

A Reading of Islamic Banking Contracts: Murābahah Sale as a Case Study—Shari’ah- Compliant Alternative or a Positive-Law Codification?

قراءة في عقود الصيرفة الإسلامية - البيع بالمربحة أنموذجاً -

بديل شرعي أم تقنين وضعي؟

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الملخص:

سعى النظام رقم 02/20 المتعلق بعمليات الصيرفة الإسلامية في الجزائر عبر استحداثه لمجموعة من العقود الجديدة، و بالتحديد البيع بالمربحة، إلى الاستفادة قدر الإمكان من الأحكام الشرعية الإسلامية في تنظيم المعاملات المالية، خاصة عبر استبعاد شرط الربا، إلا أن ذلك الطموح لم يتحقق كلياً، بفعل أصالة الفقه الإسلامي في تنظيم البيع بالمربحة، سواء من حيث مقاصده متعددة، أو من حيث ضوابطه الشرعية الدقيقة، التي تختلف شكلاً و مضموناً عن القانون الوضعي في تنظيم المعاملات المالية، و بالأخص عن قواعد القانون المدني، مما جعل ذلك العقد المدمج في المنظومة القانونية الجزائرية، كنظام هجين، بفعل الاختلاف الجوهرى في قواعد من جهة، و القصور الذي رافق طريقة تنظيمه من جهة أخرى، لا سيما إهمال الكثير من القواعد المهمة في هذا النوع من البيع، كغياب شرط التماثل في بعض الأموال، فضلاً عن الغموض الذي ساد كثيراً من المسائل، كالاعتراف بشرط التملك و القبض قبل إعادة البيع، فضلاً عن التعارض الذي شهدته بعضاً من أحكامه.

الكلمات المفتاحية: الصيرفة الإسلامية، البيع بالمربحة، الفقه الاسلامي، القانون الوضعي.

Abstract:

Algeria’s System 20/02 on Islamic banking operations introduces a set of novel contractual forms, chief among them the *murābahah* sale, with the declared aim of drawing upon Islamic legal principles—most visibly by excluding interest—to structure financial transactions. Yet that ambition remains only partially fulfilled. Classical Islamic jurisprudence regulates *murābahah* through a lattice of purposes and precise Shari’ah conditions that diverge, both in form and substance, from the framework of positive law and, in particular, from the civil-law rules governing commercial exchanges. The result is a hybrid arrangement: the *murābahah* contract has been grafted onto Algeria’s legal system while profound normative differences persist and while the regulatory text itself displays notable lacunae.

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Key Shari’ah requirements—such as the obligation of parity (*tamāthul*) in certain types of commodities—are omitted; other matters, including the purchaser’s prior acquisition and actual possession of the goods before resale, are left ambiguous; some provisions even contradict one another.

Key words: Islamic banking, *murābahah* sale, Islamic jurisprudence, positive law.

Introduction:

Legislation governing financial transactions—whether it stems from Shari’ah or from positive-law sources—pursues an essential, indeed foundational, objective: safeguarding the manifold interests of people with fairness, truthfulness, and security. Yet the extent to which that goal is achieved varies markedly. Islamic jurisprudence distinguishes itself by its comprehensive objectives and precise Shari’ah parameters,¹ vigilantly ensuring that financial dealings remain within the realm of the permissible, exclude the forbidden, maximize benefits, avert harms, and forestall litigation and conflict.² By doing so, it renders transactions more equitable³. Positive law, by contrast, exhibits persistent and even growing shortcomings—at times a kind of rigidity—in regulating financial affairs⁴. Hence one repeatedly encounters new statutes that amend or repeal their predecessors in an ongoing quest to attain the desired measure of justice.⁵

The sophistication and rigour with which Islamic Fiqh articulates its principles are nowhere clearer than in the law of sales. Here, the sacred texts explicitly endorse trade while prohibiting usury: “*Allah has permitted trade and forbidden interest*” (Q 2:275). The Prophetic tradition likewise admonishes, “The two parties to a sale retain a choice so long as they have not separated; if they speak truthfully and clarify, their transaction will be blessed, but if they lie and conceal, the blessing of their sale is effaced.”⁶ The aim is to pre-empt wrongful appropriation of wealth, align commerce with Shari’ah requirements, and uphold the classical maxim “The default rule in contracts is permissibility,”⁷ a principle exemplified by the trust sales—and most prominently by the *murābahah* sale.

Because of that distinctive profile, *murābahah* has increasingly attracted legislative interest. Algerian positive law has sought to capitalise on the richness of Fiqh-based rules to offer interest-free Islamic financing mechanisms⁸. The first step, albeit indirect, came with System 18/02 on “participatory” banking operations⁹, which referenced such transactions without defining them, subsuming them under ordinary banking rules. It was superseded by System 20/02 on Islamic-banking operations¹⁰, which expressly created several contractual forms¹¹, including *murābahah*. Article 5 defines *murābahah* as “a contract whereby a bank or financial institution sells to a customer a specified movable or immovable good that it owns, at its acquisition cost plus a pre-agreed profit margin, according to payment terms agreed by the parties.” Concurrently, Shari’ah supervisory bodies were instituted to ensure compliance with Islamic law¹², followed by Instruction 03/2020, which details Islamic-banking products and prescribes technical procedures for their implementation¹¹, and, most recently, by Monetary and Banking Law 23/09¹⁴, whose fifth chapter sets out the main contours of Islamic banking.

