

**TAWARRUQ, ITS ESSENCE AND ITS TYPES: MAINSTREAM TAWARRUQ AND  
ORGANIZED TAWARRUQ**

by

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**Preface**

Praise be to Allah who has permitted sale and forbid usury. He has fortified the system and the approach of His *Shari'ah*. He granted to His beloved slave clear sightedness. And praise be to his Messenger Mohammed pbuh, who guided us to the gratification of Allah and alerted us from the way of the people of disobedience, who try to manipulate the law of God by invited a wrong interpretation and wrong analysis. Therefore, the Prophet pbuh said, "May Allah curse the Jews, for Allah made the fat<sup>1</sup> (of animals) illegal for them, yet they melted the fat and sold it and ate its price"<sup>2</sup>. The Prophet pbuh criticized the Jews because they tried to deceive the text and they thought that way of deceiving is useful. However, the Prophet pbuh commands us to stay away from such an act. Therefore, any wrongdoings that were committed by previous nations and they were punished for it, we should keep away from that type of wrongdoing. If we commit that wrongdoings, we deserve the punishment. Furthermore, we have to praise our Prophet pbuh because he guided us to every good deed and alerted us from every bad deed. In actuality, *tawarruq* is one of those confused matters, due to the element of cheating in that contract. This cheating removes *tawarruq* from its original rule, which is based on permissible trade into something else alike tricks, which are condemned by Allah. Moreover, those tricks lead to *riba*, which is prohibited by the *Shari'ah*. I will clarify this statement by own investigation and by previous researches in this area. Additionally, I investigated the

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<sup>1</sup> Generally, all fats are prohibited, as the tradition was narrated in Sunan Alnsa'ī that prohibition is obvious from the verse, "And unto those who are Jews, We forbade every (animal) with undivided hoof, and We forbade them the fat of the ox and the sheep except what adheres to their backs or their entrails, or is mixed up with a bone. Thus We recompensed them for their rebellion [committing crimes like murdering the Prophets and eating of Ribâ (usury)]. And verily, We are Truthful." (Surah Al-An'ām: 146).

<sup>2</sup> Narrated by Albukhari, Chapter on the sale of dead animal and idol, No 2143.

actual practice on the light of *fiqh* and the purposes of the *Shari'ah*. By thanking Allah, this paper is trying to be as comprehensive as it can be for the whole concept and idea of *tawarruq*. Moreover, this paper would try to clarify the legal rule of the *Shari'ah*.

I ask Allah to make this research beneficial and to grant me His reward. Peace and blessings of Allah upon His Messenger.

### **Definition of *tawarruq***

#### Literal meaning

*Tawarruq* is the root word for *tawarraqa*, which means to take papers. It has been said that “*tawarraqa Alḥiwan*”, which means the animal has eaten the leaves of trees. Furthermore, *wariq* has two meanings:

1. Dirham that is manufactured from silver; and
2. Any silver that was issued to be as a medium of exchange<sup>3</sup>.

Allah says, “So send one of you with this silver coin of yours to the town” (surah Alkahfi: 19). *Wariq* is the recitation of Nafi‘, Ibn Kathir, Ibn ‘Amir, Alkesa‘i and Ḥafaṣ from ten recitations (*qiraat*). Another recitation is *warq*, which is for Abu Umar, Ḥamzah and Shu‘bah. However, *wariq* and *warq* are two different accent of the Arabic language. Al-Zajaj recited it as *wirq*<sup>4</sup>.

#### Technical meaning

*Tawarruq* means to purchase a commodity at deferred price, either by negotiation or *murabahah*, and then sell the commodity to a third party, in order to obtain liquidity<sup>5</sup>. In this sense, *tawarruq* is a mutual trade, because there is no difference between buying at cash and selling at cash or deferred price. Moreover, there is no difference between

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<sup>3</sup> Aasas Albalaghah, Lisan Alarab, Taj Alarus, Mu‘jam Maten Allughah, Alm‘jam Alwafi‘ and Almi‘bah Almunir “word of *waraq*”.

<sup>4</sup> Alqurtubi. The collection of rules of the Qur’an, Vol. 10, p. 375.

