

NORM CHARACTERISTICS OF ISLAMIC BANKING IN INDONESIA ON MURABAHAH INSTRUMENT TOWARDS BEYOND BANKING

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Abstract

The dynamics of Islamic banking since 2008 has grown rapidly after the enactment of Law Number 21 Year 2008 concerning Islamic Banking. Murabahah products undergo several stages of review or assessment in order to achieve compatibility between the fundamental aspects of its welfare and operations. The existence of various perceptions and implementations so far has become an important issue to be studied, considering the standardization of technical product which is a minimum standard, required as a reference for implementation products. This study used a type of doctrinal research, with textual inference procedures and qualitative descriptive analysis. The presents of Sharia or Islamic issues, legal issues and operational issues are several characteristics of norms stated in the Islamic Banking Law regarding murabahah instrument. Standard Book of murabahah products based on the Financial Services Authority Regulation which contains the capacity and service standards that are derived from important norms and guidelines in the operation of murabahah instrument. Understanding and implementing the Islamic banking industry brings together two dimensions of value, that are the value of professionals in the financial world and the value of compliance with sharia principles, one of which is the rules of commercial transaction that are not mixed with the rules of credit. These fundamental indicators determine the norm characteristics of Islamic banking in Indonesia. Thus, the construction of legal reforms for Islamic banks as beyond banking is well realized.

Keyword: Norm Characteristics, Murabahah, Sharia banking and Beyond banking.

INTRODUCTION

Islamic banking in Indonesia was born from two characteristics of the banking law paradigm. The intended paradigm was departed from the conception (view) of the paradigm itself as a set of concepts that relates logically to one another established a framework of thought that serves to understand, interpret and

explain reality and/ or problems faced.¹ The norm characteristics of Islamic banking law in Indonesia arrived from the dualism of Islamic paradigm, which consists of the Elitist Islamic paradigm/ moderate nationalist and the fundamentalist Islamic paradigm. These two paradigms provides a different frame of mind, understanding and interpretation of concepts, norms and implementation of Islamic banking.

Until now, norm that is still part of a different interpretation especially in murabahah instruments is about the concept of usury. Different interpretation on this has basically emerged at the beginning of the establishment of Islamic banks in Indonesia. As in many primarily Moslem countries, the idea of Islamic banking is always controversial in Indonesia. Moreover, prominent Moslem scholars disagree about whether the prohibition of usury in the Qur'an (literally, "additional"; see Q.S Al-Baqarah 275) forbids all loan interest or the very high interest only as stated by liberal interpreters. So that, Indonesian religious scholars have never reached a consensus on this issue.² However, along with the development of factual Islamic banking, the problem of usury, that one of its aspect is interest indicates a shift towards mutual agreement that was not converged before, becoming an encounter point in the interpretation of its normative rules. The accommodation of this encounter point against the interpretation of usury banking, hence the Indonesian Ulema Council through Declaration of the National Sharia Council - the Indonesian Ulema Council, pulled out the number 1 declaration Year 2004 concerning Interest (profit). This declaration provides a legal rule that forbids interest in transactions of banking which departs from the rules of Islamic law. These interest or profit is called usury which is forbidden in islamic under the banking debt transactions.

Law norm characteristics in the field of Islamic banking are influenced by the State, in this case the government as the executor through Bank Indonesia, the Financial Services Authority and other institutions that are in charged and authorized for that. In addition, bearers practical law in the banking sector, the entity that uses Islamic banking services becoming parts that has an important position in assessing and measuring the extent to which Islamic banking has carried out the fundamental in plenary. In this process, a shifting paradigm is needed towards pure understanding.³ The agreement that gets a lot of judgments about its "halalness" is murabahah, which is a commercial transaction that has been agreed in benefits. This is because there is a mis-perception in murabahah. Murabahah is often compared with an ordinary credit agreement, where it only change in name as murabahah contract or commercial transaction. Even though the selling price is more expensive rather than the price on a credit application at a conventional bank, it emerge that there is no difference between murabahah and ordinary bank credit in the implementation procedure.⁴

Murabahah is generally applied through the mechanism of goods commercial transaction through installments by adding profits to the bank. The financing portion with the Murabahah contract nowadays contributes 58% of the total financing of

¹ Kelik Wardiono, 2016, *Paradigma Profetik Pembaruan Basis Epistemologi Ilmu Hukum*, Cetakan I, Genta Publishing, Yogyakarta, page 43.

