

# POSITION AND ROLE OF SHARIA BANKS ON *MURÂBAHAH* CONTRACT IMPLEMENTATION

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**Abstract:** The legality and validity of sharia banks still somehow lead to some problems, including a negative view of the use of *murâbahah* contract at the level of practice in the field. Is it true that the application of the sale and purchase agreement of sharia banks, in this case the contract of *murâbahah*, *salam* and *istisnâ'*, is essentially a sale and purchase process? This is a critical question in this research. This is a critical question in this research. Such a miserable view not only emerged in the country, but also voiced in several other Muslim countries. This type of research is a qualitative descriptive method with content analysis of qualitative / inductive data. Data sources are the results of interviews with Sharia Commercial Banks (BUS) BNI, Sharia Business Units (UUS) Permata Syariah and Sharia People's Credit Banks (BPRS) Al-Salam. This research shows that sharia banks which are still dominant in using *murâbahah* contracts are not appropriate. Judging from the aspect of sharia *maqâsid*, the position of sharia banks is basically outwardly not acting as a provider of goods. Sharia banks do not have a stock of goods as a meaning of the use of contracts based on exchange or sale and purchase transactions. In fact, the position and position of a sharia bank is essentially only as an institution mediating financial service providers and not sellers. However, from the perspective of jurisprudence the practice of *murâbahah* in Sharia Financial Institutions (LKS) has fulfilled the pillars and conditions, but in the absence of stock of goods, the sale and purchase transactions of sharia banks seem still as *al-makhârij al-shar'î* (sharia solutions).

**Keywords:** transaction; *murâbahah*; Sharia Bank.

**Abstrak:** Legalitas dan keabsahan bank syariah masih menyisakan masalah. Termasuk pandangan negative tentang penggunaan akad *murâbahah* pada tataran praktek di lapangan. Benarkah bahwa aplikasi akad jual beli bank syariah, dalam hal ini *akad murâbahah*, *salam* dan *istisnâ'*, secara hakiki telah terjadi jual beli?. Inilah pertanyaan kritis dalam penelitian ini. Pandangan miris ini tidak hanya muncul di tanah air, tapi juga disuarakan di beberapa negara muslim lainnya. Jenis penelitian ini adalah deskriptif kualitatif dengan metode content analisis terhadap data-data yang bersifat kualitatif/induktif. Sumber data adalah hasil wawancara kepada Badan Usaha Syariah (BUS) BNI, Unit Usaha Syariah (UUS) Permata Syariah, dan Bank Perkreditan Rakyat Syariah (BPRS) Al-Salam. Penelitian ini menunjukkan bahwa bank syariah yang saat ini masih dominan menggunakan akad *murâbahah* adalah kurang pas. Dikaji dari aspek *maqâsid syariah*, posisi bank syariah pada dasarnya secara lahiriyah tidak bertindak sebagai penyedia barang. Bank syariah tidak memiliki stock barang sebagai pemaknaan terhadap penggunaan akad-akad yang berbasis pada transaksi tukar-menukar atau jual beli. Sebenarnya, kedudukan dan posisi bank syariah hakekatnya adalah hanya sebagai institusi mediator penyedia jasa keuangan dan bukan penjual. Namun, dari sudut fikih praktek *murâbahah* di Lembaga Keuangan Syariah (LKS) sudah memenuhi rukun dan syarat, tapi dengan tidak adanya stock barang, maka transaksi jual beli bank syariah terkesan masih sebagai *al-makhârij al-shar'î* (solusi syariah).

**Kata kunci:** transaksi; *murâbahah*; Bank Syariah.

## Introduction

Islamic law related to business transactions has the intent and purpose of upholding honesty and implementing the values of justice. This step can be taken by designing contract models and

contracts that are in line with the spirit of Islamic teachings.<sup>1</sup> Realizing a just life order is one of the important principles in the field of Islamic

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<sup>1</sup> Afzal al-Rahman, *Economic Doctrines of Islam*, Vol. 1, 1974, p. 48.

economic law (*muamalah*). Business transaction activities and activities (*muamalah*) are carried out by maintaining the values of justice and avoiding the elements of wrongdoing. The principle is that all *muamalah* practices that contain elements of wrong doing are not justified.<sup>2</sup> For example, debt transactions that are requiring the existence of more value, accompanied by collateral. For debts that are far less than the price of collateral, an agreement or condition is made if, within a certain period of time the debt is not paid, the collateral belongs to the debtor. On the contrary, buying and selling, cooperation, rent, services and other transactions are very legal.<sup>3</sup>

Generally, the study of the contract can be seen from the point of view of the advantages of each person according to the physical, for example on the basis of appreciation and respect. Justice that is impartial or only benefits one party is occurring in business transactions. In this type of transaction, the party who agrees and promises to be tightened by the commitment they agreed to when they entered into the contract. On the other hand, in the *tabarru*, agreements are more flexible, and not strictly bound by one-sidedness.<sup>4</sup> Equitable transactions are an impartial paradigm model. To assess the aspects of justice, one of which was returned to the contract agreement or contract between the parties to the transaction.

