From Ribā to Murābaḥah: When Does a Religious Prohibition Become a Rule of Law?

Murābaḥah Under Moroccan Business Law

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Résumé

La Mourabaha occupe une place importante dans le droit bancaire marocain. Elle permet à une banque participative d'acquérir un bien, d'en devenir propriétaire puis de le revendre à son client à un prix augmenté d'une marge déterminée à l'avance. À première vue, le mécanisme semble résoudre une difficulté simple : comment financer une acquisition lorsque le prêt à intérêt est considéré comme incompatible avec les principes de la finance islamique ? Mais la réponse soulève une question plus profonde. La Mourabaha bancaire n'est pas une prescription coranique : elle résulte de la mobilisation de catégories du fiqh des transactions, de leur interprétation contemporaine et de leur institutionnalisation par le droit positif. Le Maroc est un laboratoire intéressant : la Constitution affirme l'Islam comme religion de l'État et confie au Conseil supérieur des Oulémas une compétence institutionnelle en matière de fatwas officiellement agréées, tandis que la loi n° 103-12 et la réglementation de Bank Al-Maghrib donnent à la Mourabaha une qualification juridique précise. L'article examine dès lors la chaîne normative qui conduit du ribâ à la Mourabaha, puis teste cette construction au regard du droit des affaires. Il soutient que la différence entre Mourabaha et crédit conventionnel ne peut être recherchée dans le seul résultat économique ou dans le vocabulaire utilisé, mais dans la réalité de la vente : acquisition, propriété, possession et prise de risque par la banque. L'étude montre toutefois que la validité juridique et chariatique de la Mourabaha ne suffit pas à résoudre la question de son opportunité économique. Son coût, sa domination parmi les produits participatifs et la faible utilisation des mécanismes de partage des profits et des pertes invitent à réfléchir à des alternatives plus proches de l'idéal participatif de la finance islamique.

Mots clés : Mourabaha ; ribâ ; finance participative ; droit bancaire marocain ; fiqh ; Conseil supérieur des Oulémas ; propriété ; risque ; crédit conventionnel ; droit des affaires.

Abstract

Murabaha occupies an important position within Moroccan banking law. A participatory bank acquires an identified asset, becomes its owner and subsequently resells it to the customer at a disclosed cost plus an agreed profit margin. The mechanism appears to answer a practical question: how can financing be provided where interest-bearing lending is regarded as incompatible with

Islamic principles? But the legal question is deeper. Contemporary bank Murabaha is not a Qur'anic financing formula. It is a modern financial application of categories drawn from the fiqh of transactions, developed through contemporary collective jurisprudence and incorporated into positive law. Morocco is a useful case study because its Constitution recognizes Islam as the religion of the State and grants the Higher Council of Ulema an institutional role in officially approved religious opinions, while Law No. 103-12 and Bank Al-Maghrib regulations give Murabaha a precise legal structure. This article therefore examines the normative transformation from riba to Murabaha and tests that construction against business law. It argues that the distinction between Murabaha and conventional credit cannot rest solely on economic equivalence or terminology, but must be assessed through the reality of the sale: acquisition, ownership, possession and assumption of risk by the bank. At the same time, legal and Shariah validity does not settle the question of economic desirability. The cost of Murabaha, its predominance among participatory products and the limited use of profit-and-loss-sharing instruments invite a broader discussion about whether other structures may better reflect the participatory ambitions of Islamic finance.

Keywords: Murabaha; riba; participatory finance; Moroccan banking law; Islamic jurisprudence; Higher Council of Ulema; ownership; risk; conventional credit; business law.

Introduction

Imagine two customers who want to purchase the same apartment for 1,000,000 Moroccan dirhams. The first approaches a conventional bank. The bank lends the amount required for the acquisition, and the customer undertakes to repay the principal together with an additional amount calculated by reference to the agreed financing rate. The second approaches a participatory bank. The bank purchases the apartment itself, becomes its owner and then sells it to the customer for a higher price, payable in instalments. The customer therefore pays more than the asset's original acquisition price in both situations. Yet the first operation is structured as a loan with interest, whereas the second is structured as a sale known as Mourabaha. The proximity between the two transactions is precisely what makes the legal problem interesting.

The starting point of the problem is not Moroccan banking law. It is a religious norm. The Qur'an expressly distinguishes trade from ribâ: "Allah has permitted trade and has forbidden interest."[1] The Qur'anic prohibition is reinforced in the surrounding verses, which call upon believers to abandon outstanding ribâ.[2] Prophetic traditions also regulate exchange, including rules against certain forms of unequal or deferred exchange and prohibit sales involving excessive uncertainty.[3] The contemporary legal question therefore begins with a normative distinction between a return generated through a sale and an increase attached to a debt.

