

The Application of Murābaha Contract in Islamic Banking from Muslim Jurists' Perspective

Mohammad Ghozali
(Corresponding author)

Lecturer in Post Graduate Program of Islamic Economic Law,
University of Darussalam (UNIDA) Gontor

mohammadghozali@unida.gontor.ac.id

Abstract

High needs of the society needs on Islamic banking services tends to be viewed by bankers to produce more products that can be used to answer the need of financing and easy transaction acted by people. Hence, one of the Islamic banking transaction that attracts the society enthusiastic to be used is murābaha. In theory, the murābaha is allowed in Islam, therefore the society want to use it, but it may be in practice of murābaha can be found the prohibited transaction such as riba, gharar, and gambling. By then, this paper attempts to analyse the practice of murābaha in Islamic banking from the thought of Muslim jurists either classical or contemporary time. The method used for the study is comparative analysis on law produced by the Muslim jurists such as al-Mālikīyah, al-Shafī'īyah, al-hanafīyyah, and al-Hanābilah.

Keywords; 'Aqad, Muslim Jurists, murābaha

Introduction

Currently, the development of Islamic economics in Indonesia has been attracting the Indonesia government applying some instruments of it in the government programs both short and long term. This indicates that Islamic economic system or economic system based on Shariah is viable to be taken into consideration in facing the global economic problems such as worldbank includes the element of Islamic social finance like zakah and waqf as solution to achieve sustainable development goals (SDGs).

Moreover, discussion on the Islamic economics might not be separated from the development of Islamic banking which currently shows the high needs of the society to use the services of Islamic

banking. The fact, high needs of the society on Islamic banking services tends to be viewed by bankers to produce more products that can be used to answer the need of financing and easy transaction acted by market participants.

Based on data from the Financial Services Authority (OJK) ¹ on the combined balance sheet of Sharia Rural Banks “the financing assets from 2011 to August 2016 increased rapidly. It is mentioned in table 1.1 below.

Tabel 1.1: Financing Asset
Million Rupiah (IDR)

2011	2012	2013	2014	2015	*2016
2,675,930	3,553,520	4,433,492	5,004,909	5,765,171	6,485,856

*Data 2016 –August 2016²

The variation of Shariah products shifts little by little along the time,³ which impacts to the loss of a unique and clear factors that obscure the validity of law in Shari’ah. Furthermore, the establishment of norms can be used as standard for the transaction or building a trust among practitioners of Islamic banking industry can support the increase of operational efficiency and protect the product away from the framework of Shari’ah. This should be taken into consideration that the actors of Shari’ah business are some originally from stakeholders who did conventional businesses that may bring the conventional products and try to harmonize with the Shari’ah products.

In Indonesia, the rapid growth and increase of the existing customer in Islamic bank will lead to be suggested to review the practice of murābaha. As practice today, public statement on murābaha financing is the same as conventional one. This is because in the practice of murābaha financing contract seems to change by benchmark to credit in conventional banks. The fact, the murābaha contract is pro and

¹ It is established based on the Indonesia Act No 21 year 2011. It is duty is to control and monitor on the practice of financial institutions in Indonesia. See Jeni Susyanti, *Pengelolaan Lembaga Keuangan Syariah* (Malang: penerbit Empat Dua, 2016), 41.

² *Ibid.* 45

³ Adiwarmar A. Karim, *Ekonomi Islam suatu kajian Kontemporer* (Jakarta: Gema Insani Press, cet 3, 2007) 4. Also see Abdurrahman al Maliki, *al siyasa al Iqtishadiyah al Mutsala*, (terjm) (Bangli: penerbit al Izzah, 2001), 36.

controversial among the Muslim scholars that some allow and prohibit it. By then, this paper aims to known and analyse the views of Muslim scholars on the issues of murābaha in Islamic banking. How is the Shari'ah compliance of murābaha practice in accordance with fiqh?