<sup>5</sup> Legal standards, p. 492.

buying at deferred and selling at cash or deferred price. However, the trade can be achieved either by cash or deferment. Nowadays, most of the trade, especially internal trade is based on deferred payment, where the merchant buys goods at deferred price and he pays back the price when he sells the goods. Sometimes, the merchant returns the goods that have not been sold to the principal merchant, i.e. if the goods are unsalable or if the goods have expired. Therefore, the merchant may lose or gain from his trade. The profit for the merchant is the difference between the sale and purchase price. In fact, this is the essence of *tawarruq*, which is exclusively used by the Ḥanbali School of Law. However, for other schools, *tawarruq* may be involved in some types of *'inah*, because according to them, *tawarruq* is not different from trade<sup>6</sup>. There is a tradition that disapproves *tawarruq*. The tradition was narrated from Umar, that he disapproved *tawarruq* and he said, “*Tawarruq* is the origin of *riba*”<sup>7</sup>. He means that *tawarruq* contains a trick that leads to lending money with interest, as practised in some types of *riba*, such as *riba anasi'ah*. However, there are some other scholars who permitted *tawarruq*, such as Eiyas bin Mu'awaiyah (may Allah have mercy on him)<sup>8</sup>. Imam Ahmad has two opinions on *tawarruq*, as Almadawi stated in his book that “Benefit: if somebody needs liquidity and he buys soothing equals to 100 by something equals to 150, it is permissible. This is the explicit opinion of Imam Ahmad and is the common opinion of the Ḥanbali School of Law. However, Imam Ahmed has two other opinions, which are disapproving and prohibiting. Ibn Taymiyyah followed Imam Aḥmad in the latter,”<sup>9</sup>. Imam Ahmad justified the opinion of disapproving by saying that this is the sale of a forced person. Ibn Alqiyyam said this justification is based on the high understanding of Imam Ahmad, since this type of sale is just for someone who is compelled to engage in the contract of *tawarruq*<sup>10</sup>. Abu Dawood narrated from Ali (may Allah be pleased with

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<sup>6</sup> Look at *tawarruq* and organized *tawarruq* for Dr. Sami Al-Suwailem. (7<sup>th</sup> session of Fiqh Academy, Makkah), Vol. 2, p. 231-239.

<sup>7</sup> Taḥthib sunan Abi Dawood wa Iḍāḥu Mushkialteh, Vol. 2,p. 156.

<sup>8</sup> Taḥthib sunan Abi Dawood wa Iḍāḥu Mushkialteh, Vol. 2,p. 156. Eiyas bin Mu'awaiyah bin Furrāh bin Eiyas Aluzani. He is judge and was very smart. He passed away in 120 H. (Taqrib Alḥadhib, Vol. 1, p. 117).

<sup>9</sup> . Alinṣaf, Vol. 4, p. 243.

<sup>10</sup> A'lam Almuq'īn, Vol. 3, p. 170.

him) that the Prophet pbuh did not allow the sale of a forced person. Hushim<sup>11</sup> said that people will face very stingy time that:

1. The rich becomes very parsimonious and he is not ordered to do so. Allah says, “And do not forget liberality between yourselves”. (surah Al-Baqarah: 237); and
2. The compelled person is forced to sell what he has. “The messenger of Allah prohibited the sale of compelled person, sale of *gharar* and the sale of fruits before it ripens.”<sup>12</sup>

From the above mentioned, some scholars disapproved *tawarruq*. Ibn Taymiyyah and his student, Ibn Alqiyyam chose to prohibit *tawarruq*<sup>13</sup>. In his book, A‘lam Almuq‘in, Ibn Alqiyyam said, “My sheikh (Ibn Taymiyyah) prohibited *tawarruq*, and people asked him again and again to allow it, but he still prohibited *tawarruq*. Furthermore, he added that the ‘illah of *riba* is achieved in *tawarruq*. However, *tawarruq* is worse than *riba*, because *tawarruq* entails a higher cost and losses. Therefore, the *Shari’ah* does not forbid a lower harm (*riba*) and allows a higher harm (*tawarruq*)<sup>14</sup>. However, this is what was conveyed from our previous scholars who disapproved *tawarruq*. On the other hand, the scholars who permitted *tawarruq* did not agree with the evidences that were provided by those who disapproved *tawarruq*. The scholars who permit *tawarruq* cite by verse, “Allah has allowed sale” and they say that we permit *tawarruq* according to the principle that says that the original of everything is permissibility. Additionally, according to Arabic syntax, the first two letters from word “Albay” imply that every type of trade is included in the word, as long as the parties to sale mutually agreed upon it. Therefore, Allah said “O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent” (surah Al-nisa’: 29). However, this verse is a general evidence. Hence, it includes every type of trade, unless there is another evidence that

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<sup>11</sup> Hushim bin Bashir Bwuzen. He is a Hadith memorizer. He died at the age of 80 years old in 83 H. (Taqrib Altahdhib, Vol. 1, p. 574).

<sup>12</sup> Narrated by Abu Dawood, Chapter on sale of forced person, No. 2952.

<sup>13</sup> Ibn Alqiyyam. Fiqh choices, p. 113.

