



***Syari'ah* Appraisal On *Bay' Murabahah* (Mark Up Sale) Product In Islamic Banking And Financial Institutions In Indonesia**

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ABSTRACT

This study is designed mainly to assess the *Syari'ah* compliance on *bay' murabahah* (mark up sale) product offered by Islamic banking and financial institutions in Indonesia. This study employs the descriptive analysis based on *syari'ah* perspective. As a result, the study found that the product of *bay' murabahah* (mark up sale) offered by Islamic banking and financial institutions were problem and not totally Islamic. The most reasonable arguments of the problem were derived from the operating system of Islamic banking and financial institutions which is parallel with the conventional counterparts that prohibited by Islam. The problem are as follows: 1) the purchased items needed by the customers are not bought and not exist at the time of contracting; 2) mark-up price method to determine the profit margin faces problem; 3) and the Islamic banking and financial institutions have involved in mandate sale (*bay' al-fuduli*) element that is prohibited by Islam; 4) the presence of fines for the late fee installment. Therefore, to overcome the significant problem, it is necessary to reform the current operation of Islamic banking and financial system. Besides that, the optimalization of the *Shari'ah* supervision (*al-ra'qabah Shariyyah*) aspect should be taken positively and seriously by the National *Syari'ah* Council of the Indonesian Ulama' Council in order to prevent the Islamic banking and financial institutions from breaking the *Syari'ah* principles and values.

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Introduction

Islamic banking and financial institutions have evolved and adopted various Islamic sales contracts to help finance their customers. These contracts are deeply expressed in *syari'ah* and developed through a long history by Islamic economic scholars. One of them is *bay' murabahah* (cost plus value or mark up sale) product as practiced by Islamic banking and financial institutions. But in the modern world, the term is already an extension of its classical sense. Its application to Islamic banking and financial institutions is that customers apply financing with the system of *murabahah* to Islamic banking and financial institutions to buy goods (productive and consumptive) that are known to its properties, where customers and banks know the goods are real and by the bank ready to hold goods required by customers. Then made a contract or agreements between the customer and the bank or micro financial institutions regarding their ability of financial institutions to buy the desired goods and the ability of customers to buy the goods. This contract is not a contract of sale, but a contract to hold a sale.

Bay' murābahah (cost plus value or mark up sale) product as used in Islamic banking, the principle is based on two main elements, namely the purchase price and associated costs, and the agreement on the mark-up (profit). Islamic banking and financial institutions adopt a *bay' murābahah* (cost plus value or mark up sale) product to provide short-term financing to customers for the purchase of goods even though the customer has no money to pay. The basic characteristics of the contracts of *bay' murābahah* (cost plus value or mark up sale) product as sale and purchase with prepaid payments are as follows: (i) the buyer must have knowledge of the associated costs and the original price of the goods, and the mark-up shall be specified in the percentage form total price plus cost, (ii) what is sold is goods or commodities and paid with money, (iii) what is for sale and must be owned by every seller and the seller must be able to deliver the goods to the buyer, (iv) the payment is deferred. The *bay' murābahah* (cost plus value or mark up sale) product has understood here, is used in any financing where there are items that can be identified for sale.

A. Syari'ah Appraisal on Bay' Murabahah (Mark-Up Sale) Product

Before conducting an analysis on *bay' murābahah* (cost plus value or mark up sale) product in this part, it is important to note that procedures of Islamic banking and financial institutions generally include several processes that can be divided into three phases, namely: process at the beginning of financing phase, the phase of the financing period and the phase after financing.

According to Kholis, the beginning of financing phase commonly covers steps as follows: 1) the customer submits a financing proposal to an Islamic bank or a micro finance institution accompanied by all requirements regulated by the Islamic banking and financial institutions, the said bank or microfinance proposal will be analyzed by an Islamic bank or microfinance committee as preliminary analysis; 2) if the proposal fulfills the requirements, it will be continued by surveying the customer by the Islamic bank or micro finance institution's surveyor. All data collected by the surveyor from the survey activities will be discussed and analyzed by the Islamic bank or microfinancing committee before deciding to accept and refuse the proposal. Members of the bank or microfinancing committee are chief of marketing, surveyor, finance staff and marketing staff; 3) if a financing proposal is accepted or recommended by the financing committee, the next phase is giving the Islamic bank or microfinancing to the customer (Nur Kholis, 2008, 236).

