

ORGANIZATION OF THE ISLAMIC CONFERENCE

THE INTERNATIONAL ISLAMIC FIQH ACADEMY

[NINETEENTH SEMINAR]

SHARJAH EMIRATE

UNITED ARAB EMIRATES

***TAWARRUQ* IN THE BANKING SYSTEM:**

A CRITICAL ANALYTICAL STUDY OF JURISTIC VIEWS ON THE TOPIC

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Abstract

There have been many papers, studies, conferences and seminars about *tawarruq*, and scholarly opinion is divided as to its legality in the banking system and its economical usefulness. I thought it beneficial to undertake a critical analytical study of these views and the evidence for them. My contribution will be to summarize the juristic differences and discuss the latest evidence cited. This paper will treat the subject by means of an introduction, discussion of three main topics and a conclusion. The introduction consists of the definition of the research problem, the reasons for studying it and an outline for the rest of the paper.

As for the first main topic, it is a critical analytical study of the term *tawarruq*. The relationship of the term to *‘īnah* (credit sale) is treated through a critical comparison of the definitions and various forms of both *tawarruq* and *‘īnah*. I have concluded that there is a relationship between the technical legal meaning of *‘īnah* and some forms of organized *tawarruq*.

I devoted the second section to a study of the principle of *uṣūl al-fiqh* that is the basis for the difference of jurists over *tawarruq* in the banking system. I explained there that the difference of the scholars is based upon on the principle of *sadd al-dharā’i’* (blocking lawful means when they lead to unlawful ends), which subsumes the issue of legal stratagems and the problem of whether or not evaluation of contracts is limited to consideration of their forms. After thoroughly investigating the parameters of disagreement on the issue, I concluded that the application of *tawarruq* in the banking system does not fall within the area of disagreement on the issue of *dharā’i’*, and I provided evidence for that assessment.

In the third section, I presented the textual and rational evidence of both those who consider *tawarruq* in the banking system permissible and those who prohibit it. I discussed their arguments in detail and eventually gave preference to those who prohibit *tawarruq* in the banking system and provided additional supporting proofs for that position.

In the conclusion I summarized the most important research findings of the paper.

***Tawarruq* in the Banking System**

A Critical Analytical Study of Juristic Views on the Topic

Introduction

All praise belongs to Allah, the Lord of all the worlds. May mercy and peace be upon the noblest among the apostles and the messengers, our Master Muḥammad, and upon his household, his companions and whoever follows his guidance, path and tradition in righteousness till the Day of Judgment.

I undertook the writing of this research work in response to a gracious request from the International Sharī‘ah Research Academy in Malaysia for presentation at the seminar of the Islamic Fiqh Academy which took place in the Emirate of Sharjah in the UAE.

One of the most widely discussed topics of the Islamic banking system in recent times has been that of *tawarruq*. That is because Islamic banks have employed this financial instrument extensively. They do so because they believe it ensures that depositors will continue to do business with them and because it provides the liquidity that is considered to be their lifeblood. Juristic views about it are divided. Some scholars permit it, based on the legality of sales founded on mutual consent, as well as the presence of a third party that excludes it from the form of the prohibited *‘īnah* sale. Others stipulate certain conditions for its acceptability; while others prohibit this type of transaction altogether, considering it a ruse by which Islamic banks provide legal sanction for *ribā* (usury/interest), which is unanimously agreed to be prohibited. In the view of the researcher there are many causes for the conflicting opinions; among them:

First: The disagreement among contemporary jurists regarding *tawarruq* as practiced in the banking system is reflected in the disagreement among earlier scholars regarding the permissibility of *tawarruq* on an individual basis, as mentioned by the Ḥanbalī school of thought. Some scholars ruled for its permissibility, and that was the position of the majority. Others, including ‘Umar ibn ‘Abd al-‘Azīz, disliked it; while a third group, which included Ibn Taymiyyah, ruled that it is prohibited.

Second: There are differences in the methodological premises which guided the *fatwās* of various scholars regarding this type of transaction. Some of them started with recognition of the general principle that legalizes sales; as such, they would not prohibit any transaction except on the basis of explicit evidence. Others gave their verdicts by comparing juristic views, with a tendency to uphold the majority opinion. Other scholars' fundamental attitude was one of caution regarding bank transactions because they perceived the banks as having involved themselves in many doubtful practices that justified any researcher or *muftī* treating them with caution and sometimes skepticism. Still others focused on the objectives of transactions and their expected benefits, endorsing whatever agrees with the objectives of Islamic transactions and rejecting whatever goes against those objectives, even when no explicit text prohibits it.

Third: Ambiguity exists about some forms of *tawarruq* and the details of their processes. This is due to the banks presenting the procedures in such an abridged manner that the lack of detail impedes understanding of the nature of the contract, or they present them under the rubric of certain lawful practices like *murābahah*¹ and *wakālah*,² etc.

Fourth: The first *fatwā*³ of the Islamic Fiqh Academy ruled to permit *tawarruq* on an individual basis. This led some to apply the ruling concerning individual *tawarruq* to the form of *tawarruq* employed in the banking system. Some banks explicitly referred to this linkage and used it as justification for their instruments without mentioning the conditions for making the practice legal that were stipulated in the *fatwā* of the Jurisprudential Assembly.

Fifth: There are conflicting opinions about the economic effects of banking *tawarruq* on the economies of the Islamic nations. Some economic analyses present glowing

¹ A mark-up sale in which the seller informs the buyer how much he paid for the commodity and how much profit he intends to make on the resale.

² To act as an agent for someone else.

³ A verdict by a qualified jurisconsult as to what he/she believes to be the law of the Sharī'ah on a given matter.

endorsements of this type of dealing, while others present gloomy, negative assessments of it.

This paper will critically examine the views and verdicts of jurists regarding *tawarruq* in the banking system by evaluating their linguistic premises as well as the legal principles that underpin their reasoning. It will also critically examine their textual evidence and rational arguments in order to reach a final juristic judgment. This will be accomplished by treating the following topics:

The First Topic: A critical study of the term “banking *tawarruq*” and the extent of its relation to *‘inah* sales

The Second Topic: Banking *tawarruq* and the problem of *dharā’i‘* and legal stratagems.

The Third Topic: A critical study of the detailed evidence.

Research Findings

The First Topic

A Critical Study of the Term “Banking *Tawarruq*” and the Extent of its Relation to *ʿīnah* Sales

The first issue of *tawarruq* in the banking system is in connection with the technical meaning of *tawarruq* and its connection with the term *ʿīnah* (credit sale). There are those who say that the term *tawarruq* is different in meaning from the term *ʿīnah*. Those who hold this view—most prominently the majority of Ḥanbalī scholars—investigated its legal ruling independently of the ruling for *ʿīnah*. The majority of Muslim jurists consider it to fall within the parameters of *ʿīnah* and, as such, they have investigated its legality as part of their investigation into *ʿīnah*. They gave the same ruling to most of its forms, especially the organized ones among them, as they did to *ʿīnah*. This issue means that the first step in the evaluation of the jurists’ investigation of banking *tawarruq* is to examine its general linguistic and technical meanings and the extent to which they coincide with the connotations of the term *ʿīnah*.

Section One

Definition and Forms of *Tawarruq*

Subsection One

Linguistic and Technical Definitions of *Tawarruq*

First: The Literal Meaning of *Tawarruq*:

Tawarruq is the infinitive (*maṣḍar*) of the verb *tawarraqa* (to eat leaves); it is said: *Tawarraqa al-ḥayawān* (i.e. the animal ate the leaves). As for the word *wariq*, it refers to *dirhams* minted from silver. Some say it refers to both minted and unminted silver (*al-fiḍḍah al-maḍrūbah* or *al-fiḍḍah ghayr al-maḍrūbah*). *Tawarruq* was, therefore, used by earlier generations for seeking silver money, while it is used

nowadays for seeking paper money, and that is a valid linguistic usage derived from the same word.¹

Second: The Technical Meaning of *Tawarruq*:

Tawarruq is a term commonly used in the books of the Ḥanbalī school of thought while other schools mention the form of *tawarruq* under the rubric of *bay‘ al-‘īnah* (credit sale). Its technical meaning varies according to its different types. Jurists have mentioned three types of *tawarruq* as follows:

- a) ***Al-Tawarruq al-Fardī (Tawarruq on an Individual Basis)***: The Islamic Fiqh Academy defined it as: “the purchase of a commodity possessed and owned by the seller for a delayed payment, whereupon the buyer will resell the commodity for cash to other than the original seller in order to acquire cash (*al-wariq*).”²
- b) ***Al-Tawarruq al-Munazzam (Organized Tawarruq)***: This is when the seller handles the process by which cash is acquired for the *mutawarriq* (the seeker of cash). He does so by selling a commodity to him for a delayed payment; then selling it on his behalf for cash, taking the payment from the buyer and delivering it to the *mutawarriq*.

Dr. Sāmī ibn Ibrāhīm al-Suwaylim has cited three differences between *tawarruq* on an individual basis and organized *tawarruq*:

- In organized *tawarruq* the original seller acts as an intermediary by selling the commodity for cash on behalf of the *mutawarriq*, whereas the original seller in individual *tawarruq* takes absolutely no role in the resale of the commodity and has no relation with the final buyer.
- In organized *tawarruq* the *mutawarriq* receives the cash from the original seller, to whom he owes the delayed price, whereas the cash in individual

¹ See *al-Ṣiḥāḥ* on "WARAQ"; *Lisān al-‘Arab* 10/374; *al-Miṣbāḥ* 2/655; and *al-Mawsū‘ah al-Fiqhiyyah*, vol. 14, p. 147.

² Definition of the Islamic Fiqh Academy affiliated with the Muslim World League (MWL) in its 15th Session, which was held in Makkah al-Mukarramah, 11th of Rajab, 1419 AH/31st of October, 1998 CE.

tawarruq will be taken by the *mutawarriq* directly from the final buyer without any involvement by the seller.