An important aspect of justice is the creation of the principle of tolerance in *muamalah*. This willingness must arise from the parties to the transaction. As stated in the word of Allah Almighty, *an tarâdin minkum*. Conversely, an attitude that is contrary to the principle of willingness above, can plunge one party over the other party's advantage. All forms of prohibitions in sharia business transactions, in essence are to avoid the emergence of negative attitudes and tyranny to other parties. Willingness or liking for those who transact in the form of both have parallel information (complete information). At

this point, no party will feel cheated. Conversely, if there are conditions that are unknown to one party (where one party does not know the information that the other party knows), then ignorance of one party like this can be considered *tadlîs* or fraud. Ignorance of one of the parties related to the transaction is called assymetric information.

In a *tadlîs* agreement or fraud can occur in four things, namely the quantity of objects, quality, price and time of delivery of goods. Similarly, assymetric information can occur in uncertainty to both parties (the uncertainty that occurs in both parties to the transaction.<sup>5</sup> If this happens then ignorance of the potential for emergence to losses on one party and vice versa gives benefits to the other party is called *gharâr* business practices or uncertainty. Uncertainty or lack of clarity in the new *gharâr* contract will be felt by the parties to the transaction after the end of the agreed business, meaning that the potential loss to one party is very likely to occur.

The existence of the Islamic finance industry was responded by various scientists by looking at the aspect of justice in terms of the application of *muamalah* contracts. Some support though with a few notes. There is also a full criticism so it does not accept the existence of sharia banks. Among those who support with notes, namely: Muhammad Taqi Usmâni,<sup>6</sup> and Abdul Muhsin al-Turkî.<sup>7</sup> Although they have a critical view, they still make a positive contribution so that Islamic banks can still exist. The hope is of course that the sharia banking institution as a financial institution based on sharia principles, can continue to improve itself and have a business management that is committed to sharia values and norms.

The same opinion that criticized the system and mechanism of business in Islamic banks was also tightly popularized by several experts. Their arguments include that the position of sharia

<sup>2</sup> Ma'ruf Amin, *Fatwa dalam Sistem Hukum Islam*, (Jakarta: eLSAS, 3rd print, 2011), p. 303

<sup>3</sup> Abdul Hamîd Borâhîmî, *Al-'Adâlat al-Ijtimâ'iyah wa al-Tanmiyah fî al-Iqtisâd al-Islâmîyah*, (Beirut: Markaz Dirâsât al-Wahdah al-'Arabîyah, 1st print, 1997), p. 32.

<sup>4</sup> Abd. Al-Razâq Ahmad al-Sanhûrî, *Nazâriyat al-'Aqd*, (1st chapter), pp. 80-82

<sup>5</sup> Adiwarman Karim, *Islamic banking: Fiqh and Financial Analysis*, (Jakarta: Rajawali Press, 4th edition, 2011), pp. 31-32.

<sup>6</sup> Muhammad Taqi Usmani, *An Introduction to Islamic Finance*, (Netherlands: Kluwer Law International, 2002), pp. 15-16

<sup>7</sup> <http://www.kantakji.com/banks/الإسلامية/البنوك/مسيرة البنوك الإسلامية/ندوة ترشيد مسيرة البنوك الإسلامية.aspx>, accessed Mei 20, 2016.

banks as a mediatory institution whose principle of using the *murâbahah* contract is termed by Abdullah Saeed as a function of agency work.<sup>8</sup> For Zaim Saidi, agency work functions like this are considered; *First*, as an institution that leads to a conflict of interest. *Second*, denying the main goal *muamalah*, namely certainty and fairness in the transaction. *Third*, the creation of interest-bearing credit transactions and the adoption of the principles of time value of money by banks.<sup>9</sup> The potential uncertainty of this role can be seen as a form of ambiguity and uncertainty which is large enough to lead to injustice.<sup>10</sup>

In the *murâbahah* contract,<sup>11</sup> Abu Abdillah Muhammad Afifuddin explained that the practice in a sharia bank was the same as a credit purchase through a Conventional Bank. Whereas Erwandi Tarmidzi sees it as a sale and purchase transaction, where the seller is not a trader, or the bank is only an intermediary.<sup>12</sup> Or *murâbahah* is fundamentally the same as fixing a fixed interest at the beginning (usury).<sup>13</sup>

The views and arguments on the business practices of Islamic banks, can be mapped into two different choices. This difference motivates the writer to determine where the potential for justice or vice versa is the injustice of the application of *muamalah* contracts in sharia banks. Intersection and differences in the figures in presenting their reviews and opinions, for the author is as a reference material in seeing the approval of sharia banks as a container that applies the values of *muamalah* justice that runs at this time. This paper is intended to discuss the position and role of Islamic banks in *murâbahah* contract financing transactions. To what extent does this discrepancy lead to injustice?