Furthermore, there are some steps involved in giving the financing to the customer, namely: (1) conducting an agreement with the customers, such as: profit margin bargaining or negotiation of profit ratio (*al-nisbah*), mode of installment payment, collateral, etc.; (2) stamping financing contract; (3) and understanding the content of contract attended by the witnesses of two parties.

Based on the above discussion, Figure 1 presents the general process of financing applied by the Islamic banking and financial institutions in Indonesia.

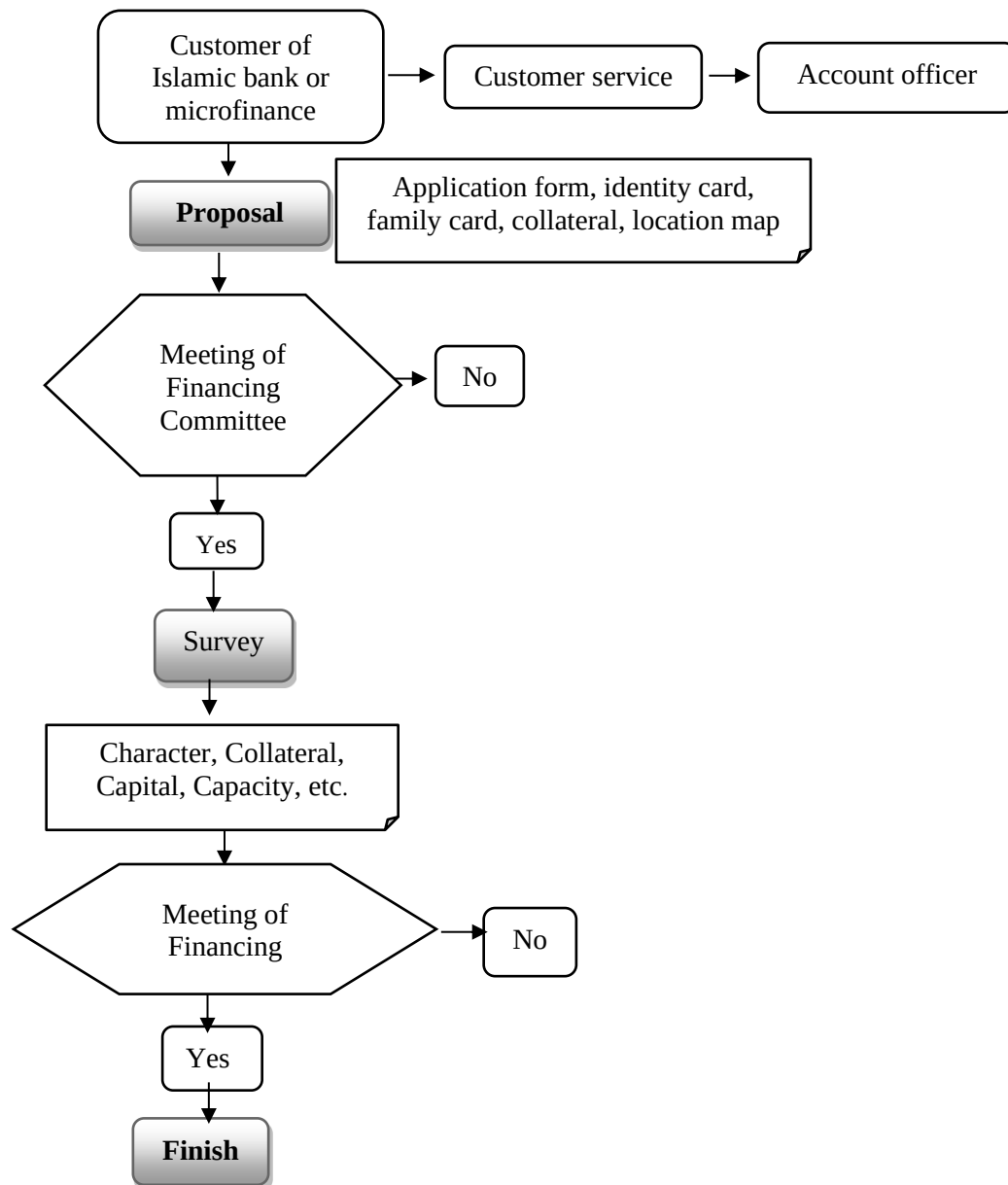


Figure 1: The Beginning of Financing Phase.

