AL-SHAJARAH

JOURNAL OF ISLAMIC THOUGHT AND CIVILIZATION
OF
THE INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA (IIUM)

2019 Volume 24 Number 1

AL-SHAJARAH

Al-Shajarah is a refereed international journal that publishes original scholarly articles in the area of Islamic thought, Islamic civilization, Islamic science, and Malay world issues. The journal is especially interested in studies that elaborate scientific and epistemological problems encountered by Muslims in the present age, scholarly works that provide fresh and insightful Islamic responses to the intellectual and cultural challenges of the modern world. *Al-Shajarah* will also consider articles written on various religions, schools of thought, ideologies and subjects that can contribute towards the formulation of an Islamic philosophy of science. Critical studies of translation of major works of major writers of the past and present. Original works on the subjects of Islamic architecture and art are welcomed. Book reviews and notes are also accepted.

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ISSN 1394-6870

MODERN APPLICATIONS OF PROFIT-SALE (*BAYʿ MURĀBAḤAH*) FROM A *MAQĀṢID SHARĪʿAH* PERSPECTIVE

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Abstract

*This paper looks into profit-sale (*murābaḥah*), a nominal sale contract in Islam, in search for Sharīʿah objectives embedded in the corpus according to the terms and conditions of the contract. In light of these objectives, applications of the profit-sale contract as a financing tool by Islamic Finance Institutions (IFIs) are examined. The study discovers that some modern applications bypass the primary Sharīʿah objectives of a sale contract, such as the seller taking liability for possible risks and having real possession of the items on sale. Contrary to this, the seller transfers his liability to the customer and takes possession (qabḍ) of the goods on paper only instead of possession in the real sense. Such applications distort the mode of trading real goods into a mere disguise for an increase in credit or riba.*

INTRODUCTION

The advent of Islamic banking and finance in the Muslim world has resulted in a transition to nominal contracts (*al-ʿuqūd al-musammāt*) in Islam serving new purposes. The contracts that were used merely for exchange-trade are now applied as modern financing tools. One such contract is profit-sale (*murābaḥah*) which is commonly used by Islamic Financial Institutions (IFIs) for financing purposes. *Murābaḥah* to the Purchase Orderer (MPO) and Commodity *Murābaḥah* are examples of such contracts that emerged in the Islamic world of financing. The change in the application of the contracts has obviously come about in response to needs that did not arise in older generations. These new applications have to be evaluated to measure their *Sharīʿah* compliance, rather than relying on IFIs claim that their financing tools are *Sharīʿah* compliant simply because of a nominal legal contract that is hooked into its dynamics. There is no doubt that the nominal contracts are divinely refined trading tools, thus *Sharīʿah* compliant in every aspect. This is because trades and contracts invented by pagan Arabs were still in practice during the advent of Islam. The Prophet (pbuh) fine-tuned these contracts to serve values like *amānah* (trust), and *ʿadālah* (justice) held by Islam. The problem arises when people out of need or unjustified desire apply the contracts such as MPO and Commodity *Murābaḥah* out of context. The allegory for this is a person who has been prescribed cough mixture by a doctor to overcome a persistent cough. If the patient then starts abusing the prescribed cough medicine as a tool to prolong his sleep, he will be unable to justify his abuse of the medicine on the premise that it is a legal product. Similarly, the claim of institutions that they are *Sharīʿah* compliant simply because they are involving contracts that were declared legal at the time of Prophet Muhammad (pbuh) is unjustified as those contracts were meant for trading and not for financing.

Financing tools based on nominal contracts can be *Sharīʿah* compliant if the *Sharīʿah* objectives (*maqāṣid*) of the original contracts are realized in the new mode of application. For this, a two-tiered *maqāṣid*-based methodology is used in this work. First, the definition of the contract and its terms and conditions are

examined thoroughly to find the underlying *Sharīʿah* objectives of the contract. Since these objectives pivot around the contract under investigation, they are known as specific objectives of the contract. There are two more levels of *Sharīʿah* objectives unveiled in relation to the contract under study. Firstly, the general *Sharīʿah* objectives Islam intends to achieve in the realm of *muʿāmalat*, and the higher *Sharīʿah* objectives in the applications of the contract under study as a result of the former two objectives. In the second tier, new applications of the contracts, namely MPO and commodity *murābaḥah,* are evaluated against the discovered *Sharīʿah* objectives. During this stage, the harmony between the man-inspired objectives of the new applications and the *Sharīʿah* objectives discovered in first tier of the research is deliberated.