## Method

This research is intended to examine the condition of natural objects, namely reviewing the elements that arise as a result of the use of *murâbahah* contracts in Sharia banks. It also sees the potential for injustice in Sharia banks, in terms of the contractual arrangements that are carried out. So the type of study is qualitative. The inductive / qualitative data analysis is sourced from interview data and direct observation to the Sharia People's Credit Banks (BPRS) al-Salaam, Permata Syariah Bank and BNI Syariah. This research also looks at assumptions that are developing in the community. The data obtained is then validated by applicable and binding rules, such as the DSN-MUI fatwa (Legislative Fatwa National Sharia Board-Indonesian Council of Ulama), review of rules and legislation, Bank Indonesia Regulations, The Financial Services Authority (OJK) regulations and others. Furthermore, the data obtained were assessed through a *fiqh* and *qawâid fiqhiyah* study approach that focused on the *muamalah* field, and as an analytical tool was still based on Islamic studies and Islamic economic law.<sup>14</sup> The results obtained lead the writer to the conclusion inductively and deductively.

The approaches used in this study include, *First*, the Islamic Law Approach. Namely *fiqh*, *usûl fiqh* and *qawâid fiqhiyah*. *Fiqh* is used to trace the opinions of the scholars who are related to the theme of the discussion. *Usûl fiqh* is used to explore the reasons of scholars in establishing a law. Meanwhile, *qawâid fiqhiyah* is used to understand aspects of consideration in the determination of law. *Second*, the Indonesian Legal Approach. Namely, making the rules relating to the research theme as a reference and barometer of research, specifically institutional legal rules, both laws, Bank Indonesia regulations, DSN-MUI Fatwa, operational system standards in financial institutions which are the research locations. *Third*, the Islamic Economic Law (*Muamalah*) approach. This relates to the use of Islamic economic study terms as theories to sharpen the analysis of the object of study.

<sup>8</sup> Abdullah Saeed, *Islamic Banking and Interest: A Study of Riba and Its Contemporary Interpretation*. (New York; Leiden; Koln : Brill, Vol. 2, 1996), pp. 128-132.

<sup>9</sup> Zaim Saidi, *Tidak Syar'inya Bank Syariah di Indonesia*, (Yogyakarta: Delokomotif, Edisi Revisi, 2010), pp. 163-168

<sup>10</sup> <http://pengusahamuslim.com/212-praktek-murabahah-pembelian-kredit-melalui-bank-syariah.html>. accessed Mei 15, 2016.

<sup>11</sup> Abu Abdillah Muhammad Afifuddin, *al-Mausû'ah al-Fiqhiyah al-Kuwaitiyah*, Vol. 36, 318.

<sup>12</sup> Erwandi Tarmidzi, *Harta Haram Mu'amalah Kontemporer*, (Bogor: Berkas Mulia Islami, 12nd print, 2016), pp. 440-452.

<sup>13</sup> Abdullah Saeed, *Islamic Banking...*, pp. 147-148

<sup>14</sup> Râfiq Yûnus al-Mishrî, *Ushûl al-Iqtishâd al-Islâmî*, (Damaskus : Dâr al-Qalam, 1993), pp. 19-21

## The Sharia Bank Position in *Murâbahah* Contract

The *murâbahah*<sup>15</sup> goods remain debatable issue since sharia bank position is considered as mediator party. Towards this *akad* (contract), sharia bank mediates the needs of specific goods between suppliers and certain customers. Sharia bank, in particular condition, is regarded as seller to financing customer. Moreover, sharia bank switches its status as buyer to supplier. The status followed does not present actual existence in terms of sale and purchase purposes and objectives. Instead, it implies that bank transaction is one of the requirements to liberate and free from *muamalat* (transaction) prohibition. In this term, the sharia bank is considered as mediator or facilitator.

The brief comment of certain issue is stated by Sharia People's Credit Banks (BPRS) Al-Salam that sharia financing institution does not provide goods supply. However, sharia bank provides financing services for any kind of customers' necessities. Concerning to banking management, critics to bank status, which is considered itself as a seller, the bank returns everything based on applicable regulations. Specifically, Legislative Fatwa National Sharia Board-Indonesian Council of Ulama (DSN-MUI) allow banking industry as funds collector into savings and investment, as well as distribution function in financing and funding.<sup>16</sup>

<sup>15</sup> Muhammad Rawwas Qal'aji, *al-Mu'amalat al-Maliyah al-Mu'asirah fi Dau al-Fiqh wa Al-Shari'ah*, (Beirut: Dar al-Nafais, 1st print, 1999), p. 89. See also, Kerjasama Pusat Pengkajian Hukum Islam dan Masyarakat Madani (PPHIMM), *Kompilasi Hukum Ekonomi Syariah* (KHES), (Jakarta: Kencana Prenada, 1st print, 2009), p. 46. In Compilation of Sharia Economic Law (KHES), it is mentioned as follow:

1. Seller should accomplish some or all the admitted purchase prices of goods for specification
2. Seller should provide required goods for customers follow by customer's name, the most important is *riba* (interest) free purchases.
3. Seller should inform honestly about the basic goods cost to customers follow by required cost.

