# Debtor Friendly or Creditor Friendly? An Appraisal of Islamic Law of Insolvency

*Dr. Syed Naeem Badshah* [*]
*Dr Najeeb Zada*[**]

## ABSTRACT

Dues to various reasons, interest in Islamic law has gained momentum in the past few decades. Not only are the Muslim majority countries persistently adopting this law and incorporating it into their existing civil or common legal structures, even the rest of the countries frequently show their interest in this millennium old legal code. Thus, we frequently find the courts in the United States and the United Kingdom etc. discussing Islamic law under the umbrella of their respective legal system, for instance, in the context of default under some Islamic financing facility. While Islamic law has multi-faceted branches, its code of commercial/business transactions has many sub branches of its own; insolvency is one of those branches dealt with under the Islamic commercial/business code. However, since this law was developed centuries ago, its insolvency code mainly dealt with individuals and not corporate entities. In any case, one of the fundamental questions addressed by all existing legal systems in the world is that whether an insolvency regime should be debtor friendly or creditor friendly? The same question is also relevant in the context of Islamic insolvency law. In this research, we argue that the Islamic law of insolvency is based on the principles of ethics and fairness whereby relevant legal injunctions are supplemented by their respective ethical set of rights and responsibilities of both the parties, i.e. the creditor and the debtor. These legal and ethical injunctions make Islamic law of insolvency unique in the sense that it simultaneously becomes debtor and creditor friendly. Thus, we find that there is a balance attained in this case by addressing the issue of insolvency from the perspective of hereafter too, a feature that is unique to Islamic law and is not found in both the common and civil legal systems.

***Key Words**: Insolvency, bankruptcy, creditor friendly, debtor friendly, Islamic law.*

[*] Associate Professor & Chairman Department of Islamic / Pakistan Studies, Agriculture University Peshawar
[**] Lecturer, Department of Islamic Theology, Islamia College Peshawar

# Introduction

Insolvency and/or bankruptcy [(1)] are the harsh realities of life. It can happen to both individuals and businesses. Therefore, each legal system has to address this issue and provide a code that caters for the rights of both the creditors and debtors. Keeping a balance between the rights of these two is, however, a difficult task. This is primarily due to the conflicting rights of the parties involved in insolvency. So on the one hand, the creditors want to liquidate the business, impose their own plan of organization if any, and avoid court interference in making main decisions. The debtors on the other hand, prefer reorganization, assets freeze, greater autonomy to bankruptcy courts and the like. Consequently, there are two insolvency approaches in vogue around the world; debtor friendly approach and creditor friendly approach. [(2)]

As their titles denote, creditor friendly regime prefers the rights of the creditors over debtors while debtor friendly regimes employ measures that are more favorable to debtors. Accordingly, under a creditor friendly regime, creditors' consent is required in all major decisions pertaining to insolvency/reorganization. The management is replaced with an administrator/liquidator and there is no asset freeze or automatic stay. Similarly, secured creditors are paid first under such regime and therefore it is creditor friendly.[(3)] Although the state provides procedures for bankruptcy under the administration of court, secured creditors have the right to veto these procedures and they can enforce default provisions as specified in the debt contract.[(4)]

On the other hand, the debtor friendly regime usually keeps the management in place. It also contains a moratoria or stay to promote recovery.[(5)] In such regime, the state imposes a court-administered procedure for bankruptcy. The objective of such procedure is to preserve the firm as a going concern and maintain employment. Creditors only play the role of advisors and their consent is not required to determine a reorganization plan. The bankruptcy courts have control of the bankruptcy proceedings and they are not bound to sell the assets of the debtor to the

(1) The terms insolvency and bankruptcy are used interchangeably in this research.

(2) Kolecek, L. (2006). *On the Role of Bankruptcy Laws in Credit Markets*, Unpublished PhD Thesis, University of Munich, available at: http://edoc.ub.uni-muenchen.de/6717/1/Kolecek_Ludek.pdf

(3) Crawford, K. (2013). *The law and economics of orderly and effective insolvency* (Doctoral dissertation, University of Nottingham).

