THE POLEMIC OF MURABAHA FINANCING VALIDITY: THE STUDY OF ITS IMPLEMENTATION IN SHARIA BANKING IN INDONESIA

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ABSTRACT

Murabaha financing is a financing most demand by the customers. In consequence, murabaha significantly dominates and contribute to increasing the percentage of market share of sharia banking in Indonesia. However, from the aspect of conformity with the concept of sharia, the implementation of murabaha is debatable because some sharia banks have not fully comply the regulation applied. First, there are some sharia banks which have not perfectly implemented the process of selling and purchasing of an object then, when murabaha financing is made, the goods have not immediately become the property of the bank. Second, in case of murabaha by using wakalah agreement, the agreement of wakalah was not perfectly obeyed by the customers and murabaha financing has executed before the customers completely perform the representation process. Third, there are still many sharia banking which is implementing the murabaha financing to be working capital containing the element of bai al-inah. Furthermore, murabaha financing is also used in the transaction takeover and refinance and conversing murabaha becomes murabaha which is explicitly prohibited by National Sharia Council of Indonesian Ulema Council. Recommendation: First, to maintain the existence or even develop murabaha financing, sharia banking needs to keep the credibility of murabaha financing by organizing its implementation to be in line with the regulation. Second, if sharia banking difficulties in implementing murabaha by involving a third party or uncomfortable applying murabaha bil wakalah, sharia banking can provide the service of murabaha by inventory even though it has to be accommodated by adequate risk management. Third, in case of sharia banking needs to operate the purchasing for productive working capital, conversion, take over and refinancing, sharia banking is better using profit-sharing financing feature such as mudharabah, musyarakah or musyarakah mutanaqish in accordance with the guidelines of National Sharia Council of Indonesian Ulama Council.

Keywords: Validity, Murabaha, Sharia Banking in Indonesia

INTRODUCTION

The existence and development of sharia banking in Indonesia is an inevitability considering that Indonesia is a country with the largest Muslim population in the world. The existence of conventional banking interest-based is not in line with the sharia principles. Based on the principle of sharia, the concept of interest is categorized as usury, and it is prohibited. Fatwa of Indonesian Ulama Council\(^1\) (MUI) No 1 of 2004 on Interest stated that interest in banking practices had met the criteria of usury which is occurred in Rasulullah SAW era, i.e. the inhibition of usury (riba nasiah\(^2\)). Therefore, interest in banking practices is forbidden (haram), whether done by the bank, insurance, capital market, pawnshop, cooperative, other financial institutions or individuals.

Related to the conventional financial institution, the Fatwa mentioned before also confirmed that it is prohibited to conduct transactions by using conventional financial institutions for the area which has easy access to sharia financial institution. Meanwhile, for the area which has no access to sharia financial institution, transactions by using conventional financial institutions are permitted by the existence of emergence principle.

In reality, the fact shows that the development of sharia banking in Indonesia is lagging compared to the conventional banking. Market share of sharia banking is only 5% compared to conventional banking. This phenomenon showed that the Fatwa on the prohibition of interest in the banking system is not obeyed by the majority of society. The matter mentioned before can be

\(^1\) Indonesian Ulama Council (Indonesian: Majelis Ulama Indonesia - MUI) is Indonesia's top Muslim clerical body. The council comprises many Indonesian Muslim groups including Nahdatul Ulama (NU), Muhammadiyah, and smaller groups such as, Syarikat Islam, Perti(id), Al Washliyah(id), Math'l'aul Anwar, GUPPI, PTDI, DMI and Al Ittihad'iyah. It was founded by the Indonesian New Order under the Suharto administration in 1975 as a body to produce fatwas and to advise the Muslim community on contemporary issues. An important function of MUI is to provide halal-certification for products (including but not limited to foods, cosmetics, pharmaceutical and clothing).

\(^2\) Riba Nasi'ah is derived from the Arabic root 'nasa'a' which means to 'delay' or 'defer'. This type of riba falls into two categories. First: Charging interest on the loan lent to an insolvent debtor. This category is commonly practiced in the pre-Islamic era. A person, for example, may lend another person a sum of money to be paid back on a specified date. When the date agreed upon is due, the creditor gives the debtor the choice either to repay the debt or defer repayment in return for charging additional interest on the principal. Second: Exchanging two items of the same type which bear the common cause of Riba Al-Fadl while stipulating deferment of delivery of one or both of the exchanged items. An example of this includes exchanging gold for gold or for silver or exchanging silver for gold while stipulating deferment of delivery. See Kazairin, 1993, p. 30. Chapra explained that the term nasi'ah was derived from nasa'a which literally means delaying or waiting for time after which the debtor is allowed to return his loan with additional benefit in the form of “interest” or “premium”. See Chapra, 1995, p. 57
caused by the existence of sharia banking is not ideal yet and has various weaknesses then, sharia banking is not in line with the society expected.

The problem mentioned above will be getting worse because free market competition of ASEAN Economic Community (AEC) in the sector of banking will be applied in 2020 then, the challenge of sharia banking in the future will also be even harder. The enforcement of AEC in the banking sector will be followed by the banking integration of ASEAN countries which is inserted in the ASEAN Banking Integration Framework (ABIF) Guidelines. The phenomenon above signifies the existence of rivalry of sharia banking is not only facing the conventional banking but also the foreign banks in Southeast Asia. Therefore, deep thinking is needed to formulate strategic steps in improving the competitiveness of sharia banking. Then, the existence of sharia banking becomes more attractive to be chosen. Also, the improvement of sharia banking competitiveness can fulfill the needs of contemporary society without violating the principles of sharia.