MURĀBAḤAH DEFINITION AND *MAQĀṢID*

Profit-sale, known as *murābaḥah* in Islam, falls under fiduciary contracts (*buyūʿ al-amānah*) as well as a variety of sales.[1] The reason for incorporating *murābaḥah* under fiduciary contracts is that the buyer trusts the seller to inform him of the original price of the commodity without presenting any evidence to support his claim.[2]

The Shāfiʿi and the Hanbali legal Schools define m*urābaḥah* as: Selling of a commodity at the original price (*ra's al-māl*) or at the price incurred by the seller plus one dirham or so of profit for every ten dirhams and its equivalent, with the condition that both contracting parties are aware of the original price.[3] Imam al-Mawardi illustrates this contract with a real life situation in which a seller says to a buyer: "I sell you this garment, which I bought for a hundred, at a profit of one to ten."[4]

In the Maliki School, *murābaḥah* is: Selling the commodity at the buying price plus a profit known to both parties. The Egyptian Maliki jurist Aḥmad Ibn Muḥammad al-Dardīr in his *al-Sharḥ al-Ṣaghīr* carved the reality of the *murābaḥah* as: The seller selling

[1] Wahbah al-Zyhaili, *Qaḍāya al-Fiqh wa'l-Fikr al-Muʿāṣir*, 251.
[2] *Al-Mawsūʿah al-Fiqhiyyah*, "al-Amānah".
[3] Wahbah al-Zuhayli, *al-Fiqh al-Islāmī wa Adillatuhu,* (Damascus: Dār al-Fikr, 2008), 3765.
[4] Al-Mawardi, *Al-Ḥāwi al-Kabīr*, vol. 6, 339.

something for the price he bought it for, with a profit known to both the seller and the buyer.[5]

In the Hanafi School *murābaḥah* denotes the transfer of ownership of a commodity in exchange for the original price (*al-thaman al-awwal*) with a profit increment.[6]

These definitions concur on a common point that *murābaḥah* is a sale in which one party sells a commodity to the other party with a profit above and beyond the cost price. If the seller sells his goods for the original price without any increment, then the sale is known as t*awliyah* (a non-profit sale). Both of these contracts are legal in Islam based on the incident that took place in the *Hijrah* (migration) of the Prophet to Medina. Abu Bakar, the companion of the Prophet (pbuh) bought two camels for the journey, and the Prophet (pbuh) said to Abu Bakar, "Sell to me (*wallīnī*) one of the camels." Abu Bakar replied, "It is yours for nothing," to which the Prophet (pbuh) said he would not take it for nothing.[7] The verb *walla yuwalli* denotes delegation of ownership to the buyer. A sale without an increment on the original price is named after the verbal-noun *tawliyah*.

Similar to other varieties of legal sales in Islam, *murābaḥah* caters to human needs. This is both the primary purpose and general purpose of all sales. The reason behind these purposes as explained by the scholars is that not every businessman has the necessary information to buy a good commodity. An uninformed buyer has to rely on a well-informed businessman's expertise and should have the assurance of having bought a good commodity in exchange for the cost price plus some profit.[8] Al-Kasāni's (d. 1191) proposition that *murābaḥah* is a sale which is widely practiced and accepted without any objections almost everywhere in the world, clearly shows the

[5] Abu al-Barakāt Aḥmad Ibn Muḥammad al-Dardīr, *al-Sharḥ al-Saghīr ʿala Aqrab al-Masālik ilā Madhab al-Imām Mālik* (Beirut: Dar al-Maarif, n.d.), vol. 3, 215.

[6] Ibid; *ʿAlāuʾddīn Abi Bakar Ibn Suʿud al-Kasāni, Badāiʿ al-Sanāiʿ fi Tartīb al-Sharāiʿ* (Quetta: Maktabah Rashid, n.d.), vol. 4, 461.

[7] ʿAlaʾ Eddin Kharofa, *Transactions in Islamic Law* (Kuala Lumpur: A. S. Noordeen, 1997), 163-164.

[8] Burhān al-Dīn Abu al-Hasan Ibn Abī Bakar al-Mirghinānī, *al-Hidāyah Sharḥ Bidāyat al-Mubtadīʿ* (al-Qāhirah: Dār al-Hadith, 2008), vol. 3, 78.

continuity of demand for *murābaḥah*.[9] This endless demand testifies to how effective *murābaḥah* contracts have become in assisting people to fulfill the requirements of their everyday needs.

Murābaḥah not only serves the general purpose of *Sharīʿah* (reviewed earlier), but also serves a particular purpose, which is highlighted in the difference between *murābaḥah* and *tawliyah.* The line of distinction between the two contracts is selling at a profit over and above the cost price. This particular purpose of *murābaḥah* relates to currency and availability of wealth, goods and commodities that is governed by the fifth cardinal purpose of *Sharīʿah* known as wealth preservation (*ḥifẓ al-māl*). One of the rubrics of wealth preservation is the flow and distribution of wealth. Not allowing for profits in sales will discourage people from sharing their goods, with the result that there is incentive to release goods from their possession if there is no benefit in the exchange. Flow and distribution of wealth is encouraged in the Qur'an when it states that wealth should not become stagnant among the rich (59:7):

> What Allah has bestowed on His Messenger (and taken away) from the people of the townships, - belongs to Allah, - to His Messenger and to kindred and orphans, the needy and the wayfarer; in order that it may not (merely) make a circuit between the wealthy among you. So take what the Messenger assigns to you, and deny yourselves that which He withholds from you. And fear Allah. For Allah is strict in punishment.