*Murâbahah* sale and purchase is one of the *amanah* (trustworthy) sale and purchase types encompass *tauliyah*, *wa'diyah*, *murâbahah*. The first term of *tauliyah* refers to selling goods without changing the base price, however *wa'diyah* defines sale and purchase loss due to lower selling of goods than its base price.

<sup>16</sup> Interview with Director of BPRS as-Salaam, Head of Syariah Goods and Business Bank Permata Syariah and BNI Syariah,

## *Murâbahah* Application in Islamic Financial Institution (LKS)

The *Murâbahah* activity in BPRS As-Salaam is classified into two contracts,<sup>17</sup> they are *murâbahah* with and without *wakâlah*. *Murâbahah-wakâlah* is implemented, for instance, in building materials sale and purchase and retail business in which various goods offered (provide many essential items). Yet, *murâbahah* of non-*wakâlah* commonly occur for motor vehicle purchase from a bank partner. The procedure begins with customers' purchase requisition for funding towards goods model, type, and price. Afterwards, followed banks attempt and deliver the goods to customers regarding to negotiation made by two parties. As a result, such implementation leads sharia bank to have every right in earning profit that sourced from sale and purchase margin. Moreover, profit is calculated from buying subtraction to dealers and selling to customers of funding.

In fact, by investigating bank status and position of goods procurement relationship pattern or examining the customers' intention to bank, bank has a role as fund facilitator to possess desired objects. Nevertheless, it should be able to provide bailouts. The most suitable *akad* to pattern relationship is that bank can apply *ijarah* (rent) scheme, as well as multi-finance *ijarah*. Multi-services *Ijarah* (IMJ) is financing *akad* in which bank provide the fund to customers to achieve the service benefits. Consequently, bank earns service reward (*ujrah*) or fee. *Ijarah* multi-services financing is specifically designated for education and health cost.<sup>18</sup> Thus, the bank is authorized to earn fee and commission over customers' essential goods procurement.

Instead, in sharia-compliant sales and purchase transaction, *murâbahah* contract facilitates the individual to request goods pricelist to sharia bank. Later, the bank as buyer to goods option, for example determining whether the goods is bought or not during

<sup>17</sup> Interview with Cahyo Kartiko, the director of BPRS al-Salaam, at BPRS al-Salaam Office Centre, Jl. Raya Cinere, Jakarta. Juli 18, 2014

<sup>18</sup> Literally explained according to DSN 44/DSN-MUI/VIII/2004: Financial multi-services



a week. In such condition, supplier performs as first seller and bank as buyer with liquidity (cash). The bank sells back to customers who in needs or already booked the goods. It begins with purchase agreement between bank and customer. After both parties deal the price, either deferred payment or by installment, the banks take the agreement with supplier by cash. Otherwise, specified goods will be invalidated. Given sale and purchase illustration is known as *murâbahah mawazî*, or gradual *murâbahah* because it consists of twice transaction. First transaction occurs between bank and supplier, the other is between bank and customer. Supplies as first seller to the bank, while bank as second seller to customer. At the same time, this condition drives the bank into two roles, buyer to supplier and seller to customer.

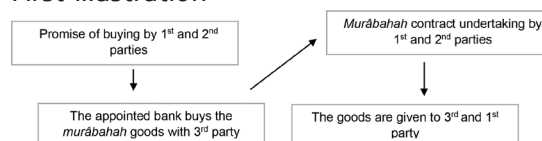
### **Murâbahah and Wa'ad (Promise)**

The aforementioned *murâbahah* above requires promise mechanism. By implementing gradual *murâbahah* or *murâbahah mawazî*, it indicates that promise (buying goods from customer) is generally non-binding promise. Hence, sharia bank is demanded to be aware in ordering goods based on requisition by the cancellation option to supplier for a week. The option of a week gap between bank and supplier also becomes the same option among sharia banks and prospective buyers with shorter time interval.

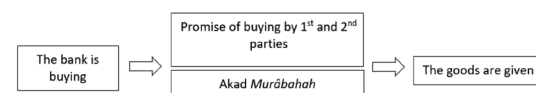
In terms of buying promise, is it possible to incorporate two *akad* at the same time between buy-and-sell and purchase promises? This certainly requires understanding of two things about the time when *wa'ad* was promised. If it is declared before committing *murâbahah* contract, the condition can be accepted. This due to promise adjustment between two parties involved<sup>19</sup>. On the contrary, if purchase promise executed after committing the promise, it brings promise violation.

