, Sunnah, DSN-MUI Fatwa No. 43/DSN-MUI/VIII/2004, Bank Indonesia regulations, and OJK provisions); secondary sources (classical fiqh texts, IFA/OIC resolutions, and academic literature); and tertiary sources (legal dictionaries and commentaries). Data analysis employed a qualitative-prescriptive method, systematically examining the consistency of existing legal norms with Sharia principles, identifying regulatory gaps, and formulating evidence-based policy recommendations. The research process proceeded sequentially: problem identification → legal material collection → doctrinal analysis → synthesis → policy recommendations.

Results and Discussion

Theoretical And Doctrinal Foundations

The Prohibition of Riba and Its Implications for Compensation Mechanisms

The prohibition of riba constitutes one of the most fundamental and unambiguous principles of Islamic economic law. Rooted in explicit Quranic proscriptions, particularly in Surah Al-Baqarah verses 275-279 and Surah Al-Imran verse 130, and reinforced by numerous authenticated hadith, the ban on riba extends

to all forms of predetermined, time-based increment on loans or debts. The classical fuqaha (jurists) identified two primary categories: riba al-nasi'ah (interest on deferred transactions) and riba al-fadl (excess in exchanges of the same commodity), both of which are comprehensively prohibited (Ekonomi & Dwi Afifah, 2026).

The doctrinal challenge posed by the development of compensation mechanisms for debtor default lies precisely in the risk that such mechanisms may, in substance if not in form, replicate the structure of interest. If an Islamic financial institution is permitted to charge an additional amount proportional to the duration of a customer's default, the economic effect appears indistinguishable from conventional interest. It is therefore essential to establish principled criteria that distinguish legitimate compensation from prohibited riba (Sj et al., 2026).

Classical Islamic jurisprudence developed several doctrines relevant to this inquiry. The principle of dhaman, or guarantee and liability, establishes that a party who causes loss to another through negligence or wrongful conduct bears an obligation to restore the other to their original position. This principle, grounded in the hadith "*la dharara wa la dhirar*" (there shall be no harm and no reciprocating harm), provides the foundation for the permissibility of *Ta'widh* as a remedy for documented losses caused by debtor misconduct (Agus Putra, 2023).

The concept of *dharar* occupies a central position in distinguishing *Ta'widh* from conventional interest-based compensation mechanisms. In Islamic jurisprudence, compensation is only justified when a real, measurable, and direct loss has occurred as a consequence of another party's negligence or misconduct. The principle of la dharara wa la dhirar establishes that harm must neither be inflicted nor reciprocated, thereby creating a legal foundation for restoring losses suffered by an injured party. Within this framework, *Ta'widh* functions as a remedial mechanism intended solely to restore the financial position of the creditor to its original state prior to the occurrence of harm. This differs fundamentally from conventional bank interest, which is calculated primarily on the basis of time value and predetermined percentage increments without requiring proof of actual loss. Consequently, *Ta'widh* derives its legitimacy from the existence of *dharar haqiqi*, whereas conventional interest represents compensation for the passage of time itself, a characteristic that falls within the prohibition of riba al-nasi'ah in classical Islamic jurisprudence."

Furthermore, the doctrine of ta'zir bil-mal (financial punishment for disciplinary purposes) has been invoked by some contemporary scholars to justify *gharamah* as a legitimate tool of financial regulation, provided that its proceeds are channeled to social welfare rather than to the creditor's private benefit. This doctrine, while

historically contested among the classical schools, has found acceptance among a number of contemporary Islamic legal bodies, including DSN-MUI.

Classical Schools of Jurisprudence on Financial Compensation

The four major Sunni schools of jurisprudence (madhahib) have developed distinct positions on the permissibility of financial compensation for delayed debt repayment. The Hanafi school, historically dominant in South and Central Asia, generally maintains strict limits on financial remedies for creditors of delayed debts, emphasizing that any additional charge arising from temporal delay constitutes riba al-nasi'ah and is therefore absolutely prohibited. However, Hanafi scholars have recognized the obligation of ta'wid in the context of tort-based liability arising from negligent or intentional harm.(*Understanding Islamic Finance | Muhammad Ayub | Perpustakaan Mahkamah Konstitusi*, n.d.)