It would nevertheless be inaccurate to say that the Qur'an itself created the contemporary banking product called Murabaha. Murabaha is a form of sale recognized in Islamic jurisprudence, classically associated with a seller disclosing the acquisition cost and adding a known profit. Its modern banking application is the result of juristic development: a bank is placed in the position of buyer and seller, often following a customer's purchase order, and uses the sale to provide financing without formally entering into an interest-bearing loan. The International Islamic Fiqh Academy addressed this contemporary structure in Resolution No. 40–41 of 1988 and accepted Murabaha to the purchase orderer only under conditions including the seller's ownership and possession of the asset and assumption of the relevant risk before delivery.[4]

This distinction between source and construction is essential. A Qur'anic prohibition, a classical fiqh rule, a contemporary collective resolution, a fatwa, a regulatory standard and a statute do not belong to the same normative order. Nor does a collective decision by jurists automatically constitute ijmâ‘ in the technical sense. Contemporary collective fiqh is better understood, for the purposes of this article, as an institutionalized form of ijtihad that seeks to address modern

[1] Qur'an, al-Baqara, 2:275. The verse explicitly establishes the opposition between *al-bay‘* (sale/trade) and *al-ribâ*.

[2] Qur'an, al-Baqara, 2:278–279.

[3] Sahih Muslim, 1584e and 1513; see also Jami‘ al-Tirmidhi, 1230.

[4] International Islamic Fiqh Academy, Resolution No. 40–41 (2/5 and 3/5), 15 December 1988, "The Fulfilment of a Promise Made and Murabaha to the Purchase Orderer."

transactions by applying and reinterpreting established principles. The question then becomes how such a religiously grounded norm enters a modern legal order.

Morocco provides an unusually revealing setting for this inquiry. The 2011 Constitution describes Morocco as a Muslim State and provides that Islam is the religion of the State; it also gives the King, as Amir Al Mouminine, a constitutional role in safeguarding Islam and presiding over the Higher Council of Ulema, which is identified as the institution authorized to issue officially approved fatwas on questions referred to it. [5]At the same time, Morocco is expressly committed to the construction of a democratic State governed by law, with separated and balanced powers. [6]Islamic finance therefore enters a legal system that is simultaneously marked by a constitutional Islamic reference and by the ordinary institutions of a modern commercial State.

Law No. 103-12 relating to credit institutions and similar entities translates this institutional context into banking law. Article 58 defines Mourabaha as a contract through which a participatory bank sells to its customer a specified movable or immovable asset owned by the bank, at its acquisition cost plus a profit margin agreed in advance. [7] The definition is striking because ownership is not an incidental feature: it is embedded in the statutory qualification of the transaction.

The article therefore asks a question that is broader than whether Murabaha is “halal” or “haram”. The central question is: **to what extent does Moroccan law, by transforming an Islamic prohibition into a contemporary financing technique, preserve the substantive reason for distinguishing ribâ from permissible profit rather than merely reproducing conventional credit under the legal form of a sale?**

Three questions follow. First, what exactly is the normative logic of the prohibition of ribâ, and what distinguishes a permissible commercial profit from a prohibited increase on a debt? Second, when the bank acquires and owns the asset before reselling it, is the legal difference from conventional credit substantive, or merely formal? Third, once this structure has been incorporated into Moroccan banking law, should the success of Murabaha be measured only by Shariah compliance, or also by its economic accessibility and its capacity to realize the broader objectives associated with participatory finance?

The hypothesis defended here is deliberately conditional. Murabaha can constitute a genuine alternative to conventional credit when the bank actually acquires, possesses and bears the relevant risks attached to the asset before selling it. Conversely, where the sale is only a formal layer placed around a transaction whose substance is merely the provision of money, the justification for the distinction becomes much weaker. The article finally argues that even a legally genuine Murabaha

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[5] Constitution of the Kingdom of Morocco of 2011, Preamble, Art. 3 and Art. 41.

[6] Ibid., Preamble and Arts. 1–2.

[7] Kingdom of Morocco, Law No. 103-12 on Credit Institutions and Similar Bodies, Art. 58.

should not be treated as the endpoint of Islamic finance. Its cost and the predominance of debt-like structures raise the separate question of whether risk-sharing mechanisms such as Musharakah and Mudarabah deserve greater practical development.

PART I — THE RULE BEFORE THE CONTRACT

I. Understanding What the Prohibition of Ribā Actually Prohibits

The first difficulty is terminological. In contemporary financial language, ribâ is often translated simply as "interest". That translation is useful as a first approximation but insufficient for legal analysis. The Qur'anic term belongs to a broader vocabulary of increase and excess, and the classical law of transactions developed distinctions between different forms of ribâ, including ribâ al-nasî'a and ribâ al-fadl. The prohibition therefore cannot be reduced to a modern numerical formula such as "any percentage charged on borrowed money". It must be examined through the structure of the underlying transaction.

The Qur'an itself presents the contrast in a particularly revealing way: the objection attributed to those who consume ribâ is that "trade is like ribâ"; the response is that trade has been permitted while ribâ has been forbidden.[8] The text thus does not deny that both transactions can generate an economic gain. Instead, it rejects the equivalence between them. That distinction is fundamental for understanding Murabaha. The fact that a seller makes a profit does not, in Islamic jurisprudence, transform the sale into a prohibited transaction. The relevant question is what the profit is attached to and through which legal relationship it arises.