- In organized *tawarruq* the original seller might agree beforehand with the final buyer that he will purchase the commodity. This agreement will occur by the commitment of the final buyer to the purchase so as to avoid fluctuation of the price.¹
- c) ***Al-Tawarruq al-Maṣrafi* (Banking *Tawarruq*):** “It is the performance by the bank of a formally circumscribed procedure in which a commodity (other than gold or silver) from an international commodity market or some other market is sold to the *mutawarriq* for a delayed payment, on the binding condition—either by its stipulation in the contract or by the rule of custom—that the bank will represent him in selling it to another buyer for cash, whereupon the bank will deliver its payment to the *mutawarriq*.”²

Dr. Sāmī ibn Ibrāhīm al-Suwaylim and others have considered banking *tawarruq* as a form of organized *tawarruq* preceded by *murābahah* (purchase and resale) for the one who orders the purchase. Both of them are structurally the same but different in terms of the entity who administers the procedures of the *tawarruq*.

Subsection Two

Forms of *Tawarruq*

First: Forms of Individual *Tawarruq*:

There are three famous forms of individual *tawarruq*:

- 1- A person is in need of cash and finds nobody to lend it to him or does not want to ask anyone for a loan, so he buys a commodity on credit in order to sell it to

¹ Sāmī ibn Ibrāhīm al-Suwaylim: *Al-Takāfu’ al-Iqtisādī bayn al-Ribā wa al-Tawarruq*, a paper presented to the 24th seminar of al-Barakah, 29th of Sha‘bān – 2nd of Ramaḍān, 1424 AH, 25th/27th of October, 2003 CE, p. 18.

² Definition of the Islamic Jurisprudential Assembly affiliated to the Muslim World League MWL in its 17th Seminar which was held in Makkah al-Mukarramah, between 19-23/10/1424 AH (13-17/12/2003 CE).

someone other than the first seller, without disclosing his intention and his need of cash to anyone.

- 2- The *mutawarriq* requests a loan from a trader; the trader tells him that he has no cash but offers to sell him a certain commodity on credit with payment delayed a year in order that the *mutawarriq* may sell it in the market. He will then sell him the commodity at its cash price in the market without any addition in consideration of the delayed payment.
- 3- The third form is like the second form except that the trader will sell the commodity to the *mutawarriq* at higher than its market price in consideration of the delayed payment.

Dr. al-Şiddīq al-Ḍarīr has ruled out the possibility of any dispute regarding the first and second forms and has taken the view that any dispute should be limited to the third form.¹

Second: Forms of Organized *Tawarruq*:

Organized *tawarruq* has numerous forms:

- 1- The bank purchases local or international goods for cash and sells them to the *mutawarriq* (usually an individual, although it may be another bank, as is presently the case in Malaysia) till a certain fixed time, followed by the authorization of the bank to make an instantaneous sale to a third buyer, which is frequently the first seller, without the commodity ever moving from its place. This is the most famous form of banking *tawarruq*.
- 2- Cash is deposited in foreign banks, which are then delegated to purchase commodities in cash on the international market. They then sell the commodities [on behalf of the *mutawarriq*] to themselves with payment delayed to a certain time at an increased price commensurate with the interest rate. Those commodities will then be resold in the international market in

¹ See: al-Şiddīq al-Ḍarīr: al-Tawarruq al-Maşrafī (al-Ra'y al-Fiqhī), Ḥawliyyat al-Barakah, (No. 6), Ramaḍān 1425 AH/October, 2004, p. 194.

order to restore the deposit to its cash form a second time. It is relied upon by Islamic banks as a means of employing the liquidity in their possession.

- 3- *Şukūk* of leased properties: It consists of the sale of certain properties to the public at a fixed price, then leasing them from them on the condition that they be sold back to the first seller (the issuing entity) at the same price at which they were purchased, whether through payment by installments or at once. The holders of the *sukūk* would earn rent between the two purchases.
- 4- *Şukūk* of benefits: These represent long-term benefits whose ownership can be purchased by members of the public with a cash payment, on the condition that these same benefits be incrementally resold to their initial seller on a yearly basis at an overall increased price, with payment due at the end of each year.
- 5- The client signs an initial agreement authorizing the bank to undertake *tawarruq* for the benefit of his account whenever his balance reaches a stipulated amount, whether for a credit card or a current account. The procedure of *tawarruq* is conducted in order to realize a monetary increase for the Islamic bank on his account deficit.¹

Section Two

The Definition of *Īnah* and Explanation of Its Forms

Subsection One

Literal and Technical Definitions of *Īnah*

First: The Linguistic meaning of *Īnah*: The literal meaning of *Īnah* is a loan or advance payment. It is said in Arabic: *I'tāna al-rajul* (The man bought on credit).

¹ See: the research work of Muḥammad 'Abdul Ghaffār al-Sharīf: *Al-Taṭbīqāt al-Maṣrafiyyah li al-Tawarruq: Mashrū'iyyatuhā wa dawruhā al-ijābī wa al-salbī. Ḥawliyyat al-Barakah*, no. 5, Ramaḍān 1424 AH/October, 2003 CE. See also the research of Mundhir Qaḥf and 'Imād Barakāt: *al-Tawarruq al-Maṣrafi fī al-Taṭbīq al-Mu'āṣir*, a paper presented for the conference of Islamic Financial Institutions on "Ma'ālim al-Wāqī' wa Āfāq al-Mustaqbal" held at the University of the UAE, 8th -10th of May, 2005 CE.

This is usually said when he barter one thing for another on credit or when he buys on credit. This type of sale is named *‘īnah* (a credit sale) because the buyer of the commodity for a fixed time will take its compensation (from the seller) in cash, i.e. ready money. Al-Kamāl ibn al-Hammām ventured that the name *bay‘ al-‘īnah* (credit sale) is derived from the tangible property (*‘ayn*) that is recovered in the course of the transaction. Al-Dasūqī preferred the view that it is only named *‘īnah* because of the assistance (*‘awn*) its owner gives to the needy to achieve his objective through a stratagem by which he pays little to gain much. Al-‘Iyyād said in *Kitāb al-Ṣarf* that it was so named because of the cash (*‘ayn*) acquired by the seller, who sold it for a delayed payment.

Secondly: The technical meaning of *‘īnah*: The scholars have differed in their technical definitions of *‘īnah* due to their differences of opinion regarding its forms, which will be mentioned soon; however, one of its most famous definitions among early scholars was: “One person sells a commodity to another for a specific price with payment delayed until a fixed date, then buys it back from him at a lower price for cash.”¹

However, *al-Mawsū‘ah al-Fiqhiyyah (The Juristic Encyclopedia)* has chosen its own definition, based upon the most common reason for engaging in it, that it is “a loan in the form of a sale in order to make the increase appear lawful.”²

¹ - See: al-Nawawī: *Al-Majmū‘ Sharḥ al-Muḥadhdhab*, (Medina: al-Maktabat As-Salafiyyah, nd), vol. 10, p. 153, Ibn Rushd al-Ḥafīd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, (Cairo: Dār al-Fikr li al-Ṭibā‘ah wa al-Nashr, nd), vol. 2, p. 106, Muḥammad ibn Aḥmad ibn ‘Arafah al-Dasūqī: *Hāshiyat al-Dasūqī ‘Alā al-Sharḥ al-Kabīr*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1st ed., 1996 CE), vol. 4, p. 143, Ibn Taymiyyah: *Majmū‘ al-Fatāwā*, collected and arranged by ‘Abd al-Raḥmān ibn Muḥammad ibn Qāsim (Beirut: Dār al-‘Arabiyyah, 1978 CE), vol. 29, p. 430 and Ibn ‘Ābidīn: *Radd al-Muḥtār ‘Alā al-Durr al-Mukhtār*, (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī & Mu’assasat al-Tārīkh al-‘Arabī, 1st ed., 1998 CE), vol. 7, p. 480.

² - Ministry of Endowments and Islamic Affairs: *Al-Mawsū‘ah al-Fiqhiyyah- Juristic Encyclopedia* (Kuwait: Ministry of Endowments and Islamic Affairs, 1987 CE), vol. 9, p. 96.

Subsection Two

Forms of *ʿīnah* (Credit Sale)

The books of early jurists have cited many forms of *ʿīnah*, among them:

The First Form: A man sells the commodity to another man for a certain price with payment delayed until a specified date, and then buys it from him at a lower price in cash.

The Second Form: “Ṭālib” buys a commodity from “Zayd” through an intermediary present at the transaction. The first step is that the intermediary buys it from Zayd. He then sells it to Ṭālib, the seeker of *ʿīnah*, at a price higher than the price at which the intermediary bought it from Zayd, with payment delayed till a fixed time. Then Ṭālib sells it to Zayd for cash at a price lower than the price Ṭālib paid for it. Shaykh al-Islām Ibn Taymiyyah commented on this form, saying, “If he buys a commodity for him then sells it to him and buys it back from him again, or sells to it to a third party who is the real owner from whom the loaner bought it in the first instance, it is *ribā*.”

The Third Form: A man sells a commodity, with payment delayed till a stipulated time. He then buys it back, with payment delayed till a date later than that of the first transaction at a higher price.

The Fourth Form: One person lends fifteen *dirhams* to another; then the lender sells the borrower a garment worth ten *dirhams* at a price of fifteen *dirhams*. He takes the *dirhams* which he had lent him as payment for the garment, and the fifteen-*dirham* loan will remain on the borrower to settle.

