

Contracts Applied in Indonesia Sharia Interbank Money Market (PUAS); An Analysis from Comparative Fiqh Views

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Abstract

Bank Indonesia Regulation (22/9/PBI/2020) administers that Sharia Interbank Money Market (PUAS) is based on particular instruments which are SIMA (Mudharabah Interbank Investment Certificate), SiKA (Commodity Murabahah Investment Certificate) and SiPA (Wakalah bil-Istismar or Investment Agency Certificate). Despite the existing fatwas (DSN-MUI 37/X/2002, 38/X/2002, and 78/IX/2010) rule the principles within PUAS in Indonesia, yet those are straightforward and concise. Hence, it is crucial to develop extended fiqh deliberation on the regulation as it can further develop and evaluate the current practice. The research aims mainly at achieving a clarity from comparative fiqh views on the practice of conventional and Islamic banks mixed funds within the PUAS. Particularly, it will examine whether the existing Islamic contracts offered within PUAS encounter potential fiqh issue. This study applies qualitative approach using content analysis method namely comparison of jurist views and legal maxim. It summarised: (i) there is no fiqh issue in the use of excess liquidity from conventional banks to be invested in sharia banks with the rationale of Quran (2:274) and Legal Maxim of “it is absolved in dependent events and not so for independent ones”, (ii) the subject-matter of each contract within PUAS, capital and work in Mudharabah, price and goods in commodity Murabaha, and trusted funds in wakalah bil-istismar, has no potential fiqh issue with regarding the mandatory condition of subject-matter that should be sharia-compliant. (iii) However, although utilizing comingled wealth is permissible, nonetheless it stands under detestation. As such, commodity murabahah contract (SiKA) has less fiqh issues because it dissociates sharia banks in PUAS to expose directly with excess liquidity from conventional banks.

Keywords: *Contracts Sharia in Indonesia, Contracts Sharia Interbank Money Market*

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Introduction

As the intermediation in the nature of collecting short-term deposits and transforming them to the middle and long-term financing, banks, either conventional and Islamic, encounter liquidity challenges to fulfil their demanded liabilities from customers or excessed deposits that need to be allocated as financing assets. Therefore, this inherent mismatches of the banking business model needs to meet the appropriate market to be accommodating.¹ With the global total asset of merely 2 trillion USD in 2019,² the robust financial infrastructures to manage liquidity for that tremendous amount of assets are inevitable. At the global level, there are several main existing liquidity management instruments implemented in distinct jurisdictions.³ International commodity *Murabahah*, *Salam* sukuk which Bahrain experiences, short-term *Ijarah Sukuk* in Bahrain, *Wakalah bil-Istismar* (Investment Agency), *Musharakah* certificates implanted commonly in Sudan, and Malaysian Islamic Interbank Money Market (IIMM) are the instances of such instruments.

In the context of Indonesia, Bank Indonesia as the central bank of the nation started to implement Islamic money market instruments in 2004 with the issuance of Bank Indonesia *Wadi'ah* Certificate (SWBI) on short-term tenor basis up to 28 days. Nevertheless, this instrument was a bilateral instrument between Bank Indonesia and Islamic banks based on *mudarabah* investment certificates, and therefore non-tradable nature was an endogenous weakness of this instrument. As a response, in 2008, Bank Indonesia introduced Bank Indonesia Sharia Certificate (SBIS) as the alternative instrument adapting *ju'alah* agreement, *mudarabah*, *musyarakah*, *wadi'ah*, *qard*, and *wakalah* agreement⁴. In addition to these contracts, recently, Bank Indonesia Regulations⁵ administers that Sharia Interbank Money Market (PUAS) is based on particular instrument which are SIMA (*Mudarabah* Interbank Investment Certificate), SiKA (Commodity *Murabahah* Investment Certificate) and SiPA (*Wakalah bil-Istismar* or Investment Agency Certificate). Bank Indonesia reported in 2020 that overnight tenor dominated the market with total volume of Rp 1,527 trillion with majority of *mudarabah*-based contracts and the monthly average transaction volume was in between Rp 14 to 19 trillion.⁶

With the undergoing development of instruments within sharia interbank money market (PUAS) in Indonesia, the fatwas of National Sharia Board of National Ulama Assembly (DSN-MUI) maintains that conventional banks are able to be participants, as investing banks, of PUAS. These fatwas, subsequently, translated and legalized to the Bank Indonesia Act⁷ administers that the participants of PUAS are Islamic Banks, as investing and receiving banks, and conventional banks, as only investing banks. This exposure is in line

¹ Obiyathulla Ismath Bacha, Abbas Mirakhor, and Hossein Askari, 'Risk Sharing in Corporate and Public Finance: The Contribution of Islamic Finance', 27.

² Bacha, Mirakhor, and Askari.