Prophetic traditions reinforce this structural approach. The well-known hadith concerning the exchange of gold, silver, wheat, barley, dates and salt imposes particular requirements on certain exchanges and identifies an addition in specified circumstances with ribâ. [9]Another hadith prohibits the sale of what the seller does not possess[10]. A further tradition prohibits sales involving gharar, commonly rendered as excessive uncertainty. [11]These rules are not interchangeable, but together they reveal a recurrent concern: the legitimacy of profit is connected to the legal and economic reality of the exchange, including the subject matter, possession, risk and certainty of the parties' obligations.

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[8] Qur'an, al-Baqara, 2:275; the text expressly contrasts trade and *ribâ*.

[9] Sahih Muslim, 1584e, 1586a and 1587c.

[10] Jami' al-Tirmidhi, 1232; Sunan Abi Dawud, 3503.

[11] Sahih Muslim, 1513.

This is why the distinction between a loan and a sale matters. In a loan, the borrower becomes debtor and the lender's claim is fundamentally a monetary claim. If an additional return is stipulated on the loan, the return is generated by the debt itself. In a sale, by contrast, the seller transfers an asset in exchange for a price. The seller's profit is connected to the commercial transaction and to the asset being sold. A deferred price may be higher than a cash price without automatically becoming interest, provided the legal conditions of the sale are respected. The contemporary Murabaha structure relies precisely on this distinction.

Yet this reasoning should not be exaggerated into the proposition that every sale generating a fixed return is automatically more "Islamic" than a loan. Islamic jurisprudence also imposes restrictions on uncertainty, deception, prohibited subject matter and other forms of contractual abuse. The legal form of a sale cannot therefore operate as a universal escape route from the prohibition of ribâ. The substantive conditions of the sale remain decisive.

II. Murābaḥah: A Fiqh-Based Construction Before Becoming a Banking Product

Classical Murabaha is a cost-plus sale. The seller discloses the cost incurred in acquiring the asset and adds an agreed profit. The modern bank did not invent this contract; it adapted it. The decisive innovation was to place the financial institution inside a sequence of transactions in which it acquires the customer's desired asset and subsequently resells it. This is why contemporary Murabaha should be described as a financial application of an existing nominate contract rather than as a contract directly prescribed by revelation.

The contemporary juristic development is especially visible in the resolutions of the International Islamic Fiqh Academy. In 1988, the Academy examined Murabaha to the purchase orderer and declared it permissible where the commodity had become the property of the purchaser and was in its possession as required by Shariah, and where the purchaser assumed the risk of deterioration before delivery and the consequences of certain defects or justified returns. [12]The resolution is important not because it creates a new Qur'anic rule, but because it demonstrates collective contemporary ijtihad confronting a financial practice that did not exist in its present institutional form in the classical period.

AAOIFI's Shariah Standard No. 8 develops the same logic in greater operational detail. It requires the institution to acquire the asset before selling it by Murabaha and emphasizes that possession serves a substantive purpose: the institution must assume the risk associated with the asset before it becomes entitled to sell it. [13] The standard also recognizes constructive possession in appropriate circumstances and addresses agency, insurance, defects and payment. [14]

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[12] International Islamic Fiqh Academy, Resolution No. 40–41, cited above.

[13] AAOIFI, Shari'ah Standard No. 8: Murabahah, sections relating to the acquisition of the asset, possession, and risk.

[14] AAOIFI, Shari'ah Standard No. 8, particularly the provisions relating to constructive possession, agency, insurance, and defects.

The normative chain can therefore be summarized as follows: the Qur'an establishes a prohibition and a distinction between trade and ribâ; the Sunnah supplies rules concerning exchange, possession and uncertainty; classical jurists elaborate these rules into a law of transactions; contemporary jurists adapt them to institutional finance; Shariah standards translate them into operational requirements; and national legislation determines the legal consequences within a State. The originality of Moroccan law lies not in inventing Murabaha, but in making this layered normative structure part of a positive banking regime.

PART II — FROM RELIGIOUS NORMS TO MOROCCAN LAW

I. The Transition from Fiqh to Positive Law

The Moroccan case becomes particularly interesting once the constitutional dimension is considered. The Constitution does not simply describe Morocco as a country whose population is predominantly Muslim. Its preamble refers to Morocco as a sovereign Muslim State and emphasizes the pre-eminence of the Muslim religion within the national reference framework. Article 3 states that Islam is the religion of the State, while Article 41 entrusts the King, Amir Al Mouminine, with safeguarding Islam and establishes the Higher Council of Ulema as the institution authorized to issue officially approved fatwas on questions submitted to it.[15]

This constitutional arrangement does not mean that every rule of fiqh is automatically a rule of Moroccan law. That conclusion would collapse the distinction between religious norm and legal norm that this article seeks to examine. Rather, the Constitution establishes an institutional mechanism through which certain religious questions may acquire an officially recognized normative status. The banking legislation then provides the second stage of the process: it defines the legal product, identifies the competent regulator and creates enforceable obligations for banks.

Law No. 103-12 devotes Title III to participatory banks. Article 58 lists several financing products, including Mourabaha, Ijara, Moucharaka, Moudaraba and Salam. In the case of Mourabaha, the statutory definition expressly requires the bank to own the movable or immovable asset being sold and fixes the economic structure of the transaction as acquisition cost plus an agreed profit margin.[16] The statute therefore performs an act of legal qualification: a concept originating in Islamic transactional jurisprudence is converted into a category of Moroccan banking law.