The Fifth Form: This type was mentioned by Ibn al-Qayyim as follows:

There is a fifth form of *ʿīnah* —the worst and most prohibited among its forms—in which both usurious contracting parties agree to an interest transaction. They then proceed to a man with a commodity. The needy party buys it from him and then sells it to the usurer for a cash payment which he receives from him on the spot. The usurer then sells it back to the needy party for a delayed price, as they have both previously agreed. The needy party then returns the commodity back to its original owner and gives him something [for his participation]. This is known as tripartite *ʿīnah* because it involves three parties. If the commodity is just between the two of them, it is then called binary *ʿīnah*. In the case of tripartite *ʿīnah*, they have brought in an intermediary between themselves

that they believe will make legal for them the *ribā* that Allah has made unlawful. He is like the legalizing third party in remarriage [after a triple-divorce]; however, this one serves to legalize *ribā*, while the other serves to legalize sexual relations. And nothing is hidden to Almighty Allah. He knows the treachery of the eyes and what is hidden in the chests.¹

Section Three

A Critical Reading of the Definitions and Forms of Both *Tawarruq* and *ʿīnah*:

It can be seen from the literal and technical definitions of *tawarruq* and *ʿīnah* that the two are congruent in terms of the purpose behind them, which is to acquire cash. In addition, they are also congruent in that they result in the payment of a greater amount at a later date in exchange for a smaller amount of immediate cash in consideration of the delay. However, they differ in terms of the return of the commodity sold. The requester of *ʿīnah*—according to its most well-known definition—will return the commodity back to the seller, whereas the *mutawarrīq* in the individual form of *tawarruq* will sell the commodity to a new buyer other than the first buyer with neither the arrangement nor the knowledge of the first seller. However, in organized *tawarruq* he arranges with the first seller to sell it to a third party or return it to its first seller. This clear difference between *tawarruq fardī* (*tawarruq* on an individual basis) and *tawarruq munazzam* (organized *tawarruq*) has led some Ḥanbalī scholars—who are unique in distinguishing between *tawarruq* and *ʿīnah*—to classify organized *tawarruq* as a form of *ʿīnah*. Ibn Taymiyyah's opinion about the second form of *ʿīnah* has already been mentioned, as has that of Ibn al-Qayyim about the fifth form. Both of them used examples of organized *tawarruq* to illustrate the two forms. Hence Ibn al-Qayyim named the fifth form tripartite *ʿīnah* because of the inclusion of the third party between the requester of *ʿīnah* and the seller in an attempt to legalize the transaction. Before them the Shāfiʿī scholar al-Nawawī explained that the first and second forms are classified by the majority of Shāfiʿī scholars as manifestations of *ʿīnah*. After quoting al-Harawī's description of the second form, al-Nawawī stated:

¹ Abū al-Ṭayyib Shams al-Ḥaqq al-ʿAzīm Ābādī, *ʿAwn al-Maʿbūd Sharḥ Sunan Abī Dāwūd*, and with it, *Sharḥ al-Ḥāfiẓ Ibn Qayyim al-Jawziyyah* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1st ed., 1990 CE), vol. 9, p. 347.

Some of them defined *‘īnah* solely in terms of the second form and called the first form, which we are presently discussing, ‘purchasing what one has sold’. That is the approach of the Ḥanafī School. But there are other scholars who consider the term *‘īnah* to encompass both matters together, as al-Harawī has said. Our companions use the term in that latter sense, and the Mālikīs incline to the same usage.¹

Classifying the organized form of *tawarruq* within the parameters of *‘īnah* is strengthened by some narrations from the Salaf,² especially the use of the term *‘īnah* for organized *tawarruq*. In the narration of ‘Abd al-Razzāq and Ibn Abī Shaybah, Dāwūd ibn Abī ‘Āṣim al-Thaqafī narrated that his sister said to him: “I want to buy a commodity by *‘īnah* (credit sale), so order it for me.” He told her, “I have some grain in my possession.” He related, “I sold the grain to her for a price in gold till a fixed time, and she took possession of it. She then said, ‘Find someone who will buy it from me.’ I told her I would sell it on her behalf, and I did so. Then I had some misgivings about that action which prompted me to consult Sa‘īd ibn al-Musayyib. He asked me, “Consider [this]; aren’t you the original owner?” I said, ‘I am.’ He said: ‘That is absolutely *ribā* (interest), so take your capital and return the excess back to her.’”³ Mālik gave a *fatwā* about the form that is discussed by the Mālikī School in the chapters of *‘īnah*. Ibn al-Qāsim stated in *al-Mudawwanah* that he asked Mālik about a man selling a commodity for a hundred dinars till a fixed time. Once the transaction is completed between the two parties, the buyer says to the seller: “Sell it for me to a man for cash, for I am not proficient at trade.” Imām Mālik said, “There is no good in it,” and he forbade it.⁴

This analysis of the various definitions leads to the conclusion that the incorporation of organized *tawarruq* within the parameters of *‘īnah* is not limited to the Ḥanafī, Mālikī and Shāfi‘ī *madhhabs*, but is, in fact, also the view of the Ḥanbalī School. It is a classification that the researcher considers valid and sound because it is congruent with the technical meaning as well as with the two forms of *‘īnah* mentioned by the

¹ - Al-Nawawī: *Al-Majmū‘ Sharḥ al-Muhadhdhab*, vol: 10, p. 153.

² Literally: “Predecessors”; short for “The Pious Predecessors”, an appellation for the first three generations of Muslims, starting with the Companions of Prophet Muḥammad (peace be upon him).

³ - ‘Abd al-Razzāq ibn Hammām: *Al-Munṣif*, taḥqīq Ḥabīb al-Raḥmān al-A‘ẓamī, (Beirut: al-Maktab al-Islāmī, 2nd ed., 1983CE), vol.8, p. 294-295.

⁴ - See: *al-Mudawwanah al-Kubrā li al-Imām Mālik Riwāyat Saḥnūn ibn Sa‘īd al-Tanūkhī*, (Riyadh: ‘Ālam al-Kutub, 2003 CE), vol. 4, p. 244-248.

Ḥanafī, Mālikī, Shāfi‘ī and Ḥanbalī *madhhabs*. However, this classification does not put an end to the controversy over the ruling on *tawarruq* in the banking system, for ‘*īnah* itself is a point of controversy among jurists. The Ḥanafī School divides it into *mubāḥ* (permissible), *makrūh* (disliked) and *muḥarramah* (unlawful);¹ the Mālikī School ruled to permit some of its types;² while the majority of Shāfi‘ī scholars³ and the Zāhirī School⁴ ruled to permit it. If the matter is such, then research on the differences of opinion about organized *tawarruq* or ‘*īnah* must be conducted through research on the foundational basis for the differing opinions about them. The basis for disagreement about organized *tawarruq* and ‘*īnah* is disagreement about the issue of *dharā’i‘* (lawful practices that are likely to lead to unlawful practices); also the rules of contracts, as well as the disagreement regarding detailed evidence about ‘*īnah*. This requires first an examination of the issue of *dharā’i‘*, and then a study of the detailed evidence.

¹ - See: al-Kamāl ibn al-Hammām: *Sharḥ Faṭḥ al-Qadīr*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1st ed., 1995 CE), vol. 6, p. 396.

² The author of *Mawāhib al-Jalīl* mentioned the Mālikī *madhhab*’s divisions of ‘*īnah* into permissible, disliked and prohibited. He referred to the permissible by his statement: "... The permissible for the two persons that have neither made mutual promises on any matter nor mutual agreement with the buyer like a man saying to another man: Do you have a commodity like so and so? The man will say: no, and he will so turn back without any appointment. He will buy it and when his friend meets him, he will say: I have that commodity with me. This is permissible to sell it from him with what he likes in cash". See: Muḥammad ibn ‘Abdur Raḥmān al-Ḥaṭṭāb, *Mawāhib al-Jalīl Sharḥ Mukhtaṣar Khalīl*, ed. Muḥammad Aḥmad ‘Abdul Qādir ‘Aṭā, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1st ed., 1995 CE), vol. 6, p. 293.

³ See: al-Shāfi‘ī, *Al-Umm*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1st ed., 1993 CE), vol. 3, p. 90 and al-Nawawī: *Rawḍat al-Ṭālibīn*, vol. 3, pp. 416-417.

⁴ See: Ibn Ḥazm al-Zāhirī, *Al-Maḥallā bi al-āthār*, ed. ‘Abdul Ghaffār Sulaymān al-Bandārī, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1988 CE), vol. 9, p. 549.

The Second Topic

Banking *Tawarruq* and the Issues of *Dharī'ah* and Legal Stratagems

Section One

The Relationship between *Dharā'i'* and Legal Stratagems

The discourse about *dharā'i'* in monetary transactions generates divergent opinions regarding contracts: is the main consideration wording and forms, or is it aims and meanings? Whoever is of the opinion that the main consideration is wording and forms does not approve of blocking lawful means that may lead to unlawful results. And whoever is of the view that the main consideration is aims and meanings decrees that lawful means which may lead to unlawful results should be obstructed.

The issue of 'blocking the means' (*sadd al-dharī'ah*) is closely related to the issue of legal stratagems (*hiyal*). The two are congruent in that the full range of *taklīfī* rulings apply to them,¹ but they differ in the following aspects:

1. The most common usage of the term 'legal stratagems' (*hiyal*) is for actions employed to evade rules of the Sharī'ah; therefore, al-Shāṭibī said, "It is generally held that their true nature is to present a deed that is apparently lawful in order to thwart a Sharī'ah ruling and transform it on the surface to a different ruling."²
2. Legal stratagems occur specifically in contracts, whereas *dharā'i'* occur in contracts as well as other acts and are, therefore, a wider category.
3. Intention is an essential component in the identification of legal stratagems, while that is not the case for *dharā'i'*; therefore, whenever a means is employed with the intention of evading a Sharī'ah ruling, the act is classified

¹ Ibn al-Qayyim said: "With regarding to their linguistic meanings, they are divided into five [categories, one for each of the *taklīfī*] rulings. Eating, drinking, clothing and obligatory journeys are stratagems for achieving the objectives for which they are performed. Likewise, contracts in the Sharī'ah may be compulsory, commendable or neutrally permissible, and all these are stratagems for achieving the subjects of those contracts. Likewise, unlawful means are stratagems for achieving the objectives for which they are performed." See: *I'lām al-muwaqqi'īn 'an Rabb al-'Ālamīn* (Beirut, Dār al-Kutub al-'Ilmiyyah, 2004), p. 618.