³ Al-Amine, Muhammad al-Bashir, chapter 7 within the book by Hunt-Ahmed, Karen, et al. Contemporary Islamic Finance: Innovations, Applications, and Best Practices, John Wiley & Sons, Incorporated, 2013

⁴ ISRA, International Shari'ah Research Academy for Islamic Finance. 2016. 2nd Edition Islamic Financial System: Principles and Application. Malaysia (CTP-VVP). 402.

⁵ Peraturan Bank Indonesia Nomor 22/9/PBI/2020 tentang Pasar Uang Antarbank berdasarkan prinsip Syariah. (Bank Indonesia Act number 22/9/PBI/2020 for Sharia Interbank Money Market)

⁶ Laporan Ekonomi & Keuangan Syariah, LEKSI. (Sharia Economy and Finance Report). 2020. Bank Indonesia

⁷ Peraturan Bank Indonesia 22/9/PBI/2020

with the engagement of Islamic banks within the dual banking system in Indonesia. It is also essential to notice that the importance of halal chain (end-to-end) of money flows in Islamic financial system, especially in banking, should be preserved. Though it is hard to achieve, maximizing endeavour needs to be conducted continuously.

Despite the existing fatwas (DSN-MUI 37/X/2002, 38/X/2002, and 78/IX/2010) ruling the principles within Sharia Interbank Money Market in Indonesia, those are straightforward with concise *fiqh* justification and general deliberation. Hence, the need of extension studies from *fiqh* views to grab an exhaustive deliberation should be developed. Several studies has been conducted observing the nature and development of PUAS in Indonesia. Widayatsari in 2014 reviewed the practice of PUAS in Indonesia however her study was more to descriptive and did not explore the *fiqh* analysis of products transacted in PUAS. A study by Rahmatika and Ilmiah in 2017 critized the application of Mudharabah in PUAS whereby musharakah contract is more viable to be applied because SIMA product is tradable. Futhermore, Islamic Interbank Money Market even though is operated under shariah principles is subject to speculation if it is treated as liquidity trading transaction as Leu report in 2016. Liquidity management transacted in Islamic Money Market can utilise several types of shariah contracts. Qatar Financial Authority (2015) proposes commodity murabahah (CM), equivalent to SiKA in PUAS, for Islamic Interbank Money Market transaction. However, some studies critically evaluate the CM-based liquidity management products in Islamic Money Market because it converge the interest-bearing like products in conventional finance (Kornitasari, 2014; Ahmad et. Al, 2020). Therefore, the current research aims to investigate the current shariah contracts applied in PUAS in order to achieve clarity.

With quoting the near jurisdiction and merely similar economic conditions to Indonesia, there is a resolution issued by the Sharia Advisory Committee of Bank Negara Malaysia (SAC BNM) regarding the collection of doubtful sources of funds for Islamic banks deposit products. The SAC BNM resolves the permissibility based on the hadith that maintains that the Prophet pbuh. has transacted commercially with Jews and Christians while their wealth was commonly generated from unlawful sources.⁸ However, this resolution is an answer for retail banking products, which are liabilities from Islamic banks toward their customers. Hence, to the date of this research conducted, there is still a gap of comprehensive studies to examine the potential *fiqh* issues where the Islamic banks' funds are exposed immediately with their conventional counterparties in wholesale banking products in specific Indonesia Sharia Interbank Money Market (PUAS).

The research aims mainly at achieving a clarity from comparative *fiqh* views on the practice of conventional and Islamic banks mixed funds within the Sharia Interbank Money Market (PUAS) in Indonesia. To be more specific, this paper will examine whether the existing Islamic contracts offered within sharia interbank money market in Indonesia, which are *Mudarabah*, *Commodity Murabahah*, and *Wakalah bil-Istismar*, encounter potential *fiqh* issue that is the combination of halal and haram wealth since conventional banks are allowed to invest their excess liquidity into Islamic banks with the deficit of liquidity. To reach such

⁸ 2nd Resolution of Sharia Advisory Council of Bank Negara Malaysia (SAC BNM). 2010

objective, we structure the research questions as followings: What are the comparative *Fiqh* Views on the exposure of conventional excess liquidity, which is transacted based mainly on interest, in Sharia Interbank Money Market that inflows to the Sharia Banks? With the finding of the first question, how it is implemented from contract theory in *fiqh* within Indonesia Sharia Interbank Money Market available products: *Mudarabah*, *Commodity Murabahah*, and *Wakalah* Investment Certificates? What contract has less *fiqh* issues with regard to godliness principle (*al-wara'*), as it is one of complementary body of knowledge in *fiqh*, within the Islamic financial system in banking as a whole?

Methods

This research will approach qualitative method using content analysis from the sources of sharia with deriving classical as well as contemporary jurist views in comparative study in addition to legal maxim (القواعد الفقهية) to answer first research question. For the second question, we examine views from the fuqaha in terms of the theory of contract, focusing on the subject-matter of contract, and its implication for each *Mudarabah*, *Murabahah*, and *Wakalah* as it is implemented in Indonesia sharia interbank money market (PUAS).