Chux Ghevase Iwu stated that two main issues facing sharia banking in the world and need to be solved immediately are: first; lack of innovation, the offer of sharia banking is limited, second; the problem of conformity of sharia banking products with the principles of sharia (sharia compliance) needs to be tightened. Therefore, there are two strategies for improving the sharia banking, i.e. improving the innovative product, including optimizing the products that have been owned and maintaining the sharia banking products obey the sharia principles.

Based on the data from Financial Service Authority (Otoritas Jasa Keuangan/OJK) Republic of Indonesia in 2018, in Indonesia, there are 201 sharia banking, consisting of 13 Islamic Bank (Bank Umum Syariah/BUS)², 21 Bank of Shariah Business Unit (Bank Unit Usaha Syariah/USU)³ and 167 Islamic Rural Bank (Bank Pembinaan Rakyat Syariah/BPRS)⁴.

The activities of sharia banking have no collecting to conventional banking, i.e. both sharia and conventional banking are the intermediary financial institution – collecting public funds in the form of savings, distributing the funds for those who need (credit in the conventional bank and financial in sharia banking). The differences between sharia and conventional banking are the use of interest which is categorized as riba in the perspective of Islam. Furthermore, the operations of sharia banking which is oriented to sale and purchase and profit sharing have to be in line with the sharia principles, i.e. riba, gharar, maisir and haram are prohibited.

Riba is an addition in one or two homogeneous equations (akim) which is the addition has no reward in exchange⁵. Samuel G. Kling explained the definition of riba or interest as the compensation for the use and land money.⁶ According to Syafi’i Antonio, riba is the retrieval of addition, both transaction of sale and purchase and borrow and lend which is contrary to the principle of muamalah in Islam (baitil)⁷.

The meaning of Maisir is the transaction on uncertainty situation and chancy. Nik Norzrul Thani, defined the meaning of Maisir as gambling in the sense of a speculative form.⁸ Furthermore, gharar is a transaction of uncertainty objects, ownerless, unknown to its existence or absence, unless otherwise stipulated by sharia. Saleh Nabil stated that the identification of gharar could be seen in three primary points, i.e. firstly, the existence of the object is unknown. Secondly, the nature of the object is unknown, and the third is the ineffective supervision from the parties toward the object. Mean while haram is a transaction of the forbidden object based on the provision of sharia and zalim is a transaction creates injustice for the involved parties.

Financing of sharia banking is operated in various products, such as murabaha, i.e. the agreement of sale and purchase between bank and the customers by means of the sharia bank buys the object needed by the customers and sells the object to the customers at acquisition cost plus the margin or profit agreed between the sharia bank and the customer⁹.

Based on the literature review and field research, the financing of murabaha is famous financing in sharia banking in Indonesia. The domination of murabaha in sharia banking is not only occurred in Indonesia but also the other countries such as Malaysia, Pakistan, Dubai, Jordan and others.

⁴ In Indonesia, Sharia banking is divided into three different categories, namely Sharia General Bank (BUS), Sharia Business Unit and Sharia Public Funding Bank, as regulated in Law No. 21 Year 2008 about Sharia Banking.
⁵ Sharia General Bank (BUS) is Sharia Bank which provides service related to the traffic of payment. See Law No 21 Year 2008 about Sharia Banking.
⁶ Sharia Business Unit (USU) is a division of the central Conventional General Bank functioning as a main office of offices or units conducting business activity according to principles of sharia or working units in branch office of a bank located in foreign countries which conducts business activities conventionally and functions as main office from sharia branch offices and/or sharia units. See Chart 1 number 10 Law No 21 Year 2008 about Sharia Banking.
⁷ Sharia Public Funding Bank (BPRS) is a bank which does not provide service related to payment traffic.
⁸ M. Umar Chapra. Towards a Just Monetary System, A Discussion of Money, Banking and Monetary Policy in The Light of Islamic Teachings (Leicester: The Islamic Foundation, 1995) P. 30
¹⁰ M. Syafii Antonio, Bank Syariah, dari Teori ke Praktek, (Jakarta: Gema Insani, 2014) P.
¹³ Law No 21 of 2008 on Sharia Banking.
¹⁴ Ahmad Ifhah, Buku Pintar Ekonomi Islam, (Depok: Herya Media, 2015) P. 574
Abdullah Saeed stated that year by year murabaha financing composition is increasingly dominating the financing because of its largest distribution. Furthermore, according to him, since 1984, the financing of murabaha occupies 80% share in the financial institutions of Pakistan, while in Dubai occupies 82% share, even Islamic Development Bank (IDB) operates the murabaha scheme as much as 73% for more than 10 years of financing. Haider Alia Hamoudi mentioned that murabaha dominance reached 80-95% of financing Islamic financing institutions that apply murabaha transactions. Shafta Abdul-Khalig also mentioned that 42% investment which is offered by banks in Jordan is sharia investment and the majority of sharia investment is murabaha.

Data of Financial Service Authority (Otoritas Jasa Keuangan) of Republic of Indonesia showed that the portion of murabaha contributes the most to the total financing of sharia banking in Indonesia, i.e. 60% of the market share of sharia banking financing.

The result of research which is conducted by the researchers in four Islamic Bank (Bank Umum Syariah), three Bank of Shariah Business Unit (Bank Unit Usaha Syariah) and ten Islamic Rural Bank (Bank Pembiayaan Rakyat Syariah) also showed the murabaha dominance, on average 60-90% compared to the other financing.