² Nurjannah S, 2018, *Relasi Islam dan Negara dalam Akomodasi Hukum Perbankan Berbasis Nilai-Nilai Transendental*, Cetakan I, Genta Publishing, Yogyakarta, <http://hdl.handle.net/11617/9684>, page 94.

³ Nurjannah S, 2018, *Relasi Islam dan Negara dalam Akomodasi Hukum Perbankan Berbasis Nilai-Nilai Transendental*, Cetakan I, Genta Publishing, Yogyakarta, <http://hdl.handle.net/11617/9684>, page 94.

⁴ Wardah Yuspin, *Penerapan Prinsip Syariah dalam Pelaksanaan Akad Murabahah*, Jurnal Ilmu Hukum, Vol. 10, No. 1, Maret 2007, <http://hdl.handle.net/11617/743>, page 56.

Indonesian Islamic Banking.⁵ One important part of this murabahah instrument is the interpretation in the form of perceptions and implementation of various murabahah contracts by Islamic banking which also have an impact on the quality and service of Islamic banking products. Therefore, the government strive to improve the quality by issuing service standards for murabahah sharia banking products. It is in accordance with the direction of the Financial Services Authority policy contained in the 2015-2019 Indonesian Sharia Banking Road-map to fix the quality service and diversity products.

Murabahah instrument as one of the leading products of Islamic banking with a significant contribution other than the establishment of standards for murabahah Islamic banking products by the Financial Services Authority. On the other hand, it felt very necessary to construct the paradigm of a practical law entity, in this case human resources in banking. Hence, between the normative, interpretive and implementative aspects becoming a whole entity in supporting the development of Islamic banking towards beyond banking which is not just an ordinary bank and strengthening the characteristics of banking norms which are the fundamental basis.

Based on the background above, the statement of problem in this study is how norm characteristics of Islamic banking in Indonesia within Murabahah instruments. Furthermore, from the results of the analysis problem, a law construction on Islamic banking murabahah instrument can be obtained, which indicates that Islamic banks in Indonesia are expected to be beyond banking or not just an ordinary bank. Furthermore, this study uses law normative research methods or doctrinal law research using qualitative descriptive analysis.⁶ Analysis carried out by using secondary data, both in the form of individual data, public data and law secondary data consist of law primary substance in the form of Islamic legal principles derived from the Qur'an and Sunnah, the exist law positive norms, starting from the law of Islamic Banking, Bank Indonesia regulation, Financial Services Authority regulation and implementing regulations in the form of standard Islamic Murabahah banking products.

DISCUSSION

Norm Characteristics of Murabahah Instrument Based on Paradigm

Indicator that determines the characteristic of Sharia banking and what makes it different from conventional banking is about usury (riba) within the banking norm and transaction, gharar (uncertainty), maysir (gambling) and injustice (zalim). First, the norm concept of usury has been clearly regulated in the provisions of the National Sharia Council declaration of the Indonesian Ulema Council number 1 year 2004 concerning interest which was established on January 2004. The declaration explained about 1) the current practice of interest money fulfilling the criteria of usury, which is Nasi'ah usury, occurred at the era of Prophet Muhammad Sallallahu 'alaihiwasallam. Therefore, the practice of interest money is in the form of usury and it is forbidden; 2) the practice of interest is prohibited to do by banks, insurance, individual, capital markets, pawnshops and other cooperatives and financial institutions.

The definition of interest based on the declaration of the Indonesian Ulema Council is an additional fees imposed in money loan transaction (al-Qardh) that counts from the main loan without considering the benefits or the principal results, based on time

⁵ Mulya E Siregar, 2016, Deputi Komisioner Pengawas Perbankan I, Sambutannya dalam *Buku Standar Produk Perbankan Syariah Murabahah*, Otoritas Jasa Keuangan, Jakarta, page. vi.