The Maliki school, which has historically exerted significant influence in North and West Africa, developed a somewhat more flexible approach through the concept of fawat al-manfa'ah (loss of benefit), recognizing that creditors may in certain circumstances be entitled to compensation for opportunity costs when debtors engage in willful procrastination. The Shafi'i school, predominant in Southeast Asia and therefore particularly relevant to Indonesian Islamic legal discourse, generally adopts a position closer to the Hanafi school on riba prohibition but has developed sophisticated doctrines regarding contractual conditions and guarantees that create space for certain compensation mechanisms.(*Understanding Islamic Finance | Muhammad Ayub | Perpustakaan Mahkamah Konstitusi*, n.d.)

The Hanbali school, known for its relative openness to public interest (maslahah) considerations in financial matters, has provided important doctrinal resources for contemporary Islamic economists and jurists seeking to develop workable compensation frameworks. Ibn Taymiyyah and Ibn al-Qayyim, prominent Hanbali scholars, both acknowledged the legitimacy of financial penalties directed toward disciplinary purposes under the ta'zir doctrine, a position that has significantly influenced the reasoning of modern Islamic financial regulators.(Kamali, n.d.)

Contemporary Scholarly Discourse on *Ta'widh* and *Gharamah*

The twentieth and twenty-first centuries have witnessed intense scholarly debate among Islamic economists and jurists regarding the appropriate response to debtor default in modern Islamic financial institutions. This debate has been shaped by the work of foundational figures such as Muhammad Nejatullah Siddiqi, Monzer Kahf, and M. Umer Chapra, who have grappled with the fundamental tension between strict

riba prohibition and the functional requirements of modern commercial finance.(Islahi, 2008)

A significant contribution to this debate has been the work of scholars associated with the Islamic Fiqh Academy (IFA) of the Organization of Islamic Cooperation (OIC), which has issued several resolutions bearing on compensation for delayed debt repayment. The IFA's Resolution No. 53 (6/9) and subsequent deliberations have established that while it is impermissible to stipulate in advance any additional amount based on time delay, it may be permissible for courts to award compensation to creditors for proven actual losses attributable to debtor negligence, under conditions that prevent this mechanism from functioning as disguised interest.(Muneeza et al., 2019)

Indonesian scholarship has made increasingly significant contributions to this global discourse. Scholars associated with the State Islamic Universities (UIN) and Islamic economics programs at major Indonesian institutions have produced substantial bodies of work examining the implementation of *Ta'widh* and *gharamah* within the Indonesian regulatory context, analyzing the relationship between DSN-MUI fatwas and positive law, and proposing refinements to the existing framework that would better align it with both Sharia principles and modern financial practice.

Regulatory Framework: Dsn-Mui Fatwa No. 43 And Related Instruments

DSN-MUI Fatwa No. 43/DSN-MUI/VIII/2004: Structure and Content

DSN-MUI Fatwa No. 43/DSN-MUI/VIII/2004 concerning *Ta'widh* was issued by the National Sharia Board of the Indonesian Council of Religious Scholars in August 2004, following extensive deliberation regarding the need to establish principled guidelines for the compensation of losses in Islamic financial transactions. The fatwa represents a significant regulatory milestone, providing the primary normative basis for the practice of *Ta'widh* in Indonesian Islamic banking and finance (*Fatwa – Laman 13 – DSN-MUI*, n.d.).

The fatwa establishes several foundational principles. First, it affirms the permissibility of *Ta'widh* as a compensation mechanism when an Islamic financial institution sustains real losses (dharar haqiqi) as a direct result of the debtor's negligence or willful default (taqshir). Second, it distinguishes *Ta'widh* from riba on the grounds that the former compensates only actual, documentable losses rather than providing any incremental benefit arising merely from the passage of time. Third, it specifies that the compensation must not exceed the actual losses suffered and must be directly causally linked to the debtor's misconduct.(Prihatin & Asmuni, 2025)

The fatwa further specifies procedural requirements for the application of *Ta'widh*, including the necessity of establishing documentary evidence of actual losses,

the requirement that compensation be calculated on the basis of proven costs rather than opportunity costs, and the provision that any amount received by the Islamic financial institution in excess of its actual losses must be returned to the debtor or directed toward social welfare purposes.