Based on the explanation above, it can be seen that murabaha becomes primary product of sharia banking. Nevertheless, hard critics are proposed to financing product, i.e. murabaha. The validity of murabaha product in sharia banking is becoming a debatable issue in the contemporary Islamic scholars and stakeholder community. Murabaha financing practice is still considered not in accordance with the sharia principles because various reasons, i.e. the allegation of riba in murabaha, murabaha is considered as bai al-inah which is unlawful (haram), murabaha is considered as a transaction in a transaction (bai’ataam fī bai’ah wahidah) and even murabaha is assumed as a tricky way (hilah) to make riba becomes legal (halal).

Murabaha financing practice in sharia bank is doubtful whether it is in line with the sharia principles because when the transaction occurs, the object of the transaction does not belong to the bank as the seller party.

Abdullah Saeed confirmed that murabaha financing practice in many Islamic Banks is not in line with the Islamic principles because murabaha is unknown practice in Islamic study. Abdullah Saeed also criticized murabaha products by declaring a statement that there are no substantial differences between mark up and interest, if Islamic Law permits the practice of murabaha, the question is why the interest of the conventional bank is prohibited.

Umar Ibrahim Vadillo also stated that the existence of murabaha financing in Islamic banking practice endangers the existence of Islamic bank in the world. Meanwhile, the expert of Islamic banking in Indonesia, Zaim Saidi also stated that murabaha in Islamic banking is an incompatibility with Islamic teaching because it seems like credit in conventional banking.

Muhammad Taqi Usman contended that at the beginning murabaha is not financing but a mean to avoid interest. Furthermore, murabaha is not an ideal instrument to develop the essence of Islamic economic goals. According to him, the instrument of murabaha is used only in transition step in the process of inserting Islamic teaching in economic sector.

In line with Taqi Usman, the Financial Services Authority also admitted that murabaha financing was initially unrelated to financing. However, the expert and Ulama of sharia banking combined the concept of murabaha with the other concepts which forming the financing concept with murabaha contract (Akad).

A very extreme negative judgment of murabaha was stated by Erwadi Tarmizi. According to him, murabaha financing–mainstay product of sharia banks, is carrying a big problem. Erwandi also judged the product of murabaha in sharia banks has violated three hadiths, i.e. hadith which prohibits the sale and purchase of the property which is not owned by the seller, two kinds of sell and purchase in a sell and purchase and sale and purchase of property which has already sold but physically the property is not received yet by the buyer. Erwandi also stated that Murabaha in sharia bank is 100% categorized as usury (riba).

It is very unfortunate if Murabaha which has a lot of contribution in the sharia banking sector is questionable in its sustainability with sharia principle. In this paper, we raise a single question, namely: how is the conformity of practice of murabaha financing with the shari'a principles? This paper aims to examine the validity of the implementation of Murabaha financing in Indonesia. It also proportionally reveals both the advantages and disadvantages of murabaha which need to be immediately solved in order to support its product to be developed well. This paper is a result finding of socio-legal research, which was conducted to 12 Islamic banks in Indonesia. All data collected then was analyzed by using a qualitative – descriptive method.

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23 Book of Murabaha Standard, 2016
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THEROEITICAL FRAMEWORK OF THE POLEMIC OF THE CONFORMITY OF MURABAHA TO SHARIA.

Pillar and Legal Basis of Murabaha

Murabaha is financing with a mechanism of bank buys the property needed by the customer with bank’s name, and this financing has to be legal and free from usury (riba). The bank sells the property to the customer at a selling price equal to the purchase price plus a profit for the bank. In the case mentioned before, the bank needs to tell the customer about the detail of the cost honestly.

To adjust the implementation of murabaha to sharia, the pillar needs to be fulfilled. The pillar is mandatory if the pillar is not fulfilled then, based on sharia principle, the transaction of murabaha is null and void. The pillar of murabaha: First, there must be a doer, i.e. seller and buyer. Second, there must be a certain object, the object is not illegal (haram) in Sharia. Third, there should be an agreement between the seller and buyer which is manifested in term of acceptance (ijab qabul). The agreement mentioned above has to avoid the error and mistake in providing the object, force and fraud. In the murabaha transaction, the third pillar needs to be fulfilled cumulatively if one of a pillar or even all pillars is not met. As a consequence, the murabaha transaction is null and void.

Conceptually, murabaha financing has no problems because it has complete legal protection both in international and national level. Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) has confirmed the legality of murabaha which is transformed to sale and purchase in Islamic religion. Ijma of the majority of ulama also decided that the permission to sell and purchase by using murabaha financing.

In national level, the legal basis of murabaha and business activities of sharia banking is mandated to National Sharia Council of Indonesian Ulama Council (DSN MUI). DSM MUI has a task to arrange in the form of Fatwa. Nowadays, DSM MUI has issued 116 Fatwa which is legally binding because even though MUI is not part of government’s administration, the authority of MUI to regulate the activity of sharia banking is stated in Law No 21 of 2008 on Sharia Banking. Furthermore, Fatwa DSM MUI is adopted in the Bank Indonesia Regulation or Indonesian Financial Services Authority Regulation then, it will be the part of legislation in Indonesia.

The legal basis of the implementation of murabaha in Indonesia has been regulated in many Fatwa DSM MUI, among others Fatwa DSM No 04/DSN-MUI/IV/2000 on murabaha, Fatwa DSM No 10/DSN-MUI/IV/2000 on Wakalah, Fatwa DSM No 13/DSN-MUI/IV/2000 on Down Payment of Murabaha, Fatwa DSM No 16/DSN-MUI/IX/2000 on Discount in Murabaha, Fatwa DSM No 17/DSN-MUI/IX/2000 on Punishment toward Capable Customers to Delay the Payment.