(4) Davydenko, S. A., & Franks, J. R. (2008). Do bankruptcy codes matter? A study of defaults in France, Germany, and the UK. *The Journal of Finance*, *63*(2), 565-608.

(5) Crawford, K. (2013). *The law and economics of orderly and effective insolvency* (Doctoral dissertation, University of Nottingham).

highest bidder.(1) In short, debtor friendly regimes give debtors more control over the insolvency proceedings and they favor reorganization. On the contrary, creditor friendly regimes strongly enforce creditors' rights and give them control over the proceedings while favoring liquidation of the debtor. (2)

It is noteworthy, however, that these two approaches are not universal and, therefore, insolvency regimes differ substantially across countries and ages in many ways. So much so that even the countries which share a similar legal system and common tradition have great divergence in the design of their bankruptcy laws.(3) As pronounced pertinently by one researcher: *Insolvency is an area of law where there is little uniformity of approach even among countries that share a similar common or civil law framework.* (4) This diversity in the approach towards insolvency is attributed by Foster to factors such as a particular worldview and the related socioeconomic ideology of a particular society:

> *Those procedures are the product of considered decisions, taken after much deliberation and debate, about the distribution of assets as between groups of creditors, and are deeply rooted in a particular view of world … To put it another way, few areas of commercial law are so linked to the socioeconomic ideology of a society as insolvency law, for it determines which group gets which resources when there are insufficient resources for everyone.* (5)

In this scenario, a question arises naturally: which approach is best and possibly favoured in Islamic law? The answer to this question is neither simple nor absolute. On the one hand, we have a divine command in the Quran that favours the debtor thus:

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(1) Davydenko, S. A., & Franks, J. R. (2008). Do bankruptcy codes matter? A study of defaults in France, Germany, and the UK. *The Journal of Finance*, *63*(2), 565-608.

(2) United Nations Commission on International Trade Law. (2005). *Legislative guide on insolvency law*. United Nations Publications.

(3) Buttwil, K., and Wihlborg, C. (2005). The efficiency of the bankruptcy process; an international comparison. Ratio Working Paper No: 65. The Ratio Institute, Available at: http://econpapers.repec.org/paper/hhsratioi/0065.htm

(4) Bridge, C. (2013). Insolvency- a second chance? Why modern insolvency laws seek to promote business rescue. Law in Transition, *Law in Transition*, pp. 28-41 Available at: http://www.ebrd.com/downloads/research/law/lit13ee.pdf

(5) Foster, N. H.D. (2013). Operating with a Truncated Legal System: Financial Law without Insolvency Law, *SOAS Law of Islamic Finance Working Papers Series No. 5*. University of London

*If the debtor is in a difficulty, grant him time 'til it is easy for him to repay. But if ye remit it by way of charity, that is best for you if ye only knew.* (1)

On the other hand, it is reported in a *hadith* of the Prophet peace be upon him that he would not offer the funeral prayer over a person who died while a debt of two dirhams was owed by him, indicating the seriousness of debt repayment and that debt won't be waived off even after a person's death. This ruling is also endorsed under Islamic law of inheritance where one of the four rights which are to be paid from the inheritance of a deceased also include the debt owed by him to others. Unless such debts are paid in full, the inheritance property will not be distributed among the deceased's heirs.

What one understands from the diverse sacred texts indicated above is that Islamic law does not compromise on the rights of both the creditor and debtor, and that it is neither absolutely pro-debtor nor pro-creditor. Islam ensures justice and fairness at all costs and for this purpose, we find a detailed list of the respective rights and obligations of both the creditor and debtor. Below, we elaborate how Islamic law has extensively dealt with this issue. Even though the two primary sources of Shariah do not provide detailed guidelines about the subject of insolvency, they do provide the founding principles pertaining to insolvency which were then expanded by the Muslim jurists into a compact code of individuals'' insolvency.