With respect to *gharamah*, the fatwa takes a more cautious approach, acknowledging its potential utility as a disciplinary tool while imposing strict conditions designed to prevent its abuse. Most significantly, the fatwa requires that the proceeds of *gharamah* be directed entirely to charitable (al-birr) purposes, ensuring that the creditor institution does not profit from the penalty in a manner that would replicate the economic function of interest (Kamaruddin & Mohd Hanefah, 2023).

Related Normative Instruments and Regulatory Architecture

DSN-MUI Fatwa No. 43 does not operate in isolation but forms part of a broader regulatory architecture governing Islamic financial transactions in Indonesia. Several other DSN-MUI fatwas bear directly on the interpretation and application of *Ta'widh* and *gharamah* provisions. DSN-MUI Fatwa No. 17/DSN-MUI/IX/2000 concerning sanctions for customers capable of repayment but engaging in procrastination (ta'khir) provides an important complementary framework, particularly in its specification that sanctions must be directed to social welfare and must not be treated as income by the Islamic financial institution (Program Pascasarjana, 2025).

DSN-MUI Fatwa No. 48/DSN-MUI/II/2005 concerning debt rescheduling (penjadwalan kembali tagihan murabahah) further elaborates the framework for managing debtor default, establishing conditions under which Islamic financial institutions may restructure obligations without violating Sharia principles. This fatwa interacts critically with the *Ta'widh* framework by defining the circumstances under which debt rescheduling should be preferred over compensation claims (*Fatwa – Laman 12 – DSN-MUI*, n.d.).

At the level of positive law, Bank Indonesia Regulation (Peraturan Bank Indonesia, PBI) and subsequent Financial Services Authority (Otoritas Jasa Keuangan, OJK) regulations have incorporated DSN-MUI fatwa provisions into legally binding regulatory instruments. OJK Regulation No. 16/POJK.03/2014 and its successors establish the regulatory framework for Islamic banking products, including provisions relating to handling of non-performing financing and the application of restructuring and compensation mechanisms (Setijawan, n.d.).

The interaction between DSN-MUI fatwas and OJK regulations creates a distinctive regulatory architecture in which religious legal authority and state regulatory power operate in parallel and, ideally, in mutual reinforcement. The Sharia Supervisory Board (Dewan Pengawas Syariah, DPS) of each Islamic financial

institution plays a crucial intermediary role, ensuring that institutional practices comply with both the fatwa framework and applicable regulatory requirements.

Normative Criteria for Permissible*Ta'widh*

The regulatory framework established by DSN-MUI Fatwa No. 43 and related instruments specifies several normative criteria that must be satisfied for *Ta'widh* to be considered permissible under Indonesian Islamic financial law. These criteria can be analyzed under four principal headings: conditions relating to causation, conditions relating to the nature and extent of losses, conditions relating to the debtor's conduct, and conditions relating to the disposition of any excess compensation.

With respect to causation, the fatwa requires a direct causal link between the debtor's breach and the losses claimed by the Islamic financial institution. Remote, speculative, or consequential losses that cannot be directly attributed to the debtor's default are not compensable under the *Ta'widh* framework. This requirement reflects the classical fiqh doctrine of causation (sababiyyah) and distinguishes *Ta'widh* from the punitive damages concept familiar in common law jurisdictions.

Regarding the nature and extent of losses, the framework requires that only real (haqiqi), documentable losses be compensated. Opportunity costs, potential profits foregone, and other forms of hypothetical loss are generally excluded from compensable *Ta'widh*, though some scholars have argued for a more expansive interpretation that would include certain categories of opportunity costs in cases of willful procrastination (matl al-ghani). The fatwa's position on this contested issue reflects the cautious approach of the DSN-MUI toward mechanisms that could replicate the economic function of interest.