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Nevertheless, these newly introduced instruments have unsettled the existing positive-law framework, which is not fully prepared to absorb qualitatively different, simultaneously worldly and other-worldly, rules such as *amānah* (trust) sales—unknown to conventional civil law. System 20/02’s treatment of Islamic-banking contracts, *murābahah* included, therefore calls for a critical examination. This paper undertakes a comparative reading of the contract in Islamic fiqh and in positive law, while also offering a close, evaluative analysis of System 20/02 itself. Employing an analytical method, it investigates whether all Shari’ah prerequisites of this modernised sale have in fact been met and whether the resulting framework coheres with positive-law principles—determining, ultimately, whether the model constitutes a genuinely Shari’ah-based alternative or merely a hybrid codification of positive law?

This study thus reveals profound divergences between Algeria’s legal system and Islamic jurisprudence (Part I), prompting an assessment of the legislative approach embodied in System 20/02 (Part II).

I. Recognising the *Murabaha* Sale: Profound Divergences

The incorporation of *murābahah* as a newly designated nominate contract exposes several key conclusions that lay bare substantive gaps separating it from the other nominate contracts regulated under Algerian law. These divergences manifest at three interconnected levels: (1) the very substance of the governing rules; (2) the way those rules are conceptualised and depicted; and (3) their doctrinal classification and derivation.

1. Divergence in the Substance of the Rules

Between the *fiqh*-based conception of *murabaha* and its treatment in positive law lie pivotal differences. The four Sunni schools diverge in their classical definitions of this financing technique. Ḥanafī and Shāfi’ī jurists describe it as “a sale of what one owns at its original cost plus a profit,” thereby construing the phrase “*what one owns*” broadly to include assets acquired by purchase, gift, inheritance, bequest, and the like¹⁵. They further allow the seller to include ancillary costs that raise the commodity’s value—tailoring a garment, land or air freight charges, and similar expenses—according to commercial custom.

Mālikī and Ḥanbalī authorities, by contrast, define *murābahah* as “a sale of what one purchased at its purchase price plus a known profit,” thereby confining the transaction to assets the seller acquired *strictly by purchase*, in marked contrast to the wider Ḥanafī–Shāfi’ī ambit¹⁶.

These early definitions addressed the ordinary *murābahah* concluded directly between two market parties. Contemporary Islamic-banking practice, however, employs modified labels: “structured” or “bank *murābahah*,” “*murābahah* to the purchase orderer,”¹⁷ or more precisely “*murābahah* to the potential buyer who has issued a unilateral promise to purchase.” The last term captures the operative reality: “a sale, to someone other than the first seller, of an item lawfully owned by the intermediary at a price in a different currency that exceeds the

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intermediary's cost by an agreed profit margin.”¹⁸ The form itself is not new; only its designation has evolved, and both variants remain well attested in *Fiqh*¹⁹:

- **Classical bilateral *murābahah***, usually free of any hypothetical sale of goods not yet owned because the commodity is present in the market.
- **Triangular bank *murābahah*** involving three actors—initial seller, ultimate buyer, and the bank as intermediary—where the bank acquires the good only after the buyer specifies his needs and issues a prior purchase promise.

Positive law plots a different course. Algerian contract law, rooted chiefly in the Latin family along French lines²⁰ with certain Anglo-Saxon borrowings²¹, has lately been enriched—though also unsettled—by Shari'ah-based financing rules. Inevitably, the introduction of this new layer has produced doctrinal divergence: the Algerian legal order now recognises a fresh set of nominate contracts, including the *murābahah* sale mentioned in article 4 of System 20/02. If *murābahah* is thus treated as a new nominate contract, can it be folded back into the general category of sale under the Algerian Civil Code, given that it is already statutorily regulated? And, more pointedly, does its positive-law treatment approach the classical fiqh rules that govern sales in Islamic jurisprudence?

By turning to the Civil Code—specifically, to the law of obligations and contracts—we find that Algerian private law grants parties virtually unfettered discretion under the principle of contractual freedom²². Islamic commercial jurisprudence, however, restricts such latitude through Shari'ah safeguards: it proscribes *gharar* (excessive uncertainty), interest (*ribā*), and all forms of wrongful appropriation of wealth²³. Comparable constraints govern the very nature of the property that constitutes the contract's object. An asset that is legally valid and unrestricted under positive law is not ipso facto permissible in Shari'ah; to be licit, it must belong to the realm of lawful benefits, not harmful or prohibited uses²⁴. Accordingly, the sale of musical instruments, the financing of concert halls, or the funding of projects to build such venues—transactions unobjectionable under the Civil Code, whether structured as sales, leases, or gratuitous loans—remain impermissible under Islamic fiqh.

Conversely, the Civil Code does not treat interest (*ribā*) as inherently forbidden in commercial dealings—sales included—leaving the parties free to stipulate whatever terms they wish. Thus, Article 363 permits the seller and buyer to postpone transfer of ownership until the price is paid in full. Interest is barred only exceptionally in loans between private individuals: Article 454 states that “a loan between individuals shall always be interest-free, and any clause to the contrary is void.” Yet the Code re-authorises interest in dealings among financial institutions: Article 456 allows licensed lending entities that extend credit to promote national economic activity to charge interest.