**Islamic Law of Insolvency: A Creditor Friendly Code**

The Islamic code of insolvency has a number of legal and ethical injunctions that are aimed to make sure that the rights of the creditors are properly protected. To begin with, Islam emphasized that all contracts should be honoured:

*O you who believe! Fulfil (your) obligations*.(2)

The above verse is the principle which requires that all types of obligations be fulfilled. The obligations may be those that are owed to other human beings, or those which are owed to the Creator. Since debt is also an obligation, it needs to be paid back too. This verse, therefore, makes the debtor bound to pay back his obligations and it provides the creditor the surety that his right is protected through a sacred commandment.

But there is another direct and explicit verse in the Holy Quran that orders the Muslims to write down any debt contract. The interesting fact about this verse is that it is the longest one in the Quran and the entire

(1) Al-Quran: 2/280
(2) Al-Quran: 5/1

verse deal with the mechanism of a debt contract. Relevant parts of the verse are translated below:

> *O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuse to write as Allah has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear Allah, his Lord, and diminish not anything of what he owes. But if the debtor is of poor understanding, or weak, or is unable himself to dictate, then let his guardian dictate in justice. ……. You should not become weary to write it (your debt contract), whether it be small or big, for its fixed term, that is more just with Allah; more solid as evidence, and more convenient to prevent doubts among yourselves……*[(1)]

This verse provides a detailed guideline about how a debt contract be treated by the parties. In other words, it secures the right of the creditor by writing down whatever is owed to the debtor and/or bearing witnesses who can later on give testimony if dispute arise between the creditor and debtor. When we look into the hadith literature, we find important legal injunctions that protect the rights of the creditor. To begin with, it is reported in a hadith that procrastination by a debtor is injustice: [(2)]

**مطل الغنى ظلم**

Therefore, if a debtor is capable to pay his debts and the debt is due but he still refuses to do so, it is considered impermissible under Shariah and it exposes the debtor to serious implications. While this hadith apparently seems to be relevant to the hereafter and is more ethical in nature, the Muslim jurists have expanded the worldly/legal injunctions that are derived from it. For instance, one possible outcome of procrastination is that the debtor's testimony will be refused in the court of law as a result of this act. However, the debtor should be a habitual procrastinate for this injunction and only once or twice procrastination does not carry this legal implication.[(3)]

Another important legal outcome of procrastination is that the creditors in this case will have the right to seize/snatch their due right from the debtor if they get a chance to do so. The famous Hanafi jurist Imam ibn

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(1) Al-Quran: 2/282

(2) Al-Bukhari, Muhammad ibn Ismail. *Sahih al-Bukhari*, Kitab al-Hawalaat, Baab al-Hawalah, hadith no. 2194

(3) Al-Taibi, Sharafud Din (1413AH). *Sharh al-Taibi ala'a Mishkat al-Masabeeh*, Kitab al-Buyu, Baab al-Iflas, v. 06, p. 109, Idarat al-Quran wa al-Uloom al-Islamiyyah, Karachi

Aabideen highlights that it is not even necessary that the property forfeited by the creditor be from the same genus that was owed to the creditor. Although this was the opinion of the earlier Muslim jurists, ibn Aabideen argues that due to change in circumstances whereby dishonesty prevails in our times and debtors procrastinate whereas previously people used to willingly pay what they owed to others.

ان عدم جواز الاخذ من خلاف الجنس كان فی زمانهم لمطاوعتهم فی الحقوق،
والفتوی الیوم علی جواز الاخذ عند القدرة من ای مال كان لا سیما فی دیارنا
لمداومتهم الحقوق (1)

Perhaps the most important outcome of a debtor's wilful non-repayment of debt is his imprisonment which has been discussed by the Muslim jurists in detail. The summary of their discussion is that if the judge is sure that the debtor is solvent and capable to pay his debts but is wilfully delaying payment, he can be imprisoned under certain conditions. One such condition is that the debt should be due; therefore, imprisonment of debtor is not allowed for debts which are due in future as mentioned by the Hanafi jurist al-Kasani:(2)

(اما) الذی یرجع الی الدین فهو ان یكون حالا فلا یحبس فی الدین الموجل

Similarly, the second condition for imprisonment of the debtor for wilful non-payment of debt is that he should be solvent and capable to pay his debts: (3)

(واما) الذی یرجع الی المدیون فمنها القدرة علی قضاء الدین حتی لو كان معسرا لا یحبس