As a result of natural weaknesses and a loss or lack of means, people may not be able to participate in businesses and projects that can make money. The whole idea of *infāq* (charity for the poor and needy) is to assure circulation of money. The aforementioned verse proposes flow of wealth at all levels of society as an economic policy.[10] Similarly, allowing contracts such as *murābaḥah* allows for the smooth flow of wealth and goods among the people.

Al-Mirghināni (d. 593 AH) observed that since the *murābaḥah* sale is largely used by people to fulfill their needs, it is founded on

[9] *Badāiʿ al-Sanāiʿ fi Tartīb al-Sharāiʿ*, vol. 4, 460.
[10] Amin Ahmad Islahi, *Tadabbur-i Qur'an* (Delhi: Taj Company, 1997), vol. 8, 292.

the grounds of trust (*amānah*) and abstention from deception (*khayānah*).[11] The price which the seller discloses is a trust by which the two parties can close an agreement for the profit amount proposed by the seller. It is imperative for the seller to be truthful and abstain from treachery and deceit. The textual authority for this is provided in the Qur'anic verse (8:27):

> "O you that believe! Betray not the trust of Allah and the Messenger, nor misappropriate knowingly things entrusted to you."

The purport of the verse is endorsed by the *hadīth* where the Prophet directed: "He who deceives us is not one of us."

To retain the elements of trust in *murābaḥah*, stipulating the contract with terms and conditions is necessary. These terms and conditions in *maqāṣid* discourse are known as mediums (*wasā'il*) which enable *murābaḥah* contracts to serve both their general and particular purposes. Adding to the sale conditions in general, *murābaḥah* has its own specific conditions including:

- Knowledge of the original price: the seller must reveal the original price or acquisition price to the purchaser.
- Knowledge of the profit the seller makes: the amount of profit in relationship to the total price must be revealed.[12]

The purpose is to avoid any type of misrepresentation in regard to the price and profit. The purpose of *Sharīʿah* in demanding the seller to be honest and abstain from any type of discrepancy and misrepresentation is justice (*ʿadl*), which is one of the general purposes of *Sharīʿah*. These two conditions of *murābaḥah* fine-tune the contract to achieve both its specific purpose of *murābaḥah* and its general purpose.

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[11] *Al-Hidāyah Sharh Bidāyat al-Mubtadi* (al-Qahirah: Dar al-Hadith, 2008), vol. 3, 78.

[12] *Badāiʿ al-Sanāiʿ fi Tartīb al-Sharāiʿ*, vol. 4, 461-465; Wahbah al-Zuhaili, *Qaḍāya al-Fiqh wa'l-Fikr al-Mu'āṣir*, 252.

MODERN APPLICATIONS OF *MURĀBAḤAH*

Murābaḥah is primarily a trading instrument and not one of financing although in its modern applications it is also used as a mode of financing, especially in the case of MPO (*murābaḥah li'l-amīr bi'l-shira'*). This is a secondary purpose and usage of *murābaḥah,* which has dominated and almost completely suppressed its primary purpose as a trading instrument.[13] This frequent practice of *murābaḥah* involves a transition from its primary purpose to a secondary one, and it has for this very reason come under criticism. It should also be noted that the use of *murābaḥah* as a mode of financing is not a problem in itself, provided it does not distort its basic purpose as a mode of trading over real goods into a mere disguise for an increase in credit or *riba*. In utilizing the traditional trading instruments for financing purposes, the IFIs should employ them so as to fulfill the purposes of *Sharīʿah* as much as possible. Yet the reality has moved in a different direction. This has prompted some scholars to propose that *murābaḥah* for financing purposes should only be used in situations or cases where *muḍārabah* and *mushārakah* cannot work.[14]

Commodity *murābaḥah* is another financing tool commonly used by IFI's, which in reality is *tawarruq*. *Tawarruq* is derived from the word *al-wariq* which means money, while *tawarruq* means a method or way that is used by someone who wants to obtain money.[15] Technically *tawarruq* refers to a set of sales contracts such as *murābaḥah,* where a buyer buys an asset from a seller for a deferred price; the buyer then subsequently sells the asset to another buyer for cash at a lower price than the deferred price.[16] In other

[13] Walid Hegazy, "Islamic Liability (Daman) as Practiced by Islamic Financial Institutions," *Wisconsin International Law Journal*, vol 25 (no. 4): 817.