However, the *murābahah* sale stands on entirely different ground, for it is constructed upon the categorical prohibition of *ribā* and the prevention of unjust consumption of others' property. Its every detail is regulated by Shari'ah commands and constraints that all trace

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back to the fundamental Islamic principle of *tawhīd* (servitude to God), since God—exalted is He—is the true grantor of human rights and their ultimate owner²⁵. As He says: “Believe in God and His Messenger, and spend out of that with which He has made you trustees; those of you who believe and spend shall have a great reward” (al-Ḥadīd 57:7). He likewise enjoins: “And call witnesses whenever you transact a sale” (al-Baqarah 2:282). These texts underscore the divine requirement to conduct dealings only in what is permissible and to shun the forbidden, particularly any wrongful appropriation of wealth. God further declares: “God obliterates usury but fructifies almsgiving” (al-Baqarah 2:276), and warns the faithful: “O you who believe, fear God and abandon whatever remains of usury, if you are truly believers. But if you do not desist, then be informed of war from God and His Messenger” (al-Baqarah 2:278–279).

In a different vein, regulation of the contract of sale under the Civil Code pays no heed to the requirement that the buyer take physical possession of the good before reselling it²⁶. For the Code, the decisive act is merely the transfer of ownership, because it conceives that transfer as an obligation on the seller rather than as a legal effect of the sale itself, as set out in Article 351 of the Civil Code. Consequently, the Algerian legislator treats the passage of title from seller to buyer as sufficient to vest the buyer with full proprietary powers—including the right to dispose of the good. That stance is highly problematic when the buyer is unable to obtain the goods he has already resold, whether because it is destroyed or because the first seller retains it.

Islamic jurisprudence adopts the opposite position: ownership status depends on both title and *qabḍ* (actual receipt). The prohibition is explicit in the ḥadīth of Ḥakīm ibn Ḥizām—“I said, ‘O Messenger of God, a man comes to me asking to purchase something that I do not have; I then buy it from the market and sell it to him.’ He replied, ‘*Do not sell what you do not possess.*’”²⁷ A sale concluded without prior possession can also become a stratagem for *ribā*—functionally a loan with interest—where the purchaser in effect says to the bank, “Lend me the value of this good at a specified mark-up,” but adopts this device to obtain a prohibited interest-bearing loan.²⁸

The seriousness of this integration problem, despite the profound doctrinal gap, is compounded by the clear cross-referencing to the Civil Code that the preamble to System 20/02 employs in order to signal the various legislative texts related to these new contracts.

2. Divergence in the Conceptualisation of the Rules

Algerian civil law proceeds from the premise that contractual intent plays the decisive role in both forming a contract and determining its effects; hence everything ultimately rests on the parties’ mutual consent²⁹. The legislator protects that consent through the doctrine of vitiating factors and even classifies contracts according to their mode of conclusion—whether negotiated (bargained) or contracts of adhesion³⁰. Islamic jurisprudence, by contrast, distinguishes between bargain sales (*bayʿ al-musāwamah*) and trust sales (*buyūʿ al-amānah*)—to which *murābahah* belongs—where the price-setting method is integral. In a

trust sale the purchaser relies on the seller’s disclosure of his actual acquisition cost; the seller must therefore speak truthfully. Should he misrepresent that cost, he is deemed treacherous.³¹

This trust-based taxonomy is entirely absent from Algerian positive law. The Civil Code neither privileges nor even recognises the distinction between honesty and deceit in a *murābahah*-type transaction. System 20/02, however, alludes to it implicitly in Article 5, which requires the bank to sell the asset “at its acquisition cost plus a pre-agreed profit margin, and in accordance with the payment terms agreed by the parties.” The very need to specify “acquisition cost” imports a set of ancillary safeguards aimed at truthfulness and at averting fraudulent price inflation. Asset typology furnishes another contrast; Civil law classifies property chiefly as movable or immovable by nature, or as determined individually or by genus. Shari’ah layers additional normative filters: assets are also judged *ribā-susceptible* or *non-ribā-susceptible*, a distinction designed to block both usury and excessive uncertainty.³² Consequently, while *murābahah* is catalogued in Islamic law as a trust sale, in positive law it enters the books merely as one of several banking-finance templates.

3. Divergence in the Doctrinal Derivation of Rules

Algerian contract law begins with a binary premise: a contract is either valid or void. If the agreement satisfies its constitutive elements and conditions, it stands; if any essential element is missing, it collapses into nullity. Even where a defect of consent is invoked, the aggrieved party may choose—pursuant to Article 100 of the Civil Code—to uphold the contract rather than annul it. Islamic jurisprudence proceeds from an altogether different starting point. The controlling maxim “*The default rule in contracts is permissibility*” directs the jurist to treat novel financial arrangements as lawful unless a specific textual or rational proof dictates otherwise. Accordingly, *fiqh* scholarship undertakes a two-stage inquiry whenever confronted with an unprecedented transaction.³³

1. **Juristic classification (*takhrīj*)** – The scholar first determines whether the case can be subsumed under a pre-existing nominate contract recognised in the primary sources; if not, the transaction is treated as *sui generis* and assessed on its own merits.
2. **Shari’ah compliance audit** – Having located (or declined to locate) an analogue, the inquiry then ensures that every procedural step is free from prohibited elements. These methodological commitments oblige us to evaluate the statutory *murābahah*: does its positive-law configuration truly mirror the classical *fiqh* template?