The Strength of Murabaha

Murabaha is a selling and buying financing based on trust because when the contract (akad) is conducted, the bank needs to disclose the purchase price of the property and the profit margins needed by the bank as the seller. The characteristic of murabaha as selling and buying based on trust is a positive aspect because it is in line with the Islamic teaching which upholds the honesty and openness. The success of murabaha financing in increasing the sharia banking market share is the advantage of murabaha. Because without murabaha, the percentage of sharia banking market share compared to the conventional bank is increasing than before.

Dhumale and Sapcanin declared that the implementation of murabaha as the ideal model of financing to purchase various business equipment. The financing model requires sharia banks have and purchase the asset or business equipment to be sold at a price that has been raised. According to them, this scheme is the appropriate way of buying the business purchasing. This financing model has been implemented in Malaysia since 1997 and in 1999 has received more than 1000 active customers. Dhumale and Sapcanin also confirmed that murabaha is more practical and the best scheme for financing of sharia finance, because Murabaha allows repayment in the same instalment so that it is more manageable and monitored.

Frank E Vogel and Samuel El also stated that the dominance of Murabaha financing shows an indication that it proposes many advantages for sharia bank. The advantages are, for instance, First, the certainty of the buyer, i.e. sharia bank will not give any properties unless the buyer exists. Second, the certainty of profit, i.e. sharia bank can ensure the profit of the property which has been sold. Third, Murabaha financing is easier to be implemented compared to the other financing.

25 Fatwa DSM MUI No 04/DSN-MUI/IV/2000
26 Amran Suadi, Penyelasaan Sengketa Ekonomi Syariah, Penemuan dan Kaidah Hukum, (Jakarta: Prenada Media Group, 2018)
27 Fatwa DSM MUI No 04/DSN-MUI/IV/2000
28 AAOIFI, Standar 8 Tentang Murabaha
29 (Ibnu Rusyid, 161, al-Kasani: 220–222)
30 Article 26 section (2) Law of Sharia Banking delegates Indonesian Ulama Council to publish Fatwa related sharia principles on product and services of sharia banking.
32 Frank E Vogel and Samuel El Hayes, Islamic Law and Finance: Religion Risk and Return (Netherlands: Kluwer Law International,
Book of Sharia Banking Product Standard on murabaha which is issued by OJK confirmed that the dominance of murabaha financing occurs because most of credit and finance which are provided by Indonesian banking relies on the consumptive sector. Therefore, in competing with conventional banking, the feature of murabaha financing is more easy and simple. The features make murabaha becomes the primary issue in sharia financing in fulfilling the need of financing needs such as motorcycle, property and the others. Murabaha financing also become dominance because it has easier system and technique of calculating and it is easy to be understood by both the customers and banks. In murabaha financing, the customers do not have to use the financing to do business.

According to Adi Warman Karim, the contract of murabaha is a type of natural certainty contracts, i.e. financing that provides certainty both in term of number and time. Cash flow can be predicted with relatively certain because it has been agreed by both parties at the beginning of the contract. Besides, the dominance of murabaha in sharia banking is also caused by the concern of banking on moral hazard and asymmetry information in the financing of profit sharing that may harm the bank.

Furthermore, according to Karnaen A. Perwataatmadina, in Murabaha, the risk of sharia banking is very small, and banks also do not have to know about profit and loss of customers. Meanwhile, when using mudharaba or musyaraka product, then the possibility of risk experienced by the bank is very high and vulnerable to the possibility of moral dangers because Islamic banks should assume that everyone honest, so the bank is prone to deal with people who have bad intention. Moreover, the calculation in mudharaba and musyaraka is more complicated compared to murabaha then, professional officers are needed. In reality, the professional officers of sharia banking are from the conventional bank, in this case, the professional officers are still constructed in the system of interest.

The research result provides the answer that many arguments support sharia bank to implement murabaha financing because the application is easy, the bank has a certainty of profit, the bank has no concern whether the customer profit or loss, the regulation is complete and easy to be understood by the society because the society is familiar with sell and purchase transaction then, customer interest on murabaha financing is quite high.

Practice and Criticism on Murabaha

Murabaha financing in Indonesia generally attracts the customer in order to obtain a bailout to pay the goods which the customers cannot pay in cash. Thus, the offered murabaha financing of the sharia banking in, Indonesia is always in the form of debt or installment payment. Sale and purchase in debt in Islam are, allowed, as long as the good is an urgent need, cannot be paid in cash even though the price is higher than its cash price. The decision of Majma Al-Fiqh Al-Islami No. 51 Year 1990 said that “We may surpass the goods’ price which is sold in non-cash, exceed the cash price and install in an agreed period.”

If the non-cash murabaha is applied according to the rules, it is not a riba (interest) and is not the same as the interest of conventional banks. There are some differences between them, which is described below:

- First, the profit of non-cash Murabaha is halal, while the interest of the conventional bank is haram because it is lending money with the condition of giving extra money in the time of paying it back. Second, the profit of the non-cash Murabaha comes from good financing, in which good is changed to money. Meanwhile, the interest of debt is that money financing is changed to money, not in cash. Third, the money turns over happens in the non-cash murabaha. The money is used to buy goods, and then the good is sold again and becomes money again. It makes the rotation of the economic wheel so, it doesn't monopolise by the owners of the capital. Meanwhile, in debt with interest, there is no money turn over, it is only making money from money. Fourth, in the non-cash Murabaha, the amount of money disbursed is followed by the increase of good and service in real terms. Meanwhile, debt with interest will be the main cause of inflation due to the increase in money supply which is not followed by the increase of good and service.