Implementation In Indonesian Islamic Financial Practice

Application in Islamic Banking Products

The implementation of *Ta'widh* and *gharamah* provisions in Indonesian Islamic banking practice has evolved significantly since the issuance of DSN-MUI Fatwa No. 43 in 2004. In the murabahah (cost-plus sale) financing context, which represents the dominant product category in Indonesian Islamic banking,*Ta'widh* provisions are typically embedded in standard financing agreements as contractual clauses specifying the calculation methodology for compensation in the event of customer default (Wiley & Pte Ltd, 2011).

In practice, Islamic banks in Indonesia have adopted varying approaches to the quantification ofTa'widh. Some institutions calculate compensation based on documented administrative costs, including staff time devoted to debt collection, legal costs associated with enforcement proceedings, and other direct out-of-pocket

expenses attributable to the default. Others have sought to develop more sophisticated approaches that capture a broader range of actual losses, including funding costs incurred as a result of the mismatch between asset repayment schedules and liability payment obligations.

The *gharamah* mechanism has been implemented by some Indonesian Islamic financial institutions as a component of their total default management framework, with the proceeds directed to specialized charitable funds administered by the institution's DPS or by designated charitable organizations. The governance of these charitable funds, and the transparency of reporting regarding their administration, has emerged as an important area of concern for regulators and Sharia compliance professionals.

In the ijarah (leasing) financing context, the application of *Ta'widh* raises distinctive issues relating to the continued accrual of rental obligations during periods of default and the interaction between compensation claims and asset repossession rights. Similar product-specific complexities arise in the context of musharakah (partnership) financing, where the determination of losses attributable to debtor misconduct must be distinguished from ordinary business risks that cannot give rise to compensation claims against the partner-debtor (*Understanding Islamic Finance | Muhammad Ayub | Perpustakaan Mahkamah Konstitusi*, n.d.).

Challenges in Documentation and Verification of Losses

One of the most significant practical challenges in the implementation of *Ta'widh* is the requirement to document and verify actual losses with sufficient precision to satisfy both Sharia requirements and regulatory standards. Indonesian Islamic financial institutions have invested substantially in developing internal loss documentation systems, but significant variation persists in the rigor and comprehensiveness of these systems across the industry.

The verification of losses claimed as the basis for *Ta'widh* is particularly challenging in cases involving multiple layers of indirect costs, such as regulatory capital charges attributable to non-performing financing, reputational costs affecting the institution's ability to attract depositors, and systemic liquidity costs arising from elevated non-performing financing ratios. While these costs may in a broad sense represent genuine losses attributable to debtor default, their inclusion in *Ta'widh* calculations raises difficult questions about the boundary between genuine compensation and disguised interest (Hosen & Muhari, 2019).

The role of the DPS in verifying loss documentation is crucial but poses its own challenges. DPS members are typically trained primarily as Islamic legal scholars rather than as financial accountants or economists, creating potential gaps in their

capacity to evaluate the technical adequacy of loss documentation presented by management. Efforts to build bridges between Sharia governance and financial expertise represent an important area of institutional development for the Indonesian Islamic finance industry (Ahmed, 2011).

Judicial Treatment of *Ta'widh* and *Gharamah* Disputes

The Religious Courts (Pengadilan Agama) of Indonesia, which have exercised jurisdiction over Islamic economic disputes since the enactment of Law No. 3 of 2006 and Law No. 21 of 2008 on Islamic Banking, have developed an evolving body of jurisprudence on *Ta'widh* and *gharamah* disputes. The Supreme Court's Compilation of Islamic Economic Law (Kompilasi Hukum Ekonomi Syariah, KHES), enacted through Supreme Court Regulation No. 2 of 2008, provides additional normative guidance that courts have applied in resolving such disputes (Nurjaman & Witro, 2022).

Analysis of Religious Court decisions relating to *Ta'widh* reveals a generally consistent approach of upholding compensation claims that are supported by adequate documentation of actual losses and that are structured within the parameters established by DSN-MUI Fatwa No. 43. Courts have been more reluctant to enforce gharamah provisions when the proceeds have not been demonstrably directed to charitable purposes, or when the *gharamah* appears to function in substance as a financial benefit to the creditor institution (Syahirah et al., 2023).