In conjunction with Figure 1, the survey found that at the beginning phase of the financing process regarding the product of *bay' al-murabahah* (cost plus value or mark-up sale) and the requirements set by Islamic banking and financial institutions in Indonesia, they seem to have adhered to the *Syariah* regulation. However, in the operational system, the survey found that this type of

product is problematic. The most reasonable arguments for the problem are as follows: 1) the purchased items needed by the customers are not bought and not exist at the time of contracting; 2) mark-up price method to determine the profit margin faces problem; 3) and the Islamic banking and financial institutions have involved in mandate sale (*bay' al-fuduli*) element that is prohibited by Islam; 4) the presence of fines for the late fee installment.

1) The purchased items needed by the customers are not bought and do not exist at the time of contracting

At the beginning of the operational of *bay' al-murabahah* (cost plus value or mark-up sale) contract, we can find that Islamic banks or microfinance attempt to avoid the *sunnatu Allah* (provision of Allah) which has been set in the world of business. The *sunnatu Allah* (provision of Allah) here are the risks or losses of business. It can be seen from the operation of *bay' al-murabahah* (cost plus value or mark-up sale) product, before the Islamic banks or microfinance institutions hold the purchased items which are needed by customers, the institutions have made a purchase-sale agreement in advance with the owner (supplier) who sells the items. Subsequently, the Islamic banks or microfinance institutions have set various requirements for the purchasing of such items to their customers, whereas in fact the Islamic banks or microfinance institutions are not the owners of purchased items (Nurhayati, 2012, Interview: Arifin Badri, 2008, 8).

Based on this point of view, the Islamic banks or microfinance institutions are considered to have been selling purchased items to their consumers which they do not own and that is prohibited in Islam. Definitely, this significant problem is basically derived from the existence of Islamic banks or microfinance institutions which are not involved in the real business. The prohibition of such transaction is clearly stated by Rasulullah (s.a.w) in the following hadith:

عَنِ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: (مَنْ ابْتِئَاعَ طَعَامًا فَلَا يَبِيعُهُ حَتَّى يَفْضُضَهُ). قَالَ ابْنُ عَبَّاسٍ: وَأَحْسِبُ كُلَّ شَيْءٍ بِمَنْزِلَةِ الطَّعَامِ.

Ibn 'Abbas (r.a) reported that Rasulullah (s.a.w) said, "Anyone who buys food stuff, then he should not sell it back until he finished the acceptance". Ibn 'Abbas further said, "And I think that everything can be equated by the law such as food stuff". (Bukhari, Hadith No. (2133); Muslim, Hadith No. (3922).

Based on the above hadith, it can be said that the prohibition of reselling the purchased item to second buyer until it is received by the first buyer from the seller, not only applies to food stuff such as rice and wheat, but can be applied to all traded items. As for the prohibition of reselling the purchased items that Islamic bank and financial institutions have not bought, we can take the

experience of Ibn ‘Umar (r.a) when he was told by Zayd ibn Thabit’ (r.a) not to deal with such transaction because it is forbidden by Rasulullah (s.a.w). Ibn ‘Umar (r.a) said:

عَنِ ابْنِ عُمَرَ قَالَ : ابْتِغْتُ زَيْتًا فِي السُّوقِ , فَلَمَّا اسْتَوْجَبْتُهُ لِنَفْسِي لَقِينِي رَجُلٌ فَأَعْطَانِي بِهِ رِبْحًا حَسَنًا , فَأَرَدْتُ أَنْ أَضْرِبَ عَلَى يَدِهِ , فَأَخَذَ رَجُلٌ مِنْ خَلْفِي بِذِرَاعِي , فَالْتَفَتُ فَإِذَا زَيْدُ بْنُ ثَابِتٍ فَقَالَ : لَا تَبِعْهُ حَيْثُ ابْتِغْتَهُ حَتَّى تَحُوزَهُ إِلَى رَحْلِكَ , فَإِنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ هَيَّ أَنْ تُبَاعَ السِّلْعُ حَيْثُ تُبْتَاعُ حَتَّى يَحُوزَهَا التُّجَّارُ إِلَى رِحَالِهِمْ .

Ibn ‘Umar said, “I bought some olive oil in the marketplace, and when it came into my possession I was met by a man who offered me a good profit for it, and I wanted to make a deal with him, but a man behind me took hold of my arm. I turned around and saw that it was Zayd bin Thabit. He said: *“Do not sell it where you bought it until you take it to your place, for the Messenger of Allah (pbuh) forbade selling merchandise where it were bought, before the merchants moved them to their places.”* (Abu Dawud, Hadith No. (3501).