Result and Discussion

Excess Liquidity in Conventional Banks and its Fiqh Views

One of the Money Market functions is to facilitate banks with excess of liquidity to employ their funds (by lending those) for the banks with deficit of liquidity. As a part of the market components of the Sharia Interbank Money Market (PUAS), it is essential to define what does excess liquidity to be invested within interbank money market. Khemraj (2007) elaborates that excess liquidity is the total bank liquidity subtracted by mandatory reserved ratio determined by the national central bank.⁹ Agenor and El-Aynaoui (2010) maintain that the nature of excess liquidity in commercial banks occurs involuntary.¹⁰ It means they unintentionally hold more cash than they desired. However, commercial banks may decide to hold excess liquidity in the way of precautionary purposes in optimizing their behavior, to anticipate undesired massive withdrawal for instance.¹¹

At any given events of excess liquidity, it comprises apparently from the combination of reserve cash in vault and third-party funds (TPF) which bank can manage either to extend loan or other objectives. Hence, in the context of practice in sharia interbank money market (PUAS), conventional banks expose their excess liquidity to be an investment funds absorbed by Islamic banks with deficit liquidity. In spite of Deposits (TPF) within conventional banks are loan with interest, while in the Islamic banks are investment based on *mudarabah*

⁹ Tarron Khemraj, 2007. What does excess bank liquidity say about the loan market in Less Developed Countries? DESA Working Paper No. 60. ST/ESA/2007/DWP/60

¹⁰ Pierre-Richard Agénor, Karim El Aynaoui. 2010. Excess liquidity, bank pricing rules, and monetary policy. *Journal of Banking & Finance* 34 (2010). 923

¹¹ Saxegaard, Wagnus. 2006. Excess Liquidity and Effectiveness of Monetary Policy: Evidence from Sub-Saharan Africa. IMF Working Paper. WP/06/115

contract.¹² it is noticed that conventional banks business model¹³ can be classified into two separate products: (i) services that commonly do not include interest (those also provided by Islamic banks as those are general services) and (ii) services that predominated by interest which are deposit and financing products, although some of those may non-interest based.

From the fiqh view, this combination of separate money flows, deposit as a pool of fund collected by interest-bearing incentive and cash as combination of revenue generated by the commercial banks from several services, exposes the mixing wealth between halal and haram into a new basket called the excess liquidity, and which subsequently is possible to be invested in sharia interbank money market (PUAS). Hence, the following paragraphs will analyse the opinions that sharia scholars that have been elaborated extensively in classical discussion on the sharia ruling for the transaction of halal-haram mixed wealth and afterward adapting those opinions into the event of excess liquidity in conventional banks participating in PUAS.

a. The comingling of halal-haram wealth

The combination of halal-haram wealth can be classified either what can be distinguished and cannot be separated.

- (i) In the event of haram parts can be separated from halal ones, it is compulsory to avoid such wealth. This is to prevent a person being involved for other sin and evil. This is based on what Abu Hurairah narrated from the prophet Muhammad PBUH, “Who purchases stolen properties and he knows that is stolen goods, truly he has been involved within the dishonor and the sin of steeling.”¹⁴
- (ii) In the event of haram part cannot be separated from halal ones, ‘Allam (2021) deliberates that the majority of jurist from four prominent mazahib allow the transaction from such event of wealth on the rationale of *al-istishab* (presumption of continuity) with the halal. Because the genuine event is halal, and haram occurs at emergence and it is not absolutely determined, hence the genuineness of halal remains the same at any event which is in line with the legal maxim of (الأصل بقاء ما كان على ما كان). In classical discussions, the followings are some prominent scholars from different mazahib elaborated the case of unseparated comingled wealth:

Hanafi School

Al-Allamah al-Tahtawi, “the transaction with the one who his wealth is dominated by haram, is not prohibited to trade with him. There is no absolute identification of haram that he/she acquires is the basis of the argument. However, it is detestable because of prevention of falling into haram.”¹⁵

¹² Dr. Ali Muhyidin al-qaradaghi. (2010). *Al-Istitsmar fil Ashum*. Majallah Mujamma’ Fiqh El-Islamiy.

¹³ Rahali, al-Jalali Abdul Qadir. 2007. *Ma Yahillu wa Yahrumu fi Nitaqi al-‘Amal fi al-Masharif wa al-Bunuk al-Ribawiyah*. Majma Fuqaha al-Shariah bi Amerika. Al-Mu’tamar al-Sanawiy al-Khamis. Manama – Bahrain.

¹⁴ Ibn Syaibah, Abu Bakr. 1988. *Al-Kitab al-Mushannaf fi al-Ahadits wa al-Atsar*. Tahqiq: Kamal Yusuf al-Hutt. Al-Rushd Publishing – Riyadh, Saudi Arabia. First Edition, Vol. 4. 453.