Murābahah Concept

Murābaha is derived from the root word *rabaha-yarbihu-ribh*, which literally means profit. So murābaha is sale of goods with an agreed profit⁴ on the other wordsd, it also means sale of goods with an agreed upon profit mark up on the cost. To Ibn Manzur in his book '*Lisān al-'Arab*' says that the murābaha is basic form of (*wazn*) *fā'ala-yufā'ilu-mufā'alatan* that means increasing and growing in business.⁵ Practically it refers to a sale contract in which goods are sold for their original price (capital) plus a specified mark-up or profit agreed upon by the parties (buyer and seller).⁶

In practice, the application of murābaha in Islamic banking differs from its theory written in classical fiqh books. In Islamic banks, the transaction of Murābaha is between Islamic bank and customer, which the Islamic bank buys the good demanded by the customer and the sells it with a specified mark-up or profit agreed upon by two parties. Hence, the transaction payment of Murābaha can be paid in deferred or installment basis based on the fatwa issued by National Shari'ah Board (DSN). The mechanism begins with the demand of customer on the goods that he/she needs. Then, the customer apply the murābaha financing and sign an agreement to buy the goods or assets to Islamic bank. After the Islamic bank receives the application from the customer, then the the Islamic bank will buy the good or asset from the first seller before selling to the customer who demand it based on agreed contract.

Moreover, It is allowed for the Islamic bank withdrawing a penalty fine of 5% per year if the customer who intends to delay a payment (principal loan and, or margin) calculated from the amount of overdue installment. Consequently, revenue of fine will

⁴ Muhammad bin Abi Bakar Abd al-Qādir al-Rāzi, *Mukhtār al-Sahāh*, (Kairo: Dār al-Hadīts, 2002), 132.

⁵ Abu Fadhl Jamaluddin Muhammad bin Mukrim Ibnu Manzur al-Afriqi al-Mishri, *Lisān al-Arab*, jld II, cet. I (Beirut : Dār al-Fikr, 1990), 443; Sayyid Sabiq, *Fiqh Sunnah* (Beirut, Dar al Kitab al Arabiyah, 1973), 85.

⁶ Muhammad, *Sistem dan Prosedur Operasional Bank Islam* (Yogyakarta: UII Press, 2008), 270.

be allocated to charity (*tabarru*) funds that written in murābaha financing contract.

Compensation is only allowed to be used for those people or parties who intend or neglect to do something againts the agreed contract that will affect a loss. The amount of compensation is based on the real value of loss that exists in the transaction and not the expected loss. In addition, the accrued loss is recognized as bank income and should not be included in the contract.

The practice of sale is cursorily not in line with the definition of murābaha either theoretically in fiqh or practically in Islamic banking, but it is in line with with the component of first price and profit persentage. While demand and agreement are not mentioned in the definition of fiqh, but some ulamas have inserted the demand of murābaha contract as the sale of murābaha. Therefore, it can be said that the murābaha can be divided into two ways without demand of goods as explained in classical fiqh literature and by demand or order of goods that is known as *al-murābaha lil 'amir bi al-shira'* atau *al-murābaha li wa'id bi al-shira'*.⁷

The second murābaha is different with the first one in some practices.⁸ Firstly, the good in first category exists in the place of contract, while the good in second category does not exist. Secondly, the contract in the literatur of fiqh happens only in one contract place, whereas in the practice of Islamic bank consists of two phase, namely phase of agreement and contract. Thirdly, the agreement of murābaha in Islamic banking is binding, though the exact price is unkown whereas the price of murābaha goods in the classical fiqh is known in the place of contract.

Fourthly, a seller does not hesitate to buy something whether it is being used or sold within the range of time when the seller buy something and resale it; while in Islamic banking, the good demanded or ordered by the customer will be bought by the Islamic bank and resale it to the customer.⁹Fifthly, the payment can be paid in cash or deferred basis; while in the practice of Islamic bank the payment of the goods is always paid in deferred basis.

⁷ Yūsuf al-Qardawī, *Bai' al-Murābahah Li al-Âmir Bi al-Syirā' Kamâ Tajrîhi Al-Mashârif al-Islamiyyah*, (Kairo:Maktabah Wahbah, 1995), 62.

⁸ Saami Hamud, *Bai' al-Murābahah lil Aamir bi asy Syirā'* dalam kumpulan *Majalah Majma' al-Fiqh al-Islami* edisi kelima (2/1092) dinukil dari *al-Uquud al-Maaliyah al-Murakkabah*, 257.

⁹ *Ibid*, 258

Sixthly, there is disagreement between the Muslim jurists about the first price in classical fiqh; while in the practice of Islamic bank, all costs can be regarded as the first price.¹⁰ Seventhly, the profit is attained from the sale in cash normally; while practice in Islamic bank shows that the profit is attained through deferred payment. If the bank wants more profit, the price of the goods will be higher. Then, if this is practiced in murābaha contract, it will be more burdening the customer. The customer does not assume to the bank except as financee, while the role of profit-seeking will be at the hand of customers later. Moreover, the views of Muslim jurists can be divided into two groups in the murābaha contract. Some allows the application of murābaha contract and others prohibits and ignore from permissible contracts that are run by the Shari'ah.