It is evident from these texts that the creditors' rights will be properly protected under any insolvency code that is based on Islamic law. Not only such a regime ensure creditors' rights by legal force, the moral guidelines provided by Shariah in this connection will ensure that some areas (like moral hazard etc.) that can not easily be covered under the legal spectrum are covered under the moral force. For instance, it is reported in one hadith that anyone sacrificing his life in the way of Almighty Allah will be rewarded in the form of all his sins forgiven. However, the only sin which is not covered under this glad tiding is the non-payment of debt. Similarly, it is reported in another hadith that if a person incurs debt or takes loan with the intention not to pay it at the due time, he is left unassisted by Allah the Almighty. But if his intention is to pay it on time, he is helped by Allah in the timely payment of his loan/debt.

(1) Ibn Aabideen, al-Shami. *Radd al-Muhtar ala; al-Durr al-Mukhtar*, kitab al-Hijr, v. 9, p. 255, Maktabah Raheediah, Quetta

(2) Al-Kasani, Ala al-Deen abi Bakr. *Badai al-Sanai fee Tarteeb al-Sharaie*, Kitab al-Hadhr wa al-Habs, v.7, p. 173, Beirut.

(3) ibid

Thus, it is visible that Islamic law is rich with guidelines and commandments that make sure the protection of the rights of the creditors and which may lead one to conclude that Islamic law is creditor friendly. The unique feature of Islamic code of insolvency is that it has an additional layer of moral, ethical and spiritual dimension whereby the debtor is under obligation to pay his debts during his lifespan and taking one's debt obligations to the hereafter is a serious sin in the eyes of Shariah.

**Islamic Law of Insolvency: A Debtor Friendly Code**

It is noteworthy that the roots of a lenient attitude towards a distressed debtor are found in the Holy Quran itself where it is commanded that:

> *And if the debtor is in difficulty (has no money), then grant him time till it is easy for him to repay* (1)

Although the above verse is explicit in its message, the Muslim jurists have expounded the issue of whether giving respite/time to a distressed debtor (till it is easy and possible for him to pay his debt), as upheld in this verse, is only a recommendation or an obligatory injunction. This question is of paramount importance as it its answer will be a definitive foundation of the nature and essence of Islamic law of insolvency. If such a respite is recommended in nature, it will show that Islamic law has a soft corner towards the debtors. But if it is mandatory, then the entire code could be labelled as debtor friendly in the legal sense of the word. To find answer to this question, we need to look into the relevant *ahadith* and the views of the classical Muslim jurists who expanded the ruling of the above verse in light of the relevant hadith literature.

Before answering the above question, it is highlighted that the friendly attitude towards distressed debtor is endorsed in a number of *ahadith.* The following hadith, for instance, tells the story of a person who used to be lenient to his debtors in the hope of being forgiven by Allah for the leniency, and he was accordingly forgiven for this attitude.(2)

كَانَ الرَّجُلُ يُدَايِنُ النَّاسَ، فَكَانَ يَقُولُ لِفَتَاهُ إِذَا أَتَيْتَ مُعْسِرًا فَتَجَاوَزْ عَنْهُ، لَعَلَّ اللَّهُ أَنْ يَتَجَاوَزَ عَنَّا. قَالَ فَلَقِيَ اللَّهَ فَتَجَاوَزَ عَنْهُ

Similarly, the hadith below explains the reward of giving time to a distressed debtor in the following words:(3)

> Whoever gives respite to one in difficulty, he will have (the reward of) an act of charity for each day. Whoever gives him

(1) Al-Quran: 2/280

(2) Al-Bukhari, Muhammad ibn Ismail. *Sahih al-Bukhari*, Kitab Ahadith al-Anbiya, hadith no. 3480

(3) Ibn Majah. *Sunan ibn Majah*, Kitab al-Sadaqat, hadith no. 2418

respite after payment becomes due, will have (the reward of) an act of charity equal to (the amount of the loan) for each day.