One notable illustration emerges from several Islamic banking disputes resolved within the jurisdiction of Indonesian Religious Courts, where claims for *Ta'widh* were upheld only when financial institutions could substantiate the existence of tangible and quantifiable losses directly attributable to customer default. In various murabahah financing cases, judges underscored that compensation should not be determined merely based on the duration of payment delays or by adopting conventional interest rate benchmarks, as such approaches would conflict with the prohibition of riba in Sharia principles. Rather, the courts required clear evidence of actual costs incurred, including administrative, legal, or debt recovery expenses, resulting directly from the debtor's negligence. These rulings indicate that Indonesian Religious Courts predominantly construe Ta'widh as a form of compensation rather than a means of deriving profit from delayed payments. Concurrently, judicial attention to the management and allocation of *gharamah* funds highlights an ongoing concern that financial penalties could evolve into concealed forms of interest if not subject to rigorous oversight and transparent governance.

The development of Islamic dispute resolution mechanisms outside the formal court system, including through the National Sharia Arbitration Board (Badan Arbitrase Syariah Nasional, BASYARNAS) and various mediation processes, has

created additional fora for the resolution of *Ta'widh* and *gharamah* disputes. These alternative mechanisms offer potential advantages in terms of speed and specialized expertise but also raise questions about consistency and the development of coherent legal precedent (Nurjaman & Witro, 2022).

Legal Controversies And Analytical Challenges

The Riba Boundary: Conceptual and Operational Challenges

The fundamental conceptual challenge in the legal analysis of *Ta'widh* is the delineation of a principled boundary between permissible compensation and prohibited riba. This challenge is not merely theoretical but has direct practical consequences for the legitimacy of Islamic financial practice. If *Ta'widh* provisions are structured or applied in ways that effectively replicate the economic function of interest, the entire normative enterprise of Islamic finance is called into question.

Several scholars have raised concerns that, in practice, *Ta'widh* calculations in Indonesian Islamic banking have migrated toward formulas that bear a suspicious resemblance to conventional interest calculations, using as their basis not documented costs but rather benchmarks derived from conventional interest rates. This practice, if widespread, would represent a fundamental subversion of the DSN-MUI fatwa framework and would require urgent regulatory attention (Paldi, 2014).

The operational challenge of maintaining a clear riba boundary is compounded by the competitive dynamics of the Indonesian financial market. Islamic banks operating alongside conventional banks face pressure to maintain product pricing that is broadly comparable to conventional offerings, creating incentives to structure default charges in ways that are commercially competitive even if this comes at the cost of Sharia compliance. Addressing this structural tension requires both regulatory vigilance and a deeper cultural commitment to Sharia compliance within Islamic financial institutions.

The *Gharamah* Paradox: Effectiveness Versus Sharia Compliance

The *gharamah* mechanism embodies a fundamental paradox: its effectiveness as a deterrent against default depends upon the financial cost it imposes on debtors, yet its Sharia legitimacy depends upon this cost not flowing to the creditor institution as a financial benefit. This paradox creates structural incentives for creative compliance that allows institutions to benefit indirectly from *gharamah* proceeds, for example through tax benefits associated with charitable deductions or through reputational benefits from visible charitable activities funded by *gharamah* proceeds.

The theoretical legitimacy of *gharamah* as a disciplinary mechanism is well established; however, its practical effectiveness in deterring intentional default

remains open to question. One key limitation lies in the requirement that any proceeds derived from such penalties must be allocated solely for charitable or social purposes. This stipulation reduces the direct economic incentive for Islamic financial institutions to enforce *gharamah* in a consistent and rigorous manner. Consequently, some customers may perceive *gharamah* as less punitive compared to conventional penalty interest, given that it does not function as a revenue-generating instrument for the creditor. This perception may weaken its deterrent capacity, particularly among financially debtors who deliberately delay fulfilling their obligations (Muneeza et al., 2019).