II. Assessing the Statutory Design of the *Murabaha* Contract: Multiple Shortcomings

The close reading of System 20/02 reveals that Algerian law has not comprehensively captured the *murabaha* framework. Three inter-related problems loom large: (1) regulatory lacunae, (2) textual ambiguity, and (3) internal inconsistency.

1. Regulatory Lacunae

System 20/02 on Islamic banking omits many provisions that Islamic jurisprudence deems essential to a valid *murābahah* arrangement. From the outset—at the level of the pre-*murābahah* conditions—the text shows little concern for the validity of the bank’s *first* purchase, concentrating instead on the second-stage sale to the customer (“*murābahah* is a contract whereby the bank or financial institution sells a specified commodity to a client...”). Yet the initial purchase can be defective or void, for example if the bank obtained the good under duress or exploitation, through gambling or excessive *gharar*, sold it before acquiring title or possession, financed it with an interest-bearing loan, or dealt in *ribā-susceptible* commodities that require both spot delivery and strict parity. If the original price is paid in a commodity of the same *ribā* genus, Shari’ah demands equality—item for item, hand-to-hand—because any excess would be usury, not profit³⁴. Only when the exchange involves different genera may unequal amounts be allowed, as the Prophet ﷺ said: “Sell as you wish, provided it is hand-to-hand.” Does the bank’s Shari’ah board rigorously police these scenarios? Article 5 (“...a specified commodity, whether movable or immovable...”) offers no hint that it does. The provision instead reflects a Latin-law taxonomy of assets, eclipsing the finer, *fiqh*-based distinctions—both in terminology and in substance.

Deficiencies persist at the moment of concluding the *murābahah* itself. Article 5 simply states that the bank sells “a good it owns at its acquisition cost plus a pre-agreed profit margin,” remaining silent on the sanction if the bank misstates the original cost or hides ancillary expenses. Classical *fiqh* treats such misrepresentation as treachery, but System 20/02 provides no redress. Other Arab statutes—Saudi Arabia’s Civil Transactions Law, Article 316, for example—supply explicit remedies, allowing the buyer to rescind where the seller conceals cost or where excessive mark-up emerges *ex post*. The Algerian text offers no parallel remedy, leaving practitioners to wonder whether the matter should revert to general contractual principles or to the Shari’ah board’s discretionary rulings—doubts borne out by current banking practice.³⁵

Instruction 03/2020 explicitly states in Article 4 that “acquisition cost” comprises both the purchase price of the asset and all direct expenses linked to acquiring that asset. In practice, this means that items such as notarial fees for the formal contract, appraisal costs for real estate, registration duties, financing charges, and similar outlays may all be folded into the cost base. Yet banks typically do not itemise these charges for the customer; transport, storage, or miscellaneous fees are simply embedded in the quoted price. Does this not place an additional—and largely opaque—financial burden on the *murābahah* purchaser?

2. Textual Ambiguity

System 20/02 is not merely incomplete; several of its provisions are obscure—largely because the drafters strove to adhere to civilian templates while neglecting central *fiqh* canons. The result is uncertainty on many fronts:

a. Warranties and risk allocation

There is no mention of the obligations that bind the bank or financial institution if the sold good is destroyed or found to be defective. In Islamic jurisprudence, once the bank has taken possession and ownership of the asset, it becomes liable for all related risks and defects, as established in Resolution No. 40-41 on “Fulfilment of Promise and Murabaha to the Purchase Orderer,” issued by the International Islamic Fiqh Academy during its fifth session in Kuwait. The system’s silence on this point opens the door to the possibility that warranty claims may be redirected to the original seller, rather than holding the bank accountable. This omission is striking because, under Shari’ah, the bank must actually acquire and possess the item before reselling it to the client, thereby guaranteeing it against defects, damage, or loss³⁶. Does the system intend for this requirement to be addressed through general civil law rules? The Civil Code, on one hand, grants the owner the right to dispose of the property upon transfer of title, and on the other, makes risk of loss dependent on delivery—a partial overlap with Islamic law³⁷. However, this is insufficient, where ownership and possession must precede the sale to the client. If the legislature intends to leave this to practice, it poses a risk to the Shari’ah principle that mandates possession and liability before resale—especially given that banks often seek to exclude themselves from liability for hidden defects, leaving the client alone to pursue claims against the original seller. This is irrespective of the possibility for the client to involve the bank or financial institution in litigation, as permitted by Article 194 of the Code of Civil and Administrative Procedure (which allows for intervention at first instance or on appeal, either optionally or obligatorily).

b. On the Nature of the Promise in Fiqh and Law

In addition to the foregoing observations, several crucial issues arise before a *murābahah* is concluded—chief among them the banker’s insistence that the customer proceed with the sale once the bank has acquired the requested asset. What civil sanction applies if the customer reneges after the bank has taken title? Can the client be compelled to execute the *murābahah* once the bank owns and possesses the commodity?