[14] Taqi Usmani, *An Introduction to Islamic Finance*, 107; Kelly Holden, "Islamic Fiance: "Legal Hypocrisy" Moot Point, Problematic Future Bigger Concern," *Boston University International Law Journal*, vol. 25, 357.

[15] Uthmani, M. T, "Ahkām al-Tawarruq wa Tatbīqātuhu al-Masrafiyyah." *Majallah Majma' al-Fiqh al-Islami*, 2009, accessed on june 4, 2017, http://www.isra.my/media-centre/downloads.html?task= finish& cid =84&catid=20.

[16] This definition was accepted by the OIC Fiqh Academy in their deliberation on the issue on 1st November 1998 (11 Rajab 1419 AH). See also (*Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyah*, 2005).

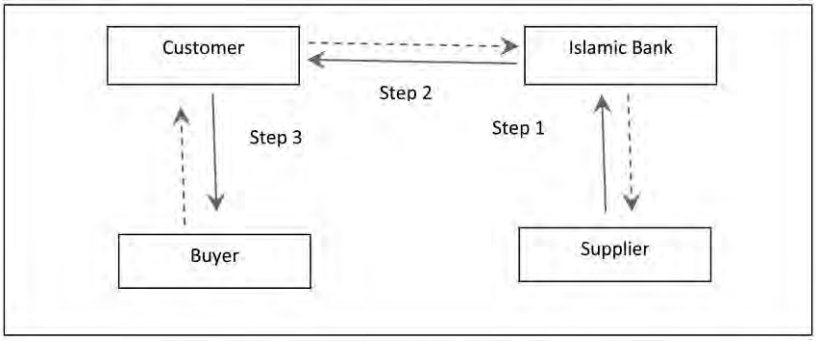
words, the buyer buys a commodity in a deferred payment in order to sell it to a third party at a lower price for cash. In this contemporary market—especially in Malaysia—*tawarruq* is known as commodity *murābaḥah* while in other countries such as those in the Middle East, it is known as *tawarruq*. It is named *tawarruq* mainly because it is not the real intention of the buyer to take benefit from the commodity purchased, but rather to facilitate an individual to obtain liquidity. For this reason some prefer to call *tawarruq* Islamic monetization.

Referring back to commodity *murābaḥah*, it is currently used widely in today's market as a financing tool. The Central Bank of Malaysia uses commodity *murābaḥah* as the largest source of obtaining funds with a percentage of 22.4% compared to *murābaḥah* (18.7%), *mushārakah* (9.2%), BBA (12%), *ijārah* (18%) and others.[17] In addition, IFIs extensively use commodity *murābaḥah* in offering their products, be it financing or deposit products to obtain funds, rather than using *muḍārabah* and *mushārakah*. The extensive use of commodity *murābaḥah* applications have secured profits for the IFIs compared to the other financing tools that cannot guarantee such a profit. This is because the structure of commodity *murābaḥah* involves a trading concept consisting of a mark-up sale that takes place between the customer and bank with a promised return.[18]

The diagram illustrates the mechanism of commodity *murābaḥah* applied in financing

[17] Bank Negara Malaysia.

[18] Ahmad Aizuddin Hamzah, Farah Shazwani Ruzaiman, Haneffa Muchlis Ghazali "Islamic Investment Deposit Account through Mudharabah and Commodity Murabah Contract: An Overview" (paper presented at the Persidangan Kebangsaan Ekonomi Malaysia ke 9 (PERKEM-9), Kuala Terengganu, Terengganu, October, 17-19, 2014, 28-33.



(Source: Author's development)

The diagram shows the modus operandi of *tawarruq* or commodity *murābaḥah*. At step one, the Islamic banks will buy an asset from a supplier, after the customer appoints the Islamic bank as the agent through contract of *wakālah*. At step two, the Islamic bank sells the asset to the customer, with a deferred payment for a certain period of time. The customer then sells the asset to another buyer with a spot payment that is less than the price for the deferred payment for the purpose of obtaining cash. The deferred price of the deal between the bank and the customer becomes a financial obligation or liability to the customer that needs to be paid to the bank inclusive of the profit margin ~~as~~ expected by the bank. For deposit mobilizing currently used by IFIs in Malaysia, the mechanism is similar to the one used in financing, with the difference being the change of the position of the bank as buyer and the customer as seller. In this case, the deferred price becomes a liability to the bank that needs to be paid to the customer with a profit.