First Group of Ulama who Allow the Practice of murābaha contract in Islamic Banking

One of the ulama is Muhammad Shabir who allows it. According to him, murābaha contract in Islamic banking consists of four elements:¹¹

1. Agreement Contract

Hanāfiyyah, Shāfi'iyyah, Hanābilah and Mālikiyyah say that the agreement is morally religious and not legally binding, because it is part of *tabarru'* (charitable act) which is not compulsory binding like a usury (riba).¹² Ibnu Shibrimah, Ishaq Bin Rahawaih, al-Hasan al-Basri and one of the arguments of Mālikiyyah say that the agreement is legally binding.¹³

Some Mālikiyyah say that the agreement is legally binding if it is related with the reason/cause in the contract such as "I want to marry your", "I want to buy that goods", "I want to go and please give me loan"; If the answer is yes, the person who say those statements such as marry, or buy or go, they are legally binding to do it.¹⁴ It is supported by another Mālikiyyah is Ibnu Qasim who says that the agreement is legally binding if it is related with reason/cause and

¹⁰ *Ibid*, 258.

¹¹ Muhammad 'Uthman Shabir, *al-Mu'amalat al-Maliyyah al-Mu'asirah fi al-Fiqh al-Islami*, (Jordan: Dar al-Nafa'is, 1996), 312.

¹² *Ibid*, 310.

¹³ *Ibid*, 310.

¹⁴ *Ibid*, 311.

the matter what is agreed is in the contract. For instances, a person promises to buy a slave if he will be help by 1000 Dirham. Then, he is obliged to buy that slave.¹⁵

In the fitth of *Majma' al-Fiqhi al-Islami* held in Quwait, December 10-15 1988 decided that the agreement that is offered by person who asks other person to do something or person's desire to do something is legally binding in Shari'ah except there is an exception, and it shall be a legal binding if it is related with causes and the cases that are promised in the contract, and the obligation should be continued by doing the agreement, or by means of the compensation due to unsuccessful agreement in the contract.

2. Sale Contract in Murābahah between Seller (Supplier) and Islamic Bank

However, all jurists either classical and contemporary agree that there is no differences in the murābaha sale between seller (supplier) and buyer (Islamic bank). This part/element is allowable in Shari'ah.

3. The Murābaha Contract between Islamic Bank and Costumer in Credit (Taqsit)

The murābaha has been done in Islamic bank is offering additional price of goods demanded by the costumers. Dalam hal ini para ulama' terdapat perbedaan. Firstly, Hanāfiyyah, Malikiyyah, Shafiyyah and Hanābilah argue that the sale by credit is allowed in the Shari'ah. This argument is also supported by the contemporary jurists like Syeh Abdul Aziz Bin Baz and Qardawi.¹⁶ Secondly, Shi'iyyah like al-Qasimiyah, Imam Yahya, Ibnu Sirin, Shuraih, Ibnu Hazmin al-Dhahiri argues that kind of sale is *harām* (prohibited in Shari'ah). Some Contemporary scholars like Syeh Rafiq al-Misri and Syeh Abd al-Rahman Abd al-Khaliq kind of the sale can be regarded as *riba*, because additional price for the compensation of deffered time.¹⁷

4. Hybrid Contract: Various 'Uqud in One Contract

There is disagreement among ulama on the issues of hybrid contract or multiple agreement in one contract. Hanāfiyyah,

¹⁵ *Ibid*, 313.

¹⁶ Abdullah AthThoyaar, *al-Bunuuk al-Islamiyah Baina an-Nazhoriyah wa at Tathbiq*, (kota:Dar al-Wathon,1414H), 308.

¹⁷ Husamuddin 'Ifanah, *Bai' al- Murābahah li al-Âmir bi al-Syirā'*, cet.1 (Aman:Maktabah Dandis, 1421 H/ 2000), 38.