⁶ J. Supranto, 2003, *Metode Penelitian Hukum dan Statistik*, Cetakan Pertama, PT. Rineka Cipta, Jakarta, page. 2.

period, calculated in advance and generally based on percentage. Whereas usury is an additional (ziyadah) without any compensation that occurs due to the suspension in the payment that promised before is called as nasi'ah usury.⁷

Second, Gharar in Arabic is al-khathr which means betting, majhul al aqibah and an uncertainty results. It can also be interpreted as al-mukhatharah, al-jahalalah or obscurity. Gharar is a form of doubt, deception or action aims to harm others. From all these words, gharar can be interpreted as form of all commercial transaction contains uncertainty elements, betting or gambling. All of these impact on uncertain results of rights and obligations in a commercial transaction.⁸

The issue is how the interpretation of usury on Islamic banking transaction and contract. In consequence, it is very clear that usury in Islamic banking is still a debating aspect among the experts, as well as among the caretaker of law banking. The Indonesian Ulema Council has banned bank interest since 2003. This was confirmed by the issuance declaration Number 1 Year 2004 concerning the prohibition of bank interest. Bank interest is usury, and it is forbidden as stated in Qur'an Surah Al-Baqarah verse 275:

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ
الرِّبَا وَأَخَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ مِنْ رَبِّهِ فَانْتَهَى فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ
فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا خَالِدُونَ

“Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, “Trade is [just] like interest.” But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein.”

Furthermore, in the next verse, Allah Subhanahuwa Ta'ala provides a solution to this matter where usury can be destroyed by zakah. As what Allah Subhanahuwa Ta'ala said in Qur'an Surah Al-Baqarah Verse 276:

يَمْحَقُ اللَّهُ الرِّبَا وَيُرْبِي الصَّدَقَاتِ وَاللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَثِيمٍ

“Allah destroys interest and gives increase for charities. And Allah does not like every sinning disbeliever.”

In this case, usury means taking some benefits and/ or profit from the debt agreement (Qard Agreement). The empirical fact shows that Murabahah Agreement combines two contracts in one transaction, namely the incorporation contract of commercial transaction and the Debt Agreement that breaks the Islamic rules. Prophet Muhammad Shallallahu 'alaihi Wa sallam said which means “it is prohibited combining the loan

⁷Fatwa Dewan Syariah Nasional-Majelis Ulama Indonesia Nomor 32 tahun 2004, tentang Bunga (interest/fa'idah)

⁸ Nadratuzzaman Hosen, Analisis bentuk Gharar dalam Transaksi Ekonomi, Al-Iqtishad, Volume I, Nomor 1, Januari 2009.

agreement and commercial transaction, the existence of two requirements in one commercial transaction, the goods that are not in your guarantee and also selling goods that are not yours” (Narrated by Abu Daud. According to Al-Albani of Hadist Hasan Shahih).⁹

This is considered as the link between the prohibition of usury and the negative side of the norm of prohibiting guarantees. Prohibition of usury is one part of the upper structure that relies on the negative side and the biggest part. The upper structure explains the Islamic ban on all types of loans with interest. Interest is recognized in a capitalist system as a fee that capitalists lend to fund commercial projects and so on.¹⁰ In the prohibition of usury and the implementation of zakah, usury should be dissociated from the economic community interaction. Whereas zakah is a strategic instrument that can help the communities welfare.¹¹ Usury is forbidden in all religions and all of the prophet theories. It means that usury transaction has been existed since the past. Usury occurs because of human deviations that influenced by their greed towards property. The rule of forbidden usury not only applies to the people of Muhammad Sallallahu‘alaihi Wasallam, but it has been applied for previous people.¹²

The development of Islamic banking since 1992-2008 passed several phases starting from the profit sharing that was regulated generally in the provisions of article 1 number 13, article 6 letter m, article 7 letter c, article 8 paragraph (1) and (2), article 11 paragraph (1), (3) and (4A) Law number 7 of 1992 and Law Number 10 of 1998 concerning Banking. The principles of Sharia or Islamic Banking above are not yet specifically regulated so that a special law is needed to adjust Islamic banking.