The application of contemporary commodity *murābaḥah* in Islamic finance either as a deposit or financing product remains a debatable issue. Firstly, it is being criticized as one of the tricks or *ḥīlah* to circumvent riba-based transactions in order to the *Sharīʿah* conditions of a valid sale and purchase contract. Adding to the conditions stipulated on valid sales, the sales contract requires the contracting party to have a real intention of owning the asset for their own benefits. However, the intention of the contracting party entering the commodity *murābaḥah* contract becomes an issue when it is merely to facilitate liquidity or to obtain quick cash and not due

to an interest in the asset, as required in a valid sales contract. As such, it is utilised as merely a tool to facilitate cash in the absence of valuable assets that resemble *riba*-based transactions such as a loan.[19]

Secondly, it is controversial because of the non-delivery issue which becomes apparent during certain applications where a clause states that a buyer should not have any intention to take delivery, which is against the *Sharīʿah* objectives of a sales contract.[20] Thirdly, the implementation of dual agency in commodity *murābaḥah* also becomes an issue and falls under criticism. This is because IFIs are appointed to only handle a few tasks such as buying and selling the commodity on behalf of the customer and to manage all transactions without much interference from the customer.[21]

There are two major sets of Islamic legal rulings in relation to traditional practices of commodity *murābaḥah* or *tawarruq*. A majority of scholars (*jumhūr*) are inclined towards the permission in the classical application of *tawarruq*, although it is not specifically discussed in the legal works of the Schools. Only under the discussion of *bayʿ al-ʿīnah*, is it discussed randomly in some treatises. Opposing this majority opinion of the scholars are the opinions of Ibn Taymiyah and his disciple Ibn Qayyim of the Hanbali School, which completely disallow for *tawarruq*. The reason behind their position is that it is a legal trick (*ḥīlah*) meant for the procurement of *riba*.[22] The modern application of commodity *murābaḥah* in the market today is a controversial issue and is under criticism due to its structure which is primarily organized to facilitate the operation in order to acquire liquidity. The modern commodity *murābaḥah* is offered by the IFIs as an alternative to facilitate the customer in need of cash without any collateral or assets to enter into

[19] Refer to Resolution No.179 (19/5) OIC Islamic Fiqh Academy, available at www.isra.my.

[20] Asyraf Wajdi Dusuki, "Can Bursa Malaysia's Suq al-Sila' (Commodity Murābaḥah House Resolve the Controversy over Tawarruq?" (A research paper, ISRA, 2010).

[21] Refer to Resolution No. 179 (19/5) OIC Islamic Fiqh Academy, available at www.isra.my.

[22] Wahbah Al-Zuhayli, *Al-Fiqh al-Islāmiy wa Adillatuhu* (Beirut: Dār al-Fikr, 1989).

a business transaction. This defies the concept of realism in Islamic finance.

Most of the contemporary Muslim scholars adhere to the Islamic rulings on *tawarruq* held by the classical Muslim Jurists. However there is a spectrum of opinions when it comes to the ruling of modern applications of commodity *murābaḥah*. The distinction between the traditional and the modern *tawarruq* is the incorporation of an organized element. It is this element that causes the change in traditional *tawarruq*'s basic structure and concept. The International Council of Fiqh Academy (ICFA) has determined that the contemporary application of *tawarruq* is impermissible because it involves elements of deception and procurement of *riba* through simultaneous transactions between the IFIs and their customers, in exchange for a financial obligation.[23] The ICFA has resolved that the application is not permitted, in as much as there is cooperation between the IFIs and their customers, whether it is explicitly, implicitly or inadvertently done as a common practice.[24]

However, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) in its *Sharīʿah* standard (30) permits the application of contemporary *tawarruq* provided that all the guidelines and parameters outlined are observed.[25] Similarly, in the resolution made at the seminar '*al-Barakah li al-Iqtisād al-Islāmiy*,*'* some requirements need to be fulfilled to make the application permissible. These requirements which include legal documents and the non-involvement of any fictitious commodity should be implemented when there is urgency.[26] In Malaysia a resolution was made in 2005 by the *Sharīʿah* Advisory Council of

[23] The International Council of Fiqh Academy, which is an initiative of the Organization of Islamic Conferences (OIC), in its 19th session which was held in Sharjah, United Arab Emirates, from 1 to 5th of Jamadil Ula 1430 AH, corresponding to 26 to 30 April 2009.

[24] "Al-Tawarruq: Haqiqatuh, Anwaʿuhu (al-Fiqhi al-Maʿruf wa al-Masrifi al-Munazẓam," *Majmaʿ al-Fiqh al-Islami al-Duwali* (2009), resolution no. 179 (19/5), accessed May 30, 2017, http://www.fiqhacademy.org.sa.

[25] "Fatwa in Islamic Finance," ISRA.

[26] Resolution no. 23/3, Nadwah al-Barakah al-Thālithah wa al-ʿIshrun li al-Iqtisād al-Islāmiy, accessed June 5, 2017, http://www.islamfeqh.com. Accessed on 24/01/12.