مَنْ أَنْظَرَ مُعْسِرًا كَانَ لَهُ بِكُلِّ يَوْمٍ صَدَقَةٌ وَمَنْ أَنْظَرَهُ بَعْدَ حِلِّهِ كَانَ لَهُ مِثْلُهُ فِي كُلِّ يَوْمٍ صَدَقَةٌ

We come across many other *ahadith* whereby the reward for giving respite and treating the debtor leniently is greatly emphasized. For instance, the following hadith tells that a person was forgiven, even though he did not have sufficient number of good deeds in his account, only because he used to be lenient to his debtors. Consequently, this action by him triggered the mercy of Allah in his favour and he was forgiven: (1)

حوسب رجل ممن كان قبلكم فلم يوجد له من الخير شيء إلا أنه كان يخالط الناس وكان موسراً فكان يأمر غلمانه أن يتجاوزوا عن المعسر قال : قال الله عز وجل نحن أحق بذلك منه تجاوزوا عنه

The above texts from the *hadith* literature are important in two ways. First, these clearly manifest the "debtor-friendly" attitude of Islamic law towards debtors in distress. This attitude is also evident from the fact that a debtor is one of the eight categories who are eligible to be paid zakat. Second, these texts also provided the foundation for the Muslim jurists to build their insolvency chapter on. Accordingly, a friendly attitude towards distressed but honest debtors is found in Islamic jurisprudence. This brings us to our earlier pursuit to know the legal status (i.e. merely recommended or mandatory) of giving respite to a distressed debtor in the view of the Muslim jurists.

The issue of whether giving respite is mandatory (*wajib*) or recommended (*mustahab*) is addressed in the four major schools of Islamic law. In this connection, Imam Qurtabi from the Maliki School strongly argues in his famous *tafsir* that such a respite is mandatory and not merely recommended: (2)

وقال جماعة من أهل العلم : قوله تعالى : فنظرة إلى ميسرة عامة في جميع الناس ، فكل من أعسر أنظر ، وهذا قول أبي هريرة والحسن وعامة الفقهاء . قال النحاس : وأحسن ما قيل في هذه الآية قول عطاء والضحاك والربيع بن خيثم . قال : هي لكل معسر ينظر في الربا والدين كله فهذا قول يجمع الأقوال

The same opinion of the mandatory nature of respite is held by other Muslim jurists too. However, Imam al-Qarafi addresses this issue from an interesting angle. He mentions a juristic principle whereby something

(1) Imam Muslim, *Sahih al-Muslim*, Kitab al-Musaqat, hadith no. 1561

(2) Abu Abdullah, Al-Qurtabi, *Al-Jami li Ahkam al-Quran*, v. 3, p. 240, Dar al-Kutub al-Ilmiyyah, Beirut

generally recommended turn out to be better than and preferred over what is generally mandatory. This is due to the fact that the originally recommended act carries more advantages than the originally mandatory act and therefore the former is preferred over the later:(1)

> ثم أنه قد وجد في الشريعة مندوبات أفضل من الواجبات وثوابها أعظم من ثواب الواجبات وذلك يدل على أن مصالحها أعظم من مصالح الواجبات

For the explanation of the above principle/scenario, the writer then mentions seven examples and the very first example is about the issue of mandatory or recommended nature of respite given to debtor. According to the writer, the general principle is that giving respite to a distressed debtor is mandatory from a legal perspective while waiver of the entire debt is recommended in the eyes of law. However, due to the greater social and spiritual benefits of debt waiver, such waiver, which is recommended originally, is given more preference by Shariah than the mandatory act of respite:(2)

> فاذكر من المندوبات التي فضلها الشرع على الواجبات سبع صور: الصورة الأولى إنظار المعسر بالدين واجب، وإبراؤه منه مندوب إليه، وهو أعظم أجراً لقوله تعالى: (وأن تصدقوا خير لكم) [البقرة:٢٨٠] فجعله أفضل من الإنظار، وسبب ذلك أنّ مصلحته أعظم لاشتماله على الواجب الذي هو الإنظار، فمن أبرئ مما عليه فقد حصل له الإنظار، وهو عدم المطالبة في الحال.