### **Promise (wa'ad) in murâbahah-scheme fund.**

#### **1. First illustration**



#### **2. Second illustration**



Description: processed data of reading result on *wa'ad*

1<sup>st</sup> party: customer of buyer

2<sup>nd</sup> party: bank

3<sup>rd</sup> party: supplier (goods agent)

The first scheme places the promise in the beginning before *akad* is implemented. Purchase promise scheme of customer can be categorized as sale and purchase order (*murâbahah* to purchase order). This model is widely known as *murâbahah al-Amir bi al-Shira'*. Such *akad* is practically understood as individual request or buyer to another individual to set up and purchase desired goods for buyer. Those who were asked to purchase is selling back with higher price. It is consistent as Imam Syafi'i argues in the book of *Al-Umm*. As second scheme mentions that promise is declared after implementing sale and purchase *akad*. The first scheme tends to be correct which promise is made before *akad* of transaction occurs. Consequently, it leads two parties to understand each other, specifically to things related to rights and duties. However, second scheme distributes the promise before *akad* is implemented. As promise of purchasing is stated before promising, misunderstanding may occur between buyer and seller, resulting dispute among them.

Issue on promises has been debatable whether it is binding or unbinding. Most ulamas, except Malikiyah, argue that promise is legally unbinding. In contrast, a promise is legally bounded based on religious law. Malikiyah ulama also agree that it is legally binding, as cause-related promises. It has been clearly described in promise statement<sup>20</sup>. Contemporary ulamas are more likely to agree that

<sup>19</sup> HR. At-Tirmidzi> : الصلح جائز بين المسلمين إلا صلحا أحل حراما أو حرم حلالا. (رواه الترمذي عن عمرو بن عوف) والمسلمون على شروطهم إلا شرطا حرم حلالا أو أحل حراما.

<sup>20</sup> Ahmad Ibrâhim, "al-'Uqûd wa al-Shurû wa al-Khiyârât", *Majallah al-Qanûn wa al-Iqtisâd*, year IV, vol. 6, pp. 646.

promise is binding (*mulzim*). It is also supported in Mukhtar V held in Kuwait, December 1988. The following *fatwa* (Islamic legal pronouncement) becomes a guidance for sharia banking. It is also included in DSN-MUI *fatwa* on promise (*wa'ad*).<sup>21</sup>

Another explanation to two schemes above indicates that bank does not intend to purchase as well as directly cancel the transaction during *akad*. However, the sellers/suppliers request to the bank, for instance a buying option for a week by cash. Suppliers as sellers then ask the customers who require liquidity (cash) by providing lower price than deferred payment or installment.

“*Murâbahah* financing consists of two types, with and without *wakâlah*. *Murâbahah-wakâlah* presents in building materials sale and purchase and retail business in which various goods offered (provide many essential items). Yet, *Murâbahah* of non-*wakâlah* commonly occur for motor vehicle purchase from a bank partner. The procedure begins with customers’ purchase requisition for funding towards goods model, type, and price. The banks appointed then attempt and deliver the goods to customers based on appointment made by two parties”<sup>22</sup>

Following the demonstration above, this condition is not an issue for *ulamas*. Most *ulamas* have decided allowing such transaction. Thus, the problem emerges is that the sellers want to sell the goods by cash and do not want to defer or pay by installment. Therefore, the seller expects the bank as mediator or third party between seller and buyer. The bank later determines cash price to sellers, and installment price to buyer. In this case, the seller actually does not want to provide financing directly or in installments, but uses a third party, that is the bank. Thus, supplier has no responsibilities as a seller. In fact, the supplier takes steps by providing direct installment financing to the banks. Based on this procedure, the banks become financial bailouts, not as seller or buyer<sup>23</sup>.

## Responsibility over Sale and Purchase Damage Object

Advanced question to the informant proposed about the order of ownership in sale and purchase transaction: “When the customers come for purchase requisition, followed by *akad*. The bank then informs its partner to send the customer’ requested object”.<sup>24</sup>

Following answer implies that bank as an agent to provide bailouts. The banks actually do not have stocks of ready-to-sell goods. The fresh goods are attempted after the order undertook. Nevertheless, the contract applied is sale and purchase *akad*. Bank prefers sale and purchase follow by price deviation without enduring the sale and purchase risks. Does this position comparable in normal condition which banks buy the goods then sell to other sellers with higher price, even though the banks’ ownership period for certain goods is concise?.

The banks’ intention in following question suggests inadequate condition. The illustration as follow: the bank position as original seller, moreover bank looks like imposing the sale and purchase transaction. In fact, the significance of the transaction is providing financial bailouts. The banks as if expect only profit without guarantee the risks.<sup>25</sup> Basically, the bank sell the goods which does not belong to it, but the bank has position as trader. Such undertaking way aim to trick the position of the bank who executes the financial bailouts by pretending as seller. Unlike the condition, bank can have normal position as both buyer and seller at the same time.