The role of Bank Al-Maghrib is equally important. Circular No. 1/W/17, issued in 2017, concerns the technical characteristics of participatory products and their presentation to customers. Bank Al-Maghrib explains that the circular establishes the technical characteristics of Mourabaha,

[15] Moroccan Constitution of 2011, Preamble, Art. 3 and Art. 41.

[16] Law No. 103-12, Art. 58.

Ijara, Moucharaka, Moudaraba and Salam, the rules governing compliance with the opinions of the Higher Council of Ulema, the contractual elements that must be defined and the guarantees that may be required.[17] The circular was issued after the required institutional consultations and was published in the Official Bulletin after approval by the relevant authorities.[18]

The process is therefore neither purely religious nor purely secular. The Shariah opinion does not itself replace the statute, while the statute does not erase the religious origin of the product. Once the rule has been incorporated into legislation and regulation, however, the immediate legal consequences are determined by Moroccan law. A bank does not merely have a religious obligation to respect Article 58; it has a statutory and regulatory obligation.

This distinction matters for judicial review. A Moroccan judge faced with a dispute concerning a Murabaha contract is not simply a religious adjudicator. The judge must apply the contract, the relevant provisions of banking law, consumer law, property law and procedural law. The religious standards that influenced the creation of the product may inform the interpretation of its structure, but their legal effect depends on their incorporation into the Moroccan normative framework.

II. A Question of Legal Theory: Who Speaks When Sharia Enters the Law?

The Moroccan system therefore creates a useful distinction between normative inspiration and legal enforceability. The Higher Council of Ulema provides officially recognized religious opinions within its constitutional sphere; Bank Al-Maghrib translates the approved product characteristics into regulatory requirements; Parliament has already enacted the statutory category. The resulting rule is a Moroccan legal rule whose religious reference is constitutionally and institutionally mediated.

This point also corrects a common simplification. It is tempting to describe Murabaha as a "fatwa product". That expression is incomplete. A fatwa is an opinion concerning a question of Islamic law; it is not, by itself, an act of legislation. In Morocco, the originality lies precisely in the institutional articulation between religious authority, legislative authority and banking supervision. Murabaha becomes legally operative because this articulation gives it a place within positive law.

The same phenomenon appears in other jurisdictions, but the institutional form differs. In Malaysia, for example, courts dealing with Islamic finance have operated within a statutory framework that gives the Shariah Advisory Council a significant role in determining Shariah

[17] Bank Al-Maghrib, Annual Report on Banking Supervision 2016, section relating to Circular No. 1/W/17.

[18] Circular of the Wali of Bank Al-Maghrib No. 1/W/17 of 27 January 2017, published in Official Gazette No. 6548 of 2 March 2017, following the approval of the Higher Council of Ulema.

questions, including a duty on courts and arbitrators to take its rulings into consideration.[19] The comparison is instructive: the problem is not unique to Morocco. Whenever a State integrates Shariah-based finance into ordinary commercial law, it must determine who has authority to define compliance and how that determination interacts with judicial power.

Morocco has therefore not simply imported a foreign financial product. It has built a legal interface between Islamic jurisprudence and contemporary banking law. The next question is more demanding: does the legal structure actually preserve the substantive conditions that justify calling the transaction a sale?

PART III — MURĀBAḤAH UNDER THE TEST OF BUSINESS LAW

I. Is the Bank's Ownership a Legal Requirement or Merely a Formal Step?

Article 58 places ownership at the heart of the statutory definition. This is not accidental. The bank must sell a property "owned by" it. If the bank never acquires the asset, the transaction cannot satisfy the statutory definition of Murabaha. The same requirement appears in contemporary Shariah standards. The International Islamic Fiqh Academy requires the asset to have become the seller's property and possession before the Murabaha sale, while AAOIFI explains that possession is required so that the institution bears the asset's risk before it is entitled to sell it.[20]

Consider the difference between two sequences. In the first, the customer identifies a car. The bank immediately promises to provide the money necessary for the customer to buy the car in his own name. The bank's only economic role is financing. The customer becomes the buyer from the dealer, and the bank receives a larger monetary amount over time. Calling the final relationship a "sale" would not change the fact that the bank never owned the asset.

In the second sequence, the customer identifies the car and requests a Murabaha. The bank purchases the car from the dealer, pays the acquisition price, becomes the owner, takes actual or constructive possession where legally appropriate, and only then sells it to the customer for a disclosed price including its margin. The bank is no longer simply a lender. It has entered the chain of ownership and assumed at least the risks that arise during its period of ownership.

This distinction is particularly important because ownership and risk are connected. Ownership is not merely a document that allows the bank to satisfy a formal requirement. It determines who is entitled to the asset, who bears certain liabilities before resale, who is exposed to defects and loss, and who has the legal power to dispose of the property. AAOIFI Standard No. 8 explicitly explains

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[19] A. Trakic, "Shari'ah compliance in Islamic finance contracts: the Malaysian constitutional dilemma", Oxford University Commonwealth Law Journal, vol. 20, No. 2, 2020, pp. 289–309.