<sup>14</sup> Ibn Alqiyyam. A‘lam Almuq‘in, Vol. 3, p. 170.

prohibits a certain type of trade. Furthermore, there is no explicit evidence that forbids *tawarruq*. In fact, the essence of *tawarruq* is buying a commodity on credit to trade the commodity, and as any trade goes, the trader may lose or gain. In most *tawarruq* sale, the trader is exposed to loss, rather than to gain. However, even if he loses, he managed to fulfill his needs and he kept away from consuming the prohibited (*riba*). Actually, *tawarruq* makes the life of a trader easier and it legally fulfills his needs. However, such a transaction is considered as a legal device, and it is supported by the tradition of Abu Sa'id Alkhudri and Abu Hurirah, i.e. when the Prophet pbuh appointed a person as the governor of Khaibar, that governor brought to him an excellent type of dates (from Khaibar). The Prophet pbuh asked, "Are all the dates of Khaibar like this?" He replied, "By Allah, no, O Allah's Apostle! But we barter one Sa' of this (type of dates) for two Sa's of dates of ours and two Sa's of it for three of ours." Allah's Apostle said, "Do not do so (as that is a kind of usury) but sell the mixed dates (of inferior quality) for money, and then buy good dates with that money<sup>15</sup>". So, this tradition proves that it is permissible to use a legal device, as long as the device leads to something permissible. Moreover, Albukhari wrote a full chapter about devices in his book *Aṣṣaḥiḥ*, and he mentioned some legal devices and illegal devices as well. Albukhari mentioned the previous tradition many times in different places from his book. He mentioned the tradition in the chapter on tricks. in his book *Fatḥul Albari*, Ibn Ḥajjer considers the tradition as evidence that allows using legal device. He said, "Devices are the plural of device. Device is a tool which enables Man to get what he wants, but through an invisible way. The scholars have classified the device according to the purpose of the person:

1. If he uses the device in a legal manner, and in order to abolish the right or to prove the false, then the device is prohibited;
2. If he uses the device in a legal manner, and in order to prove the right or to cancel the false, then the device is obligated or permissible;
3. If he uses the device in a legal manner, and in order to avoid something disapproved (*makruh*), then the device is permissible (*mustaḥab*); and

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<sup>15</sup> Sahih Albukhari. No. 2089.

4. If he uses the device in a legal manner, and in order to leave something recommended (*mandub*), then the device is disapproved (*makruh*).

Ibn Ḥājer added that the device is a way to get rid of difficulties. Therefore, the exemption in swearing is permissible because the exemption is a way to get rid of oath breaking. Furthermore, the conditions for any contract are to avoid the difficulties that may occur. In this sense, the tradition of Abu Sa'īd Alkhuḍri and Abu Hurirah comes into the picture, i.e. when the Prophet pbuh said, "Do not do so (as that is a kind of usury) but sell the mixed dates (of inferior quality) for money, and then buy good dates with that money".

In general, all previous evidences prove that *tawarruq* is permissible, because it is a legal device that leads to something permissible. Actually, *tawarruq* is way to get rid of the difficulties of life, and the *Shari'ah* came to make life easy and to actualize the interest of all Muslims. Sometimes, the person falls in financial difficulty, and it is hard to find somebody who lends him money without interest. Therefore, may he resort to take *tawarruq*, since it is trading and it is included in the speech of Allah (Allah has allowed trade) and (O you who believe! When you contract a debt for a fixed period, write it down). Additionally, the original ruling for any transaction is permissibility, unless there is evidence that forbids the transaction, and we do not know any legal evidence that prohibits such transactions. However, for those who prohibited *tawarruq*, they considered the intention of the buyer, i.e. he wants to get liquidity. However, even if the intention is to get liquidity, is that enough reason to prohibit or to disapprove *tawarruq*? So, what can we say about the transactions of all merchants? Generally, all merchants intend to get more money by spending less money, and the commodity is the conduit to achieve that.

This opinion of permissibility has been adopted by the Fiqh Academy in its fifteenth session. The Academy stated that:

Firstly, *tawarruq* is defined as buying a commodity from a seller who possesses it at a deferred price, and then the buyer sells the commodity to a third person, in order to obtain liquidity.

Secondly, according to majority of the scholars, *tawarruq* is legally permissible, based on that the origin of things is permissibility and Allah says, “Allah has allowed trade and has prohibited *riba*” (surah Al-Baqarah: 275). In this sale of *tawarruq*, no *riba* is intended and the general concept of *tawarruq* does not look like *riba*. However, there is a need for this sale to settle a debt or to get married.

Thirdly, this sale is conditioned by that the buyer should not resell the commodity to the first seller, either directly or at price lower than the purchase price. If the buyer sells to the first seller at a price lower than the purchase price, then the sale is prohibited, because it is considered as an *inah* sale. *Inah* is prohibited in the *Shari’ah*, because it is a trick of *riba*. Therefore, in this sense, the contract is prohibited.

To sum up, we can observe that classical *tawarruq* (which is known by all scholars) is permissible. So, the question is:

Is organized *tawarruq*, as currently practised, the same as classical *tawarruq*?