The murabaha which is written in various classic literatures is the murabaha between the seller and the buyer with the condition of the sellers have already had the commodity or the object of murabaha when the process of sale and purchase happens. So, in this murabaha, there are only two parties, the seller party and the buyer party.

The implementation of murabaha in the Islamic banking undergoes a modification which is called murabaha li al amir bi al syira. It is the sale and purchase transaction where the customer comes to the bank to propose the buy to her/him a product with certain criteria. And then the customer promises the bank that she/he will buy the product in murabaha. The customer buys the product with a price of base price plus the profit agreed by the two parties, and the customer makes installment payments with the amount of per installment in accordance to her/his financial ability. Contemporary Muslim scholars such as Sami Hamud, Yusuf Qardhawi, Ali Ahmad Salus, Shadiq Muhammad Amin, Ibrahim Fadhil and others, acknowledge the validity of Murabaha li al amir bi al syira.

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98 (1998) P.140-141
33 Book of Murabaha Standard, 2016
36 Research result of 4 BUS, 3 UUS and 5 BPRS.

The implementation of murabaha li al amir bi al syiara requires the third party, the distributor or supplier, in the sale and purchase transaction. The murabaha resulted from the modification must be conducted through several stages in order to conform to sharia rules. First, the customers come to the bank, say their intention to buy a good, explain its specification as detail as possible and promise to buy it if the bank has already bought it from the supplier. In this stage, what is conducted is merely a promise to buy, so the trading contract hasn’t started yet? Second, sharia bank buys the good ordered by the customer in cash from the developer or supplier. Legally bought and owned by the bank, the good is sold to the customer. Third, the murabaha contract between the bank and the customer is conducted with the mechanism of; the sharia bank informs the buying price of the good, includes the operational expense and the profit desired by the bank and agreed by the customer. Fourth, the customers pay the murabaha dept in installment payments with a certain amount per installment and period according to the agreement.

Muhammad Syafi’i Antonio describes the implementation of Murabaha in the sharia bank after the modification into three categories. Type one is a type which consistent to the fiqh muamalah. In this type, the bank bought the good which will be bought by the customer first, after the agreement has made. After the good has been brought under the name of the bank then sold to the customer with the buying price plus the agreed profit. Type two is similar to type one. However, the ownership transfer is directly from the supplier to the customer, and the payment is directly from the bank to the supplier. Then, the customers receive the good after they have made the muharabah agreement with the bank. Meanwhile, the third type is the most applied type done by the sharia banks. The bank makes Murabaha agreement with the customer and at the same time representing (wakalah contract) the customer to buy by their own the good order to the bank. Then, the fund to buy the good is credited to the customer’s account and the customers sign the money receipt.

The practice of murqaqabah type one is considered in accordance with the sharia rules, while the practice of murabaha type two and three invite debate, so they are considered containing the elements of bai al-ma’dum, bai al-inah, bai ataani fi bai’ah, containing gharar, viewed as 100% riba and considered as the installment of the conventional bank.

The practice of muharabah type two is in question because when the murabahah contract is conducted, the object is considered as hasn’t fully owned by the bank. The supplier hasn’t given the good to the bank. Meanwhile, the murabaha type three is considered that it doesn’t in line with the sharia because the muharabah agreement has been conducted before the customer realizing the representative duty. The status of ownership of the good in murabaha practice type two is still in debate. Erwandi confirmed in that type two, the good hadn’t been yet belonging to the bank. According to him, the requirements of good ownership transfer from the supplier to the bank are that the good must be handover from the seller to the buyer in real.

Fatwa DSN MUI Nomor 04/DSN-MUI/2000 prohibits the sharia bank to sell the goods unless those goods have already been owned by the bank. However, owning, in this case, doesn’t mean that the bank must hold or receive the goods from the seller first. It is because there are two kinds of owning the goods namely physical ownership (qodhul haqi’iq) and constructive/legally ownership (qodhul hukmi). Circular Letter of the Financial Service Authority about the product and activity of the sharia bank explains that financing object ownership must be already in the seller’s hand, both in the physical ownership (qodhul haqi’iq) and constructive ownership (qodhul hukmi). The circular also confirms that the ownership of financing object, wherever possible, is effectively transferred from the bank as the seller to the customer as the buyer in accordance with the prevailing habits as long as it is not contrary to sharia. The meaning of effectively object ownership is when the two parties have agreed to the contract of sale and purchase even though the bank does not require any legal proof of ownership (physical ownership). The ownership is considered valid by the bank with the transaction between the bank and the supplier or only with constructive ownership. Thus, the practices of muharabah type two don’t have any problems in accordance with sharia, as long as the bank buys the good from the supplier.

Related to the practice of muharabah type three, the author agrees that the implementation of this model still has some problems seen from the sharia perspective.

**Murabaha and Bai al-ma’dum**

Bai al-ma’dum is the sale and purchase which the good has not been in the seller’s hand yet. This prohibition is based on the La baia ma lais adaka, Rosululloh hadith. According to Al-Qardawi, quoted by Asy-Syaukani, the prohibition in the hadith is the prohibition of selling goods which have not been owned by the seller. According to Ibn Taimiyah, the prohibition is not seen from the whether the property exists or not, but it is because the gharar, which is a sale and purchase of something that cannot be handed over.