Malikiyyah, Shafiyyah and Hanābila prohibit this issue except in one case as argued by Malikiyyah and Shafiyyah is combination of sale and hire (ijarah) contract.¹⁸ Some Malikiyyah and Ibn Taimiyah allow the combination of agreements in one contract with the reason is that “the original position of contract (*‘aqd*) is permissible or not prohibited”.¹⁹

The Second Group of Ulama who are Objection to the Practice of the Murābaha in Islamic Banking

The contemporary scholar who questioned the legality of murābaha sale practiced in Islamic Banking is Abdullah Saeed. According to him, the murābaha which is practiced in Islamic banking has no differences with the conventional banks. So, the contract in the murābaha sale leads to the relationship between debtor (Islamic bank)-creditor (Customer), which the buyer agrees to pay the price plus mark-up in credit, total amount paid, and payment due determined in the contract.²⁰

When the Islamic bank and the customer agree to enter the murābaha sale contract, the price will be borne by the customer as a loan to the Islamic bank. Therefore, the relationship between the Islamic bank and the customer is like debtor and creditor. This argument is supported by Muhammad Nejatullah Sidiq who also agrees to eliminate the murābaha contract from the permissible contracts that are run by Islamic banks.²¹

The validity of the murābaha contract in the Islamic bank refers to the components of the murābaha itself, which Muslim scholars have different argument on the practice. However, one of the issues is time value of money in the murābaha practice. There are many Muslim jurists who reject to acknowledge each interest in loan or sale price can be allowed in the basis of time, because of time itself is not money or underlying assets used for loan compensation. For instance, the debtor party accelerates the repayment of his delayed debt by paying an amount that is less than the total amount (face value) of the debt is regarded as *riba*.²²

¹⁸ Ibnu Qudamah, *al-Mughni*, (Turki: Dar Alamul Kutub, 1997), 316.

¹⁹ Ibnu Taymiyah, *Nazariyat al-Aqd*, ... 188.

²⁰ Abdullah Saeed, *Menyoal Bank Shari'ah: Islamic Banking And Interest* (Jakarta: Paramadina, 2006), 147

²¹ Abdullah Saed, *Menyoal Bank Islam, ...*80

²² *Ibid*, 89

In this context, the Islamic bank is not as a seller but as a financee in the transaction of murābaha. Furthermore, the Islamic bank does not hold the goods and not take a risk on them. The demanded good by the customer is attached with a promise to buy it with the down payment in ensuring that the customer is serious and has sufficient payment to complete the sale contract. The sales contract will be completed immediately after the goods are ready to be delivered or after the related documents arrive at the Islamic bank. Accordingly, the Islamic banks do not care about the good condition but it is the responsible of the customers to check its specifications before signing the contract. If there is defection goods, the customer cannot claim to the Islamic bank and bring to the court. The defection goods is handled by insurance company, which insurance cost is included in the total price of the goods that will be borne by the customer. Then, courier is regarded as an agent who deliver the goods to the customers. The cost spent by this action is aslo borne to the customer as well as unexpected cost or payment in the murābaha sale contract.²³:

إذا اجتمع الحرام والحلال غلب عليه الحرام

“If the halal and the haram are joined, then the haram takes precedence.” This legal maxim comes from the hadith of the Prophet prohibiting us before allowing us. To Saeed (2006) the murābaha that is practice in Islamic bank is not valid to Shari’ah.²⁴

Conclusion

The practice of murābaha contract in Islamic banks differs from theory in the classical fiqh. All Muslim jurists or scholars have a different view on the practice of murābaha either it is allowed or prohibited in the Shari’ah. The sale practice in the murābaha is not compliant to Shari’ah cursorily in term of definition, but it is complied with its elements such as first price and profit presentated in the first price. There are two kinds of murābaha is without demand of goods as explained in classical fiqh literature and by demand or order of goods that is known as *al- murābaha lil ‘amir bi al-shira’* atau *al- murābaha li wa’id bi al-shira’*.

Moreover, all Muslim scholars have different opinion analyzing

²³ Abdullah Saed, *Menyoal Bank Islam,..*91.

²⁴ *Ibid*, 95

the legal aspects of murābaha practice. The group one who rejects the practice of murābaha such as Malikiyyah and Syeh Muhammad al-Uthaimin. Malikiyyah argues that the practice of murābaha is leike sale of *al-'inah* that is allowed in Shari'ah, whereas al-Uthaimin views that is practice is *hilah* (a legal device) from borrowing money which is included usury (*riba*) is haram. Second group who allows the practice of murābaha such as Shafiiyyah, Hanafiyyah and Hanābilah that phase of agreement is not binding in legal , but it is legally binding is haram.

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