To answer the question, we need first to understand the organized *tawarruq*, as practised by the Islamic banks today.

### **Definition of organized *tawarruq***

The Fiqh Academy has defined organized *tawarruq* as, “A typical role of a bank, where the bank buys a commodity that is not gold or silver from the international markets of commodities, and the bank sells the commodity to a *mustawriq* (the one who seeks liquidity) at deferred price. Furthermore, the bank conditionally or customarily, adheres on behalf of the *mustawriq* to sell the commodity to a third party at cash price, and hand the money over to the *mustawriq*”<sup>16</sup>. Some others defined *tawarruq* as, “The bank arranges *tawarruq* for the client, where the bank sells a commodity - mostly from mineral - to the client at deferred price. After that, the client assigns the bank as his agent to sell the commodity in cash to a third party. Then, the bank hands the cash over to the

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<sup>16</sup> Decisions of Fiqh Academy, p 322.

client”<sup>17</sup>. Both definitions are the same, in terms of clarifying the meaning and the stages within organized *tawarruq*. The stages of *tawarruq* are as follows:

1. The bank buys the commodity according to the promise to purchase it by the client (the one who seeks cash);
2. The bank sells the commodity to the client; and
3. The client appoints the bank as his agent.

According to both definitions, the similarities between classical and organized *tawarruq* are shown below:

1. The commodity is sold to a third party, and not to the first seller;
2. The client gets the wanted liquidity; and
3. The conclusion of this *tawarruq* is done via nominal commercial process.

However, organized *tawarruq* differs from classical *tawarruq* in the following aspects:

1. Usually, the bank does not hold and sometimes, does not possess the commodity. Actually, the bank deals with papers and bills;
2. There is no actual circulation of the commodity between the bank and the client, and between the bank and the company, which deals directly with the international markets of commodities;
3. The essence of organized *tawarruq* is to lend money with interest. The bank uses the commodity as a cover to lend money with interest, since the bank pays the price of the commodity and there is no commodity at all, either in the hand of the client or the bank;
4. In fact, organized *tawarruq* brings large liquidity to the bank, while the bank does not achieve the objectives of the clients, who naturally aim to reduce their debts and stay away from *riba*;
5. In organized *tawarruq* the bank is required to sell the commodity to a third party. Practically, the bank does not pay the price of the commodity to the seller, but to the *mustawriq*, since the bank is his agent. Therefore, this transaction resembles

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<sup>17</sup> Ibrahim Al'ubidi. Essence of sale of classical and organized twarruq, p79.

agency in *riba*, where the *mustawriq* takes the lesser amount and he returns a bigger amount at the maturity date. However, the difference here is that the *mustawriq* takes the lesser amount as a client (buyer), and not as a borrower. Although the difference is minimum, the transaction is still similar to *riba*<sup>18</sup>. Moreover, the *mustawriq* is required to appoint the bank as his agent. So, the bank does not sell or buy, unless the bank gets to be the agent. Therefore, according to the majority of jurists, this contract is voidable<sup>19</sup>.

In general, when we look at the similarities and differences between classical and organized *tawarruq*, we can say that organized *tawarruq* is nominal *tawarruq*, and it does not match classical *tawarruq* at all. Therefore, the disagreement becomes apparent when the practice of *tawarruq* is totally different from the theory. Besides that, the Fiqh Academy reviewed their previous decision about *tawarruq*, because the *tawarruq* practised by the banks is not *Shari'ah*-compliant. In its seventeenth session, the Fiqh Academy decided that the *tawarruq* currently practised is not permissible for three reasons:

1. Due to the continuation of being the *wakil* in the contract of *tawarruq* to sell the commodity or to make arrangements to sell the commodity, this makes the contract similar to the prohibited *'inah*. Furthermore, it does not matter whether the agency role is stipulated in the contract or due to customary practices;
2. In many cases, there is no actual delivery of the commodity, which clearly violates one of the pillars of a valid contract, that states that a commodity must be handed over to the purchaser; and
3. Effectively, this transaction involves providing financing to the *mustawriq*, in which the *mustawriq* would return the principal plus an extra amount. The process like this: the bank gives cash to the *mustawriq* to conduct buying and selling, which are mostly just premised on formality. The objective of the bank is to obtain extra money from the original capital that they have given to the

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<sup>18</sup> Taqi Usmani. Applications and rules of banking *tawarruq*, p59.

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*mustawriq*. And this transaction is different from classical *tawarruq* which is known by the jurists. In its fifteenth session, the Fiqh Academy highlighted the differences between classical and organized *tawarruq*<sup>20</sup>.