System 20/02 is silent on the matter. This lacuna, in our view, stems from the legislator’s neglect of the binding-force question in the pre- *murābahah* phase. Article 5 merely allows the parties to agree on the profit margin and on the terms and modalities of payment, tacitly consigning the degree of pre-contractual commitment to party autonomy. Instruction 2020-03 later filled in operational details for “*murābahah* to the purchase-orderer,” yet most of its clauses impose *non-Shari’ah-compliant* requirements that effectively bind the customer prior to the *murābahah* itself. Article 11 authorizes the bank, before it buys the designated asset, to oblige the customer to sign a unilateral purchase undertaking; Article 12 permits the bank to demand a good-faith deposit. Article 13 confirms that the unilateral promise, the bank’s purchase contract, and the murabaha itself are three distinct contracts. In practice, therefore, the bank can saddle the client with pre- *murābahah* obligations.

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A further legal reality complicates matters: under Articles 71–72 of the Civil Code, a promise to contract is itself a contract that may be enforced in kind or by damages. Classical fiqh, however, treats a *wa‘d* (promise) merely as an expression of intent, falling short of a contract or enforceable obligation. Which standard will a Shari’ah board apply—the civil-law rule or the fiqh rule? The system’s silence amounts to an evasion of an issue that fiqh regards as central: the customer must bear no binding duty before the bank has acquired and possessed the asset; the pre- *murābahah* stage must remain a non-binding promise. Classical jurists split into two opinions on this point.³⁸

- **Prohibition.** The Mālikīs, joined by modern scholars such as Shaikh Muhammad ibn ‘Uthaymīn and Shaikh Nasir al-Dīn al-Albānī, view the promise as a stratagem for interest and therefore impermissible.
- **Permissibility.** The Ḥanafīs, the Ḥanbalīs, and Shaikh ‘Abd al-Aziz ibn Baz—followed by the International Islamic Fiqh Academy and most contemporary authorities—allow the practice but only on two conditions:
 1. The agreement must remain preliminary—a mere, non-binding promise of sale and purchase. Either party may walk away, and if the asset is destroyed between promise and contract, the loss rests with the bank (the would-be seller), for no sale yet exists.
 2. The *murābahah* contract may be concluded only after the bank has taken full title and possession of the asset.

Any violation of either condition renders the transaction unlawful, given the Fiqh maxim that contracts are presumed permissible unless a clear prohibition applies.

Hence the Shari’ah-based solution favored by many jurists is to keep the customer’s option to withdraw open after the bank acquires the asset. The International Islamic Fiqh Academy adopted this position in Resolution 157/176 on “Promises and Undertakings in Contracts” (Amman, June 2006):

- “A bilateral promise is morally binding but not enforceable by a court; ... a bilateral promise devised to circumvent *ribā*—such as a promise on *‘inah* (sale and buyback) or on a usurious sale—is prohibited.”

For the bank’s own protection if the customer defaults, fiqh offers devices such as stipulating an *option of condition* (*khiyār al-sharṭ*) for a set period³⁹: the bank purchases the asset subject to that option, so that if the client backs out the bank may return the asset to the original seller.

Bank practice in Algeria does not resolve these issues. The Banque de Crédit Populaire d’Algérie, for example, markets Islamic-finance products—most prominently *murābahah* for car and real-estate purchases—detailing eligibility criteria, financing ratios, and so forth. Yet it imposes *up-front file-processing fees* and other obligatory charges before the *murābahah* even exists, contra Fiqh requirements.⁴⁰

C. On Sanctions

Great uncertainty surrounds the penalty for entering into a murābahah sale without the requisite license. Under positive law, when special contracts such as the contract of sale are regulated, the same substantive elements and conditions apply to every new form of sale, with any differences remaining purely formal. This creates a degree of uniformity. Islamic jurisprudence, by contrast, assigns distinct pillars to each kind of sale. The sale of gold and silver, for example, is not treated like the sale of cars or real estate: in addition to the well-known pillars, the former requires immediate exchange and equality. What, then, is the proper penalty if a murābahah contract is concluded in defiance of these differences—whether because ribā is involved or because no Sharī’ah license has been obtained? Should the matter be referred to the general rules (absolute or relative nullity), or to the classifications of sanction in Islamic jurisprudence?⁴¹ In Fiqh, the sale is void if any condition of formation is missing, defective if a condition of validity is absent, suspended if a condition of enforceability is lacking, and voidable if a condition of binding force is unmet.

D. On Referring to the rules

System 20/02 is not free from the concept of reference—whether to Islamic fiqh or to positive laws. Article 2 states, *inter alia*, that such operations “must comply with the provisions set out in Articles 66 to 69 of Ordinance 03/11 on Money and Credit, as amended.” A close reading shows that the system confines itself to a limited set of rules while making direct cross-references. Implicitly, it also refers to other financial-market statutes, notably Law 23/09 on Monetary and Banking Law, and to System 18/02, which System 20/02 repealed yet partly reproduced—especially in the preamble to System 18/02, which draws primarily on the traditional legal rules governing Algeria’s banking and financial sector. Thus, the text does not mark a clean break with the conventional framework; it represents a formal change rather than a genuine move toward Islamic finance.⁴²

This issue warrants careful scrutiny: Is removing interest alone sufficient to declare contracts licit? At the very outset of System 20/02 (Article 2), the interest condition is excluded, as though Islamic financial rules were limited to ribā alone. Yet banks and financial institutions characteristically deal in interest; hence the system focuses on ribā but neglects other Sharī’ah controls (prohibition of *gharar*, injustice, and harm). Is there any safeguard in positive law adequate to prevent these other violations when the spotlight is placed solely on interest?