In addition, the lack of standardized methods for calculating and implementing *gharamah* across Islamic financial institutions contributes to inconsistencies in practice, which may further undermine its preventive role. Nevertheless, efforts to enhance the punitive dimension of *gharamah* raise significant Sharia concerns, as overly severe or profit-oriented penalties risk resembling a form of disguised riba. Therefore, the central regulatory challenge in Islamic finance is to strike an appropriate balance between ensuring effective deterrence and maintaining strict adherence to Sharia principles. In this context, *gharamah* must operate as a genuinely corrective instrument rather than merely serving as a symbolic or formalistic element of compliance.

The governance of *gharamah* funds represents a critical area where the gap between Sharia principle and institutional practice has been particularly evident. Concerns have been raised by Sharia compliance researchers about the adequacy of documentation and transparency in the administration of these funds, including questions about whether charitable disbursements are genuine or serve primarily to create a facade of compliance while the institution retains effective economic benefit from the penalty proceeds.

From a legal perspective, the enforceability of *gharamah* clauses in financing agreements has also been questioned. If *gharamah* is properly understood as a regulatory mechanism directed toward social welfare rather than as a contractual remedy benefiting the creditor, there are questions about the proper legal characterization of such clauses and about their treatment in insolvency or restructuring proceedings where the priority of different creditor claims must be determined.

Harmonization with Positive Law: Gaps and Tensions

The relationship between the DSN-MUI fatwa framework governing *Ta'widh* and *gharamah* and the corpus of Indonesian positive law is characterized by both formal harmony and substantive tensions. At the formal level, Law No. 21 of 2008 on Islamic

Banking explicitly recognizes DSN-MUI fatwas as a source of Sharia compliance requirements and mandates that Islamic banks implement the fatwa framework. This formal incorporation of religious legal authority into the positive law framework represents a significant achievement of the Indonesian regulatory system.(Salsabila et al., 2023)

At the substantive level, however, tensions persist in several areas. The Civil Code provisions governing compensation for breach of contract, which apply subsidiarily to Islamic financing agreements, are based on principles derived from Dutch civil law that do not fully align with the fiqh principles governing *Ta'widh*. The interaction between these different normative frameworks creates interpretive complexity for courts and practitioners seeking to determine the applicable standard of compensation in any given case.

Insolvency law represents another area of significant tension. The Bankruptcy and Suspension of Payment Law (Law No. 37 of 2004) does not contain specific provisions addressing the treatment of *Ta'widh* and *gharamah* claims in insolvency proceedings, leaving courts to develop ad hoc approaches that may not consistently reflect the Sharia principles underlying these mechanisms. The development of specialized insolvency provisions for Islamic financial institutions has been identified as a priority by industry bodies but has not yet resulted in legislative action.

Comparative Perspectives

Malaysia's Approach to *Ta'widh* and *Gharamah*

Malaysia, as the most developed Islamic finance jurisdiction in Southeast Asia and a global leader in Islamic capital markets, provides important comparative reference points for the analysis of *Ta'widh* and *gharamah* regulation. The Malaysian regulatory approach, coordinated primarily through Bank Negara Malaysia (BNM) and the Shariah Advisory Council (SAC) of BNM, has in some respects developed more prescriptive standards than the Indonesian framework.

BNM's Guidelines on *Ta'widh* and *Gharamah*, issued under the Islamic Financial Services Act 2013, specify quantitative limits on compensation charges that represent a distinctive feature of the Malaysian approach. The BNM framework generally limits *Ta'widh* to actual documented costs and specifically excludes opportunity costs and funding costs from the compensable categories, reflecting a conservative interpretation of the permissible scope of compensation (Zulkipli, 2019).

The Malaysian approach to *gharamah* has similarly been subject to detailed regulatory specification, with BNM guidelines requiring Islamic financial institutions to direct *gharamah* proceeds to charitable purposes and prohibiting any indirect benefit

to the institution from these proceeds. The SAC has issued specific resolutions addressing the governance of charitable funds derived from *gharamah*, providing a level of regulatory clarity that has not yet been matched by the Indonesian framework.