The Fiqh Academy again discussed organized *tawarruq* in its nineteenth session. The Academy discussed organized *tawarruq* with a new product that is called “alternative product for *wadi‘ah*”, which is practised by some Islamic banks. However, the Academy decided that the alternative product is prohibited, because it is similar to *‘inah*, where the intention is not to possess the commodity. Moreover, the bank is ‘required’ to buy the commodity from the customer. Conceptually, this transaction is like organized *tawarruq*, which has been previously prohibited by the Academy. Furthermore, the transaction is against Islamic finance, where the objective of Islamic finance is to finance real projects; projects that boost development and economic welfare<sup>21</sup>. Additionally, the Academy did not permit reverse *tawarruq*, reverse *murabahah* and reverse *tawarruq* and investment.

In his research, which was presented to the Academy, Sheikh Taqi Usmani clarified and expressed reservation on organized *tawarruq*, as follows:

1. There are many sales, as practised in the international commodities bourses which are not genuine sales, where the commodities are not delivered to the buyers. Actually, the practice is just to record those sales on the computer and then, a clearance happens for the sales, on the basis of price differentials. The sales are classified into future sales, which is prohibited and current sales, which do not take into consideration the rules of the *Shari‘ah*, such as the subject matter should be precisely determined and should be owned by the seller. However, the sales are concluded by exchanging papers of sale. Very often, the papers do represent certain commodities. However, the papers represent the right of the paper holder to collect a quantity of commodity from the warehouses that have thousands of tonnes of the commodity. Furthermore, the quantity that is stated on the paper is

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<sup>20</sup> Decisions of the Fiqh Academy, p. 27-29.

<sup>21</sup> Decisions of the Fiqh Academy.

not distinguished from other quantities, which are available in the warehouses. According to the *Shari'ah*, before the buyer can sell it again, the sold quantity should be owned by the buyer. But the practice is not like that. The prevailing practice is that the buyer sells the quantity before he possesses it, and even before his quantity can be distinguished from other quantities. Therefore, this process is not *Shari'ah*-compliant, due to guarantee of profit for something that is not possessed. Sheikh Taqi added that there should be *fiqh* scholars supervising the transactions of these markets, so that legal sales are concluded. However, that can be done by setting up a special way and formulating new contracts by *Shari'ah* committees. Furthermore, the parties involved should negotiate with the brokers and trader in these markets, i.e. for adherence to the *Shari'ah* principles, as far as possible. If that cannot be achieved, dealing with these markets is not permissible, either for *tawarruq* or for anything else;

2. Suppose that the mechanism of such markets is very strict, where the mechanism satisfies the legal conditions of a sale, and the process of a *tawarruq* sale takes place, as I have mentioned earlier, then the commodity must be delivered to the buyer before he sells it to someone else. If the mechanism is so, then the sale is valid because the mechanism fulfills the condition that states the buyer must possess the commodity, either by himself or through his agent. Furthermore, it is not allowed for the bank to be the agent of the buyer (*mustawriq*) to possess the commodity on behalf of the buyer. However, the bank is the seller. Hence, the bank has to hand over the commodity to the buyer (*mustawriq*) or to the buyer's agent, who is definitely not the seller;
3. Suppose that the broker is the agent for the buyer (*mustawriq*) and the broker possesses the commodity from the bank before he sells it to the third party. This is fine, but the problem is that the broker himself is the bank's agent as well. The broker purchases the commodity and he possesses it from first seller on behalf of the bank. Then, he sells it to the *mustawriq*. Legally, the broker assumes the position of the bank. Therefore, the broker cannot be the agent for the *mustawriq* to possess the commodity. There are two legal ways to make this sale *Shari'ah*-compliant. The first way is initially, the bank has to hand over the commodity to

- the *mustawriq*. The moment the bank is no longer liable for the commodity, the *mustawriq* can assign the bank or the broker to sell the commodity to a third party. However, if there is an upfront agreement that states that the *mustawriq* **has to appoint** the bank as his agent, then the sale is void. Additionally, if the agreement is concluded after the bank possesses the commodity and before the commodity is handed over to *mustawriq*, then the sale is void as well, since the bank is still liable for the commodity. Obviously, adhering to the previous conditions in the international commodities markets is so difficult. The second way is that there should be two brokers, i.e. one is to buy the commodity on behalf of the bank and another to possess the commodity and sell it on behalf of the *mustawriq*. Thus, there are two brokers; one is the agent of the *mustawriq* and the other is the bank's agent. Therefore, considering the difficulty of applying the first approach, the second approach should be adopted by *Shari'ah* committees, and they should not allow anyone to use the first approach;
4. The procedures of executing sales in modern bourses are just taking place on the screens of computers. So far, I am sure that the appearance of the name of a buyer on a computer screen does not transfer the ownership and liability to him. To me, before judging on such contracts, there should be an independent study for contracts that happen through computers, in light of the laws and rules<sup>22</sup>.