As for the prohibition of reselling items which have already been bought but not yet handed, it can be referred to the following *hadith*:

عَنْ عَبْدِ اللَّهِ بْنِ عَمْرٍو قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: لَا رِبْحَ مَا لَمْ تَضْمَنْ .

‘Abd Allah ibn ‘Amru said: The Messenger of Allah (s.a.w) said, “It is not lawful gains without any responsibility to bear the loss.” (Abu Dawud, Hadith No. (3506).

The Muslim scholars have mentioned the wisdom (*hikmah*) of this prohibition, because the purchased item which have not been received or handed by the first buyer can be cancelled at any time by whatever reasons of risks of damages such as destroyed by fire, water exposure, etc. Therefore, when the second buyer (customer) asks or needs to purchase the items, the problem is the first buyer cannot submit it to the second buyer (customer).

Additionally, when the purchased items are bought from the first seller, the truth is all risks of damages become his responsibility. Therefore, when the buyer resells those purchased items, the delivery becomes the responsibility of the first seller, then the buyer is free from responsibility of damage that might occur at the place of the first seller or during the delivery process. Hence, the profit gained by the buyer is a profit without responsibility to bear the possible loss (Al-Asqalani, 2009, 598).

In respect to this matter, Ibn 'Abbas (r.a) when he was asked by His disciple (Tawus) regarding this prohibition, he then clarified it by mentioning the following *hadith*:

عَنْ طَاوُوسٍ عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا قَالَ : أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ (كَهَى أَنْ يَبِيعَ الرَّجُلُ طَعَامًا حَتَّى يَسْتَوْفِيَهُ). قُلْتُ لِابْنِ عَبَّاسٍ : كَيْفَ ذَاكَ ؟ قَالَ : ذَاكَ دِرَاهِمٌ بِدِرَاهِمٍ وَالطَّعَامُ مُرَجَأٌ.

Tawus from Ibn 'Abbas (r.a) reported that Rasulullah s.a.w. has forbidden a man who sells foods until he receives it. I asked Ibn 'Abbas: "How could such a thing happen? He replied: That can happen because it is actually selling the dirham (money) by another dirham (money), meanwhile the ingredient food which are sold have been postponed". (Bukhari, Hadith No. (2132); Muslim, Hadith No. (1525).

Ibn Hajar al-'Asqalani (852H) further interprets the words of Ibn 'Abbas above as in the following interpretation:

Someone buys food for 100 dinars, for instance, and he has paid the money to the first seller for that food. Meanwhile, he has not received that food from the seller, he had sold it to another buyer at the immediate price of 120 *dinar*, whereas in fact, that food still remains with the first seller. In this case, the buyer had exchanged his money at a price of 100 *dinar* with 120 *dinar*. (See, al-'Ayni, 2007, 250); Ibn Bazz, 2008, 64).

As for the prohibition of selling the purchased items that the buyer has not received it from the seller and reselling to another buyer when the purchased items do not exist at the time of contract, some Muslim jurists such as al-'Ini and ibn Bazz have not allowed to deal with this type of sale. According to the rules of Islamic *mu'amalat*, any property sold or item must exist at the time of contract. Otherwise, this product or service would be categorized as invalid.

2) Mark-up price method to determine the profit margin was problematic

According to Kholis (2008), mark-up price method as a significant method of profit margin determination of *bay' al-murabahah* financing is determined by negotiation between the Islamic bank and financial institutions with their customers until they agree to conduct that contract. The application of *bay' al-murabahah* contract mechanism in Islamic bank and financial institutions in Indonesia is similar to each other. The differences are about the shop location, place of transaction and place of transaction binding (Nur Kholis, 2008, 241).

However, certain controversial aspects to the way it is practiced by Islamic bank and financial institutions, such as profit rate and installment calculation method by those institutions is

similar to flat interest rate model. The profit rates in *bay' al-murabahah* products are influenced by maturity of financing and time value of money concept. The longer the period of financing, the higher profit margin which is required by those institutions (Zaharuddin, 312-315).

Although the majority of Muslim jurists (*jumbur al-fuqaha'*) such as jurists of Maliki, Shafi'i Hanbali and Hanafi schools of law including some Muslim intellectuals today such as Yusuf al-Qaradawi, 'Abd al-'Aziz ibn Bazz and Muhammad Uthman Shubayr have accepted it, however, the current practice of *bay' al-murabahah* is rejected according to ibn Hazm al-Zahiri, ibn Sirin, Shurayh 'Abd al-Rahman ibn 'Abd al-Khaliq and Rafiq al-Misri.