The provisions of article 1 number 4, 5 and 6 of Law number 21 Year 2008 turns out that it still regulates about conventional banks in Islamic banking law, so it brings out question on what is wrong about the law norm of Islamic banking law? If it was analyzed normatively, in the clause of the Islamic banking law turns out that it is not purely regulating Islamic banking and its instrument. The rules regarding conventional bank should be fully regulated based on Law number 7 Year 1992 and Law Number 10 Year 1998 concerning banking, hence, it occurs overlapping, misplaced an even wrong substances between these two laws. In this case, as researchers, we hope that between the law norm of Islamic banking and conventional banking, there should be clearly stated about the boundaries both from the type of law and from the clauses of the articles in it. Although there is a classic reason commonly used, which it happens as a logical consequence of the Dual banking system applies in Indonesia. However, this will actually erode the publics trust against the Islamic banking context which is expected to be beyond banking or not just an ordinary bank.¹³

Regulations of Bank Indonesia Number 9/1/PBI /2007 concerning the Soundness Rating System of Commercial Banks based on Sharia Principles is carried out in

⁹ Erwandi Tarmizi, 2017, *Harta Haram Muamalat Kontemporer*, Cetakan kelimabelas, PT. Berkat Mulia Insani, Bogor, page. 440.

¹⁰ Muhamamad Baqir Ash Shadr, 2008, *Buku Induk Ekonomi Islam: Iqtishaduna*, Cetakan ke-1, Zahra Publishing House, Jakarta, page. 370.

¹¹ Muchamat. Amarodin, *Konstruksi Sistem Ekonomi Islam Pemikiran Tokoh Ekonomi Islam Kontemporer* (Abu A’la Al-Maududi, Baqir Ash-Sadr, dan Adiwarmarman A. Karim, 4 eksyar, Volume 5 No. 1 Juni 2018, hlm. 48.

¹² Ammi Nur Baits, 2016, *Ada Apa dengan Riba*, Cetakan Pertama, Pustaka Muamalah Jogja, Yogyakarta, page. 41.

¹³ It is stated in the development policy of Islamic banks in Indonesia, namely the new imaging program of Islamic banking which includes aspects of positioning, differentiation and branding. The new positioning of Islamic banks as a mutually beneficial bank, differentiation aspects with competitive advantages with diverse products and schemes, transparency, competency in finance and ethics, information technology that is always up-to-date and friendly user, and the existence of adequate experts on Islamic finance investment. Whereas in the aspect of branding, “Islamic banks are more than just banks or beyond banking”

order to provide a law protection for parties who violate promises in the form of bad credit. In the principle of loan transaction based on sharia, it is forbidden to commit tyranny in the form of seizure as fact happens in the field. What is conceptualized in commercial transaction (murabahah) and cooperation of profit and loss sharing system or the mudharabah/musyarakah transaction happens when there is violate promise that effects on a failure payment or experience loss. Consequently, the efforts conducted is together return selling and buying the objects of guarantee at a reasonable price (not below market prices), without going through foreclosures that have been carried out by Islamic banking. It is known that the seizure contained in the PBI is a voluntary submission, but this condition is rarely found in the field. Bank cooperates with the third parties, namely the Debt Collector in context of the confiscating collateral objects.

Financial Services Authority Circular Letter Number 36/SEOJK.03/2015 concerning products and activities of Islamic Commercial Banks and Islamic Business Units as further provisions of Financial Services Authority Regulation Number 24/POJK.3/2015 concerning products and activities of Islamic Business Units Syariah Banks. The inception of murabahah standard product arranged on the basis of the logical consequences of the ASEAN Economic Community (AEC) and the free market in the ASEAN sector has led to Indonesia's competitiveness towards the three superior neighboring countries such as Singapore, Malaysia and Thailand. The banking industry is the main scheme so that capacity and standard services become the main factors in the development of Islamic banking in Indonesia along with the limitation possessed such as products, fund, financial resources, Human Resources, Information Technology and operational standards. Further consequences are the standardization and certification products which was produced and marketed. Due to the various perception and implementation by Islamic banking, it is necessary to standardize the operation products in a technical manner which is a minimum standard as a reference for the implementation products so that they can fulfill islamic requirements, law regulations and prudential principles. The preparation standard is based on a collaborative process and focuses group discussions between the Financial Services Authority with the National Islamic Council- Indonesian Ulema Council as industry players and other stakeholders by aligning the Standard Operating Procedure of murabahah products.