The significant of bank intention is facilitating financial bailouts in debts, not in sale and purchase (*murâbahah*). In some cases, customers with adequate information will have the goods, therefore by undertaking *murâbahah bi al-wakalah*, bank is supposed to buy first then sells back to the buyer. This given condition is accepted in *fiqh* (Islamic jurisprudence) regarding to sale and purchase practice towards *murâbahah* contract, however the superficial condition depicts the categorization

<sup>21</sup> Fatwa DSN-MUI No. 85 of 2012 on Promise of Islamic Finance and Business Transaction.

<sup>22</sup> Interview with the officer of BPRS Al-Salaam, Juli 18, 2014

<sup>23</sup> This is often criticized by thinkers and analysis of the banking system, including the Islamic banking transaction system. Among Saeed, Omar Fadillo and Zaim Saidi.

<sup>24</sup> Interview with the officer of BPRS Al-Salaam, Juli 18, 2014.

<sup>25</sup> Response of Samer Kantakji to Rafiq Yunus al-Misri view through email conversation. <http://www.kantakji.com/financial-engineering/بيع%20المراجعة%20في%20المصارف%20الإسلامية.aspx>, accessed Mei 15, 2015.

of debts (installment bailouts). So that, there is a combination of two contracts in a transaction, namely loan (credit) with sale and purchase<sup>26</sup>.

One of indicators that bank is intended as mediator, not a financial bailouts (*murâbahah*) provider to customers, is responsible for risks that may occur over goods transaction loss between bank and customer. Risks occurred are not are charged by the seller (financing fund in the form of *murâbahah*), but it is delegated to other parties. In this case, for instance in vehicle transaction, it is charged to the supplier or dealer or certain insurance institutions that are the bank's partners.

Regarding to this case, it occurs when goods damage bought through a *murâbahah* contract from the bank, the customer is directed to communicate with the dealer, but not to complain to the bank who as a seller. In BPRS al-Salaam, Permata Syariah bank and BNI Syariah bank as well as other financial institutions, become their own obstacles related to claims requested by customers. Why? Because when providing funding through *murâbahah* contract, the bank does not have a show room, service facilities and its kinds.

This essentially increases the gap between meaning of sale or *murâbahah* with the accompanying consequences. Although cases like this are not expected, they are very likely to occur afterwards. The injured party in this case is generally the customer. Sale and purchase agreement with the bank. However, if there is a complaint or claim of damage, it will be given to another party (show room) who usually has service facilities in the case of a new vehicle procurement. The presence of the dealer itself is not in the *murâbahah* contract with the customer.<sup>27</sup> *Murâbahah* contract requires one party's relationship with another party. The contract occurred between the seller (*bai'*) and the buyer (*mushtari*) only breeds a two-way reciprocal relationship. In the case of the emergence of risk, the bank seems to break away and does not want to know what will happen after the *murâbahah*

transaction, including claims for damage to goods that will be given to third parties.

One of the clauses of *murâbahah* financing contract obtained from one of the banks that is in Article 12 stated: "The customer for his responsibility is obliged to inspect both the physical condition of the goods as well as the validity of documents or documents of ownership or rights to the goods concerned. Therefore, if something happens to the said item, since this contract is signed, all risks are entirely the responsibility of the CUSTOMER, and therefore the CUSTOMER promises and hereby commits to release the BANK from all these risks." All risks are entirely the responsibility of the customer.<sup>28</sup>

### The Significance of *Murâbahah* Financing

From the above explanation, the practice of *murâbahah* in sharia banks can be described as financing, with buying – selling and bailout being included. However, the relationship between the bank and its customers is more inclined to the provision of bailouts or loans, as in the following definition: the term financing basically means "I Believe, I Trust." Thus, the notion of financing is submission of present economic value of trust in the hope of regaining a similar economic value in the future.

However, according to Banking Law Number 10 of 1998, financing is the provision of money or claims that can be equaled, based on an agreement between the bank and another party that requires the financed party to return the money or the bill after a certain period of time with compensation or profit sharing.<sup>29</sup> This law explains the meaning

<sup>28</sup> *Murâbahah* contract, Article 12. In case of dispute between the bank and the customer, it will be resolved by an arbitration mechanism through the National Sharia Arbitration Agency (Basyamas) or the Religious Court. See: Fauzan, "Analisis Klausul Arbitrase Dalam Akad Pembiayaan di Bri Syariah Cabang Kota Bengkulu", *Manhaj: Jurnal Penelitian dan Pengabdian Masyarakat*, Vol 5, No 2, 2016, pp. 158-164.