In a similar vein, al-Buhuti rules that it is impermissible in the eyes of Shariah to demand payment of debt from distressed, interdict him, or pursue him for the payment of debt: as follows: (3)

> (فإن كان) المدين (عاجزاً عن وفاء شيء منه) أي الدين (حرمت مطالبته والحجر عليه وملازمته) لقوله تعالى " وإن كان ذو عسرة فنظرة إلى ميسرة" وقوله صلى الله عليه وسلم لغرماء الذي كثر دينه " خذوا ما وجدتم وليس لكم إلّا ذلك"

A similar opinion is also held by ibn Qudamah (Died: 620 AH) who mentions different cases of a distressed debtor to explain whether a debtor could be imprisoned or given respite etc. According to him, if a debtor claims to be insolvent but has no proof, the judge should look into his condition. If he has apparent resources/wealth, the debt should be paid

(1) Al-Qarafi, Ahmad ibn Idrees, *Al-Furooq*, v. 2, p. 227, Dar al-Kutub al-Ilmiyyah, Beirut

(2) ibid

(3) Al-Bahūti, Manḥūr ibn Yūnus. (2003 AD, 1423 AH). *Kashshāf al-Qināʿ ʿan Matan al-Iqnāʿ*. v. 5, p. 1649, Dār ʿĀlam al-Kutub, Riyadh, Special Edition

from it. If not, he should not be imprisoned and should be given time till ease: (1)

> ( ومن وجب عليه حق , فذكر أنه معسر به , حبس إلى أن يأتي ببينة تشهد بعسرته ) وجملته أن من وجب عليه دين حال , فطولب به , ولم يؤده , نظر الحاكم ; فإن كان في يده مال ظاهر أمره بالقضاء , فإن ذكر أنه لغيره , فقد ذكرنا حكمه في الفصل الذي قبل هذا , وإن لم يجد له مالا ظاهرا , فادعى الإعسار , فصدقه غريمه , لم يحبس , ووجب إنظاره , ولم تجز ملازمته , لقول الله تعالى { : وإن كان ذو عسرة فنظرة إلى ميسرة} . ولقول النبي صلى الله عليه وسلم لغرماء الذي كثر دينه : { خذوا ما وجدتم , وليس لكم إلا ذلك . }

Among the contemporary jurists, al-Anzi has also reported the consensus of the Muslim jurists belonging to the four main *sunni* schools that giving respite to distressed debtor and not imprisoning him is obligatory. In his paper presented at the OIC Fiqh Academy session, the writer asserts that any creditor not giving respite to the distressed debtor will be considered sinful: (2)

> ولاسيما أن الفقهاء قالوا بأنه يجب إنظار من ثبت إعساره عند الأئمة الأربعة إلى وقت اليسار، ولا يحبس لقوله تعالى: {وَإِن كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَى مَيْسَرَةٍ}. فهذا الأمر من الواجبات بمعنى أن من لم ينظر المعسر فعليه إثم

However, the writer further argues that this view is restricted to cases whereby the creditor himself does not suffer due to giving respite to debtor. If that is the case, then the creditor is not bound and will not be considered sinful if he refuses to give respite to the debtor: (3)

> إن إنظار المعسر يعتبر من الواجبات ما لم يرتب ضرراً على الدائن، فالفقهاء ذكروا هذا الحكم بناء على أن الدائن لا يتضرر من إنظاره للمعسر، لذلك قالوا بعدم حبس المدين المعسر، لأن الدائن لا ينتفع من ذلك ... مما لا شك فيه أن شرعنا الحنيف عندما أمرنا بإنظار المعسر قصد التخفيف على هذا المعسر بما لا يلحق الضرربالدائن، فإذا كان الدائن مليئا لا يتضرر بإنظار المعسر فإن هذا الواجب في حقه هو الإنظار

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(1) Ibn Qudāmah, ʿAbd Allāh ibn Aḥmad and Ibn Qudāmah, Abdul Rahman ibn Muḥammad (1983 AD, 1403 AH): *al-Mughnī wa al-Sharḥ al-Kabīr*, v. 5, p. 191, Dār al-Kitāb al-ʿArabī,