It is obvious from the above mentioned that Sheikh Taqi confirmed what is going on in the banks today and that leads to lending with interest, i.e. by means of *tawarruq*. This makes some scholars say that since there is a School of Thought permits *tawarruq*, there is no need to crack down on people and to open up an argument about the validity of *tawarruq*. However, the *tawarruq* that has been approved by jurists is based on an individual who performs a sale that is by fulfilling the pillars of selling and buying. After this is done, another separate operation commences. Actually, there is no contractual link at all between the two operations.

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<sup>22</sup> Taqi Usmani, Applications and rules of banking *tawarruq*, p. 62-64.

Briefly, it is not acceptable to say that organized *tawarruq* is the same as classical *tawarruq*, which is permitted by the jurists. Consequently, we cannot say that organized *tawarruq* is permissible. My conclusion is that organized *tawarruq* is not permissible, because it is not the same as the classical *tawarruq* that has been permitted by the jurists. Without a doubt, this opinion is notable, because it is evidenced by text, legal maxims, *Shari'ah* objectives and social interests.

The Shari'ah Council of Legitimated Standards tried to control the process of *tawarruq*. Hence, the Council has issued its thirtieth standard that states:

### **Controls of valid *tawarruq***

1. The contract of deferred sale should be *Shari'ah*-compliant, either by negotiation or *murabahah* – taking into account the eighth standard, which concerns *murabahah* and *murabahah* to the purchase orderer - and make sure that the commodity exists and possessed by the seller before he sells it. In case of a binding promise, the promise should only be from one party. Moreover, the subject matter should not be gold, silver or currencies;
2. The commodity must be precisely determined, either by possessing or by serial number of its documentation, such as the serials numbers of warehouses certificates;
3. If at the time of concluding the contract, the commodity does not exist, then the seller must provide full information regarding the description, quantity and the place the commodity is stored to the client, in order to ensure that the sale is genuine not nominal. Preferably, the transaction should use local commodities;
4. There should be real possession of the commodity, and there should not be any obstacle that prevents the client to hold the commodity;
5. The commodity should be sold to a third party, and not to the first seller, so that sale of '*inah* is avoided. Additionally, the first seller should not get back the commodity by any condition, collusion or through customary practices;
6. There should not be any link between the contract of purchase at deferred price and the contract of sale at cash price, by a way that forbids the client to hold the

- commodity, either the link is stated in the contract or due to customary practices or by the nature of the procedures;
7. The client should not appoint the company (which deals with the international markets of commodities) or its agent to sell the commodity that the client has bought. Moreover, the company should not appoint itself as the agent for the client. However, if the system in the market does not allow the client to sell the commodity by himself, the client can assign the company as his agent to sell the commodity, on condition that the sale should be done after the client has held the commodity;
  8. The company should not appoint another agent to sell the commodity (which was sold by the company - first seller) on behalf of the client;
  9. By taking other provisions into account, the client should sell the commodity himself or through another agent (not the company); and
  10. The company should provide full information, in order to enable the client to sell the commodity, either by himself or through his agent.

**The controls that govern *tawarruq* that is executed by the bank for its own purposes**

1. *Tawarruq* is not a form of finance or investment, but it is permitted, due to a need that fulfills certain legal conditions. Therefore, the bank should not resort to *tawarruq* to finance its operations. Instead, the bank should try to finance its operations through *mudarabah*, investment on behalf of others, issuing investment *sukuk* and so on and so forth. Moreover, the bank should use *tawarruq* within the legal need to avoid:
  - a. Deficit;
  - b. Lack of liquidity;
  - c. Loss of clients; and
  - d. Faltering operations.

2. The bank should not appoint an agent to sell the commodity, even if the agent is not the first seller. Additionally, the bank should sell the commodity themselves, and it is acceptable to benefit from the services of brokers<sup>23</sup>.

However, the Academy tried to set some rules to avoid the problems of agency that Sheikh Taqi Usamni has highlighted earlier. The Academy did not permit an agency that breaches the contract. Furthermore, the Academy did not encourage the use *tawarruq*, unless if there is a need to use it. However, the Academy did not recommend *tawarruq* to be the alternative for other products of finance that share risk, profit and losses. The decision of the Academy means that the Academy is not comfortable with *tawarruq* and nominal sale that is stated in provision 2 and 3. The Academy allowed nominal sale if the bank knows the serial numbers of the certificates of warehouses. Practically, knowing the serial numbers does not mean much, due to the sale process in the bourse. The process goes like this: after selling of the commodities, the commodities are sent to warehouses. After unloading and taking the suitable procedures, the commodities are weighed according to equal units, i.e. every unit is equivalent to 25 tonnes. After weighing those units, the details for each unit is written down on paper, such as type, specification, actual weight that may be a little bit increased or decreased, the place of storing and so on and so forth. This written paper is considered as the bill of warehouses, which will later on be traded in the bourse and transferred from company to company, until the customer gets the bill, which enables him to receive the commodity. However, the details are recorded on computer and Islamic banks do not receive the commodities and even the bills. Moreover, so far, no Islamic bank has ever received any commodity or bill, because the banks do not want to bear the risk of fluctuating prices and the risk of the goods getting damaged. Instead, the banks just show concurrently the price of spot purchase and the price of postponed sale. Moreover, the banks do two things:

1. Inform the agent that they agree on both prices; and
2. Give permission to the agent to deliver the bills of warehouses, since he is the agent for the banks<sup>24</sup>.