To avoid the bai al-ma’dum in murabaha, the contemporary Islamic scholars require that the practice of murabaha is conducted with the following conditions. First, sale and purchase murabaha is not a loan given with interest, but it is a commodity sale and purchase with the acquisition price plus the profit margin and the mutually agreed cost. Second, The bank as the giver of the financing must have bought the good and keep it in the bank’s authority or buy through the third person as an agent before the goods are sold to the customer. If it’s not so, the murabaha will be stuck in bai al-ma’dum.

DSN MUI Nomor 04/DSN-MUI/IV/2000 has also underlined that in the murabaha, the bank must buy the goods under the name of the banks itself and this purchasing must be legitimate and riba free (free from interest). Then, the bank sells those goods with the selling price as much as the buying price plus its profit. In this case, the bank must acknowledge honestly the buying price and the cost to the customer. If the customer wants to buy the goods to the third party, the murabaha sale and purchase contract must be conducted after the goods have already owned by the bank in principle.

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41 Circular Letter of FSA Nomor 36/SE OJK. 03/2015. 3.3.10, 3.3.11 and 3.3.12
The essence of the rules above is basically to make sure that when the transaction is conducted, the commodity or the goods have already been owned by the bank. So, the object of the transaction is clear, known by the two parties and doesn’t cause gharar.

Based on the research, the author found that in an unclear object of sale and purchase. It is because generally murabaha is realized in a way that bank gets the customer to represent to buy the goods to the third party through the wakalah contract (murabaha bil wakalah). However, before the customer does the wakalah process, the murabaha contract between the bank and the customer has already conducted. Even more, the Murabaha and wakalah contract is written in the same contract document, so the requirement which said that murabaha contract must be conducted after wakalah process is conducted by the customer is not fulfilled. The sources from the sharia banks said the reason to the murabaha mechanism. If it must wait until wakalah process finished, it will have a high risk. That is because it means the banks must hand over a sum of money to the customer to buy the goods to the third party before the murabaha contract is agreed.

Toward the practice of murabaha bil wakalah, Yenti, in her research’s result said that conceptually, murabaha should only involve two parties, namely the seller and the buyer. Nevertheless, in its application in sharia bank, murabaha involves the third party as the supplier of goods to the bank on customer demand. Furthermore, in reality, Murabaha is mostly applied to the concept of murabaha bil wakalah. The bank gives authority to the customer to buy the goods needed by the customer by doing wakalah agreement (representative), which at last, the customer only hand overs the receipt of the purchase as a proof that the signed murabaha contract has been run according to the procedure.43

Abdullah bin Muhammad Ath-Thaiyar44 judged that the practice of murabaha with wakalah model which is only proved with the receipt resembles credit transaction in the conventional banks. In this practice, according to him, Murabaha is no longer as pure as Murabaha in fiqh (Islamic law). It has deviated to the direction of conventional bank credit model because the bank doesn’t buy the good to the customer. Instead, the banks give cash to the customer.

Erwandi also thought that Murabaha with wakalah practice where the customer represents the bank to buy and receive the good directly from the supplier is a mistake. He gives an example; a customer wants to buy a house with the price of 500 million rupiahs with the specific specification, then the bank gives a check of 500 million rupiahs to the customer and gets the customer to represent the bank to buy and receive the house directly from the developer. At the same time, the bank notes the customer’s obligation to pay 500 million rupiahs plus the agreed profit to the bank in instalment way, in the certain period and a certain amount of the payment per month. Erwandi argued that this practice is the manipulation of the riba legalisation because the bank hasn’t owned the house or the object of murabaha sale and purchase. According to him, in this kind of transaction, the point is that the bank gives a loan of 500 million rupiahs which will be returned in a certain period plus the murabaha interest so, this transaction is similar to the credit loan of the conventional bank.45

According to the author, the practice of murabaha bil wakalah does not disturb the murabaha validity, as long as the wakalah mechanism conducted properly and fulfilled the requirement. When the murabaha is realized, the murabaha object principally has owned by the sharia bank as the seller party. The author argued that the practice of murabaha bil wakalah, in order to make it in accordance with the sharia rules, must be conducted with the following procedure. First, the customer and sharia bank sign the general agreement, the customer promises to buy certain commodity with the acquisition cost and certain margin. Second, the bank gets the customer to represent the bank to buy the commodity with the signing wakalah contract by the two parties. Third, the customer buys the commodity under the name of the bank and takes over the commodity or goods. In this stage, the commodity risk is still in the bank; it hasn’t moved to the customer. Fourth, the customer informs the bank that the purchasing under the name of the bank has been conducted and informs the bidding price. Fifth, the customer and the bank sign the murabaha contract, after that the ownership and the risk of the commodity or the good moves to the customer. With this procedure, when the murabaha contract occurs, the good principally has already been owned by the bank. So, it avoids the bai’al-ma’dum and gharar.

The prohibition of bai’al-ma’dum is explicitly written in the Rasulullah hadith narrated by Abu Daud from Hakim bin Nizam. He said: “O. Rasulullah, someone came to me to buy a good. Unfortunately, I am in a condition of not having that good, may I still sold it and then I bought the desired good from the market and gave it to that buyer?” Rasulullah answered: “ Don’t sell the good which you haven’t owned it”.

Sharia banking guiding book compiled by AAOIFI also emphasizes that it is haram when the financial institution sells well with murabaha before the good is owned by the bank. It is not valid when the two parties signing murabaha contract before the sharia financial institution buy the good ordered by the customer from the first seller.

Indonesian Compilation of Sharia Economic Law, (KHES) Section 119 also gives a guide if the bank wants the customer to represent the bank to buy the product from the third party, the murabaha sale and purchase contract must be conducted after the good has principally been owned by the bank.