¹⁵ Al-Tahtawi, Ahmad Muhammad Ismail. 1998. *Hasyiyat al-Tahtawi ‘ala Mara’iq al-Falah Syarah al-Idhah*. Tahqiq: Muhammad Abdul Aziz al-Khalidi. Darul Kutub al-Ilmiyah. First Edition. Vol. 35

Maliki School

Ibn Rushd maintains, “Ibn Wahab and some scholars from Maliki argue that it is prohibited to transact with person who his wealth cannot be separated between the halal and haram as well as receiving gifts from him. The rationale is acquiring from him is considered as an involvement of committing part of evil in his wealth on the basis of Istihsan without al-Qiyas. On the contrary, based on al-Qiyas it is allowed the transaction with such person.”¹⁶

Al-Imam al-Qaraḥi suggests, “if the predominance of mixed wealth is halal, it is permissible to transact with those possessing such wealth as it is prevalent in the shariah considering the predominance. On the contrary, where haram preponderating comingled wealth, Ibn al-Qasim argues the transaction with such wealth is detestable (makruh), while Asbugh (أصبغ) prohibits such event with exemption of involving that wealth in the trading or sale halal properties activities.”¹⁷

Syafi'i School

Al-Imam al-Mawardi, “unseparated comingled halal wealth with the haram, it is prevalent the predominance of halal over haram.”¹⁸ Al-Imam al-Suyuthi, “transaction with those possessing more haram wealth and could not be defined how it is acquired in certain way, it is not prohibited to transact in such event since there is possibility of halal and uncertain of haram. However, it is detestable to do so to avoid involving in haram.”¹⁹

Hanbali School

Syaikh Ibn Taimiyah, “in the event of certain haram can be defined, it is prohibited to transact otherwise it is not. Nonetheless, where haram preponderates the wealth, avoiding transaction is a form of godliness (al-wara’).”²⁰ Allamah Ibn Muflih, “it is not prohibited but detestable whether haram is thin or large, and that is the opinion of several scholars. The degree of detestability weakens or strengthens in line with the amount of haram.”²¹

Concluded opinion:

From representative of four juristic schools, it can be concluded that in the event of undistinguishable halal-haram wealth, the principle of predominance is applied. This is also in line where the principle and subordinate cannot be separated²² with the minimum portion of predominance is 33 percent based on the hadith

¹⁶ Ibn Rushd al-Qurthubi. 1998. *Al-Bayan wa al-Tahsil*. Tahqiq: Muhammad Hajji. Dar al-Gharb al-Islamiy, Beirut. Second Edition. Vol. 18. 195

¹⁷ al-Qaraḥi, Syihab al-Diḥ -died 643 H-, 1994. *Al-Dzakhirah*. Tahqiq Muhammad Hajji. Maktabah Dar al-Gharb al-Islamiy. Beirut. 1st Edition, Vol. 13. 317-318

¹⁸ Al-Mawardi. 1999. *Al-Hawi al-Kabir*. Tahqiq: Ali Muhammad Mi’wad and ‘Adil Ahmad Abdul Maujud. Darul Kutub al-Ilmiyah, Beirut. First Edition. Vol. 15. 54

¹⁹ Al-Suyuti. 1990. *Al-Asybah wa al-Nadzair*. Darul Kutub al-Ilmiyah, Beirut. First Edition. Vol. 1. 75

²⁰ Ibn Taimiyah. 1995. *Majmu’ al-Fatawa*. Tahqiq: Abdurrahman Qasim. King Fahd Publisher, Medina al-Munawarah, Saudi Arabia. Vol. 32. 215

²¹ Ibn Muflih al-Maqdisi. 1999. *Al-Adab al-Syar’iyah*. Tahqiq: Syu’aib al-Arnaut and Umar al-Qiyam. Muassasah al-Risalah, Beirut. Third Edition. Vol. 1. 471

²² Marjan Muhammad. 2016. Principles of predominance (ghalabah) and subordinacy (taba’iyah): a highlight of sharia issues in the trading of “blended” sukuk. Islamic Commercial Law Report. ISRA & Thomson Reuters. 93-96.

narrated by al-Bukhari in his Sahih book, hadith no 2724, on bequeath where the prophet (pbuh) mentioned: "... and even one-third is too much...". This minimum portion, however, is subject to debate among scholars and some of those view that 51 percent is the minimum of predominance principle. With respect to permissibility of transaction with comingled wealth, mentioned majority prominent scholars from different mazahib opted at the prohibition in the nature of abhorrence or detestability deliberating the principle of godliness (al-wara'). In addition, the possibility of distinguishing between what is halal and haram within the wealth is required and mandatory if the possibility is achievable. Accounting treatment can be applied based on the chart of account, that is master ledger accounts of the company coded numerically to obtain fast and easy identification and reporting,²³ to detect the lawfulness of the source of revenues that conventional banks end up to be an excess liquidity.

b. The implementation of the concluded opinion on excess liquidity.