² Abū Is'hāq Al-Ṣhāṭibī, *al-Muwāfaqāt fī uṣūl al-Sharī'ah*, ed. by 'Abd Allāh Darāz, (Cairo, Dār-al-Ḥadīth, 2006), vol. 4, p. 436.

as a legal stratagem, and when that intention is missing, it will remain a *dharī'ah*.¹

Section Two

Clarifying the Locus of Disagreement with Regard to *Dharā'i'* and Juristic Opinions about It

Subsection One

Literal and Technical Definitions of *Dharā'i'*

First: Linguistically, *dharī'ah* (pl. *dharā'i'*) is: a means or way to something.

Second: Technically, *dharī'ah* means: an issue that is apparently permissible but will lead to an illegal act.²

Third: Categories of means (*dharā'i'*): Scholars have identified four categories of *dharā'i'*:

1. a means conducive to harm and corruption, such as drinking alcohol, which leads to the harmful state of intoxication; an accusation of sexual impropriety without supporting witnesses, which leads to the harm of slander; and fornication and adultery, which lead to confusion of lineage.
2. a means conducive to permissible matters and which is not employed with an intent of harm or corruption, although it may potentially lead to it; however, the benefit associated with it is weightier than the potential harm; for example, looking at a woman one is thinking about marrying, or speaking the truth to a tyrannical ruler.
3. a means conducive to permissible matters but which is employed in order to achieve a harmful or corrupt objective; for example, someone who marries a thrice-divorced woman with the intention of divorcing her so her husband can remarry her, or someone who engages in business with the intention of disguising an interest transaction.

¹ The same source, and the same page, and Ṣāliḥ ibn 'Abd al 'Azīz Āl Maṣṣūr: *Uṣūl al-Fiqh wa Ibn Taymiyyah*, Egypt, Dār al-Naṣr li al-Ṭibā'ah wa al-Naṣr) vol. 2, p. 493.

² Abū al-Walīd al-Bājī: *al-Ishārāt fī Uṣūl al-Fiqh*, ed. Nur al-Dīn Mukhtār al-Khādīmī, (Beirut, Dār Ibn Ḥazm, 1st ed., 2000), p. 113.

4. a means conducive to permissible matters which is employed without any intention of harm or corruption; however, the act in question frequently leads to it, and its harm outweighs its usefulness; for example, cursing the gods of non-Muslims and a widow beautifying herself during the waiting period after the death of her husband.¹

Subsection Two

Delineating the Locus of Controversy in the Issue of *Dharā'ī*'

The controversy among scholars is in regard to the third and fourth categories above; for they unanimously agreed that the first category is forbidden and that the second category is permissible, while there is a divergence of opinion concerning the third and fourth categories. The Mālikī and Ḥanbalī schools are of the view that such means should be interdicted because permitting them leads to dissolution of the objectives of the Sharī'ah, but al-Shāfi'ī and Ibn Ḥazm al-Zāhirī made a distinction between the manifestation of corrupt intent in the contract and the absence of clear indicators of such intent. When the intent to engage in the unlawful or inflict harm is apparent, like the intent to partake in usury, then al-Shāfi'ī and Ibn Ḥazm make absolutely no allowances for it. Al-Shātibī, has commented on this reality, saying:

It is absolutely incorrect to say that al-Shāfi'ī allowed the employment of means that lead to usury. He just didn't presume the existence of an intention to do something forbidden unless there is manifest evidence for it, whereas Malik did make such a presumption due to the manifestation of what would otherwise be a pointless act (i.e., the intermediary transaction), which indicates the intent to do what is forbidden. It is apparent to me that there is by and large agreement on the validity of the principle of *dharā'ī*'. The difference of opinion actually revolves around the regulatory indicators which cause the principle to be invoked.²

It is clear then that the dispute regarding *dharā'ī*' is not on the fundamental validity of the principle; it is only in determining the presence of the regulatory indicators which cause it to be invoked. This is what al-Qarāfi stated:

Blocking the means is not [an evidence] particular to Mālik's school of thought, as many Mālikī scholars mistakenly presume...it is just that he

¹ See Ibn Qayyim al-Jawziyyah: *I'lām al-muwaqqi'īn 'an Rabb al-'Ālamīn*, p. 559.

² Abū Ishāq al-Shātibī, *al-Muwāfaqāt fī uṣūl al-Sharī'ah*, vol. 4, p. 435-436

invoked it more than other [*mujtahids*], but there is consensus on the principle that [lawful means] should be interdicted [when they lead to the prohibited].¹

The evidence that the dispute is centered on the presence of the regulatory indicators which identify the improper use of means—and not the basic validity of the principle—are explicit statements by al-Shāfi‘ī and Ibn Ḥazm requiring certainty that a given lawful means will lead to a prohibited outcome in order to rule that a contract is invalid. Al-Shāfi‘ī stated,

The basis for my position is that if a contract fulfills the Sharī‘ah’s manifest criteria for validity I will not invalidate it on the basis of a presumption or a customary practice between sellers and buyers. I approve it by virtue of its apparent validity, but I detest² that the two of them should have an intention which, if it were made manifest, would spoil the transaction. For instance, I forbid someone buying a sword with the intention of killing with it [unjustly], but it is not unlawful for the seller to sell it to someone he suspects will use it to kill unjustly because it is possible that he will not use it to kill [unjustly]; therefore, I don’t invalidate this kind of business transaction. Likewise, I detest that someone sell grapes to a buyer he thinks will use them to make wine, but I don’t invalidate such a sale because he is selling it as something lawful, and it is possible that the buyer will never make wine from the fruit, just as the purchaser of the sword may never use it to kill anyone. Likewise I invalidate temporary marriage [i.e., *mut‘ah*, whereby an expiry date is stipulated in the contract], but if a man marries a woman with an authentic contract intending to keep her as a wife for only a day, or less or more than that, I would not invalidate such a marriage contract. I would only invalidate the contract when [the intention] is made manifest....When a man buys a commodity from another person, and the payment is deferred to a stipulated time, there is nothing wrong if he sells it back to the person he bought it from or to another person for cash at a price lower or higher than the price at which he bought it, or for a debt³ or barter of a commodity at a value he chooses to assign to it. The second transaction is

¹ Shihāb al-Dīn al-Qarāfi: *Tanqīḥ al-Fuṣūl*, (Egypt: Al-Azhar Colleges’ Library, 1993), p. 200.

² Al-Zarkashī, the Shāfi‘ī scholar, said: The word *makrūh* (detestable) is used for four meanings: *ḥarām* (unlawful), as in Allah’s statement: “... All these in the sight of your Lord are detested,” i.e. unlawful. This usage occurs in statements of al-Shāfi‘ī and Mālik; for example, what al-Shāfi‘ī said in the chapter on vessels, “I detest vessels made from ivory,” and in the chapter of *al-salam* (deferred delivery sales): “I detest stipulations that [an animal be] scrawny or [meat] cooked or roasted because scrawniness is a flaw, and stipulating a flaw spoils [a contract].” Al-Ṣaydalānī said: “This is its predominant meaning in the expressions of early scholars, for they disliked having Allah’s statement apply to them: ‘And do not say about what your tongues falsely characterize, “This is lawful and this is unlawful.”’ They disliked the use of the term *ḥarām*.” *Al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, (Kuwait, Ministry of Endowment and Islamic Affairs, 2nd ed., 1992), vol. 1, p. 296.

³ “A debt” would refer here to a deferred payment to the seller in this transaction.

not linked to the first transaction. Don't you agree, if the buyer in the first transaction purchases a slave woman, that he has the right to have intercourse with her, or give her away as a gift, or free her or sell her by another transaction for a deferred payment to whomever he chooses at a price lower or higher than the price at which he bought her? If that is the case, who made [the second transaction] unlawful for the buyer? How can anyone presume [to do so]? Surely, he has acquired her by a new transaction with its own payment, not with the delayed *dīnars*.¹

Al-Shāfi'ī does prohibit *'īnah* ethically [i.e. when the transactor considers how he will justify his behavior and intention before Allah] when a corrupt intention on the part of the dealer in *'īnah* has not been made manifest; however he does not prohibit it insofar as a judge's legal ruling, i.e., he does not declare it invalid. However, if the corrupt intention of the dealer in *'īnah* becomes manifest by stipulation that the commodity be resold to the first seller, then he would prohibit it both ethically and legally.

The Zāhirī School agreed with al-Shāfi'ī, as Ibn Ḥazm stated:

Whoever sells a commodity for a stipulated price to be paid immediately or for payment deferred for a short or long term, he has the right to sell that commodity to the one from whom he bought it at the same price he paid for it or for less or more than that. Payment can be immediate or deferred to a term shorter or longer than the term of the first transaction or for the same term. All of that is allowed; there is no detestation in it as long as it there is no a condition to that effect stipulated in the [original] contract. If there is such a condition, then it is forbidden and must be nullified without any statute of limitations, and it will be classified as a type of forced expropriation. And this is al-Shāfi'ī's position.²

Based on the above, the locus of the controversy in the third and fourth issues pertaining to *dharā'ī'* is when there is no manifest intention to seek a forbidden objective by permissible means. That is because al-Shāfi'ī's statement, especially regarding the slave girl, and Ibn Ḥazm's statement made it clear that if the unlawful intention is made manifest by an invalid condition or becomes a matter of certainty [by some other means], they both uphold the principle of interdicting lawful means that lead to the unlawful and they both declare the contract to be invalid. This interpretation is strengthened by the position of the Shāfi'ī School that if a killer uses a weapon or an instrument designed for killing, that should be regarded as an

¹ Al-Shāfi'ī, *al-Umm*, vol. 3, p. 90.