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<sup>23</sup> Legal standards, p. 492 & 493.

Therefore, for the above mentioned, we can say that organized *tawarruq* is not permissible, due to the following:

1. Seemingly, the contract is a trick that leads to *riba*, because the client does not hold the commodity purchased from the bank, but rather holds cash, and he has to return the cash after while, with an extra amount added to it. Actually, this is a loan with interest and the commodity is just a device to legitimize the contract of sale, since the commodity was not initially intended. Therefore, the client knows nothing about the commodity and he does not bargain the price and he does not even know the nature of the commodity, because the commodity was not intended. The intention of this transaction is to get cash and the role of client is just to sign papers. Actually, by signing the papers, the client claims that he possesses the commodity. Then, it is sold on his behalf to get cash. The scholars have alerted to trick on *riba* by using exposed trick. Imam Sayed Abdul Allah Ba'lawi Alḥadad warned against using tricks that legitimize *riba*. There are some idiots who use tricks to legitimize *riba*, and they think that they are rid of the sin of *riba* in this world and are rid of punishment in the Hereafter. Far, very far that is tick that leads to *riba* is *riba*<sup>25</sup>. Wathelah bin Alasqa' (one of the Prophet's companions) said, "I stood in front of the Prophet's eyes in Alkhif mosque and my friends said, 'do not stand in front of the Prophet. The Messenger of Allah said let him, he came to ask. Wathelah said I approached to the Prophet and I said "let my father and mother be scarified for you. Give me *fatwa* that I can follow it and I do not need to ask anyone after you. Allah's Apostle said consult yourself. Wathelah said how do I do that. The Messenger of Allah responded for him to leave something suspicions to something is definite, even though people have given you *fatwa*. Wathelah asked how I deal with that? Allah's Apostle said put

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<sup>24</sup> Dr. Ali Alsalus, '*Inah* and banking *tawarruq*, p. 158.

<sup>25</sup> Religious advices and fiducial commandments, p. 327.

- your hand on your mind; the heart is pleased with halal and it is displeased with haram and pious Muslim leaves little haram for fear of falling in large haram”<sup>26</sup>.
2. Outwardly, the liquidity that the client has gotten is the price of commodity but in fact, this is not true, because the contracts of organized *tawarruq* are concluded according to described commodities, and not according to specified commodities. Therefore, the commodities are not possessed by the bank, which sold them to the client and they are not possessed by the client who appointed the bank to be the agent. Furthermore, the broker does not have the commodities, even though he sold the commodities to the bank. Moreover, the broker sells more than what he actually has;
  3. There is no link between the amount of finance, the commodity and the price of the commodity. The bank’s willingness to credit the agreed amount into the client’s account within a short period of time confirms this fact. It is known that any sale has certain risks, due to price fluctuations, default of purchaser, defects in the commodity and so on and so forth. Despite all those risks, the bank still deposits the agreed amount of money, which proves that there is **no link** between the amount of financing and the sale of the commodity; and
  4. This contact leads to tripartite *‘inah* which is prohibited. For example, in the local market, the bank buys a car from a supplier, and the bank sells it to their client on credit. After that, the client assigns the supplier as his agent to sell the car. The supplier then sells the car to the bank again. Subsequently, the bank sells the car to another customer and the circle keeps moving like that. Therefore, the documentation on the ‘sale’ of the car rotates hundreds of times among the supplier, the bank and the clients, even though the car has not moved even one inch from its place. Obviously, this transaction constitutes exchange of money with money, and the commodity is just a trick to legitimize the transaction. However, this circulation is not stated in the contract, but it is known as a custom. The scholars have set the principle that says, “Everything is stipulated by custom. It is considered as a condition in the contract, although it is not mentioned.”

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<sup>26</sup> Narrated by Ibn Hajar. *Almaṭalib Al‘aiyyah*, No. 1467.