Bank Negara Malaysia (BNM),[27] which permits the contemporary application of *tawarruq* by IFIs with some *Sharīʿah* and operational requirements.[28] The resolution was based on the following evidences:[29]

1. Al-Qur'an (*al-Baqarah* 2: 275): "And Allah permits trading and prohibits *riba*." Based on the meaning projected by this verse, the scholars were of the opinion that *tawarruq* is permissible as a part of trade. It may occur for the purposes of attaining cash, with or without the knowledge of counterparties. It may also occur due to a critical situation of need or as a common activity by certain parties or institutions.
2. Legal Maxims: The original ruling in *muʿāmalat* is permissibility, except if evidence shows the prohibition.
3. Views of contemporary scholars that permit the usage of *tawarruq:* For instance, opinions based on the Hanafi, Shafi'i, and the Hanbali legal Schools.

According to Shaikh ʿAbd Al-Aziz Ibn Abdullah Al-Bāz, one of the members of the Senior Council of Scholars (*Hai'ah Kibār al-ʿUlamā'*), organized *tawarruq* is permissible even though the intention is merely to obtain money.[30] The permissibility of *tawarruq* has been further supported by several *Sharīʿah* Advisors of Islamic banks, such as the Arabian Islamic Bank, the Kuwait Finance House, National Commercial Bank, Arab National Bank, Shamil

[27] This resolution was held on 21st Jamadi al-Akhir 1426H, corresponding to 28th July 2005.

[28] "Tawarruq", BNM, accessed May 31, 2017, www. bnm.gov.my/guidelines/05_ shariah/ PD_ Tawarruq.pdf.

[29] "Resolusi Syariah dalam Kewangan Islam", BNM, 94, accessed May 30, 2017 http: //www.bnm.gov.my/microsites/financial/pdf/resolutions/shariah_resolutions_2nd_edition.pdf.

[30] Al-Baz, *Majmuʿ Fatāwa wa Maqālat Mutanawwiʿah, Muhammad ibn Sa'd*, vol 19, (Riyadh: Dar al-Qasim, n.d) pg. 95-97

Bank, al-Rajhi Bank, Abu Dhabi Islamic Bank, Investment Dar (Kuwait), Saudi British Bank and Saudi American Bank.[31]

One can infer from the position of contemporary scholars that as long as there is no explicit text denoting illegality *tawarruq* can still be an alternative to avoid the practice of *riba,* provided its parameters are well observed. It has the mechanism to assist individuals in obtaining cash via trading of commodities instead of becoming involved in a loan, which is obviously prohibited. The main objective behind the IFIs allowance of *tawarruq* is to enable customers with no collateral or assets to obtain cash for their use. With this application, economic transactions can take effect between the IFI and its customers. The application is one alternatives employed by IFIs to provide customers with much needed cash. Furthermore, *tawarruq* is the key financing structure for IFIs as they heavily rely on this mechanism. A sudden withdrawal would result in a negative impact on the industry. For the time being the use of *tawarruq* must be controlled and should be implemented according to the guidelines and parameters that have been outlined by authorizing bodies, until and unless new structures are found to replace the mechanism of *tawarruq*.

The contemporary applications of *murābaḥah* based on financing products by IFIs, such as the MPO and commodity *murābaḥah* that were discussed earlier, have also come under criticism. This is a result of reducing and bypassing almost all their *fiqh*-stipulated conditions, by taking over delivery and possession, transfer of ownership, and agency matters in such a way that the IFI passes the entire risk of possible damage, loss and destruction of the goods onto the customer. This manner of use and practice of *murābaḥah* also invokes the *Sharīʿah* principle of 'blocking the means (*sadd al-dharāiʿ*)' in that a lawful contract is used as a means of procuring unlawful gain. Some critics have gone on record to say that these compromises in the practice of *murābaḥah* are tantamount to tricks or *ḥīlah,* aimed at the procurement of *riba*, which is unlawful.[32] The late Wahbah al-Zuhaili drew a parallel between *ʿīnah*

[31] Al-Rashidi, *'Amaliyyat al-Tawarruq wa Tatbīqātuha al-Iqtisādiyyah fi al-Masārif al-Islamiyyah,* (Amman: Dar al-Nafais, 2005).

[32] Wahbah al-Zuhayli, *Qaḍāya al-Fiqh wa'l-Fikr al-Mu'āsir*, (Damascus: Dar

and MPO, especially when it involves cross border transactions between two or more countries, wherein "the real but often undeclared purpose is an increase in debt, and people are commonly critical of it as it leaves little to differentiate it from an interest-based loan obtained from a conventional bank openly and without any recourse to *ḥīlah*."[33] Ibn Taymiyah's explanation underlines a principle to decide which *ḥīlah* is appropriate and which is not. He states that if a *ḥīlah* opposes the outcome of 'blocking the means' then it is a mockery. 'Blocking the means' in the form of stipulated conditions are to achieve the purpose of contract which blocks the means to procure *riba.* However, if the *ḥīlah* is used to procure *riba* and an unjust appropriation of wealth then it will oppose the very purpose of the contract and its conditions. The *Sharīʿah* does not allow *ḥīlah* that demolishes the *maṣlaḥah* or purpose of the Divine lawmaker.[34]