² Ibn Ḥazm, *al-Maḥallā bi al-Āthār*, vol. 7, p. 549.

indicator that the killing was deliberate, even if the killer claims to have done so unintentionally.¹ The view of leading Shāfi‘ī scholars like Shaykh Abū Ishāq al-Shīrāzī and Abū Muḥammad was that ‘*īnah* is unlawful when indicators are present of evil intention; for instance, when a person habitually engages in ‘*īnah*. Ibn Ḥazm had a similar view in case of certainty that means are being employed for evil purposes in dealings:

Issue: It is not allowed to sell something to someone when one is certain they will use it to disobey Allah. Such sales are to be nullified without any statute of limitations. For instance: to sell anything that one is certain will be used to make wine; to sell *dirhams* of inferior quality to someone who is certain to use them to defraud; to sell a young slave to someone who is certain to commit an immoral act with him or castrate him; to sell a slave to someone who is sure to mistreat him; to sell weapons or horses to someone who is certain to use them against Muslims; to sell silk to a man who will definitely wear it, etc. Allah says, “Help one another in virtue and piety, and do not help one another in sin and transgression.”² The transactions we have mentioned are patent examples of facilitating sin and transgression, without need for further elaboration; and to invalidate them is cooperation in virtue and piety.³

As the locus of controversy regarding *dharā’i’* has been clarified, it has become clear to the researcher that the weightier view is that *tawarruq munazzam* (organized *tawarruq*) is outside the locus of controversy for *dharā’i’*. That is because the intention of both the seller and buyer is not merely apparent, but is stipulated as a condition of the contract. Despite that, there remains an unresolved issue: is the objective of the *mutawarruq* in the banking transaction to be regarded as invalid, and is his intention evil? Some have said that the objective in a *tawarruq* transaction with a bank is not invalid, for the intention is to refrain from interest, not to engage in it.⁴

¹ Al-Shāfi‘ī stated in *al-Umm*, “When one man strikes another man wearing a helmet and armor and kills him after cutting his shield, I would rule that he is subject to retribution. Even if he says that he didn't intentionally kill him, he should not be believed because when someone wears a helmet and armor it is just like part of his body.” See al-Shāfi‘ī, *al-Umm*, vol. 6, p. 90.

² Al-Qur’ān, 5:2.

³ Ibn Ḥazm: *Al-Maḥallā bi al-Āthār*, vol. 7, p. 522

⁴ Dr. Muḥammad ‘Alī Elgarī said: “Neither *tawarruq* nor any other transaction will be a ruse except if one intends to achieve an unlawful aim by it; because the fundamental constituent of a ruse (*hīlah*), as was mentioned by Ibn Taymiyyah, is the intention. Consider *tawarruq* in the contemporary banks; there is no doubt that the modern *mutawarruq* does not intend to engage in unlawful dealing; just the opposite, his intention is to abstain from unlawful dealing. If he intended the unlawful, there would be no need to resort to a ruse because it is available legally through banks in the form of a loan. In fact, the complications and expenses of a loan are less than that of *tawarruq*. He only abandoned that and took

This raises the issue of whether judgment on the validity/invalidity of an act is solely on the basis of inward intention—even if the outer aspect of the deed contradicts the Sharī‘ah—or is consideration given to both the intention and the outer aspect of the deed?

Undoubtedly, inner intention is not sufficient to make a deed acceptable; rather, consideration must be given to manifest conformity of an act with the principles of the Sharī‘ah. This view is supported by the statement of ‘Umar bin al-Khaṭṭāb (may Allah be pleased with him): “Verily, people during the era of the Prophet (peace be upon him) were judged by the revelation. Now the revelation has ceased, so we can only judge you now by what is apparent of your deeds. Whoever shows us good behavior, we will trust him and bring him close, and his motives do not concern us; it is Allah who will judge his private motives. And he whoever shows us bad behavior, we will neither trust nor believe him, even if he says that his motives are good.”¹

This is in line with the commentary of Shaykh al-Islām Ibn Taymiyyah on a similar issue in his comments regarding the problem of means (*dharā‘i‘*) and its connection with *‘īnah*. He said:

Allah has forbidden [some] means (*dharā‘i‘*)—even if there is no intent to achieve unlawful objectives—due to apprehension that they will lead to the unlawful. When the intent is precisely to achieve the unlawful, it is more fitting to declare such an act unlawful than in the case of *dharā‘i‘*. This declaration of unlawfulness makes clear the effective cause for prohibition in cases of *‘īnah*. This door is blocked off in order to prevent people from taking it as a means to engage in usury while saying that they do not intend usury by it.²

Likewise, al-Shāṭibī reached the same conclusion when he explored the very issue in the second section of the objectives of the Sharī‘ah, Issue Four: “The ruling concerning one who has an intention opposed to [the objectives of the Sharī‘ah] while his act is in outer conformity, and vice versa.” He analyzed the issue as consisting of four categories, and he characterized the fourth as:

tawarruq in order to refrain from the unlawful. Someone may say that his intention is not to acquire the commodity; his sole intention is to get its cash value, and this is what makes it a ruse. The answer to this is that such a factor has no effect because it is a lawful objective. See the research of Dr. Muhammad ‘Alī Elgarī: *al-Ṭaṭbīqāt al-Maṣrafiyyah li al-Tawarruq wa Madā Shar‘iyyatuhā wa Dawruhā al-Ījābī*, Ḥawliyat al-Barakah, no. 5, October, 2003, p. 99.

¹The *ḥadīth* was narrated by Bukhārī in the Book of Shahādāt (Legal Testimony); see *Ṣaḥīḥ al-Bukhārī* (al-Riyadh, Dār As-Salām li al-Nashr wa al-Tawzī‘, 2nd ed., 2000), *ḥadīth* number 2641.

² Ibn Taymiyyah, *Majmū‘ al-Fatāwā*, vol. 29, p. 446.

an act or abstinence from acting which is in conflict [with the Sharī‘ah] while the intention is congruent with it. This is of two types: The first is that one possesses knowledge of the conflict, and the other is that one is ignorant of the conflict. When one is aware of the conflict, the act is an innovation, as in the invention of new forms of worship and adding new features to acts of prescribed worship; however, people are not usually bold enough to do so except by some reinterpretation [of a text]. Even so, one who does so is considered blameworthy, as per the dictums of the Qur’ān and the Sunnah....Secondly, that the deed is in conflict [with the Sharī‘ah]; When the Sharī‘ah promulgates a rule or forbids something, it is with the intent that compliance occur. If one does not comply, then the intent of the Sharī‘ah has been contravened. A good motive has no weight as a counter-consideration for the [outer] contravention because the act has not fulfilled the aim of the Lawgiver (Allah), and the motive is not harmonious with the act. Therefore, the composite [of act and intent] contravenes [the Sharī‘ah] just as would occur if there was contravention in both together. The evidence cited for the importance of intention is the saying of the Prophet (peace be upon him), “Every action is contingent upon the intention,”¹ on condition that it does not contradict the aim of the Lawgiver, in line with the saying of the Prophet (peace be upon him), “Whoever does a deed which is not in accord with our affair will have it rejected.”²

The foregoing discussion of *dharā’i‘* has made it clear that the disagreement of al-Shāfi‘ī and Ibn Ḥazm [with those who make wider use of blocking the means] is with regard to cases where the intention of the person who wants to employ a given means is not manifest. Thus, their disagreement would not apply to *tawarruq* in the banking system. However, there is still need to conduct a critical investigation of the detailed Sharī‘ah evidence to make sure there are no exceptions to the general rule, for there are general rules [in the Sharī‘ah] to which exceptions have been made by specifying texts; for instance: exemption of *salam* from texts that prohibit sale of commodities one does not possess at the time of the transaction; the exemption of a stipulated option to annul a sale from the general rule that contracts are binding; and the exemption of *muzābanah*³ from the prohibition of interest. Likewise, there are cases

¹The *hadīth* was narrated by al-Bukhārī in the chapter of: Kayfa Kāna Bad’u al-Waḥy, *hadīth* No.1.

²The *hadīth* was narrated by Bukhārī and Muslim, see al-Shātībī: al-Muwāqāt Fī Uṣūl al-Sharī‘ah, vol. 2 p.500-503.

³ *Muzābanah* means to sell fresh dates on the trees for a volume of dry dates, or to sell grapes for a volume of raisins, or to sell any unharvested fruit by estimate. These are examples of interest in barter because they will almost certainly result in exchanges of unequal amounts of the same type of commodity. However, they have allowed by specific texts which override the general prohibition in these cases.

in which a conspicuous analogy is abandoned for an inconspicuous analogy when there is no specific text on a matter. Likewise, the situation may require invoking the rule that a substantial need is given the same consideration as dire necessity. All such considerations require a critical study of the Shari‘ah evidence.

The Third Topic

An Analytical Study of the Shari‘ah Evidence

Section One

Evidence of Those Who Support *Tawarruq* in the Banking System¹

It is not possible to precisely identify those who permit *tawarruq* in the banking system on the basis of the published research. That is because its advocates initially based their opinion for it on the permissibility of individual *tawarruq* without being aware of the ramifications of the practical implementation of this type of *tawarruq* by Islamic banks. This has caused many of them, in particular the Islamic Fiqh Academy (Majma‘ al-Fiqh al-Islāmī) to update their verdicts based upon the developments which have become manifest as a result of its implementation by the banks. As a result, identifying the supporters of this opinion has to be an ongoing exercise. Therefore, I did not consider it important to enumerate its supporters. I will only summarize their evidence and arguments and critically analyze them. It is worth noting again that those who allow *tawarruq* in the banking system do so based upon their view that individual *tawarruq* is permissible. The Islamic Fiqh Academy allowed the latter with certain conditions,² and they deduced its permissibility based on the following evidence:

- 1- *Tawarruq* enters into the generality of Allah’s statement: “Allah has permitted trade and forbidden *ribā*” (Q 2:275). *Tawarruq* is a form of trade, which has, with all its forms, been declared lawful by the comprehensive indication of the abovementioned verse, except when there is specific evidence to prohibit a particular transaction. Therefore *tawarruq* is one of the forms of trade which Allah has permitted in general, and there is no clear-cut evidence that declares it unlawful.