Strengthening the Murabahah Instrument Towards Beyond Banking

Beyond banking also referred as an Islamic bank which is not just an ordinary bank, not only act as a new imaging program for Islamic banking which includes positioning, differentiation and branding aspects. The new position of Islamic banks as beneficial bank for both bank and customer has differentiation aspects with competitive advantages in the form of various products and schemes, transparency, competence in finance and ethics, information technology that is always up to date, friendly user and also the existence of adequate experts of Islamic finance investments.

Murabahah is an agreement on commercial transaction of an item that cost similar as the cost of goods in addition with the agreed profit together with payments deferred from one month to one year that also includes payment methods at once. While Al-Bai'u Bithaman Ajil is an agreement on commercial transaction of an item that cost similar as the cost of goods in addition with the agreed benefit. This agreement also includes the payment period and the number of installments. Oktriani (2011) stated that through murabahah financing, Financial Islamic Institutions shall get a profit income from the cost of goods which have been set by the financial institution. Research that examines

the effect of murabahah financing on profitability has been done previously. According to Muslim, et al (2014), the results of previous studies indicate that murabahah financing has affects he profits obtained.

In other condition, Murabahah initially was not related to financing. Later on, experts and Islamic banking ulema combined the concept of Murabahah with the other concept so as to form the concept of financing with murabahah contract or called as murabahah instrument. Even though murabahah financing is identical to the consumptive financing, it can actually be use to purchase productive goods for investment activities and business working fund. Unfortunately, the convenience of murabahah financing mechanism does not guarantee in the field practice in accordance with islamic rules and standards as well as the applicable law regulation. Several things related to distortion between the practice of murabahah financing and the provision of standard islamic and positive law were still found so it becomes the basis for organizing murabahah standards product.

There are three main issues presents from murabahah instrument in Islamic banking which are 1) syaria or islamic issue, 2) legal issue, and 3) operational issue. These three issues were tried to be inventoried and sought to find solution. It was done as part of the improvement efforts from the existing norm problems and Islamic banking operations. The following are issues from the problematic application on murabahah instrument:

Table 1: Application Issues on Murabahah Instrument

No	Islamic Issue	Legal Issue	Operational Issue
1	Murabahah can be trapped into the tawarruq contract, so that in real, there is no transfer of ownership from the bank to the customer	Some financing deeds made by a notary do not fulfill the requirement and pillar agreement that was regulated in Islamic law	The concept as an intermediary institution effects for the bank of being unable to apply as a direct seller of murabahah financing.
2	The existence of markup profit based on non cash financing considered as a value of time concept which is contradict to the islamic value	The existence of an exoneration clause in the Murabahah contract that weakens the customer's position (eg a prohibition clause for costumer)	Overall accountability risk on goods is often delegated to the customer for the wakalah contract from the bank

<p>3 If the murabahah financing activities was not submitted, the contract that occurs will fall to the loan transaction contract</p>	<p>The existences of amenability right for the bank can potentially become as usury</p>	<p>M u r a b a h a h financing is often compared with debts and receivables due to the non-enactment of Value Added Tax (VAT) on commercial transaction that in the banking balance report is called murabahah debts.</p>
<p>4 Rescheduling or rollover for customers who are unable to pay murabahah was considered as a form of usury due to the imposition of additional fees on time added compensation</p>	<p>The existence of legal pluralism related to the guarantee aspect</p>	<p>If the customer ends the contract by pretending not to be able to fulfill the obligations, it can be categorized as a moral hazard that can harm the bank</p>
<p>5 Giving discounts for the costumer who make an earlier repayments from the time it was negotiated</p>	<p>Some contracts still regulate the settlement of disputes that are contradictory with the absolute authority of the Religious Courts</p>	<p>The presence claim from customers who say that they owe money from the third parties, not from the bank</p>