It is worthwhile to mention here that the *Resolutions of the Securities Commission Sharīʿah Advisory Council* published and updated more than once by the *Sharīʿah* Advisory Council (SAC) to the Securities Commission of Malaysia has little to say on *murābaḥah*. The collection itself has sections that include *mushārakah*, *baiʿ dayn*, *baiʿ al-ʿīnah*, *baiʿ al-ʿurbūn*, *baiʿ al-muzāyadah*, but none on the *murābaḥah* contract.[35] The same can be said of the BNM publication entitled *Sharīʿah Resolutions in Islamic Finance*.[36] The work focuses on industry practices and procedural matters concerning *murābaḥah* applications, but has little to say on the *Sharīʿah* aspects of the contract, let alone the purposes or *maqāṣid* that *Sharīʿah* seeks to realize through *murābaḥah*. The fact that *murābaḥah* is the most widely applied *Sharīʿah* contract in

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al-Fikr, 2006), 260.

[33] Ibid.

[34] Wahabah Zuhayli, *Usūl al-Fiqh al-Islāmiy* (Beirut: Dar al-Fikr al-Mu'asir, 2004), vol. 2, 942; Muhammad Hashim al-Burhāni, *Sadd al-Dharāi' fi al-Sharīʿah al-Islāmiah* (Dimashq: Dar al-Fikr, 1995), 86-87.

[35] *Shariah Advisory Council (SAC) Securities Commission Malaysia, Resolutions of the Securities Commission Shariah Advisory Council* (Kuala Lumpur: Securities Commission, 2nd edition, First Reprint, 2007).

[36] Bank Negara Malaysia, *Shariah Resolutions in Islamic Finance* (Kuala Lumpur: Bank Negara Malaysia, 2nd edition, 2010).

Islamic banking and finance, not only in Malaysia but in almost all Muslim countries, makes one wonders why such scant attention is given to the *Sharīʿah* blueprint of this contract.

The elements of *murābaḥah* that have come under criticism require a response from a *maqāṣid* perspective. These elements are possession (*qabḍ*), risk, liability (*ḍaman*), profit, and transparency.

It is a *fiqh* requirement of *murābaḥah* that the IFI takes an actual or constructive possession of the item before selling it. Taking possession has a specific purpose or *maqṣad* in *Sharīʿah*, which is that the IFI assumes the risk of ownership of the goods it intends to sell. Adding to this, possession clearly identifies the point of time the risk transfers from one party to another in a sales contract. A time interval is required between the buyer taking possession of the goods and selling it by way of *murābaḥah* to a third party.[37] Field research conducted by IFIs in Pakistan, Saudi Arabia, Kuwait and Egypt shows that the IFIs *murābaḥah* contracts and credit sales arrangements are designed in a way that minimizes the period of liability for the risks associated with the *murābaḥah* goods.[38] Adding to this, the time interval justifies the profit the IFIs are making on top of the cost price of the *murābaḥah* goods. Abu Bakar Ibn al-ʿArabi (d. 543 A.H.) in his *Kitāb al-Qabas* says, amongst the sales prohibited by the Prophet (peace be upon him) includes a sale which procures profit without liability (*ribh ma la yuḍman*). In explaining the reason of prohibition, he states that such sales are not valid because "no liability" can exist by not possessing the commodity or by selling something which one does not have.[39] The liability of the risks by possessing the commodity justifies the mark-up of the original price. If the IFI designs the MPO in such a way that it does not have to bear the risks, then their profits will not be justified.[40]

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[37] *Accounting and Auditing Organisation for Islamic Financial Institutions (AAOUFI)*, (Sharia Standards for Islamic Financial Institutions, Bahrain, 2010/1432), 120.

[38] Walid Hegazy, "Islamic Liability (Daman) as Practiced by Islamic Financial Institutions," vol. 25, (4): 818.

[39] Abu Bakr Ibn al-Arabi al-Mu'āfiri, *Kitab al-Qabas fi Sharh Muwatta Malik Ibn Anas,* ed. Muhammad Abd Allah Walad Karim (Beirut: Dar al-Gharb al-Islamic, 1992), vol. 2, 792 & 799.

[40] Walid Hegazy, "Islamic Liability (Daman) as Practiced by Islamic Financial

Undertaking risks in MPOs is the line of distinction between IFIs and the conventional banks, which lend money on the basis of interest. Here one can say that the *Sharīʿah* prohibits *riba* because the lender does not take any risk-liability, whereas the profit in *murābaḥah*-based lending is permitted because the lender undertakes the risk-liability.[41] Taking this into consideration the IFI should receive the item from the supplier before selling it to the customer. It is permissible, however, for the IFI to authorize an agent to be responsible for delivery on its behalf.