¹ See Abdullah al-Munī‘: *Al-Ta’sīl al-Fiqhī li al-Tawarruq fī Ḍaw’ al-Īḥtiyājāt al-Tamwīliyyah al-Mu‘āshirah*, vol. 2, p. 446-447. See also Muhammad ‘Alī Elgārī: *al-Taṭbīqāt al-Maṣrafiyyah li al-Tawarruq wa Madā Shar‘iyyatuhā wa Dawruhā al-Ījābī*, *Hawliyyat al-Barakah*, no. 5, p. 94-95; also, Muhammad ‘AbdulGhaffār al-Sharīf: *al-Taṭbīqāt al-Maṣrafiyyah li al-Tawarruq: Mashrū‘iyyatuhā wa Dawruhā al-Ījābī wa al-Salbī*, *Hawliyyat al-Barakah*, no. 5, p. 89.

² The Islamic Fiqh Academy stipulated for the permissibility of individual *tawarruq* that the buyer not sell the commodity back to the first seller for a price lower than the price he paid for it, either directly or through an intermediary. See the resolution of the Islamic Fiqh Academy on *tawarruq* at its fifteenth session.

- 2- It was reported by Abū Sa‘īd al-Khudrī and Abū Hurayrah (R.A) that the Messenger of Allah (peace be upon him) appointed a man as his agent in Khaybar. He brought some *junayb* dates to the Prophet (peace be upon him), who asked him, “Are all the dates of Khaybar like this?” The man replied, “No, I swear by Allah, O Messenger of Allah; we exchange a *ṣā’*¹ of this kind of date for two *ṣā’*s of another, and two *ṣā’*s of this for three *ṣā’*s.” Allah’s Messenger (peace be upon him) said, “Do not do that! Sell [your] batch [of dates] for *dirhams* and then pay for the *junayb* dates with the *dirhams*.”² Their angle of reasoning from the *ḥadīth* is that something may be unlawful because its format is not in line with the format endorsed by Sharī‘ah, but if we are able to reformat it to a format approved by the Sharī‘ah it becomes permissible. *Tawarruq* is a sound form of trade transaction characterized by its conditions and essential elements and free of any factors that would render it flawed or invalid, and its aim is to achieve monetary liquidity so that people may avoid falling into *ribā*.
- 3- The starting assumption for transactions is that they are lawful except when there is some proof that prohibits a particular transaction, and there is no known Sharī‘ah proof that would forbid this one. Therefore, those who argue [that *tawarruq*] is lawful are not required to provide evidence. The burden of proof lies on those who would prohibit *tawarruq* sales because it is they who want to alter the starting assumption.
- 4- The objective of traders from their transactions is to acquire more money in exchange for less money by means of some commodity which serves as an intermediary between the seller and buyer. Nobody says when a trader wants to come out of a transaction with more money that the transaction is disliked. The same holds true for *tawarruq* because the aim of the transaction is to acquire money, and the commodity is an intermediate instrument between the two parties. To make a distinction between a seller and a *mutawarriq* because the seller aims at making a profit while the *mutawarriq* sells in order to get cash, whether he gains or loses, is not a telling distinction. That is because profit is also the

¹ A measure of volume equivalent to 2.75 liters. See Wahbah al-Zuhaylī, *al-Fiqh al-Islami wa Adillatuh*, 1:142.

² See *Ṣaḥīḥ al-Bukhārī*, Chapter: When One Intends to Sell Dates for Better Dates, *ḥadīth* no. 2201, and *Ṣaḥīḥ Muslim*, Chapter: Bartering Staple Foods, Like for Like, (Riyadh, Dār As-Salām li al-Nashr wa al-Tawzī‘, 2nd ed., 2000, *ḥadīth* no. 4081.

acquisition of money, and the *mutawarrīq* does not lose, since the deferment of payment for the commodity has a role in the overall value of the price.

- 5- Necessity calls for this kind of transaction, for not everyone that wants to borrow money can find someone to lend to him.
- 6- *Tawarruq* is to be considered one of the forms of Islamic financing; it helps to cover many needs and provide sufficient liquidity by a lawful Shari‘ah means, and it is extremely effective in realizing [the objectives of Islamic] economic philosophy and securing benefits for traders, whether they be individuals or organizations. It is also an important instrument by which governments can finance their trade deficits and provide necessary liquidity.
- 7- The position of the Islamic banking system in the Arab and Islamic countries requires that no opportunity be missed for increasing its profitability and providing its customers with financing instruments, considering the intense competition faced from usurious banks, which represent more than 70% of the banks in Islamic countries. The usurious banks provide their clients with a variety of financial products that greatly surpass the products provided by Islamic banks to their clients. We cannot eliminate a financial instrument that has not been conclusively proven to be prohibited in light of the difficulties faced by the Islamic banking sector, which require that no financing opportunity be ignored.

Discussing the Evidence of the Advocates of

***Tawarruq*¹**

- 1- The reasoning of the advocates of *tawarruq* on the basis of the general indication of Allah’s statement, “Allah has made trade lawful and made *ribā* unlawful,” is not substantial proof because it is reasoning on the basis of a

¹ See the rebuttal of the evidence of the advocates of *tawarruq* by al-Ṣiḍīq al-Ḍarīr: *al-Tawarruq al-Maṣrafi* (al-Ra’y al-Fiḥī); Mukhtār al-Salāmī: *al-Tawarruq al-Maṣrifī*, Sāmī ibn Ibrāhīm al-Suwaylim: *al-Tawarruq al-Munazzam*, Dirāsah Ta’šiliyyah; Aḥmad Muḥydeen Aḥmad: *al-Taṭbiqāt al-Maṣrafiyyah li ‘Aqd al-Tawarruq wa Āthāruhā ‘alā masīrat al-‘Amal al-Maṣrafi al-Islamī*; Mundhir Qaḥf and ‘Imād Barakāt: *al-Tawarruq al-Maṣrafi fi al-Taṭbiq al-Mu‘āsir*; and ‘Alī Muḥydeen al-Quradadghi: *Murāji‘at Fatāwā Nadawāt al-Barakah al-Majmū‘ah al-Thāniyyah*, Papers of the 29th al-Barakah Symposium on the Islamic Economy, 7 Ramaḍān 1420 A.H/6-7 September, 2008.

generality, and most scholars consider a general wording to be inconclusive (*zanni*) in subsuming all possible members of its set. This has led to the commonly quoted scholastic aphorism that there is scarcely a general text which has not had some members excluded from its linguistically defined set. As for the Ḥanafī view that general wordings are definitive in their indication, it does not apply to the abovementioned verse, for the declaration of permissibility of trade in general has been narrowed down, according to them, by the prohibition of invalid transactions. And according to the Ḥanafīs, once a general text has been subjected to the exclusion of some of the elements of its linguistic set, its indication for the remaining members is suppositional (*zanni*). Therefore, use of the above verse as evidence is use of a suppositional general proof, and this generality has been specified, according to those who prohibit *tawarruq*, by evidence prohibiting two sales combined in a single transaction; a transaction with an added condition; credit sales (*ʿīnah*); the prohibition of legal ruses; and other texts.

1- Their argument on the basis of the *ḥadīth* about *junayb* dates is misapplied, for it is actually evidence against them not for them. That is because the aim of the Prophet (peace be upon him) in giving his instruction was to change the transaction in its substance, not merely its form. It is inconceivable that the Prophet (peace be upon him) would concern himself with the outer form of the transaction while ignoring its substance. Therefore, the *ḥadīth* is clearly directing the Companion to change the substance of the transaction from a rejected transaction, in which one of the parties is almost certain to be taken advantage of, to a transaction built on an exchange of truly comparable values that will make money play its rightful role of precisely revealing the differences of value between various types of commodities.

2- Their argument that the starting assumption for transactions is that they are lawful, except when there is some proof that prohibits a particular transaction, is basically a sound proof; however, there are clear proofs for this transaction being unlawful, especially the texts that forbid legal ruses, credit sales (*ʿīnah*), a transaction with an added condition, and two transactions combined in a single transaction.

3- Their analogy comparing the dealer in *tawarruq* with a trader, in that the objective of traders from their transactions is to acquire more money in exchange

for less money, which is the same intention as that of the *mutawarriq*, is an analogy between two things which are fundamentally different (*qiyās ma‘ al-fāriq*). The difference between the two transactions is very clear. The greater sum of money acquired by the creditor in *tawarruq* must be considered an increase which is not matched by a corresponding benefit to the borrower, whereas the increase acquired by the trader is matched by the corresponding benefit of possessing the sold item.

4- It is possible to refute their fifth, sixth and seventh arguments in considering *tawarruq* a necessity by saying that it is a misappraisal on the part of *tawarruq*'s supporters. If *tawarruq* is a necessity, it is a necessity for the bank exclusively, in that it increases its profits. The necessity of liquidity is not convincingly established because these banks were able to operate smoothly previously without *tawarruq*. As for losing opportunities, no sane person would say that Islamic banks should forgo opportunities that serve their interests. The only opportunities to be rejected are those that undermine the foundational principles and objectives upon which Islamic banks have been established.

Section Two

Evidence of Those Who Repudiate *Tawarruq* in the Banking System¹

Those who reject *tawarruq* in the banking system have relied upon many proofs:

1- Banking *tawarruq* clashes with the principle that matters are to be evaluated in light of their objectives. The objective of the repeated sales in *tawarruq* is to procure immediate cash in exchange for a deferred payment of a larger amount of cash.