Law 23/09—Monetary and Banking Law—implicitly answers. Article 71 provides: “For the purposes of this Law, a banking operation relating to Islamic banking is any operation carried out by banks or Islamic windows that is in conformity with the provisions of Islamic law.” The legislator thus replaced the phrase “any banking operation that entails neither charging nor paying interest” (Article 2, System 20/02) with “Islamic law,” thereby widening the circle of controls beyond ribā.

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There are also indirect references, above all to the laws invoked in the system’s preamble—civil, commercial, and the like. Given the paucity of substantive rules on murābahah in the framework (the text merely defines the contract and leaves out its Shari’ah conditions), the system implicitly delegates a crucial role to the Shari’ah board in defining the contract’s requirements. This, in turn, overrides legislative texts and the roles of judge and parties, because the contract must conform to Shari’ah, not to positive law. Yet the question remains: Has the system expressly empowered the board to verify murābahah conditions and to create binding legal rules for all parties?

The tasks assigned to Shari’ah bodies⁴³ vary by phase⁴⁴. *Ex-ante* oversight is performed by the National Shari’ah Board for Fatwā and Islamic Financial Industry, which may approve or reject products (Article 14, System 20/02). *Ex-post* monitoring is entrusted to the Shari’ah Supervisory Board of the Islamic window, whose role seems confined to checking Shari’ah compliance, yet this is opaque. Article 15 states that the bank’s general assembly appoints board members—regardless of their Shari’ah competence—and Article 72 of Law 23/09 reiterates this. Stating independence is not enough; conformity to God’s law is required. How, then, can the board verify that murābahah contracts meet Shari’ah conditions? Its responsibility is great: once a Shari’ah board exists within a bank, does its remit cover alignment with fiqh or with positive law, given the existing cross-references? Or must it adhere fully to Shari’ah rules?

Further concern arises from Article 73 of Law 23/09, which stipulates that marketing Islamic-banking products requires a prior certificate of Shari’ah compliance from the competent Shari’ah board **and** the approval of the Bank of Algeria. This unequivocally grants the central bank the right to approve the Shari’ah-compliance certificate. But does the Bank of Algeria possess sufficient and comprehensive Shari’ah expertise to endorse or reject such certificates?

3.Contradictions in the Provisions

System 20/02 exhibits certain internal inconsistencies. For instance, Article 02 refers to Articles 66 through 69 of the now-repealed Ordinance No. 03/11 on Money and Credit. Those articles address banking operations, including loans, deposits, guarantees, and leasing with a purchase option. It appears the system intended for these operations to be performed without charging or paying usurious interest. However, Article 68 of Ordinance 03/11 (which became Article 70 of Law No. 23/09 on Monetary and Banking Law) defines a loan as “any transaction whereby a person, in exchange for consideration, places or promises to place funds at the disposal of another...”.

This implies that loans are, by default, interest-bearing. Yet, in the framework of System 20/02, two things are required: on one hand, such operations must not involve interest, while on the other hand, they must conform to the rules of Islamic banking. This presents a clear

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contradiction and an apparent subordination to positive law⁴⁵. How can one equate interest-based conventional banks and profit-seeking Islamic banks under the same legal rules? Such ambiguity should be resolved by subjecting these operations exclusively to Islamic jurisprudence, as decided by qualified Shari'ah scholars—something Articles 14 and 15 of System 20/02 gesture towards but require more robust implementation.

Conclusion

In summary, it appears that Algerian legislation has sought to enter the system of Islamic financial transactions using rigid and, at times, unsuitable legal instruments. The legislator's aim has been to regulate economic and financial necessity, yet remains far removed from any rigorous academic theorization of the subject that could make the system genuinely autonomous and distinctive.

The real challenge in the *murābahah* contract, as currently regulated, is the absence of legislative precedent in the Civil Code for such new forms of contract. Even with the existence of some legislative cross-references, these remain insufficient due to fundamental differences in rules and conceptualisation. Algerian law leaves us with two problematic consequences: **first**, references to other laws with differing rules; and **second**, the delegation of religious and legal responsibility to the bank's Shari'ah board to determine the contract's conditions. This has rendered *murābahah* a hybrid regime in Algerian law—neither fully grounded in Islamic jurisprudence (as it ought to be), nor fully integrated into positive law (which is to be avoided).

Therefore, we call for a binding requirement on banks and financial institutions to observe the fiqh-based rules for *murābahah* sales, as articulated by Islamic jurists. We propose that the Shari'ah Board for Fatwā mandate the use of *murābahah* contract models that comply with Shari'ah, by adhering to the earlier outlined conditions, while allowing parties the freedom to negotiate payment terms and the profit margin. This approach aims to ensure the transaction remains permissible and to harmonize and clarify Shari'ah rules, making them known and stable—subject only to new, unprecedented issues, which should be left to qualified Shari'ah authorities.