Based on the chart of account method and the two main classification of conventional bank business model,²⁴ if the predominance excess liquidity consisting of revenues generated from non-interest-bearing services, it will be considered lawful wealth and transaction on that is permissible. Otherwise, where interest-involved services dominate the component of excess liquidity, based on the predominance maxim, it will be considered unlawful wealth and hence is impermissible to transact with it. The determination of minimum percentage of predominance can be at least 33 percent of total excess liquidity based on aforementioned hadith.

Idle deposit as a part of excess liquidity

Nonetheless, there is a sequence, a gap of time, that interest-bearing services are not considered as haram when the profits have not generated yet. It is the time of idle deposits that have not distributed as financing and hence included to be a component of excess liquidity that can be injected as an investment for deficit liquidity Islamic banks. Those idle deposits are pooled as a principal amount of potential interest profit distributed at the maturity date of the deposit.

In this sense, the maxim of subordinacy (tabaiyyah) is deliberated in more detail into three main categories: (i) causal relationship subordinacy, such as fruits with their trees or usufruct of leased asset in ijarah, (ii) jurisdictional relationship subordinacy, such as wealth which inherently possessed by a slave, and (iii) adjective-substantive relationship subordinacy, such as skills attached to the worker.²⁵ We opine that idle deposit in conventional bank as a part of excess liquidity as a causal relationship subordinacy because it results from undistributed interest-bear deposit

²³ ICAI (The Institute of Cost Accountants of India). 2014. Fundamentals of Accounting: Study Notes. Repro India Limited. Second Edition. 62-63

²⁴ Al-Amin, Hassan Abdullah. 1986. Majallah Majma' Fiqh al-Islamiy affiliation of OIC in Jeddah, 2nd Volume, Chapter: Sharia Legal Perspective of Conventional Banks Activities. 798-812

²⁵ Suwailem, S. (2013). Qawaid al-Ghalabah wa al-Taba'iyah fi al-Mu'amalat al-Maliyah wa Tathbiqatuha fi Tadawul al-Ashum wa al-Wahadat wa al-Sukuk. OIC Islamic Fiqh Academy Conference, No. 20

to the form of financing. With no initial deposit collection, the idle deposit cannot be utilised as an investment fund in the sharia interbank money market (PUAS).

In addition to this, there is a legal maxim *يغتفر في التوابع ما لا يغتفر في غيرها* (it is absolved in dependent events and not so for independent ones) or other jurist concluded as *قد يجوز تبعاً ما لا يجوز ابتداءً* (it is permissible to do as a subordinate in some events, while it is prohibited at initial conduct). This maxim is reported by (Afandi, 1991) as maxim number 53 within 100 prominent legal maxims in fiqh. Idle deposit can be considered as a *تابع* or part as it is pooled consequently of the whole procedures of deposit product/services in the banks (either in Islamic or conventional). The original initial (ibtida) event is whole interest-bearing deposit procedures from the initial collection to the end of interest-based profit distribution.

In conclusion of this section, excess liquidity from conventional banks invested in PUAS can be classified in detail as follows:

- Domination of non-interest-bearing services revenues: no fiqh issue, based on predominance method of comingling wealth.
- Domination of interest-bearing services represents in the form of idle deposit: no fiqh issue, based on that the idle deposit is considered as principal and it can be acquired (al-ayat quran). It also represents as a *تابع* that is allowed based on maxim *قد يجوز تبعاً ما لا يجوز استقلالاً*

The View from Theory of Contract for Mudarabah, Murabahah, and Wakalah.

The freedom of organizing a contract for people stands as the fundamental of the theory of contract in fiqh. They are permissible to stipulated terms and/or conditions as they perceived to be advantageous with exemption of including prohibited by shariah into the contract, *riba* or interest-bearing transaction for instance.²⁶ Different schools of fiqh elaborate the components of contract in distinct way, however it can be concluded generally that a contract consists of contracting parties (al-Aqidani), subject-matter of the contract (al-Ma'qud 'Alaih), Mutual Consent (al-Taradhi baina al-'Aqidaini). Every particular component has its sharia requirements should be fulfilled in order to be classified as a valid contract. In sale contract, for instance, sharia requires that legal capacity (Ahliyah al-'Aqd) as one of conditions in contracting parties. Hence, person who losses his intellect cannot conclude the sale contract without other guidance.