This system is similar to the interest rate (*riba*) on credit loan calculations which is practiced in conventional banking system. The longer the financing loan period, the greater the interest rate is charged to the borrowers. Indeed, the survey has found that such situation happens in the operation of *bay' al-murabahah* products in Islamic bank and financial institutions (Nur Kholis, 2008, 34).

3) The Islamic bank and financial institutions have involved in mandate sale (*bay' al-fuduli*) element that prohibited by Islam

As we have highlighted earlier, application of *murabahah* (cost plus value or mark-up sale) contract mechanism in Islamic bank and financial institutions is similar to the conventional system. In the case of *bay' al-murabahah* (cost plus value or mark-up sale) contract, it is found that Islamic bank and financial institutions have not bought the property to be sold. The instrument of *bay' al-murabahah* financing contract between Islamic bank and financial institutions and their customers is usually held at the office where they give cash directly to customers. When they need to purchase the desired items, the Islamic bank and financial institutions mandate to customers to buy their own (See, Zaharaddin, 2006, 312-315; Yusuf al-Qaradawi, 1987, 86; 'Abd al-Khaliq, 2010, 31; Rafiq al-Misri, 1984, 24).

According to Islamic law of financial transactions (*fiqh al-mu'amalat al-maliyyah*), the pillar of *murabahah* (cost plus value or mark-up sale) contract requires the ownership or property of items as the significant object of transaction. If this does not happen, it can be said that Islamic bank and financial institutions are involved in *bay' al-fuduli* (unmandated sale) concept because the seller do not really have the items or goods being sold (*yakunna al-maball mamlukan li al-ghair*) but they are sold to the buyer (customer). Unmandated sale (*bay' al-fuduli*) in Islamic law of financial transactions (*fiqh al-mu'amalat al-maliyyah*) is a sale in the effects of others without any authorization to sell on behalf of the owner and without a mandate to undertake this sale (Muhammad Hasanayn, 2006), 45).

According to the majority of Muslim jurists, such as Hanabilah, Shafi'iyyah, and Zahiriyah, except Hanafiyyah, *bay' al-fuduli* (unmandated sale) concept is prohibited by *Shari'ah*. *Bay' al-fuduli* before getting authorization or mandate it is considered as valid (*sahih*) but it depends on permission (*mawquf al-izn*) from the owner of goods or item. Even, Imam al-Shafi'i put it in invalid (*batil*) because in such transaction there is no authorization to do it (*wilayat al-tasarruf*). The absence of the purchased items as the object of contract (*al-ma'qud 'alayh*) in business transactions and the absence

of authorization to sell on behalf of the owner and without a mandate to undertake that sale is considered as a prohibited element. In conjunction with this matter, we can say that some selected BMTs in Riau Archipelago are involved in *bay' al-fuduli* (umandated sale) concept transaction that is prohibited in Islam.

4) The presence of fines for late fee installment

This study found that Islamic bank and financial institutions charge operational costs of *bay' murabahah* approximately Rp. 10,000 and fine their customers 3% that is taken from the profit margin agreed in the early contract in the case of a delay in paying installment of funding. Furthermore, all money obtained from those fines and operational costs are derived income for the Islamic bank and financial institutions that cannot be accepted by the *Shari'ah* (Nur Kholis, 2008, 28: Masykur, Interview, 2013).

Although the majority of Muslim scholars and economists allow the imposition of fines for late installment payment, it does not allow the money from these fines and charges to become income of Islamic bank and financial institutions. Actually, those collected money should be used for social purposes or public interests (*maslahah 'ammah*) (Mohammad 'Ali al-Ghari, *et al.*, 1993, 67-79.: Muhammad Taqi Uthmani, 2002, 58-59: Siddiq Muhammad Amin al-Darir, 1985, 11-112).

Otherwise, it can be accumulated by those Islamic bank and financial institutions into *qard al-hasan* (benevolent loan) product to be used it on short-time financing basis without expectation of any return on the principal. Even the Islamic Fiqh Academy has issued a *fatwa* that the imposition of fines or other payments on late installment is considered *riba* (usury) similar to conventional installment system which is prohibited by Islam (Taqi Uthmani, 1998, 447).

Conclusion

All the above discussions and findings indicate that the operations of Islamic banking and financial institutions in regards on *bay' murabahah* (mark up sale) product are not in line with *Syari'ah* principles and values have been proven and are accurate as well. The survey has found that the significant problem was driven from the operating system of Islamic banking and financial institutions which is parallel to the conventional banking and financial system counterparts which is prohibited in Islam.



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