2- *Tawarruq* in the Islamic banking system is a means that leads to *ribā*, and [blocking] means is acknowledged in Islamic law, as is reflected in the prohibition of a killer inheriting from a person he has killed. Banking *tawarruq* leads to the same result as *ribā*, regardless of the outer form of the contract. That is because *tawarruq* leads to the exchange of immediate cash for deferred payment of a larger amount of cash, and that is the essence of the prohibited *ribā*.

¹ Ibid.

3- Banking *tawarruq* is a form of *‘inah*, which is a transaction that involves interest; and the majority of scholars have prohibited *‘inah*, based on the *ḥadīth* of Ibn ‘Umar (may Allah be pleased with him) that Allah’s Messenger (peace be upon him) said, “When people become stingy with *dīnārs* and *dirhams*, transact sales on the basis of *‘inah*, follow the tails of cows, and abandon striving in the cause of Allah, Allah will afflict them with a calamity, and He will not remove it until they review their [practice of the] religion (Islam).” In a variant narration: “When you transact sales on the basis of *‘inah*, take hold of the tails of cows, become content with cultivating crops, and abandon striving in the cause of Allah, Allah will impose humiliation upon you, and He will not remove it until you return to your religion.”¹ The same ruse present in *‘inah*, because of which the Lawgiver prohibited it, is blatantly present in banking *tawarruq* in the contractual agreement between the Islamic bank and the *mutawarrīq* to make an immediate cash payment in exchange for a larger cash payment at a later time.

Indeed, banking *tawarruq* falls under the purview of the Prophet’s prohibition of two transactions within a single transaction. The *ḥadīth* was explained by Ibn Taymiyyah and his student Ibn al-Qayyim to refer to *‘inah*, based upon the Prophet’s statement in the narration of Abū Hurayrah: “Whoever contracts two sales in a single sale, he has a right [only] to the lesser price; otherwise, it is *ribā*.”² The meaning of the *ḥadīth* is that whoever sells something on credit, then he buys it at a lower price for immediate payment, he has no right in that except to his capital, which is the lower-priced of the two transactions. If he takes the second transaction, with its increase over the first transaction, he has surely engaged in usury. It would also fall under the purview of the Prophet’s prohibition of a sale with an added condition, which al-Shāfi‘ī and Ibn Ḥazm prohibited.

4- Banking *tawarruq* is more costly than the interest charged by usurious banks and more costly than other forms of *‘inah* sales. That is because the interest rate charged by usurious banks is fixed by an international index, and the rate is almost the same

¹ The *ḥadīth* on *‘inah* was authenticated by Ahmad Shākir in *Takhrīj al-Musnad*, *ḥadīth* nos. 4825 and 5007. It was also authenticated by Nāṣir al-Dīn al-Albānī when all of its chains of transmission are considered in totality. See *al-Silsilah al-Ṣaḥīḥah*, (Riyadh: Maktabat al-Ma‘ārif for publication and distribution, 1995), vol. 1 p. 42, *ḥadīth* no. 11).

² The *ḥadīth* was authenticated by al-Albānī in *Ṣaḥīḥ al-Jāmi‘ al-Ṣaḥīḥ*, *ḥadīth* no. 2326.

with the [simpler forms of] *‘inah*. What we find in banking *tawarruq*, however, is an aggregate of charges and expenses that clearly exceed those of usury and *‘inah* because it consists of a series of interrelated binding agreements. It is first of all a *murābaḥah* sale, the profit of which is equivalent to the interest rate, since it is pegged to it, although it sometimes even exceeds it. On top of that, there are fees for making the bank the client’s agent, for the broker, for the memorandum of understanding, and for other contractual agreements.

5- Banking *tawarruq* is not a replacement for currency-based financing (i.e., loans on interest); rather it bears a close resemblance to it. It has been a replacement of something good with something inferior to it. It represents a step backward from the intended course of the Islamic banking system and its sound financing instruments, which are based upon a real principle of promoting an increase in the production and circulation of what is good and useful. It replaces those instruments with what is essentially usury: exchanging instant cash for postponed cash with an increase. It means that the rationale for establishing Islamic banks—that they eschew *ribā*—is no longer operative because they have returned to it.

6- Indeed, there is an essential difference between a liquidity charge and acknowledgement of time-value in price. What is meant by a liquidity charge is an increase in a debt in exchange for an instant cash payment. It is an increment that has no corresponding benefit for the debtor, and it leads to runaway indebtedness and to the creditor gaining mastery over the debtor’s wealth. Therefore, the Lawgiver has prohibited it because it is a kind of exploitation. As for the acknowledgement of time-value in price that has been mentioned by the jurists, it is an increase of price in the business transaction and is not in the exchange of cash for cash.

7- The commodity exchanged as part of banking *tawarruq* may be either mere documents, i.e., certificates sent from one place to another, which are usually in the possession of a broker; or a defective commodity stored in a warehouse which becomes the subject of repeated *murābaḥah* transactions; or it may be in a warehouse solely for the purpose of being the subject of such *murābaḥah* transactions.

8- Banking *tawarruq* serves to justify the hegemony of usurious banks, as it also serves to justify the hegemony of the Western economic system over the Islamic

economic system. That is because banking *tawarruq* undermines the rationale for the establishment of Islamic banks, as long as these banks are operating in the same way that usurious banks operate, just under different labels. Actual consideration must be given to the reality of what is being named not the mere label. But the reverse is the case whereby the Islamic banks by practicing *tawarruq* subjected themselves to the hegemony of Western usurious banks. This may occur by Western usurious banks gaining liquidity when an Islamic bank deposits some of its wealth with the usurious bank in order to conduct *tawarruq*; or the usurious bank may make a profit on the *murābahah* transaction or from its role as an agent. On top of this, it strengthens the hegemony of Western economies over Islamic economies by providing them millions of dollars through purely formal transactions that magnificently reward Western companies and brokers (mostly of whom are Westerners) for sending certificates to satisfy the formal requirements of a commodity sale. This diversion of resources deprives local operators from access to this wealth for investment in development projects.

Discussion of the Arguments of Those Who Prohibit Banking *Tawarruq*

Possible rebuttals to their arguments are as follows:

- Although the principle that matters are to be judged by their attendant objectives is valid and accepted, its application to banking *tawarruq* cannot be conceded, in that the intention of the *mutawarriq* to engage in usury is not manifest. In fact, the intention to eschew usury is manifest with many of them. In that case, their intentions are good; and matters are to be judged by their attendant objectives.

- Their argument for the prohibition of banking *tawarruq* on the basis of blocking the means (*dharā'i'*) is not accepted from them because it is a proof in the Mālikī and Ḥanbalī schools of thought, while the Shāfi'īs and Zāhirīs did not recognize it; and [a principle particular to] one school of thought is not a proof against another school in issues of disagreement.

- The *ḥadīths* about *'īnah* are of disputed authenticity. A body of scholars has pointed out the weakness of those *ḥadīths*, among them: al-Mundhirī, Ibn Ḥajar and al-Shawkānī. Even if the authenticity of the *ḥadīths* on *'īnah* is conceded, they are about

ʿīnah, whereas the topic being debated is banking *tawarruq*, and the conformity of *tawarruq* to the definition of *ʿīnah* is not conceded.

-Their evidence that the Prophet (peace be upon him) forbade transacting two trades within a single transaction is not conceded because the scholars differed in their explanations of the *ḥadīth*. Al-Shāfiʿī gave two explanations for it: (1) the seller declares, “I’ll sell you this commodity for ten if payment is immediate or for twenty if payment is deferred,” and the agreement is concluded without stipulating whether the payment is to be immediate or deferred; (2) the seller declares, “I will sell you this commodity for 100—for example—on the condition that you sell your house to me for such-and-such an amount; i.e., as soon as my obligation to you is established, your obligation to me is also established.” It has also been explained to refer to *ʿīnah* or to payment by installments with an increased price [over an immediate payment]. The same holds true for the Prophet's prohibition of a sale with an added condition: the jurists have differing explanations of its meaning. The existence of these other possible explanations weakens the argument on the basis of these texts.

- Their argument for the prohibition of banking *tawarruq* because the expenses associated with it exceed those of *ribā* and *ʿīnah* is not conceded. That is because the higher expense of a given transaction is not a valid criterion for its prohibition. Consideration is reserved for substantial evidence for legalization or prohibition. This reasoning is not sound except in cases of conflicting public interests, whereupon the jurist undertakes *ijtihād* to determine the weightier of the two alternatives.

- The analogy between *tawarruq* and *ribā* is an analogy between two different things (*qiyās maʿ al-fāriq*) because interest is an exchange of an immediate cash payment for a postponed payment with an increase, whereas bank *tawarruq* involves buying a commodity and possessing it, then delegating the bank to sell the commodity to a third party, not the first buyer.

- Their linkage of the prohibition of *tawarruq* in the banking system with certain procedural problems associated with the *tawarruq* contracts is not accepted. That is because the procedural problems can be remedied by stipulating physical transfer of the commodity, for instance. If the problem is with procedural issues, the criticism

should be directed at the procedures, not at the fundamental ruling regarding this issue.

- Their argument that banking *tawarruq* provides justification for the hegemony of usurious banks and for usury-based Western economies is imprecise, for it does not take into consideration the realities of the world economy. It also fails to bear in mind the guidance of the Prophet (peace be upon him) in his dealings, for he used to engage in transactions with Muslims and with non-Muslims who dealt with usury. When the Prophet (peace be upon him) died, his armor was mortgaged to a Jew. This means that the existence of these Islamic banks is not predicated upon bringing an end to the existence of Western banks or with bringing Western economies to their knees; rather, they have been established in order to provide an exemplary alternative to Western economics. Perhaps, as a result, Western economies will re-examine the way they are structured and correct the track upon which they are proceeding.