We direct our study to be focusing on the subject-matter of selected contracts: *mudarabah*, *Murabaha*, and *wakalah*, applied in shariah Interbank Money Market (PUAS) as those are exposed to the conventional banks' excess liquidity, being that those funds represent a capital (Ra'sul Mal) of *Mudarabah*, or price (Tsaman) of *Murabahah*, and trusted asset (Muwakkal fih) of *Wakalah*. In general, al-Zuhaili (2011) describes that the subject-matter of a contract should be sharia-compliant, meaning that it must be owned (mamluk) and worthwhile (mutaqawwim), non-prohibited works such as robbery. Sharia compliant also implies that it should not be involved in or engaged with *riba* activities. This section will

²⁶ Al-Tajikani, Muhammad al-Habib. 2010. Nadzariyat al-'Aqd fi al-Shariah al-Islamiyah. Rawafid, Vol. 30, page 24. Wizarat al-Auwqaf wa al-Shu'un al-Islamiyah. Kuwait.

derive the procedures and mechanism of each applied contract in PUAS based on Bank Indonesia Board of Governorate²⁷ and respectively analyse the potential fiqh issue with the finding of previous section.

- a. Mudarabah as a partnership contract and its subject-matters are capital (rasul maal) and agreed work (al-‘amal). Mechanism and Procedures applied in PUAS for Interbank Mudarabah Investment Certificate (SIMA) are as follow:
 1. Sharia Banks or Islamic Windows issue a SIMA to the PUAS Participants with excess liquidity. Minimum information should be maintained on the SIMA Certificate: Principal Investment Amount, Investment Tenor, Profit Sharing Ratio, Type of Underlying Asset for the Issuance, profit sharing indicators based on underlying asset, Date of Payment for Profit Sharing.
 2. On the date of investing banks (with excess liquidity) purchase the SIMA certificate, they transfer the principal to the receiving banks (with deficit liquidity). In this stage, the transfer of funds can be considered as the transfer of Mudarabah Capital (Ra`sul Mal) since the receiving banks will manage those fund as a form of work (‘Amal) in the mudarabah contract.

As it is concluded from the previous section, if the sharia banks (receiving banks) obtain the capital of mudarabah from conventional banks with excess liquidity, there will be no fiqh issue either:

1. Excess liquidity is predominated by non-interest-bearing services revenues, or:
2. Excess liquidity is predominated by interest-bearing services represents in the form of idle deposit funds, that has yet been occupied or not contaminated by interest and hence is still considered as the principal, on the basis of qur’anic verse (al-Baqarah: 279) you may have your principal as well as the legal maxim of *قد يجوز تبعاً ما لا يجوز استقلالاً* or *يغتفر في التوابع ما يغتفر في غيرها*. Idle deposit as subordinacy (tabi) with causal relationship of initial interest-bearing deposit (ibtida) results from undistributed deposit to make loan or financing.

However, this rationale is still subject to open further observation because it is based on the opinions of majority scholars in classical discussion, that transaction with comingled wealth of haram is detestable. As such, the issue of godliness for commercial transaction arises.

- b. Murabahah as sale contract, the subject-matter which are price and goods both must be sharia-compliant. Bank Indonesia determines the procedures of Murabahah Commodity Interbank Investment Certificate (SiKA) can be done as follows:
 - 1) Islamic banks with deficit liquidity (Commodity Consumer) book certain commodity as the subject-matter of al-bay’ (al-mabi’) through conventional/islamic banks with excess liquidity.

²⁷ Peraturan Anggota Dewan Gubernur 22/18/PADG/2020 tentang Mekanisme Penerbitan Instrumen Dan Penyelesaian Transaksi Pasar Uang Antarbank Berdasarkan Prinsip Syariah. (Bank Indonesia Boar of Governorate Act for Instrument Issuance and Transaction Settlement of Sharia Interbank Money Market)

- 2) Investing banks with excess liquidity (Commercial Participant) purchase certain commodity from (Commodity Trader Participant) on spot payment basis.
- 3) Commercial Participant sells the purchased commodity to the commodity consumer on deferred payment basis with Murabahah contract. Commodity consumer (receiving bank) issues Interbank Commodity Murabahah Investment Certificate (SiKA) as a proof to disburse the agreed murabahah price.
- 4) Commodity consumer sells the goods to (Other Commodity Traders) on spot payment basis via selected agents within the Exchange (Bursa), to avoid double agency issue.
- 5) Commodity consumer obtains the cash to manage their need of deficit liquidity.

In the procedures, receiving bank is not exposed immediately with the excess liquidity from conventional banks. Instead, the fund is transformed to the commodity that subsequently can be sold by receiving bank to other commodity traders in the exchange. Accordingly, the cash is obtained from commodity purchaser which is utilised to manage the deficit liquidity. Figure 1 in appendix depicts these flows of money.

There are two sales exist here:

- (i) The sale of conventional bank sells the commodity to the receiving Islamic bank. the price of this contract will be the deferred payment from Islamic banks (which is halal and tayyib), and the goods are the commodity purchased by Islamic banks.
- (ii) The sale of Islamic bank sells the commodity to the other commodity trader(s) in the Exchange. The price will be the spot payment cash that can be managed in deficit liquidity, and the goods are the commodity transferred to the trader(s).

This mechanism is, somehow, in line with the opinion of (Asbugh) from Maliki School that it is permissible to transact with those possess haram predominance in comingled wealth by involving that wealth in the trading or sale halal properties activities.