[20] International Islamic Fiqh Academy, Resolution No. 40–41, cited above; AAOIFI, Shari'ah Standard No. 8.

the substantive reason for possession: the asset must move from the supplier's responsibility to the institution's responsibility before the institution transfers the risk to the customer. [21]

The distinction also has consequences under ordinary business law. A sale presupposes an object capable of being transferred and a seller who has the legal capacity to dispose of it. In a Murabaha, the bank temporarily becomes a trader in the relevant asset. That may appear unusual for a financial institution, but it is precisely the legal mechanism that separates the transaction from a pure monetary loan.

II. Possession, Risk, and Liability

The concept of possession deserves special attention because contemporary transactions do not always involve physical delivery. A bank financing an apartment cannot realistically take the apartment to its headquarters. Islamic jurisprudence and AAOIFI therefore recognize constructive possession in appropriate circumstances, provided the institution obtains the legal and practical control necessary for the risk to pass to it. [22] The question is not whether a banker physically occupies the asset, but whether the bank has genuinely acquired the legal position of owner and assumed the corresponding risks.

This point is also visible in the Moroccan regulatory practice. The technical framework surrounding Murabaha is designed around a sequence in which the bank acquires the asset and subsequently sells it to the customer. In the common real-estate model, the customer identifies the property, the bank acquires it, and the property is then transferred to the customer under the Murabaha sale. [23] The promise made by the customer before the bank's acquisition serves to organize the transaction, but it does not itself constitute the final Murabaha sale.

The distinction between promise and sale is therefore central. A promise to purchase can precede the bank's acquisition, while the sale itself must take place only after the bank has obtained the required ownership and possession. This sequence prevents the promise from being used as a substitute for ownership. It also helps explain why contemporary collective fiqh considers the promise, the bank's acquisition and the final sale as legally distinct stages rather than as a single monetary transaction disguised by several documents. [24]

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[21] AAOIFI, Shari'ah Standard No. 8, section 3.2, on possession and the transfer of risk.

[22] Ibid., particularly the provisions distinguishing actual possession and constructive possession according to the nature of the asset.

[23] E. M. B., "Real Estate Murabaha Contract. Guide and Contractual Obligations", Médias24, 31 July 2017, reporting the opinion of the Sharia Committee of Participatory Finance of the Higher Council of Ulema.

[24] International Islamic Fiqh Academy, Resolution No. 40–41, cited above.

Risk allocation provides the strongest answer to the criticism that Murabaha is merely a conventional loan with a different name. If the bank has genuinely assumed a risk that a lender would not assume—because the bank owned the asset and could have suffered loss, defects or other consequences before resale—then the transaction contains a legally meaningful element absent from a pure loan. That does not make the two transactions economically unrelated. It means, however, that economic similarity does not exhaust legal identity.

III. Guarantees, Insurance, and the Client's Rights

The involvement of ordinary business law becomes even clearer when guarantees and insurance are considered. The bank may require security for the customer's deferred payment obligations. Yet the existence of security does not transform the sale into a loan; security is an accessory to the customer's obligation to pay the agreed sale price. Similarly, before resale, the bank's ownership means that the relevant insurance obligations and risks cannot simply be shifted to the customer as though the bank had never owned the asset. AAOIFI expressly addresses insurance during the institution's ownership period.[25]

The customer is also not outside the protection of ordinary Moroccan consumer law. Moroccan scholarship has examined the compatibility of Murabaha contracts with Law No. 31-08 on consumer protection, particularly because the customer may have less technical expertise than the participating bank. [26]A 2023 decision of the Casablanca Court of Appeal illustrates that disputes concerning Murabaha can arise within ordinary consumer and credit-law mechanisms: the court examined a request for a judicial grace period in relation to obligations arising from a Murabaha contract and applied Article 149 of Law No. 31-08.[27]

The existence of such disputes is significant for the present argument. Once Murabaha is incorporated into positive law, it ceases to be only a matter of theological compliance. It becomes a business contract capable of generating disputes about performance, payment, consumer protection, security and liability. The Islamic origin of the contract does not remove it from the ordinary architecture of business law; it gives that architecture a particular contractual object.

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[25] AAOIFI, Shari'ah Standard No. 8, provisions relating to insurance of the asset during the period in which the institution owns it.

[26] F. Laita Ibtihal, "Consumer Protection in Islamic Contracts: The Case of the Murabahah Contract in Morocco", 2023.

[27] Casablanca Court of Appeal, Decision No. 2089 of 20 December 2023, Case No. 2000/1221/2023, concerning a request for a grace period in relation to a Murabaha contract.

PART IV — MURĀBAḤAH OR DISGUISED CREDIT?

I. Economic Equivalence Is Not Sufficient to Establish Legal Identity

The strongest criticism of Murabaha begins with a simple observation: the customer may receive exactly the same economic benefit as under a conventional mortgage. In both cases, the customer obtains the property immediately, pays over time and ultimately pays more than the original amount mobilized for the acquisition. The repayment schedule may even look remarkably similar.