- We also urge the Algerian legislator to broaden the scope of Islamic financial transactions so they apply between individuals—not just between banks and individuals—given that *murābahah* is a particularly secure contractual model, supported by multiple Shari'ah safeguards that protect both parties and prevent disputes and injustice.
- We further hope the Algerian legislator will seriously consider recognizing Islamic jurisprudence in financial transactions as an official source of property law (as is the case for family law), since enduring legal stability, genuine security, honesty, and justice in transactions, as well as flexibility and adaptability, are only possible under Islamic legal rules. By contrast, positive law remains persistently incomplete, contradictory, and static. Thus, legislative texts must be updated to align with Islamic law, explicitly repealing inconsistent provisions and firmly enshrining fiqh-based standards.

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- 2- Khalid bin 'Abd al-'Azīz bin Suleiman Āl Suleiman, *The Fundamental Rationales of Prohibited Financial Transactions*, Publications of the Saudi Fiqh Association; Dar Konnor Ishbīliyah for Publishing and Distribution, Kingdom of Saudi Arabia, 1990, pp. 5 & 35.
- 3- See: Shadiyah Muhammad Ahmed Ka'kī, *Justice in Financial Exchanges* (Umm al-Qurā University, College of Shari'ah and Islamic Studies, Mecca, 1984), p. 96.
- 4- *Legislative excellence means arriving at the truth instantly and effortlessly; this is the most salient feature of Islamic legislative norms.* — Abbas Hosni Muhammad, *Characteristics of Islamic Legislation: A Comparative Study with Positive Law*, *Journal of Shari'ah and Islamic Studies*, vol. 9, no. 24, University of Kuwait, 1994, p. 45.
- 5- The clearest proof is the torrent of specialised statutes that appear continually in the form of legislative or regulatory texts. A prime example is the Consumer Protection Law, first issued in 1989 and subsequently revised in 2009 and 2018:
 - Law No. 89-02 of 7 February 1989 on the General Rules for Consumer Protection, *Official Gazette* 1989, No. 6 (8 February 1989) — now repealed;
 - the currently operative Law No. 09-03 of 25 February 2009 on Consumer Protection and the Suppression of Fraud, *Official Gazette* No. 15 (8 March 2009), as amended and supplemented by Law No. 18-09 of 10 June 2018, *Official Gazette* No. 35.
- 6- Ṣaḥīḥ al-Bukhārī, vol. 3, p. 58, no. 2079; Ṣaḥīḥ Muslim, vol. 3, p. 1164, no. 1532.
- 7- Muhammad Sikhal al-Majjāji, *The Rules of the Contract of Sale in Mālikī Islamic Jurisprudence*, Ibn Ḥazm Publishing and Distribution House, Beirut, Lebanon, 2001, p. 23.
- 8- See also: Issam Guetatlia and Saleh Ayyad, *The State of Islamic Banking in Algeria in Light of The instruction No. 2020-02*, *Journal of Communication*, Vol. 30, No. 1, March 2024, p. 45.
- 9- System No. 18/02, dated 26 Ṣafar 1440 AH / 4 November 2018, on the rules governing the practice of participatory banking operations by banks and financial institutions, *Official Gazette* No. 73.
- 10- System No. 20/02, dated 20 Rajab 1441 AH / 15 March 2020, defining Islamic banking operations and rules for their implementation by banks and financial institutions, *Official Gazette* No. 16.
- 11- As stated in Article 4 of System No. 20/02: "Islamic banking operations include the following products: murābahah, mushārahah, muḍārahah, ijārah, salam, istiṣnā', deposit accounts, and investment accounts."
- 12- See Article 15 of System No. 20/02.
- 13- Instruction dated 2 April 2020, defining Islamic banking products and specifying the technical procedures and characteristics for their implementation by banks and financial institutions.
- 14- Law dated 21 June 2023, *Official Gazette* No. 43.
- 15- See: Mustafa Ahmed al-Zarqā, *Nominated Contracts in Islamic Jurisprudence: The Contract of Sale*, Dār al-Qalam, 2nd ed., Damascus, 2012, p. 88.
- 16- Shadia Muhammad Ahmed Kaaki, *previously cited*, pp. 147–148
- 17- Sulaymān al-Ruḥaylī, *Fiqh of Financial Transactions – Juristic Rules Relating to Sales*, Islamic Affairs Department, Sharjah, 2015, pp. 62–63.
- 18- Rabī' Maḥmūd al-Rūbī, *Murābahah to the Purchase Orderer and the Developmental Role of Islamic Banks*, Islamic Studies Research Series Center, Kingdom of Saudi Arabia, 1991, p. 9.