(2) Al-Anzi, A. K. (2013). Ta ʿAththur al-Mu'assasāt al-Māliyyah al-Islāmiyyah (Naqs al-Suyūlah) wa al-Turuq al-Muqtariḥa li Muʿāalijatihā, Paper presented at Fifth *Fiqh*i Conference for Islamic Financial Institutions Organized by Shūra Sharīʿah Consultancy on 20-21 November 2013, Kuwait

(3) ibid

Thus, it is clear that respite to a destitute debtor is mandatory and this view is well authenticated in both the primary and secondary sources of Shariah. This brings us to the conclusion that Islamic law in general is debtor friendly on the condition that the debtor is honest and is in real financial difficulty. In such scenario, the Islamic law gives the luxury of respite so that he can work hard to restore his situation and be able to pay his creditors. But as discussed previously, we also have many texts whereby the debtor is bound by all means to pay his entire debts after he becomes solvent. If he avoids his debts in spite of being able to do so, he can be subject to imprisonment in this world and punishment in the after world. Therefore, Islamic law is also creditor friendly in that the full right of creditor is guaranteed by Shariah. This dual aspect of protecting the rights of both parties is the manifestation of Islamic law's nature to be balanced in all matters and ensuring justice and equity at all cost.

Before concluding this discussion, it is important to explore a question that is relevant to this discussion and which shows the depth and breadth with which the Muslim jurists addressed the issue of insolvency and provided a comprehensive theory about it. The question is that who will prove the insolvency of the creditor? In other words, on whose shoulders lie the burden of proof regarding the insolvent condition of the debtor? Broadly speaking, there are different ways under Islamic law through which something can be proved. These include: confession, evidence, oath and circumstantial evidence. Although the Muslim jurists have discussed all these mechanisms in the context of insolvency, we will focus on evidence and oath only.

To begin with, the general principle in Islamic law of evidence is that the onus of proof lies on the plaintiff/claimant. If the plaintiff does not have proof to support his claim, the defendant will be asked to take oath and thus refute the claim of the plaintiff:

**البينة علي المدعي واليمين علي من أنكر**

Although the above principle in itself is relatively simple, complexities arise in situations where it is difficult to distinguish who is plaintiff and who is defendant. Insolvency of the debtor is one such area of contention where the Muslim jurists disagree on the determination of plaintiff and defendant.

The jurist unanimously agree that, in the absence of witness/evidence/testimony, if the debtor (whose financial status is not known) claims that the creditor knows about his (debtor's) insolvency but the creditor refuses to have such knowledge and the debtor asks him to take oath about his not knowing his insolvency, the creditor will be asked to take oath as demanded by the debtor. If the creditor accordingly takes oath that he does not have any knowledge of the debtor's being insolvent,

the debtor will be imprisoned. These two points are unanimous among the Muslim jurists. (1) However, the jurists disagree on the ruling when the creditor refuses to take such oath. According to the three schools, the oath will be directed to the debtor now and if he refuses to take oath, he will be imprisoned. However, the Hanafis argue that the debtor will not be asked to take oath and once the creditor refuses to take oath, the debtor will be considered to be insolvent and he will not be imprisoned.

The above detail is with respect to the use of oath. Regarding testimony, the Hanafis state that the witnesses of debtor to prove his insolvency will not be accepted before his imprisonment. Their logic is that testimony is provided to prove the existence of something and not to prove the non-existence of something. In this case, the debtor, by providing testimony of his insolvency, is trying to negate his solvency and not to prove anything. This is against the famous principle in testimony as endorsed by most of the Muslim jurists that testimony is useful for proving something and not for negation:

**الشهادة تكون علي الاثبات لا علي النفي**

However, this stance of the Hanafi jurists is rejected by the other three schools. For instance, ibn Qudamah has refuted this argument because it does not stand valid where the provided evidence proves a situation. He accordingly states that there are cases where testimony is accepted for negation too. For instance, if testimony is presented to prove that a person is the heir of a deceased and there is no other heir of the deceased, it will be accepted. This is because even though the testimony here proved the non-existence of other heirs, it proves a situation which is quite observable: (2)