The View of the Researcher Concerning *Tawarruq* in the Banking System

After a critical exposition of the technical definition of *tawarruq* and an investigation of its relationship with *ʿinah*; and after investigating the underlying legal principles (exemplified in *dharāʿi*) that are the basis for scholarly disagreement regarding banking *tawarruq*; and after examining the detailed evidence of both those who allow it and those who prohibit it, it has become clear to the researcher that the most authentic view concerning banking *tawarruq* is that it is not allowed. The researcher bases the conclusion that banking *tawarruq* is unlawful upon the following:

- 1) The organized manner in which *tawarruq* is conducted in the banking system coincides with the meaning of *ʿinah* in the deferred payment of a greater amount for an immediate payment of a smaller amount. This is clearly a form of *ʿinah* that was mentioned as such even by those—i.e. the Ḥanbalīs—who distinguished between *tawarruq* and *ʿinah*. The texts I quoted which explain the forms of *ʿinah* make it clear that every school of thought classified organized *tawarruq* as falling within the bounds of the second and fifth types of *ʿinah*. The majority of scholars prohibit *ʿinah*; the *ḥadīth* prohibiting *ʿinah* has proven, after thorough investigation and review, to be authentic; the explanation that the *ḥadīth*, “Whoever contracts two sales in a single

sale, he has a right [only] to the lesser price; otherwise, it is *ribā*,” refers to *‘īnah* is the only plausible one in the view of the researcher; and those narrations from the Salaf prohibiting *‘īnah* are the weightiest [views on the topic].

- 2) The existence of disparate views among scholars in matters of jurisprudence does not preclude reviewing and evaluating them for correctness, for that was the view of all the scholars, even those who took the position that every *mujtahid* is correct. And in doing so here, due consideration must be given to the objectives of the Sharī‘ah, to forbidding legal stratagems, and to blocking lawful means that will most probably lead to unlawful acts. That is so not only because it is the view of the majority of previous and contemporary scholars; but it coincides with giving consideration to the spirit of the Sharī‘ah and its fundamental principles, especially to the precept that matters must be evaluated in light of their attendant motives. Ibn al-Qayyim showed his sagacity when he said:

Since goals cannot be achieved except by means and the ways that lead to them, their means and causes are subsidiary to them and take their significance from them. Means that lead to the unlawful and sinful are disliked or prohibited to the extent that they lead to those ends and to the extent of their linkage with them. Means that lead to lawful and meritorious acts are loved and permitted to the extent that they lead to those ends. ***Hence, the means to a goal follows the goal itself; both are intended with regard to the final aim, while the former is intended as a means.*** If Allah prohibits something, and it has means and channels that lead to it, He forbids them and makes them unlawful, in order to realize [the objective of the primary] prohibition and buttress it, and to prevent any encroachment upon His preserve.¹

If, for argument’s sake, we give consideration to the opposition of al-Shāfi‘ī and Ibn Ḥazm regarding the blocking of means, the locus of their disagreement is when no forbidden intention is manifest in the use of a permissible channel. However, when the intention is made manifest in the declarations of the banks that they intend to facilitate liquidity for their clients by means of an immediate cash payment in return for a deferred payment with an attendant increase, or by adding a condition that contradicts the [requirements of] the contract, the previously quoted statements of al-Shāfi‘ī and Ibn Ḥazm are clear in prohibiting that.

¹ Ibn al-Qayyim: *I‘lām al-muwaqqi‘īn*, p. 558. The final phrase is a reference to a *ḥadīth* of the Prophet (peace be upon him): “Every king has a preserve, and the things Allah has declared unlawful are His preserve.” *Ṣaḥīḥ al-Bukhārī*, and *Ṣaḥīḥ Muslim*, (translated by ‘Abdul Ḥamīd Ṣiddīqī. Lahore: Sh. Muhammad Ashraf Publishers, 1972), *ḥadīth* no. 3882.

- 3) The actual application of *tawarruq* in the banking system and the declaration of the banks that their aim in the transaction is to provide liquidity for the client, as well as the statements of a number of bank officers whom I asked about this dealing that it is cash for cash with the commodity serving only as an intermediary, all that makes clear the real objective of this transaction. In addition, with the discovery that a number of different *tawarruq* and *īnah* transactions are issued on a single commodity, it becomes clear that this transaction is not lawful in the Sharī‘ah and it is true trickery to acquire the usury which has been declared unlawful by the Sharī‘ah.
- 4) Despite all that has been put forward to refute the criticisms directed at banking *tawarruq*, and despite the efforts to dismiss those criticisms and exonerate the *tawarruq* field from them, they cannot cover up *tawarruq*’s massive impact upon Islamic banks, which are as follows:

-They have caused national economic activities to deviate from a developmental nature to the same nature as that of interest banks under different labels. As a result, actors in the economic field have become disinclined to engage in real economic activities in favor of getting interest loans under various labels, burdening themselves with debt and spending extravagantly in excess of their income. The same thing has happened to them as happened in the West of people living beyond their means. Indeed, studies have shown that the proportion of transactions involving *īnah* and *tawarruq* in some Malaysian Islamic banks exceeds 50% percent.

- It has caused Islamic banks to deviate from serving national economic progress. They have limited themselves to the goal of competition with the conventional banks; Increasing profits has been made the top priority of the Islamic banks, even if it is at the expense of clients and the national economy.

- It has contributed to the failure to innovate new financing instruments; the banks are satisfied to find subterfuges in order to peddle usury-based products by changing some names. They have replaced Interest Rate Profit Swap with Islamic Profit Rate Swap, and the term *īnah* has been replaced with “personal investment”. Someone has lamented that, “Just as counterfeit coins displace real coins in circulation, banking

tawarruq drives out methods of financing such as *murābahah*, *muḍārabah*¹ and *mushārahah*² from the market and takes their place. This is because the beneficiaries from the financing prefer to maintain their autonomy in using it without any involvement by the financier.”³

- It has contributed to the growth of the belief of many Muslims that the dealings of Islamic banks are no different from that of interest banks except in labels and slogans. The major contributing factor to this perception is that the products of Islamic banks are similar to those of interest banks, except differences of form in the titles of contracts and some of their clauses. *‘Īnah* has turned into “personal investment,” and *tawarruq* has turned into *murābahah*.

- It has contributed to the overburdening of Islamic banks and those seeking loans by the seeking and offering of liquidity schemes without any objective study of their ramifications. Some of them have also contributed to the transfer of liquidity to the Western usury banks under the rubric of *tawarruq* investment, a practice that has deprived the Islamic and national economies of the investment of this liquidity in projects that will yield benefit to the society and the Ummah.

Based on these considerations and the strength and soundness of the evidence of those who would prohibit banking *tawarruq*, I hold this kind of transaction to be unlawful. And Allah is the Most High, and He knows best which view is most correct.

¹ A form of partnership between a party who supplies only capital and another party who supplies only entrepreneurial skills and experience. The silent partner with capital gives it to the entrepreneur to use in trade. The two parties share in any profits at a proportion stipulated in the contract. Any losses are borne by the provider of capital.

² A flexible form of partnership between two or more parties, all of whom must supply capital and who may or may not actively participate in the tasks of running the project. The parties share profits and losses in proportions agreed upon between them.

³ Mundhir Qahf and ‘Imād Barakāt: *Al-Tawarruq al-Maṣrafi fī al-Taṭbīq al-Mu‘āṣir*, p. 21.

Conclusion

To wrap up, I would like to present the most important conclusions reached in this paper:

First: The differences of opinion among scholars regarding the verdict on *tawarruq* in the banking system are due to their divergent opinions on what may be called *tawarruq fiqhī*, i.e., individual *tawarruq*, and differences in their methodological premises which regulate their *fatwās*, as well as their divergent opinions on the economic effects of *tawarruq* on the banks and the Islamic countries.

Second: The fountainhead of the dispute about banking *tawarruq* with regard to its linguistic and technical meanings is their disagreement whether *tawarruq* shares in the technical meaning of *ʿīnah*, as per the texts quoted in the paper.

Third: The scholarly dispute regarding the jurisprudential principles most relevant to the ruling on *tawarruq* goes back to their differing opinions on the rule governing means (*dharāʿiʿ*), and its applicability to banking *tawarruq*. Those who hold that means which lead to the unlawful should be interdicted prohibit banking *tawarruq*, while those who do not sanction [wide use of] blocking the means (*sadd al-dharīʿah*) do not prohibit *ʿīnah* or *tawarruq*.

Fourth: Investigation and review of the position of al-Shāfiʿī and Ibn Ḥazm regarding blocking the means (*sadd al-dharīʿah*) reveals that is limited to situations in which the corrupt intention of the contracting party is not apparent; but if it is apparent, al-Shāfiʿī and Ibn Ḥazm absolutely do not allow the contract.

Fifth: Those who allow banking *tawarruq* depend on many proofs, among them: the general lawfulness of trade established by the Qurʾānic verse that permits business transactions and forbids usury/interest; the principle of the starting assumption with regard to business and interpersonal transactions; and the *ḥadīth* about *junayb* dates, as well as some rational arguments.

Sixth: Those who proscribe *tawarruq* in the banking system also marshal many proofs, among them: the principle that all matters are judged in light of their attendant motives; blocking the means that will probably lead to the unlawful; linking *tawarruq* to *ʿīnah* by regarding it as one of its forms; and the Prophet's prohibition of

contracting two transactions in a single sale and of a sale with an added condition. They also argued on the basis of certain rational proofs.

Seventh: It has become clear after examining and reviewing the underlying linguistic and *uṣūl al-fiqh* precepts and the detailed proofs of both those who allow and those who prohibit that the evidence of those who prohibit is stronger and their arguments more cogent. Based upon that, the view that *tawarruq* in the banking system is unlawful has been found to be more correct. I also presented additional evidence that further strengthens the conclusion that this transaction is unlawful. And the end of our supplication is simply to say: All Praise is for Allah, the Lord of all the worlds.

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