Mahmoud El-Gamal has made this criticism particularly influential. In his analysis of sale-based Islamic finance, the Murabaha model permits a credit price higher than the spot price, and the resulting amortization schedule may be identical to that of a conventional mortgage. The crucial difference, in his account, lies in the contractual characterization: the conventional bank's return is described as interest on a loan, whereas the Murabaha bank's return is described as a price mark-up in a sale. [28] His broader work is critical of the use of classical contract forms to reproduce the substantive functions of modern financial instruments .[29]

This criticism cannot simply be dismissed. If a bank never truly owns the asset, if it never bears any meaningful risk, and if the sequence of documents is designed solely to produce a predetermined monetary return, the legal form becomes difficult to defend as an expression of the underlying principle. The prohibition against selling what one does not possess is relevant precisely because it prevents the sale contract from becoming an empty label.[30]

But the criticism becomes too strong if it assumes that economic equivalence automatically eliminates legal difference. Conventional and participatory financing can produce similar economic outcomes while allocating rights, obligations and risks differently. The English land-registration framework illustrates this practical point: the UK government explicitly describes Murabaha home finance as a sale in which the bank buys the property and immediately resells it to the customer at an agreed profit margin, and it accommodates the transaction through ordinary land-registration mechanisms. [31]The law therefore recognizes the sale structure without requiring the product to become a new category of property law.

The proper test is consequently not "Do the two products cost approximately the same?" but "Does the legal structure correspond to a real transaction?" That test has two levels. First, the bank must actually acquire the asset. Second, the bank must bear the risks and responsibilities that follow

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[28] M. A. El-Gamal, "Sale-Based Islamic Finance", in Islamic Finance: Law, Economics, and Practice, Cambridge University Press, 2006, pp. 64–80.

[29] M. A. El-Gamal, Islamic Finance: Law, Economics, and Practice, Cambridge University Press, 2006.

[30] Jami' al-Tirmidhi, 1232; Sunan Abi Dawud, 3503.

[31] HM Land Registry, Practice Guide 69: Islamic Financing, Government of the United Kingdom, 2019.

from ownership before the resale. If both conditions are satisfied, the sale is not fictitious merely because the bank's profit has been calculated with reference to the financing period or because the economic result resembles a conventional loan.

II. The Problem of Formal Arrangements

The danger appears when the legal sequence becomes circular or purely documentary. AAOIFI Standard No. 8 therefore contains detailed rules designed to prevent fictitious arrangements. It requires acquisition before resale and addresses cases in which the customer or a related party effectively supplies the asset to the institution and then repurchases it. [32] Such provisions reveal an important principle: Shariah compliance is not satisfied by the existence of several contracts on paper. The contracts must operate as distinct legal transactions.

This is also where the notion of hiyal, or legal stratagems, becomes relevant. The existence of a lawful contractual form does not necessarily justify an arrangement whose only purpose is to circumvent the substance of a prohibition. Critical scholarship has repeatedly argued that Islamic finance can drift toward "Shariah arbitrage", in which classical nominate contracts are selected because they reproduce the economic function of modern finance while preserving formal compliance.[33]

Yet it would be equally simplistic to treat every Murabaha as a hila. A sale with a disclosed cost and profit is an ordinary commercial mechanism. The fact that a bank uses it to provide financing does not make the sale fictitious. What matters is whether the bank has actually entered the commercial transaction. This is the point at which my argument differs from a purely economic critique: the relevant question is not whether Murabaha resembles credit, but whether the elements of sale are legally and economically real.

III. An Open Theological Question

There is a second level to the debate: whether modern bank interest is always identical to the ribâ prohibited by Islamic law. The majority position represented by major contemporary fiqh institutions treats stipulated interest on loans as prohibited ribâ. The International Islamic Fiqh Academy's 1985 Resolution No. 10 states that an increase stipulated on a loan from the beginning

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[32] AAOIFI, Shari'ah Standard No. 8, provisions relating to prior acquisition, agency, and structures that may constitute a fictitious sale.

[33] M. A. El-Gamal, Islamic Finance: Law, Economics, and Practice, cited above; T. Yousef, "The Murabaha Syndrome in Islamic Finance: Laws, Institutions and Politics", 2004.

of the contract, as well as an increase imposed in exchange for extending a debt after maturity, constitutes prohibited ribâ.[34]

That position is influential, but it should not be presented as the absence of all modern disagreement. Egypt's Dar al-Ifta, for example, has published opinions recognizing disagreement among contemporary jurists over the legal characterization of bank transactions and, in certain circumstances, permitting bank returns on the basis that they arise from new financing contracts rather than prohibited loans.[35]Mahmoud El-Gamal has also documented the jurisprudential debate between institutions that equate modern interest with ribâ and those that distinguish them. [36] Contemporary academic literature continues to discuss the competing readings of ribâ, including modernist approaches associated with thinkers such as Fazlur Rahman.[37]

This debate does not require the article to decide whether conventional interest is religiously lawful. It does, however, demonstrate why the legal question should not be reduced to "Islam says no, therefore Murabaha says yes." The theological classification of bank interest is itself a field of jurisprudential interpretation. The Moroccan legal system has chosen, through its institutional framework, to regulate participatory products as Shariah-compliant alternatives. The article's task is to examine the internal coherence of that choice rather than to settle a theological controversy that extends beyond Moroccan positive law.