Related to the risk of customer’s moral hazard, in another financing this kind of risk is always there. The risk of moral hazard can be minimalized by doing cooperation between sharia bank and the supplier. This cooperation is needed as an effort to suppress the obscurity (gharar) of murabaha object which will be transacted. In this cooperation, some agreements need to be included. For example, a commitment that customer of murabaha bil wakalah doesn’t have to pay in cash and the agreement of

44 Abdullah bin Muhammad Ath-Thaiyar, Ensiklopedi Fiqh Muammalah dalam Pandangan Empat Mazhab (Jakarta: Maktabah Al-Hanif, 2009) P. 23
45 Erwandi Tarmizi, “Murabaha Bank Syariah 100 % Riba”, Majalah Pengusaha Muslim Indonesia, 10 May 2017.
the procedure to hand over the good (qabîlîh) or the principal movement of ownership. Sharia bank also has always to supervise and reminding the customer so that they can make the wakalah implementation perfect. It is because wakalah is the bridge of mutsman fulfillment (object) which is one of the pillars and differentiators murabaha to credit loan in the conventional banking.

Then, the sharia banking thinks that it is less practical to involve the supplier or it’s not safe with murabaha bil wakalah, sharia banking can offer murabaha product inventory model which is known with murabaha by inventory. Currently, it has been popularized again the murabaha by inventory, i.e., sharia bank provides the commodity without involving the third party. It means that before doing murabaha transaction, the bank has already owned inventory product both in the form of a building or movable properties. Murabaha model by inventory has been practised by BNI Sharia since 2017 with the product namely Griya Swakarya.

Griya Swakarya is the innovation product of sharia business model with the basic contract of murabaha. In this field, sharia bank first owning the property asset which will be managed, built and sold. It is, on the balance sheet, placed as bank inventory. In sharia way, murabaha becomes more economic because the object of the transaction has been owned by the bank. The benefit of this business model can also reduce the price of the property which at first, containing the base price plus margin from the developer as well as cost margin of the bank. The price is lower because the price of the property in the murabaha model has the cost component consisting of the base price plus cost margin so, it's more competitive.

Deputy Commissioner of Banking Supervisor I FSA (OJK), Mulya E. Siregar confirmed that sharia bank is possible to have inventory because it is the root which differentiates between the sharia bank and the conventional bank. Mulya explained that in Saudi Arabia, bank Ar Rahj had practised the inventory model murabaha. Sharia bank in Sudan has also had car inventory. Murabaha with inventory model, according to him, makes many sharia banks sell the product at a lower price because the bank doesn’t have to pay the developer\textsuperscript{46}.

**Bai al-inah and Bai ataani fi bai’ah wahidah**

Bai al-inah is a sale and purchase contract where someone (the seller) sells a product to another person in cash; then the seller buys back the same product in instalment way of payment with the higher price. Malikiyah and Hambaliyah Islamic scholars argued that this kind of agreement is not valid. According to Abu Hanifah, an Islamic scholar, this kind of sale and purchase is fasid if there is no third person between the owner of the product and the buyer. According to Wahbah Al-Zuhayli, this sale and purchase contract is only a hilah leading to borrowing contract which contains riba (usury) through sale and purchase contract\textsuperscript{47}.

Murabaha may not contain bai al-inah, because this bai al-inah in the sharia banking practice is a hilah to get the loan with the credit load similar to the conventional bank. So, the buyer comes to the bank to get a loan, and the bank doesn’t buy a product. The characteristic of bai-al-inah, the same good is sold and bought by the same persons twice. The seller of the first transaction will be the buyer in the second transaction, and the buyer of the first transaction becomes the seller of the second transaction. The first sale and purchase transaction is conducted in cash and the second transaction is conducted in instalment payment with a higher price.

The example of bai al-inah illustration is as follow. The customer purposes financing to the sharia bank. The customer needs capital to buy commodity because he/she has already had a shophouse. Ideally, the customer is given the financing based on profit sharing, musyarakah, mudharabah or musyarakah mutanaqisah. However, the bank hasn’t had those products. Thus, the bank and the customer deal to make murabaha through the bai al-inah scheme, the customer’s shophouse is sold in cash to the bank. Thus customer receives sum amount of money in cash used to be the capital. Then, the shophouse is brought back by the customer from the bank with the higher price in instalment payment.

Bai al-inah and bai ataani fî bai’ah wahidah have relevance. Principally, the bai al- inah sale and purchase is part of the prohibition of two sale and purchase transactions in a sale and purchase contract. Conceptually, the Islamic scholars relate bai al-inah sale and purchase with the riba concept. Meanwhile, in the process, most of the Islamic scholars place bai al-inah sale and purchase as a hilah effort (hilah ribawaiyih).

Rasulullah prohibits Bai ataani fi bai’ah wahidah. This prohibition is based on Hadith of the prophet of Muhammad SAW which said: “Nabiya Rasulullah an baitaina fi baiah” which means Rasulullah prohibits two sale and purchase transactions in a sale and purchase transaction. Toward this kind of sale and purchase, Asy-Syafi’i gives two ta’wil. First, “I sale this good two thousand in temporary payment or I sale this good one thousand in cash. Then, choose which one that you want.” Second, “I sell my house to you, but you have to sell your horse to me.” According to him, this kind of sale and purchase is fasid (invalid/broken). According to Hanafiyah scholars, this kind of sale and purchase transaction is also fasid because the price is unclear and with certain conditions. According to Syafi’iyah and Hambaliyah scholars, this kind of sale and purchase is a void because it contains gharaib.