- c. Wakalah, as an agency contract, the subject-matter (trusted good) which is excess liquidity to be managed by sharia banks should be sharia compliant. The transaction of Fund Management Investment Certificate (SiPA) based on Wakalah bil-Istismar can be issued in one of three types:
 1. SiPA type 1 is issued based on Government Sukuk (SBSN) owned by receiving banks (al-wakiil) as an underlying asset to be pledged into investing banks (al-muwakkil),
 2. SiPA type 2 is issued based on business activities operated by receiving banks (al-wakiil) as an underlying asset with the pledge of SBSN to be held into al-muwakkil,
 3. SiPA type 3 is issued based solely on business activities as an underlying asset.

At any given types of SiPA, receiving banks (Islamic) absorb the excess liquidity from al-Muwakkil either Islamic or conventional banks as subject-matter of wakalah bil-istismar (investment agency) contract. Once Islamic banks receive excess liquidity from

conventional banks, that is the subject-matter of wakalah contract, there will be no fiqh issue as it is found from the previous chapter.

Principle of Godliness (al-wara') to determine which contract has less fiqh issue

The Importance of Godliness (al-wara') in Financial Transaction

It is necessary on the Muslim that in his sale and buy, food and drink, and all other dealings with the Sunnah, he should take the obvious permissible and deal with it and avoid the obvious forbidden and avoid dealing with it to preserve his religion and dignity, and to avoid falling into the forbidden.²⁸ For the society in broader stage, the regulators and authorities should preserve the Islamic finance system at macro level, one of the proceeds is, by continuously identifying, classifying, and separating what are permissible and prohibited matters. This obligation is in the light of the foremost hadith in dealing with comingled wealth and the virtue of al-wara'.

عَنْ النَّعْمَانَ بْنِ بَشِيرٍ رَضِيَ اللَّهُ عَنْهُ قَالَ: سَمِعْتُ رَسُولَ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - يَقُولُ: «إِنَّ الْحَالَ بَيْنَ وَإِنْ الْحَرَامَ بَيْنَ وَبَيْنَهُمَا مُشْتَبِهَاتٌ لَا يَعْلَمُهُنَّ كَثِيرٌ مِنَ النَّاسِ، فَمَنْ اتَّقَى الشُّبُهَاتِ اسْتَبْرَأَ لِدِينِهِ وَعَرْضِهِ، وَمَنْ وَقَعَ فِي الشُّبُهَاتِ وَقَعَ فِي الْحَرَامِ، كَالرَّاعِي يَرْعَى حَوْلَ الْحِمَى، يُوشِكُ أَنْ يَرْتَعَ فِيهِ، أَلَا وَإِنْ لِكُلِّ مَلِكٍ حِمًى، أَلَا وَإِنْ حِمَى اللَّهِ مَحَارِمُهُ، أَلَا وَإِنْ فِي الْجَسَدِ مُضْغَةٌ، إِذَا صَلَحَتْ صَلَحَ الْجَسَدُ كُلُّهُ وَإِذَا فَسَدَتْ، فَسَدَ الْجَسَدُ كُلُّهُ، أَلَا وَهِيَ الْقَلْبُ». متفق عليه

“On the authority of an-Nu'man ibn Basheer (ra), who stated: "I overheard the Messenger of Allah (pbuh) say, "What is permissible is obvious, and what is forbidden is obvious, and between the two are ambiguous things about which many people are ignorant." Thus, he who avoids uncertain topics maintains his faith and dignity, whereas he who goes into doubtful matters [eventually] falls into that which is prohibited, much like the shepherd who pastures around a sanctuary, almost grazing therein. Each ruler truly has a sanctuary, and Allah truly has a sanctuary in His prohibitions. Truly, everybody contains a morsel of flesh; if it is whole, the entire body is whole; if it is diseased, the entire body is diseased. Without a doubt, it is the heart.” This hadith should be taken into consideration at the moment of issuing regulation(s) or act(s) pertaining the possibility of non-sharia compliance exposure in the Islamic financial system.

Although fatwa is not the same as the regulation of particular jurisdiction, which is binding people to obey, some countries have been adapting the fatwa of sharia national board, or other so-called sharia committee (SC), as the basis of producing regulation in terms of financial matters. Indonesia implies this model of ruling, particularly for Sharia Interbank Money Market (PUAS), namely fatwa of (DSN-MUI 37/X/2002, 38/X/2002, and 78/IX/2010), Bank Indonesia Act (22/9/PBI/2020) and Bank Indonesia Board of Governorate Act (22/18/PADG/2020). Some scholar argues that the principle of al-wara' is not relevant and not taken into account for the issuance of fatwa due to the difficulty that