PART V — BEYOND MURĀBAḤAH: WHAT KIND OF PARTICIPATORY FINANCE?

I. The Success of Murābaḥah Raises a New Question

If Murabaha is legally genuine, another problem remains. Why has a sale-based, fixed-price structure become so dominant in Islamic finance, while partnership contracts based on profit and loss sharing remain comparatively marginal? This question matters because Islamic finance is often presented not merely as a prohibition of interest but as a broader financial philosophy concerned with risk, asset-backing, fairness and the connection between finance and the real economy.

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[34] International Islamic Fiqh Academy, Resolution No. 10 (10/2), 1985.

[35] Dar al-Ifta al-Misriyyah, "Benefitting from interest", Fatwa No. 10755, 4 February 2016.

[36] M. A. El-Gamal, "Interest and the Paradox of Contemporary Islamic Law and Finance", 27 Fordham International Law Journal 108 (2003).

[37] Rania Kamla & Rana Alsoufi, "Critical Muslim Intellectuals' discourse and the issue of 'Interest' (ribā): Implications for Islamic accounting and banking", Accounting Forum, vol. 39, No. 2, 2015, pp. 140–154, DOI: 10.1016/j.accfor.2015.02.002.

The Moroccan experience illustrates the point. Bank Al-Maghrib reported that outstanding real-estate financing in the form of Mourabaha reached MAD 20.6 billion at the end of 2024, an increase of 18.5% year on year.[38] In May 2025, the outstanding amount of real-estate Mourabaha was reported at MAD 26.6 billion, up 16.8% year on year.[39] These figures show that Mourabaha is not a marginal legal experiment. It has become a significant financing technique in the Moroccan banking market.

At the same time, international literature consistently observes the dominance of non-risk-sharing or debt-like instruments. Minhat and Dzolkarnaini found that profit-and-loss-sharing instruments are hardly used in Islamic corporate financing, while Murabaha is dominant; they associate this pattern with, among other factors, moral-hazard concerns and the desire to reduce certain forms of risk.[40] The Islamic Financial Services Board has likewise identified the limited use of equity-based contracts such as Mudarabah and Musharakah as an important feature of the industry.[41]

The predominance of Murabaha therefore has a rational explanation. A bank that enters a Musharakah or Mudarabah arrangement assumes a different kind of risk. It may need to monitor the financed business, verify profits, manage asymmetric information and tolerate variable returns. Murabaha allows the bank to identify the asset, fix the sale price and rely on the customer's contractual obligation to pay. Contemporary scholarship has linked the limited use of Mudarabah to asymmetric information, adverse selection and moral hazard.[42]

But economic rationality creates a normative tension. If the most distinctive feature of Islamic finance is supposed to be the connection between profit and risk-sharing, an industry dominated by fixed-return, sale-based structures may look increasingly similar to conventional finance. The criticism is not that Murabaha is unlawful. It is that Murabaha may represent only one, and perhaps the least transformative, way of realizing Islamic financial objectives.

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[38] Bank Al-Maghrib, Annual Report on Banking Supervision 2024, data relating to real estate Murabaha financing.

[39] Bank Al-Maghrib, Credit-Deposit Dashboard, May 2025.

[40] M. Minhat & N. Dzolkarnaini, "Islamic corporate financing: does it promote profit and loss sharing?", Business Ethics: A European Review, vol. 25, No. 4, 2016, pp. 482–497.

[41] Islamic Financial Services Board, Working Paper 10, Risk-Sharing in Islamic Banking, 2019.

[42] M. Minhat & N. Dzolkarnaini, op. cit.; see also the literature on the evolution of the Mudarabah contract and the issues arising from information asymmetry.

II. The Cost of Religious Compliance and Financial Inclusion

The problem becomes concrete when the customer compares prices. Moroccan reporting has repeatedly observed that the total cost of some Murabaha home-financing arrangements has been higher than conventional financing, particularly when the additional costs associated with the bank's acquisition and resale of the property are included. [43] A 2018 comparative simulation published by La Vie Éco reported a global financing cost of approximately MAD 3 million for a MAD 1.6 million financed amount over twenty years in the examples examined, with the total cost including the bank's commercial margin and transaction-related expenses.[44] Academic Moroccan literature has likewise reported higher costs in some comparative simulations.[45]

The point should nevertheless be expressed carefully. There is no universal rule that Murabaha must always be more expensive than conventional credit. The comparison depends on the margin, duration, fees, tax treatment, insurance, guarantees and the conventional interest rate offered to the same customer. What can be stated more safely is that the additional legal steps required by Murabaha can generate transaction costs, and Moroccan studies and market reporting have identified cases in which those costs made the product less competitive.

This raises a question of financial inclusion. If a customer accepts a higher cost because religious compliance matters to her, the additional payment may be understood as the price of a value she considers important. But if the additional cost becomes sufficiently high to exclude lower-income customers, the alternative risks becoming available primarily to those who can afford to pay for religiously compliant financing. The issue is therefore not whether a customer should value Shariah compliance, but whether the legal and institutional design of participatory finance can make that choice economically accessible.