Algrafi said, “The scholars stated that if the contracting parties intend to show that something is permissible, in order to get something that is not permissible, then the contract is void, such as a sale with a loan that brings benefit for the creditor. Moreover, if the intention is to pay a bigger amount to get the lesser amount on credit, then there are two opinions in such case. First, if the apparent intention is to pay the bigger amount on spot, then it is permissible and second, if the apparent intention is not to pay the most amount, then the sale is not permissible. However, the original ruling is to look at what the two contracting parties pay and what they get. Here, it is the acts that are considered, and not the sayings”<sup>27</sup>. However, the process in the international markets does not differ from the process in the local market. The practice in the international market is that the bank buys mineral from the supplier. Then, the bank sells it to the client. After that, the bank appoints itself as an agent of the client, to sell the mineral to the supplier or to another supplier, who is colluding with the first supplier. Therefore, all parties involved are circulating the certificate of mineral and the mineral is fixed at its place;

5. The bank and the client are selling the commodity before they possess it. The Prophet pbuh said to Ḥakim bin Ḥizam, “O my brother’s son, if you sell something, do not sell it until you possess it.”;
6. Legally, it is not enough to hold a certificate of mineral or to hold a copy of card customs for the car, because the copy does not represent ownership. However, we have seen from practice that the car supplier sells the car to too many banks at the same time. Later on, the supplier just provides a copy of the customs card to the banks, and he does not deliver the car itself, because he knows that no one requested to get the car. This transaction is also practised in the international market, where the supplier of mineral sells the same mineral to many banks at the same time, and he provides copy of the certificate of that mineral to all banks;
7. It is not permissible to appoint the bank or the first supplier to hold the commodity, because both are seller. Furthermore, the commodity is originally

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<sup>27</sup> Algrafi, *Alfuruq*, Vol. 3, p. 440.

- held by them. Therefore, it is not sensible to appoint both (the bank and the supplier) or one of them to hold the commodity, since they had already held the commodity. In such contracts, where the objective is to finance, it is not acceptable for a disagreement among the scholars, because of such things that violate the validity of the contract. Therefore, the holding of commodity should be a condition of the contract, in order to avoid the nominal contract and to stay away from *riba*;
8. The client appoints the bank as his agent before the client possesses the commodity. Obviously, this is prohibited, as the previous tradition of Ḥakim bin Ḥizam. In another narration, Ḥakim said, “O prophet, sometimes, some people came to me and they ask me something that I do not have it. So, can I buy that thing from market and deliver it to them? The prophet said do not sell something that you do not have it”<sup>28</sup>.
  9. The client does not bear risk that arises from the ownership of the commodity. Therefore, the Prophet pbuh said “It is not allowed to 1. Lend and sell in the same contract, 2. Two deals in one contract, 3. Guarantee the profit, and 4. Selling something that you do not have”<sup>29</sup>.
  10. It is obvious from the above discussion that the contract of organized *tawarruq* is permitted, according to a collection of weak opinions of doctrines. However, there are many opinions that considered organized *tawarruq* as a nominal contract. Therefore, the scholars alert those who follow the weak opinions and those who collect the weak opinions to derive a new rule that no one adopts the new rule. As some people said:

أحل العراقي النبيذ وشربه      وقال حرامان المدامة والسكر  
وقال الحجازي الشرابان واحد      فحل لنا من بين قولهما الخمر

Which means: The Iraqi (Imam, i.e. Abu Haneefah) legalized drinking *nabeeth* and said that only *mudamah* (wine) and drunkenness are prohibited; but the

<sup>28</sup> Narrated by Abu Dawood, No. 3057.

<sup>29</sup> Narrated by Muslim, No. 1191. And narrated by Altermizi in the chapter of funerals.

Hajazi (Arabian Imam, i.e. Ash-Shafii ) said that the two beverages are the same (of course Imam As-Shafiii means the same in prohibition); so, by inference, wine is legalized for us out of these different opinion.

However, judging the contract of organized *tawarruq* should be comprehensive and should look at all its angles. This contract has many breaches, such as 1. Purchasing at deferred price and selling at cash price, 2. The commodity is not specified and possessed, 3. The seller is: financier, agent for sale, agent for holding the commodity and agent for taking the price, 4. The amount of money is guaranteed, and 5. The extra that the client has to pay is determined according to the market interest rate. Due to all these breaches, the contract of organized *tawarruq* is similar to finance by usury. Ibn Abbas was asked about somebody who sold silk at 100 dirham deferred price and he bought it at 50 dirham cash price. Ibn Abbas said this is sale of money by money and there is silk between two monies. In another narration, Ibn Abbas said, “Avoid *inah*, do not sell dirham by dirham and involve silk in between”<sup>30</sup>. However, organized *tawarruq* is the sale of money with money, and there is a commodity in between. Moreover, organized *tawarruq* does not acquire legality by naming it “Tawarruq Mubarak” or “Tawarruq Altisiir” or “Tawarruq Alakhir” or “Tawarruq Alyuser”, because the consideration is to the objectives and intentions, not to words and forms.

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<sup>30</sup> Narrated by Ibn Abi shaibah, No 19733, and narrated in Tahdhib Sunan Abi Dawood, Vol2, p142.