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- 19- Sa'd ibn Turkī al-Khathlān, *Contemporary Fiqh of Financial Transactions*, Dār al-Ṣumay'ī for Publishing and Distribution, 2nd ed., Kingdom of Saudi Arabia, 2016, p. 108.
- 20- See: Ali Filali, *Obligations: The General Theory of Contract*, Moufem Publishing, Algeria, 3rd ed., 2013, pp. 52–53; Chaouki Bennassi, *Introduction to Obligations*, Dar al-Khaldūniyya, 2018, p. 443 and following; Ghnima Lahlou Khiyār, *Theory of Contract*, Bayt al-Afkār, Casablanca–Algeria, 2018, p. 32 and following.
- 21- See, for example: the lease financing contract (‘aqd al-i‘timād al-ijārī), as defined in Ordinance No. 96/09 dated 10 January 1996 on lease financing, *Official Gazette* No. 03; also, the invoice assignment contract as defined in Article 543 bis 14 of the Commercial Code.
- 22- As provided in Article 106 of the Civil Code.
- 23- Although exceptionally, Article 612 of the Civil Code prohibits gambling and betting, it allows them in the context of competitions and sports betting.
- 24- Adnān Khālīd al-Turkumānī, *Contractual Controls in Islamic Jurisprudence*, Dar al-Shurūq for Publishing, Distribution, and Printing, 1st ed., 1981, Kingdom of Saudi Arabia, p. 138.
- 25- Abbas Husni Muhammad, *The Contract in Islamic Jurisprudence: A Comparative Study with Positive Law, Revealing in Detail the Superiority of Islamic Legislation*, Vol. 1, 1st ed., 1993, p. 95.
- 26- See: Baadji Aḥmed, *The Contract of Sale – A Comparative Study*, Dār Lāyimah for Publishing and Distribution, 2025, p. 444 and following.
- 27- Jāmi‘ al-Tirmidhī, Book of Sales, Chapter: "On the Dislike of Selling What One Does Not Possess" (3/534).
- 28- Sa'd ibn Turkī al-Khathlān, *previously cited*, p. 108.
- 29- This is evident from the definition of contract in Article 54 of the Civil Code and Article 59, which affirms the principle of consensualism in contracts.
- 30- See Articles: 70 and 110 of the Civil Code.
- 31- As stated by Prof. Mustafa Ahmed al-Zarqā, *previously cited*, pp. 89–90.
- 32- See: Sa'd Khalīfah al-‘Abbār, *Murābahah Banking and Its Validity as a Shari'ah-Compliant Alternative to Usurious Interest*, National Book House, Benghazi, Libya, 2018, p. 18.
- 33- Khalid bin Abdulaziz bin Sulaiman Al-Sulaiman, *previously cited*, p. 37.
- 34- Shadia Muhammad Ahmed Kaaki, *previously cited*, p. 20.
- 35- Several national banks and financial institutions in Algeria have initiated Islamic banking services. The Banque Nationale d'Algérie, for instance, has adopted *murābahah* as a financing mechanism for car and real estate purchases. However, the details provided are often superficial, limited to describing it as financing in accordance with Islamic principles. The emphasis is placed on the bank purchasing the car and reselling it with a pre-agreed profit margin, highlighting the benefits of this contract in terms of loan amount, ceiling, duration, and processing speed—without close attention to Shari'ah-compliant implementation. Much of the detail appears to be deferred to the contract model used by the bank, which is often exploited to introduce terms advantageous to the bank, such as obliging the client to complete the purchase or imposing penalties for withdrawal, regardless of Shari'ah board intervention.
Source: [Banque Nationale d'Algérie – Islamic Finance](#) (accessed: 17/05/2025)
- 36- Baadji Aḥmed, *previously cited*, p. 374 and following.
- 37- As provided in Article 369 of the Civil Code.
- 38- See details: Sa'd ibn Turkī al-Khathlān, *previously cited*, p. 110.
- 39- See: Muḥammad Ṭāhā Ḥamīdī, *Murābahah to the Purchase Orderer and the Legitimacy of Its Application by Al-Baraka Bank of Algeria*, *Al-Iḥyā' Journal*, Vol. 20, No. 27, 2020, p. 420.

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40- Muḥammad Ṭāhā Ḥamīdī, *same reference*, p. 420.

41- Aḥmed Muṣṭafā al-Zarqā, *previously cited*, p. 45.

42- See: Badr al-Dīn Barāḥliyah, *The Legal and Regulatory Framework of the Islamic Economy in Algeria*, Proceedings of the First National Conference on "Islamic Banking – Between Theory and Practice," Publications of the Laboratory for Economic and Strategic Reforms and Integration into the Global Economy, École Supérieure de Commerce, Kolea, Algeria, October 2020, pp. 252–253.

43- See: Ammaria bekhti and Kamal Ben Moussa, *Mechanisms for Activating Sharī'ah Supervision in Islamic Banks in Algeria*, in the same conference proceedings, *previous reference*, p. 262.

44- Accordingly, three types of Sharī'ah oversight exist:

- **Preliminary oversight**, which is preventive and involves referring issues to the Fatwā Council for a Sharī'ah opinion;
- **Concurrent oversight**, which involves monitoring the implementation of banking operations to ensure compliance with Sharī'ah and issued fatwas, detecting and reporting violations;
- **Subsequent oversight**, which is internal and includes auditing completed transactions. See: Samira Mechrawi, *The Role of the Supervisory Board in Regulating Islamic Financial Transactions – Murābahah to the Purchase Orderer as Applied by Al-Baraka Bank*, *Journal of Advanced Economic Studies*, Vol. 2, No. 4, December 2019, p. 93.

45- Sulaymān Būfāsah, *Obstacles to Islamic Banking – Between Diagnosis and Scrutiny*, Conference Proceedings, *previous reference*, p. 246.