<sup>29</sup> Law No. 10 on 1998 on Islamic Banking. Article 1 Paragraph 12-13. This law states in article 1 paragraph 13 that Sharia Principles are rules of agreement based on Islamic law between banks and other parties for depositing funds and / or financing business activities, or other activities declared in accordance with sharia, including financing based on profit sharing principles (*mudhârabah*), financing based on the principle of equity participation (*mushârahah*), the principle of buying and selling goods with a profit (*murâbahah*), or financing of capital goods

<sup>26</sup> Prophet of Muhammad prohibits buy-and-sell credit with sale and purchase (HR. Abu Dawud, at-Tirmidzi, an-Nasai, Ibnu Majah)

<sup>27</sup> Interview with Novi Wardi, Head of Sharia Product and Business – Consumer Financing at Permata Syariah. August 29, 2014.

of financing that can be applied in various sharia-based contracts. The sharia-based definition of financing is also a development of financing values that are in line with sharia values.

On the contrary, by looking at the status of banks that only manage money, the assumption of Sharia banks running *murâbahah* is not in line with the facts of the field. Sharia banks have no goods or show rooms. Sharia banks generally do not have the goods and also do not take risks on it. The bank function basically focuses on handling related documents. As for the function of sale and purchase agreement, it seems that Sharia banks only perform a formality to legalize borrowing bailout transactions.

The answer to disagreement that Sharia banks are not purely conducting buying – selling transaction is based on the result of the author's interview with the Sharia Supervisory Board (DPS) when questioning the criticism of the practice of buying – selling *murâbahah* in Sharia banks.

“Following the DSN *fatwa*. If someone says that *murâbahah* is not the practice of buying and selling, then he does not understand. The practice of buying and selling will actually occur when the bank has the goods. That is when the bank can sell. There are two technical concepts in *murâbahah*. It can be in the form of bank's direct buying, or a customer as a representative on behalf of the bank to buy what is needed by customers with concept of *murâbahah bil wakâlah*. This *murâbahah* is called *murâbahah albankiyah* or *murâbahah li al-Amir bi al-Syira*, where the bank actually does not have the goods. However, the practice of buying and selling in Sharia banks can be conducted if preceded by a request or order, or it can be directly or represented technically. The AAOIFI *fatwa* does not allow *murâbahah in al-wakalah* directly to the concerned party, but it is represented by a third party on the grounds of *tasyabbuh* (likeness) to the *qard* contract. Meanwhile, the DSN *fatwa* allows customers' representation. *Murâbahah* or

*murâbahah* financing must be understood as an institution providing funds channeled by a buying and selling mechanism where the bank is the seller and the customer is the buyer.”<sup>30</sup>

From the perspective of *fiqh*, the practice of *murâbahah* in sharia banks meets the elements of *fiqh* that govern the validity of the practice of buying and selling. *Fiqh* teaches about the existence of pillars and conditions.<sup>31</sup>

According to majority of *ulama*, the first buying and selling pillar is *ijab qabul*, which is the bond between the seller and buyer as indicated by the exchange of goods or something of value. *Ijab qabul* could be either clearly pronounced or not. The second pillar is those who have the intention (subject) - البيعان, namely there are 2 parties: *bai'* (seller) and *mustari* (buyer). The third pillar is *ma'qud 'alaih* (objects), which are goods that are useful according to the perspective of *syara'*. The fourth pillar is the exchange value of substitute goods. The exchange value of this item substitutes with something that fulfills 3 conditions, namely store of value, can value or price an item (unit of account) and can be used as a medium of exchange. The terms of sale and purchase are summarized in each of the five buying and selling pillars.

Essentially fulfilled in this transaction. The practice of *murâbahah* that currently involves a third party, or the bank, has obtained the legitimacy of the truth from *ulama*. Generally, *ulama*, who are members of organizations that are recognized by the governments of countries with a Muslim majority population, have given permission to the application of *murâbahah* as a sale and purchase agreement in financial institutions. For example, the Indonesian Ulama Council (MUI) through the National Sharia Council (DSN) has brought forth a number of *fatwas*. These *fatwas* serve as guidelines for the practice of economic development activities in the country.

The function of banks in providing or channeling financing is fitting to use the term

based on the principle of pure lease without choice (*ijarah*), or with the choice of transfer of ownership of goods leased from the bank by a party others (*ijarah wa iqtinâ'*).

<sup>30</sup> Interview with Hasanuddin, member of the Permata's Sharia Supervisory Board (DPS)

<sup>31</sup> See, Muhammad asy-Syarbini, *Mugni al-Muhtaj*, (Lebanon: Dâr al-Ma'rifat, 2nd chapter, 1997), p. 2.



financing. The request of buying by customer is accompanied by a contract (promise to buy) accompanied by an advance payment to give a strong message that the customer is indeed serious about the request to buy. In addition, the customer will fulfill his payment when the bank shows complete data to complete the sale and purchase contract. The bank also informs the customer that the goods and related documents are ready.<sup>32</sup> For example, in *murâbahah* or multipurpose financing activities as well as other domestic transactions that require the involvement of the bank's role. Likewise, if a complaint or defect arises in the incorporated object, then the rehabilitation of the defect is given to the insurance company, where the insurance price has been included in the total price that must be borne by the buyer.