Murābaḥah is a fiduciary contract and it is, as such, a requirement that both the price of the item and the profit margin that the IFI makes are clearly known to the contracting parties, and also that there is complete transparency over the mode of payment, whether prompt or by instalments, all of which are duly recorded in the contract. The purpose of this is to prevent ambiguity and disputes arising between the contracting parties. The IFI may ask the customer to provide a third party guarantee or a pledge that ensures due performance by the customer of the MPO.[42] In the case of default payments, if the IFI penalizes the purchaser in the form of money, the IFI cannot consider the money as part of their profit. The received amount should be isolated and used for charitable purposes. This is to avoid charging money on the debt existing between the IFI and the purchaser.[43]

Al-Zuhaili has a word of praise for some Islamic banks for their correct practice of MPO, which allows, inter alia, the parties the option to choose instead of binding them to an obligatory promise. They also acquire possession (*qabḍ*) of the goods and are ensured that the bank has legal ownership over them, which may also entail

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Institutions," 825; Kelly Holden, "Islamic Finance: "Legal Hypocrisy" Moot Point, Problematic Future Bigger Concern," *Boston University International Law Journal*, vol. 25, 349.

[41] Maulana Ejaz Ahmad Samadani, *Islamic Banking & Murabaha* (Karachi: Darul-Ishaat, 2008), 35.

[42] *Accounting and Auditing Organisation for Islamic Financial Institutions (AAOUFI)*, (Shari'a Standards for Islamic Financial Institutions, Bahrain, 2010/1432), 1223.

[43] Walid Hegazy, "Islamic Liability (Daman) as Practiced by Islamic Financial Institutions," vol. 25, (4): 823; Taqi Usmani, *An Introduction to Islamic Finance*, 97.

warehouse and storage facilities for delivery and *qabḍ*. Zuhaili adds that "one can accept permissibility in principle of cross border *murābaḥah* espoused with a binding promise and other provisions pertaining to agency and so forth on condition, however, that the *murābaḥah* follows its genuine purpose and is not simply practiced as a disguise for interest." The issue of *murābaḥah* thus boils down to one following its true purposes or *maqāṣid*.[44]

CONCLUSION AND RECOMMENDATIONS

The *specific Sharīʿah objective* of *murābaḥah* is to sell goods for a price made up of cost and profit. Through this objective, *murābaḥah* can assure the quality of goods for buyers and win their confidence. Quality and right goods in the market fulfill the needs of consumers, a clear example of a particular objective serving the general objective of a sale. This particular objective also serves the fifth cardinal objective of Islam, that is, preservation of wealth (*ḥifẓ al-māl*). One of the rubrics of the latter objective is smooth-flow in distribution of wealth. When Islam declares the lawfulness of *murābaḥah*, it encourages production and distribution of goods.

In order to ensure that *murābaḥah* is ethically sound, the *Sharīʿah* assigned a trust (*amānah*) dimension within the *murābaḥah* contract that is trust in the sense that the seller has to disclose the cost price without cheating and/or deception. On top of this, the seller must reveal the amount of profit added to the cost price. For this dimension, the *murābaḥah* earned its name as a trust-sale (*bayʿ amānah*). This dimension delivers transparency in the deal concluded by the contracting parties.

The primary purpose of *murābaḥah* is trade, and applying it as a financing tool is a secondary purpose. Allowing the secondary purpose to surpass its primary purpose should be out of necessity, so that profit-sale is only applied as a financing tool when other products such as *muḍārabah* and *mushārakah* are not applicable.

Murābaḥah is always based on the trade of a real good. Without a real good, it will be a disguise for increasing credit or *riba*.

[44] *Accounting and Auditing Organization for Islamic Financial Institutions (AAOUFI)*, (Shari'a Standards for Islamic Financial Institutions, Bahrain, 2010/1432,) 261.

Some scholars have expressed this disguise as a trick (*ḥīlah*) and a back door to *riba*.

The real trade of a real good requires IFIs to have proper delivery and possession of the goods. It requires them to provide an interval between possession and delivery so they can become liable to the risks of their goods and have the right to add a profit to the cost price, due to their risk-liability.

Special detailed parameters and resolutions for *murābaḥah* as a financing tool are expected to be written and published by *Sharīʿah* committees of IFIs. The resolutions should address the following elements of *murābaḥah* that normally fall under criticism:

1. Real possession and delivery of goods to be sold
2. Interval between possession and delivery of goods
3. Risk and liability
4. Profit and cost price
5. Transparency

AL-SHAJARAH
Vol. 24, No. 1, 2019

Contents

ARTICLES IN VOL. 24 No. 1, 2019

WoS-Indexed under *Arts & Humanities Citation Index, Current Contents/Arts and Humanities* and **Scopus**

ISSN 1394-6870