²⁸ Al-Tuwaijary, Muhammad Ibrahim Abdullah. 2009. *Mausu'ah al-Fiqh al-Islamiy*. Bait al-Afkar al-Duwalayah. First Edition. Vol. 3. 366

may occurs within the society.²⁹ However, al-Sinawi (1928) maintains that al-wara' is one of the main principles for mufti to produce fatwa. Further, a jurist is not who simply possesses knowledge, but rather who possesses both knowledge and action, as well as the piety and inherent devotion for all of that, which can only be attained by the sincerest.³⁰

Exposure of conventional funds in PUAS triggers the principle of godliness to be applied

Either in Mudarabah Contract (SIMA), the capital, or Wakalah bil-Istismar (SiPA), the trusted subject-matter, are derived directly from conventional banks. With regard to previous conclusion of no fiqh issue in excess liquidity from conventional banks, however some objections remain in this pool of funds, and therefore the non-prohibition of classical scholars was under detestable, which means makruh. In the jurisprudence (usul-fiqh), makruh stands under non-absolute prohibition, meaning that a person who commit makruh is not sinful, rather he is detestable of doing the makruh.

Otherwise, in Commodity Murabahah (SiKA), from the contractual perspective, there are two sales, and accordingly two price flows exist, in a complete arrangement of this liquidity management instrument. On one hand, excess liquidity from conventional banks as the price (al-tsaman) flows to the initial commodity trader. In this stage, sharia banks with deficit liquidity are not exposed immediately with the conventional banks' excess liquidity. On the other hand, spot price (al-tsaman) absorbed by sharia banks from the second commodity trader purchasing the commodity represents as the money inflows to be managed for the deficit liquidity. This, by definition, dissociates sharia banks in PUAS to expose directly with excess liquidity from conventional banks. The former scenario encounters the issue of detestable (makruh) transaction, dealing with the principle of godliness accordingly, and the later could be perceived that the principle of godliness can be achieved. Nonetheless, further potential issues might arise when the sequences of contractual procedures are not deliberated in detail. For example, in SiKA, conventional banks are able to inject their funds directly to IBs without transferring real price to the second commodity trader(s).

Conclusion

From the above discussion as this paper main objective is to observe whether excess liquidity absorbed by sharia banks from conventional banks in Indonesia Sharia Interbank Money Market (PUAS) is subject to fiqh issue of comingling halal and haram wealth and implementing three research questions, it can be summarized that:

- 1) To the best of the author finds, there is no fiqh issue in the use of excess liquidity from conventional banks to be invested in sharia banks dealing with liquidity shortfall. This is based on the Quranic verse (2: 274) "*But if you repent, you may have your principal - [thus] you do no wrong, nor are you wronged*" that the principal of interest-bearing transaction is forgiven to undertake. This is elaborated more by

²⁹ Khalaf, Ali Jamil. No year. Al-Dawabit al-Ilmiyah li Dirasat wa Tajdid al-Fiqh al-Islamiy. Diyali University, Iraq

³⁰ Khattab, Hasan Sayyid Hamid. 2009. Min Dhawabith Tajdid al-Fiqh al-Islamiy: Dirasat al-Tatbiqiyah. Majallat Kuliyatul Adab, Manofiyah. Volume 61

implementing the legal maxim of *يُغْتَفَرُ فِي التَّوَابِعِ مَا لَا يُغْتَفَرُ فِي غَيْرِهَا* (it is absolved in dependent events and not so for independent ones) in the sense that idle deposit as a form of excess liquidity in conventional banks occurs dependently as a whole process of take-to-generate profit from interest-bearing deposits.

- 2) As such, the subject-matter of each contract within PUAS, capital and work in Mudharabah, price and goods in commodity Murabaha, and trusted funds in wakalah bil-istismar, has no potential fiqh issue with regard to the mandatory condition of subject-matter that should be sharia-compliant, particularly is not involved in riba.
- 3) However, with the analysis of comparative fiqh views in section 1, it can be concluded deductively that although utilizing comingled wealth is permissible, nonetheless it stands under detestation. Meaning that essentially from jurisprudence view (usul-fiqh), five matrixes of sharia legal ruling maintain that detestation (الكراهة) is an order to avoid work without absolute prohibition. Therefore, implementing the principle of godliness (al-wara') is an endeavor to preserve the importance of halal chain (end-to-end) of money flows in Islamic financial system, especially in banking. As such, commodity murabahah contract (SiKA) has less fiqh issues because it dissociates sharia banks in PUAS to expose directly with excess liquidity from conventional banks. Distinct implication does not exist by implementing Mudarabah and Wakalah contract since, in both, excess liquidity is absorbed directly from conventional banks.

Based on these findings, the paper recommends to encourage Commodity Murabahah as the priority contract offered in PUAS as it basically a sale contract, enhancing the foundation of Islamic banking in the sense that it is established under the permissibility of sale contract and prohibition of interest (2:275), and hence has less fiqh issue in terms of transaction in comingled lawful and unlawful funds.

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Appendix

Figure 1: Money Flows in Commodity Murabahah Contract (SiKA)