Source: Standar Produk Perbankan Syariah Murabahah 2016

The above issues become the analysis matter towards several shifts in the interpretation patterns on the operation of Islamic banking murabahah instrument. First, Islamic banks must range their function, not only as an intermediary institutions but also as institutions that carried out ownership transfer without any contract in the process of commercial transaction, so that the terms and pillars were pure fulfilled. Second, commercial transaction credit by taking profits without regarding value of time as the seller's right to gain profits in the commercial transaction is valid based on Islamic law, and no need to be done for customers with prophetic views. Third, Banks are required to submit financing objects as stipulated in muqalah provisions regarding murabahah contracts. Deed of granting rights replaced by the deed of collateral object and resold by both customer and the bank. Hence, there is no need for foreclosure and auction since it was forbidden to do installment or credit in the islamic law. Therefore, the solution to this problem is an underlying asset of transaction where the goods must be in the bank amenability as long as the transaction between the bank and customer have not finished yet. The consequence of not transferring the ownership is when the customer considers no debt to the bank but to a third party. Fourth, if the commercial transaction credit is purely implemented in its practice, mutual moral (responsibility moral between costumer and the bank) and horizontal contract will occur, whereas hazards moral will not appear. Fifth, when failure payment happens, the Islamic law is used and not the Civil Code on the form of guarantees and delay payment of debt since it was amiss and

misplaced of law that goes to injustice. Discounts that aims to not doing reciprocally injustice is allowed in the commercial transaction law. Sixth, regarding the settlement of disputes in the murabahah contract must be under the religious court, regardless of the legal subject which was moslem or non moslem since it was competent for that.

Meanwhile, based on the provisions of article 49 letter (i) of Law Number 3 Year 2006 concerning amendments to Law Number 7 Year 1989 concerning religious justice affirmed that religious courts have the duty and authority to examine, hear and settle cases including islamic economics. Sharia or Islamic economics was defined as a business activity carried out according to islamic principles which includes islamic banks, islamic micro finance institutions, islamic insurance, islamic reinsurance, islamic mutual funds, islamic bonds and medium term securities, islamic securities, islamic financing, islamic pawnshops, retirement funds for islamic financial institutions and islamic businesses. Looking at the case which was submitted by disputes parties to the National Sharia Arbitration Council in connection with the dispute between Islamic banks and their customers, the way to solve it used two different laws namely the National Sharia Council instructions and the Civil Code. This is done in order to fill the vacuum law in filling out a case.¹⁴

CONCLUSION

In the beginning of Islamic banking norms in Indonesia, there were two paradigms namely paradigm of elitist/moderate nationalist and paradigm of fundamentalist/populist. These two paradigm also have an impact on the interpretation and implementation of murabahah instrument. However, in the range from 2010 until 2015, the normative of Islamic banking has been quite developed in providing a meeting point for the integration of concepts and interpretations specifically related to islamic fundamentals such as usury (riba), uncertainty (gharar), gambling (maysir) and injustice (zalim) to the implementation or operational of Islamic banking.

Integration between law Islamic principles and the financial industry have been improved which was seen from the commitment of the Financial Services Authority together with Bank Indonesia and the Indonesian Ulema Council in accommodating emerging issues such as; islamic issue, legal issue and operational issue. Adjustments to these issues produced a standard book of Murabahah products in the various standard of Islamic banking norm. However, on the other hand, part that has not been realized properly lies on the aspect of human resources or the practicing of legal banking that still need to be fostered and given a better understanding of the interpretation of murabahah instrument and other instruments in Islamic banking in Indonesia.

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¹⁴ M. Faisal, *Eksistensi Pengadilan Agama dalam Penyelesaian Sengketa Bisnis Syariah di Indonesia*, Jurnal IUS Kajian Hukum dan Keadilan, Volume V, Number 3, December 2017, Page 402-403.

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