Muhammad Faiz stated, "With the prevailing concept, *murâbahah* is in line with *fiqh*, that sharia banks make sure they have the goods before they are traded to customers. There is *murâbahah* without *waqah* and there is *murâbahah* with *waqah*. This is an example of viewpoint of *fuqaha* that compromises between *fiqh* and the situation. This is called *hilah syar'iyah*, and this becomes *makhârij Syar'i* (the way out) for the obstacles arised in the field."<sup>33</sup> The view of DPS Permata Syariah can compromise that the *murâbahah al-bankiyah* model of buying and selling is as a solution to *makhârij al-syar'iyah* between demands in the field and the validity of *fiqh muamalah*.

The authors argued that sharia banking should be able to consider real implementation of sharia contracts. Sharia banks no longer become bailout provider to own assets or various kinds of goods which are usually a public need. The possessed goods can later be offered to customers who need them. For example, currently, BNI Syariah has a *Griya Hasanah* program as an effort to provide housing for customers. Likewise, with the concept of *ijarah* and *Ijarah Muntahiya Bittamlik* (IMBT), the use of *Musharaqah al-Mutanâqisah*

contract at the Permata Syariah Bank seeks to provide heavy equipment, which can later be leased to prospective customers. These steps can be taken as an attempt to justify the argument that sharia banks do not carry out the concept of bailout financing in *murâbahah* transactions (*murâbahah al-bankiyah* or *murâbahah al-Amir bi as-Syir*), but actually sell something owned from the beginning.

This argument is justified by the Permata Sharia's Supervisory Board, that the model of future development of Sharia banks is, "sharia banks clarify their identity and character. Sharia banks cannot be the same as the banking mindset that make money as a commodity. The character of conventional banks that rent money. Then in sharia banks, this concept is wrapped up with schemes relating to sharia contracts: Sharia banks must have the courage to have their own forms and business models which can then be clearly differentiated between conventional banks and sharia banks that is not owned by conventional banks".<sup>34</sup>

The above response desires a form and model of sharia banks that do not "mimic" the building of existing conventional bank systems. The development of sharia banks that currently refer to the above theory is that this financial institution is still adopting an adaptation development model. This model is a sharia bank system that mimics a conventional bank, and screens things that are not in line with and in line with sharia principles.

Another issue of the practice of *murâbahah* contract is diverse object financing in one transaction. Informant of this study stated that responsibility of the recipient of financing facility often does not meet all evidence of expenditure for the use of *murâbahah* facility funds, particularly items of small value. This can also be guaranteed or justified because it is considered trivial by bank marketing. Usually, the bank will take a shortcut by rounding up the use of costs that are considered easy with a report on the use of funds.

<sup>32</sup> FIBER (Faisal Islamic Bank of Egypt), 'Aqd Bai' al-Murâbahah, (Kairo: Faisal Islamic Bank of Egypt).

<sup>33</sup> Interview with Muhammad Faiz, member of the Permata's Sharia Supervisory Board (DPS)

<sup>34</sup> Interview with Muhammad Faiz, member of the Permata's Sharia Supervisory Board (DPS)

## Conclusion

This study with object of sharia banks found the existence of sharia banking business practices that could potentially lead to mismatches in using sharia agreements in an essential way. From the aspect of *maqâshid syariah*, the position of sharia banks through their *murâbahah* contracts can still be criticized that takes the role of seller. The main function of banking is as a mediatory institution of parties who raise funds (funding) and parties channeling funds (financing) to those in need. In addition to business contracts, sharia banks have social contracts. In the aspect of buying and selling, sharia banks basically do not have stock of goods in the form of show rooms, shops, warehouses and others.

The main object of bank function is being engaged in the financial sector. When sharia banks use a sale and purchase contract (*murâbahah*), where the seller is assumed to have a stock of goods, then this practice seems to come out of the bank's function as a financial service provider. Sharia banks, when positioning themselves as sellers, should prepare requested goods or stock commodities.

The use of *murâbahah* contracts in sharia banks, as one of the financing agreements for its customers, although not fully represents the practice of buying and selling, becomes a solution that can be justified from the perspective of *fiqh*. At the very least, the reason for adding a *murâbahah* contract that begins with a promise (*wa'ad*) from the customer to process until the transaction completion can be justified by *fiqh*. This buying – selling mechanism happens because sharia banks are required to first have the object desired by the customer before using the *murâbahah* contract, and then held a transfer agreement from the bank to the customer.

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