III. Toward the Diversification of Financial Instruments

This is where Musharakah and Mudarabah deserve more than a passing comparison. A diminishing Musharakah, for example, can connect housing finance to a genuine partnership structure in which the bank and customer initially share ownership and the customer progressively acquires the bank's share. A Mudarabah can connect capital with entrepreneurial effort and distribute profits according to an agreed ratio while allocating losses according to the structure of the contract and the absence of misconduct. These mechanisms are more complex, but complexity

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[43] La Vie Éco, "How Much Does Murabaha Cost at Each Participatory Bank?", 15 February 2018.

[44] Ibid.

[45] See, in particular, the Moroccan comparative literature on the cost of Murabaha and conventional home loans, as well as the simulations published in the Revue Internationale des Sciences de Gestion.

is not necessarily a defect when the objective is to create a different model of financial intermediation.

The appropriate conclusion is therefore not that Murabaha should disappear. Its legal clarity, predictability and suitability for asset acquisition explain its success. The stronger conclusion is that a participatory banking system should avoid making Murabaha the only practical expression of Islamic finance. Diversification toward genuine risk-sharing products could help reconcile the legal legitimacy of Murabaha with the broader economic ambitions of participatory finance.

Conclusion

Murabaha reveals a legal transformation that is more complex than the simple opposition between "Islamic finance" and "conventional finance". The starting point is a religious prohibition: the Qur'an distinguishes trade from ribâ, while the Sunnah and the classical law of transactions develop rules concerning exchange, possession, uncertainty and risk. The contemporary banking product is then constructed through fiqh, collective ijtihad and Shariah standards before being incorporated into the positive law of States.

Morocco illustrates this transformation with particular clarity. Its constitutional order recognizes Islam as the religion of the State and establishes a formal institutional role for the Higher Council of Ulema. Law No. 103-12 then gives Murabaha a statutory definition that makes the bank's ownership of the asset part of the legal qualification itself. Bank Al-Maghrib's regulatory framework develops the technical conditions governing the product. The result is not a fatwa replacing legislation. It is a legal category whose religious foundations have been incorporated into a State-regulated banking system.

The central conclusion of this article is therefore conditional. Murabaha is not merely conventional credit with an Arabic name when the bank genuinely acquires the asset, becomes its owner, possesses it in the legally relevant sense and assumes the risks attached to that ownership before resale. Those elements give the sale a real legal substance. Conversely, if the bank never truly acquires the asset and the contractual sequence merely reproduces the provision of money for a predetermined monetary return, the distinction between sale and loan becomes difficult to justify. The decisive test is consequently not economic appearance alone, but the reality of the contractual acts and the allocation of rights and risks.

This conclusion does not end the debate. It opens a second one. The legitimacy of Murabaha does not prove that Murabaha is the best or most accessible form of Islamic finance. Its dominance, its transaction costs and its economic proximity to debt-based conventional finance invite a broader reflection on the role of Musharakah, Mudarabah and other risk-sharing structures. The challenge for participatory banking is therefore twofold: to preserve the substantive conditions that justify its legal and religious distinction, and to develop financing techniques capable of making that distinction economically meaningful.

The Moroccan experience can thus be understood as a legal laboratory. It shows how a religious norm can become a statutory category without ceasing to generate theological questions; how a financial transaction can be economically similar to another while remaining legally distinct; and how business law can test the authenticity of a normative claim through the concrete realities of ownership, possession, risk, liability and contractual performance. The future of Murabaha will depend not simply on whether it is called Shariah-compliant, but on whether the legal reality of the transaction continues to justify the distinction that gives the product its raison d'être.

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Notes

1. Qur'an, al-Baqara, 2:275. The verse explicitly establishes the opposition between *al-bay'* (sale/trade) and *al-ribâ*.
2. Qur'an, al-Baqara, 2:278–279.
3. Sahih Muslim, 1584e and 1513; see also Jami' al-Tirmidhi, 1230.
4. International Islamic Fiqh Academy, Resolution No. 40–41 (2/5 and 3/5), 15 December 1988, "The Fulfilment of a Promise Made and Murabaha to the Purchase Orderer."
5. Constitution of the Kingdom of Morocco of 2011, Preamble, Art. 3 and Art. 41.
6. Ibid., Preamble and Arts. 1–2.
7. Kingdom of Morocco, Law No. 103-12 on Credit Institutions and Similar Bodies, Art. 58.
8. Qur'an, al-Baqara, 2:275; the text expressly contrasts trade and *ribâ*.
9. Sahih Muslim, 1584e, 1586a and 1587c.
10. Jami' al-Tirmidhi, 1232; Sunan Abi Dawud, 3503.
11. Sahih Muslim, 1513.
12. International Islamic Fiqh Academy, Resolution No. 40–41, cited above.
13. AAOIFI, Shari'ah Standard No. 8: Murabahah, sections relating to the acquisition of the asset, possession, and risk.
14. AAOIFI, Shari'ah Standard No. 8, particularly the provisions relating to constructive possession, agency, insurance, and defects.
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