**(وقولهم أن الشهادة على النفي لا تقبل، قلنا: لا ترد مطلقاً فإنه لو شهدت البينة أن هذا وارث الميت لا وارث له سواه قبلت، ولأن هذه – وإن كانت تتضمن النفي – فهي تثبت حالة تظهر ويوقف عليها بالمشاهدة)**

The logic presented by ibn Qudamah is endorsed by Zaidan who highlights how such testimony is permissible. According to the above argument, testimony for negating something is acceptable in the case when such negation is a condition for proving something else. The same example

(1) Saultan, Abdul Karim Nazzar (1399 AH). *Aasaar al-Iflas fi al-Shakhs al-Madeen, Dirasah Muqaranah,* Risalah Majistere, Jamia Malik Abdul Aziz, Saudi Arabia

(2) Ibn Qudāmah, ʿAbd Allāh ibn Aḥmad and Ibn Qudāmah, Abdul Rahman ibn Muḥammad (1983 AD, 1403 AH): *al-Mughnī wa al-Sharḥ al-Kabīr*, v. 4, p. 53-54, Dār al-Kitāb al-ʿArabī,

is provided for this case which was presented previously by ibn Qudamah:(1)

(الأصل أن الشهادة على النفي لا تقبل، ولكن إن كان النفي شرطاً لإثبات المشروط جازت الشهادة عليه، كما لو ادعى أنه وارث الميت فلان، فقالت الشهود: إنه وارثه ولا وارث له سواه، قبلت هذه الشهادة وإن قامت على النفي وهو عدم وجود وارث للميت غير المدعي، لأنها في الحقيقة لإثبات الإرث له بواسطة إثبات شرطه، وهذا الحكم في كل شهادة قامت على النفي وهو شرط لثبوت شيء آخر فإنها تقبل، لأنها في الحقيقة للإثبات، والعبرة للمقاصد لا للألفاظ)

However, it should be noted that the Shariah does not allow the imprisonment of a debtor who is known to be in a distressed condition because it is of no use to imprison. The question of imprisonment or otherwise only arise in the case when his financial status is unknown and the judge want to know his status by putting him behind the bards. If he is unable to pay debts due to his financial status, his imprisonment will be of no use to his creditors:(2)

ولانه اذا لم يقدر على قضاء الدين لايكون الحبس مفيدا لان الحبس شرع للتوسل الى قضاء الدين لا لعينه

Thus, it appears that the mechanism of proving (in) solvency of a debtor under Islamic law is very sophisticated. On the one hand, the Muslim jurists want to protect the right of the creditors at all cost, even at the cost of putting the debtor behind bars if the judge thinks it to be beneficial for the creditors. On the other hand, they make it obligatory upon the creditors to give respite to the debtor who is known to be in a distressed condition and is unable to pay his debts. This is why it is safe to conclude that Islamic law of insolvency is both creditor friendly and debtor friendly at the same time.

**Conclusion:**

Insolvency is a grey area to address for any legal system. Due to the conflicting interests of the debtor and creditor involved, it has been difficult to balance between the rights of these two parties. Hence, the current legal systems are divided into creditor friendly and debtor friendly systems on the basis of their leaning towards one of the two sides. In contrast to such a one sided approach, it is observed that Islamic law has addressed this issue from a novel perspective. The rights of both the parties are protected by strong legal injunctions. However, in order to block the

(1) Zaidan, Abdul Karim (1989). *Nizam al-Qadha fi al-Shariah al-Islamiyyah*, Maktabat al-Bashair

(2) Al-Kasani, Ala al-Deen abi Bakr. *Badai al-Sanai fee Tarteeb al-Sharaie*, Kitab al-Hadhr wa al-Habs, v.7, p. 17, Beirut

door towards possible moral hazard, Islamic law has tied this issue to the after world and held both parties responsible and attentive towards their obligations from a spiritual perspective. This is a unique aspect of Islamic insolvency code which is not found in other insolvency regimes of the world. Therefore, it can be safely concluded that the Islamic code of insolvency is neither debtor unfriendly nor creditor unfriendly; it is both debtor friendly and creditor friendly simultaneously.