Bahrain and the GCC Approach

The Gulf Cooperation Council (GCC) jurisdictions, and Bahrain in particular as the home of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), have developed an approach to*Ta'widh* that differs in significant respects from both the Malaysian and Indonesian frameworks. AAOIFI's Financial Accounting Standard (FAS) 30 on Impairment, Credit Losses and Onerous Commitments, and related Sharia Standards, provide the primary normative framework for GCC Islamic financial institutions on these matters.

The AAOIFI approach has historically maintained a strict position on compensation for delayed payment, generally permitting only minimal administrative cost recovery while rejecting more expansive compensation formulae. This conservative stance reflects the influence of Hanafi and Hanbali scholarship in the GCC, where the prohibition of anything that could be construed as riba is interpreted with particular stringency in the context of conventional debt instruments.

Recent years have seen a degree of convergence between different regulatory approaches, partly driven by the activities of the Islamic Financial Services Board (IFSB) in developing international prudential standards for Islamic financial institutions. IFSB standards on risk management and capital adequacy have implications for the treatment of default risk that in turn affect the calibration of *Ta'widh* and *gharamah* provisions (Islahi, 2009).

Policy Recommendations

Strengthening the Regulatory Framework

The analysis presented in this article suggests several areas in which the Indonesian regulatory framework governing *Ta'widh* and *gharamah* could be strengthened to better achieve its objectives of Sharia compliance and effective financial discipline. First, OJK should consider issuing more detailed implementing regulations elaborating the DSN-MUI fatwa framework, providing specific guidance on permissible and impermissible calculation methodologies, documentation requirements, and DPS verification procedures. The current regulatory framework, while establishing the broad outlines of permissible practice, leaves too much to institutional discretion, creating opportunities for creative compliance that undermines the Sharia objectives of the system.

Second, a comprehensive review of *Ta'widh* and *gharamah* practices across the Indonesian Islamic banking industry should be commissioned by OJK, with the participation of DSN-MUI and academic experts in Islamic financial law. Such a review would provide the empirical foundation for evidence-based regulatory reform and would identify any systematic departures from the fatwa framework that require immediate attention.

Third, the professional development framework for DPS members should be enhanced to ensure that Sharia supervisors have the financial expertise necessary to evaluate the technical adequacy of loss documentation presented in support of *Ta'widh* claims. Collaboration between DSN-MUI and professional accounting bodies could contribute to the development of appropriate standards and training programs for this purpose.

This study advances the discourse on reforming Islamic financial regulation in Indonesia by highlighting several normative deficiencies within DSN-MUI Fatwa No. 43/DSN-MUI/VIII/2004. While the fatwa establishes a basic legal foundation for the permissibility of *Ta'widh* and *gharamah*, it lacks comprehensive provisions concerning the standards for assessing actual losses, the methods for calculating compensation, and the mechanisms for institutional oversight of *gharamah* funds. The absence of clear operational guidelines has led to inconsistencies in implementation across Islamic financial institutions and has heightened the risk of practices that may resemble concealed forms of interest. Moreover, the fatwa has yet to be fully harmonized with contemporary positive legal frameworks, particularly those governing insolvency, contractual liability, and financial dispute resolution. Accordingly, this article advocates for the formulation of more detailed implementing regulations and the establishment of standardized Sharia compliance mechanisms to enhance legal certainty, minimize regulatory ambiguity, and ensure that the application of *Ta'widh* and *gharamah* remains consistent with the objectives of Islamic economic law and the prohibition of riba.

Enhancing Transparency and Accountability

The governance of *gharamah* funds represents a critical area where enhanced transparency and accountability measures are urgently needed. OJK should require Islamic financial institutions to publish detailed annual reports on the receipt and disbursement of *gharamah* proceeds, specifying the amounts received, the charitable purposes to which they were directed, the organizations that received the funds, and the governance processes by which disbursement decisions were made. This transparency requirement would significantly enhance accountability and public confidence in the integrity of the *gharamah* mechanism.