Ibn Rusyd describes the prohibition of two sale and purchase transactions in one sale and purchase transaction as bai al-inah, i.e; someone sells a good to another party with a certain price in cash with the condition of the buyer sells back the good to the first seller with the higher price in installment payment\textsuperscript{48}.

To avoid bai al- inah dan bai ataani fî bai’ah wahidah in Murabaha, contemporary Islamic scholars, give guidelines that if in a murabaha, the deferred price is higher than the cash price then when the contract is conducted those prices must be agreed by both parties. Thus, when the murabaha transaction is conducted, there is only one price to avoid bai ataani fî bai’ah wahidah.

\textsuperscript{46} Republika, "OJK Rostui BNI Syariah Luncurkan Griya Swa Karya". December 13th, 2016


National Sharia Council of Indonesian Ulama Council (DSN MUI) also has anticipated the *bai al-inah* and *bai ataani fi al-bai‘ah wahidah* by publishing Fatwa No. 08/DSN-MUI/IV/2000 on *Musyarakah*. It rules the financing for the working capital in fulfilling the productive economy using *musyarakah* financing (including *musyarakah mutanaqisah*). If the financing for the working capital uses murabaha, it can be trapped in *bai al-inah*. DSN MUI also published Fatwa No.49/DSN-MUI/II/2005 on Murabaha Conversion Declaration. Based on this Fatwa DSN, *murabaha* conversion is prohibited to used murabaha too, it must use other financing methods such as, *mudharabah*, *ijarah muntahiya bittamlak* (IMBT), *musyarakah* or *musyarakah mutanaqisah* (MMQ)49. As well as in the transaction of refinancing and take over, sharia banking is prohibited to use murabaha to avoid the double sale and purchase of the same good and subject. Fatwa DSN MUI Nomor 89/DSN MUI/XII/2013 confirms that refinancing can only done with the scheme of *musyarakah mutanaqisah* contract, *al-bai ma’a al-isti’jar* contract (sale and lease back)50 or by using al-Bai contract in *musyarakah mutanaqisah*. However, in its practice, there is still a lot of work capital financing using *murabaha* with *bai al-inah* scheme. Similarly, the transactions of conversion, refinancing, and take over from *murabaha* by using *murabaha* are still conducted by sharia banks. So, there are two sale and purchase transactions in one sale and purchase transaction. Therefore, the assessment that a lot of murabaha practices still contain *bai al-inah* and *bai ataani fi bai’ah wahidah*51, *in this case*, does have a point.

**CONCLUSION AND RECOMMENDATIONS**

**Conclusion Remarks**

Conceptually, there are no problems found in the murabaha financing of the sharia banks in Indonesia because it has had complete legal protection and binding power. The practice of *murabaha* financing shows that the fact of this kind of financing is the most wanted financing future by the customer so it significantly dominates and contributes to increasing the market share of sharia banking. It happens because the application is easy, the regulation is complete, and the bank has a certainty of getting profit and no need to know whether the customer gets the profit or loss. Murabaha is also based on sale and purchase so it is easy to understand because the people have been used to the sale and purchase activity.

The implementation of *murabaha* financing on the sharia banking has not fully conformed with sharia principles because until now, there are several sharia banks which still haven’t fully complied with the provisions of the shari’a regulations, namely: First, there are several sharia banks which haven’t conducted the purchase process of good or object perfectly. Thus, when the *murabaha* contract is conducted the good is principally owned by the bank. Second, in the case of *murabaha* with *wakalah* mechanism, generally, the *wakalah* process is not conducted perfectly by the customer, and the *murabaha* contract has already conducted before the customer realizes the representative assignment completely. Third, a lot of sharia banks which implemented *murabaha* for the working capital with the mechanism that contains *bai al-in*. They use *murabaha* financing in the transaction of taking over, refinancing, conversion, from Murabaha which is prohibited by the National Sharia Council, because it can be trapped in *bai ataani fi al-bai‘ah* as well as *bai al-inah*.

**Recommendations**

In this paper, we propose several recommendations, First, sharia banking, in order to maintain the credibility of murabaha financing, fix its implementation in accordance with the regulation. Second, if the sharia bank is having difficulty or considers that it is not practical to implement murabaha involving a third party or *murabaha bil wakalah*, the sharia bank can give murabaha by inventory service though it must be with adequate risk management. Third, if the sharia bank has to do the productive, conversion, take over and refinancing woks capital financing, the sharia bank should use financing future based on profit shares such as *mudharabah*, *musyarakah* or *muyarakaah mutanaqisah*, in accordance to the guidelines of National Sharia Council of Indonesian Ulama Council.

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49 *Mudharabah*, *musharakah*, or *musyarakah mutanaqisah* are kinds of payment based on profit-sharing. For *mudharabah*, the business capital is 100% from sharia bank, while for *musharakah* and *musharakah mutanaqisah*, capital is partly from sharia bank and partly from the client. On the other hand, *ijarah muntahiya bit Tamlik* (IMBT) is a payment based on loan which is ended with transfer of ownership to the client, either with *hibah* or purchasing option. See Agustianto Mingka, *Ijarah Muntahiya bit Tamlik*, Diklat Pelatihan Iqtishad Consulting, March 2018

50 *Al-bai ma’a al-isti’jar contract* (sale and lease back) is a refinancing funding in which the client sells his asset according to sharia principle with a certain price, and then the client loans back the asset he sold to the sharia bank. See Agustianto Mingka, *Al-Bay maal Isti’jar*, Diklat Pelatihan Iqtishad Consulting, March 2018
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