To enhance the oversight of *gharamah* and other social funds, the Sharia Supervisory Board (DPS) should be endowed with more clearly defined operational mandates within Islamic financial institutions. These mandates should encompass routine verification of the segregation between *gharamah* funds and institutional revenues, as well as the compulsory review and authorization of charitable fund disbursement plans. Furthermore, DPS should conduct periodic Sharia compliance audits, particularly on a quarterly basis, to evaluate the proper utilization of penalty-derived funds.

In addition, Islamic financial institutions should be required to maintain comprehensive and transparent records detailing the total funds collected, the designated beneficiaries, and the distribution mechanisms, thereby ensuring that no indirect financial advantage accrues to the institution. The adoption of standardized reporting frameworks, complemented by independent external Sharia audits, would significantly strengthen accountability and mitigate the risk of *gharamah* funds being misappropriated as concealed institutional income. Such governance measures are essential to ensure that the management of social funds aligns with Sharia objectives and adheres to the principles stipulated in DSN-MUI Fatwa No. 43/DSN-MUI/VIII/2004.

More broadly, the Islamic finance industry should invest in the development of specialized Sharia audit capabilities that go beyond the existing DPS oversight framework. External Sharia audits, conducted by independent Sharia audit firms with the technical capacity to evaluate both the legal and financial dimensions of *Ta'widh* and *gharamah* compliance, could provide a valuable complement to internal DPS oversight and regulatory examination.

The development of standardized reporting templates and data collection systems for *Ta'widh* and *gharamah* matters would facilitate comparative analysis across institutions and over time, supporting both regulatory oversight and academic research. Such standardization would also reduce the compliance burden on individual institutions by eliminating the need to develop bespoke reporting frameworks.

Developing Jurisprudential Clarity Through Scholarly Dialogue

The contested jurisprudential questions surrounding *Ta'widh* and *gharamah* would benefit from sustained scholarly dialogue that brings together classical fiqh expertise with modern financial economics and legal analysis. Indonesian institutions of Islamic learning and Islamic economics research should be encouraged and supported in developing collaborative research programs addressing the most contested issues in this domain, including the appropriate treatment of opportunity

costs in *Ta'widh* calculations and the proper characterization of *gharamah* proceeds in accounting and tax terms.

The Religious Court system and BASYARNAS would benefit from the development of specialized judicial training programs in Islamic financial law, with particular attention to the technical dimensions of *Ta'widh* and *gharamah* disputes. The quality and consistency of judicial decision-making in this area is critical to the development of a coherent body of precedent that can guide institutional behavior and provide predictability for market participants.

Conclusion

This study establishes that the legitimacy of *Ta'widh* and *gharamah* in Islamic financial transactions in Indonesia is fundamentally contingent upon their strict adherence to Sharia principles, particularly those related to fair compensation, prevention of harm, and the prohibition of *riba*. The findings indicate that *Ta'widh* is permissible only when it reflects actual, quantifiable, and verifiable losses directly resulting from a debtor's negligence or deliberate default, thereby clearly distinguishing it from conventional interest-based practices that rely on time-dependent financial gains. Meanwhile, *gharamah* serves exclusively as a disciplinary mechanism, with its proceeds required to be allocated for social and charitable purposes without conferring any direct or indirect financial benefit to Islamic financial institutions. However, the study also uncovers several practical challenges within the Indonesian Islamic banking sector, including inconsistencies in loss calculation methods, inadequate governance of social funds, limited transparency in reporting systems, and insufficient technical oversight by Sharia Supervisory Boards (DPS). These issues pose significant risks of Sharia non-compliance and may obscure the distinction between legitimate compensation and concealed *riba*. Accordingly, this study underscores the necessity of enhanced regulatory harmonization between DSN-MUI fatwas and OJK regulations, the establishment of standardized documentation and reporting frameworks, the implementation of periodic Sharia audits, and the strengthening of DPS supervisory roles in overseeing *gharamah* fund management. Such measures are crucial to reinforce legal certainty, institutional accountability, and public trust, while ensuring that Islamic financial practices remain aligned with the ethical objectives and foundational principles of Islamic economic law.

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