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Debate on *Tawarruq*: Historical Discourse and Current Rulings

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Abstract:

One of the controversial products used by the Islamic financial sector is organized *tawarruq*. As the substance of this product resembles that of an interest-based loan, there is a debate on its permissibility from a *Shari'ah* perspective. While discussions on *tawarruq* have arisen due to the emergence of the practice in Islamic finance, there have been deliberations on this transaction in the past starting immediately after the emergence of Islam. The aim of the article is to provide an overview of the historical discourse on *tawarruq* and examine the rulings on it by two contemporary jurisprudential bodies to assess the practice of the transaction in Islamic finance. The discussions show that the current rulings concur with the majority view of the past scholars. The practice of organized *tawarruq* by the Islamic financial industry, however, appears to be inconsistent with both the contemporary and historical rulings.

Keywords: *Tawarruq*, *inah*, *riba*, Islamic finance, Islamic law.

1. Introduction

Islamic banking was initiated in the 1970s to provide Muslims with financial services compatible with Islamic law (*Shari'ah*). During its short history, the Islamic financial industry has expanded and diversified to become a significant global phenomenon. The growth path that the Islamic financial industry has taken, however, has been censured from various quarters. The criticism is focused on the products offered by Islamic financial sector which increasingly appears to be mimicking those of the conventional financial sector. From the legal perspective, the contention is that the *Shari'ah* requirements are being diluted whereby the legalistic forms of contracts are fulfilled but the substance and spirit are not. A controversial product that falls under this category is 'organized *tawarruq*'. The product involves several sale contracts starting with one in which the bank first buys a certain quantity of standardized commodity such as metal or wheat and then sells it to the client at a higher price payable at a future date. The bank then acts as an agent of the client and sells her

commodity to a broker for cash and deposits the proceeds of the sale into her account. The result of these multiple sales and the agency contract is that the client gets cash on spot and owes the bank the amount financed plus a return in the future.¹

Organized *tawarruq* has been used extensively in the Islamic financial sector, particularly in some countries of the Gulf Cooperation Council (GCC). Islamic banks use this instrument to provide financing on the asset side and accept deposits on the liability side. It is a contentious instrument as the economic substance of combining several legitimate sale contracts is similar to an interest-based loan which is prohibited. This has led to a debate among contemporary scholars on the permissibility of *tawarruq* with the crux being on whether to focus on the form or the substance of the transaction. Those who support the product base their arguments on the permissibility of classical *tawarruq* of the past and focus on the form of transactions that involves legitimate sale contracts.² The principle of permissibility (*ibaha*) in economic transactions is also cited to argue that organized *tawarruq* should be allowed as it has not been explicitly forbidden in the religious texts.³ Furthermore, modern use of *tawarruq* is deemed acceptable by invoking the maxim of necessity as it is used for financing many essential requirements, such as funding the government's trade deficit.⁴

Those who oppose *tawarruq* focus on the substance of the transaction and cite the legal maxim 'in contracts, attention is given to the objects and meaning, and not to the words and form'.⁵ Kahf and Barakat argue that *tawarruq* should be disallowed in Islamic finance since it is convincingly worse than usury.⁶ This is because organised *tawarruq* entails higher costs and risks as it involves complex procedures of buying and selling a certain commodity. They argue that Islamic law would not prohibit usury and allow organised *tawarruq* which is riskier and costlier than usurious transaction. Moreover, the transaction does not fulfil the

¹ For a discussion on organised *tawarruq* see M. Shpeer, 'Tawarruq jurisprudence and its banking contemporary applications in Islamic jurisprudence' presented at *The Nineteenth Session on Tawarruq, its Essence and Different Forms (the Classical and the Organised) 2009*, organized by The International Islamic Fiqh Academy (Sharjah, 2009) and N. Firoozye, 'Tawarruq: Shariah Risk or Banking Conundrum' (2009), viewed 25 February 2010, http://www.opalesque.com/OIFI12/Featured_Structure_Tawarruq_Shariah_Risk_or_Banking398.html.

² M.A. ElGari, 'Tawarruq, A Position Paper' presented at the *Harvard-LSE Workshop on Tawarruq: A Methodological Issue on Shari'a-Compliant Finance*, February 1, 2007 (London, 2007).

³ A. Al-Mani, 'Tawarruq ruling as it is practiced by the banks at the present time' presented at *the Seventeenth Session on Tawarruq Ruling as it is practiced by the Banks at the Present Time*, December 13-18, 2003, (Makkah, 2003), p. 342.

⁴ *Ibid.*, p. 352.

⁵ Article 3 in the *The Majelle: Being an English Translation of Majallah el-Ahkam-i-Adliya and a Complete Code of Islamic Civil Law* (Kuala Lumpur: The Other Press, 2001).

⁶ M. Kahf and E. Barakat, 'Tawarruq banking in its contemporary applications' presented at *Conference of Islamic Financial Institutions on Features of Reality and Prospects for the Future* May 8-10, 2005, organized by the United Arab Emirates University, Emirates (Al-Ain, 2005), p. 14.

objectives of a sale as the goal of the transaction is not possession of the commodity. A client would not enter into a complex process if the bank did not promise to hand over the money in the end.

Reflecting the debate, two contemporary international Islamic jurisprudential bodies have issued rulings on *tawarruq*. The Shari'ah Board of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), an international standard-setting body for the Islamic financial industry, ruled in 2006 that *tawarruq* is acceptable provided it is not organised and the conditions of sale are met.⁷ In 2009 the International Islamic Fiqh Academy (IIFA), an international jurisprudential body of the Organization of Islamic Cooperation (OIC), issued a ruling declaring organized *tawarruq* illegal as it entails elements of prohibited *riba*.⁸

While the recent practice of Islamic banking and finance has ignited the debate on *tawarruq*, there have been deliberations on it since the beginning of Islamic scholarship. However, these early discussions have not been studied systematically in light of the recent developments in Islamic banking practices. Given the emergence of the practice of *tawarruq* in the Islamic financial sector, the aim of this paper is to examine the origins of this debate and review the past opinions of jurists and then juxtapose these views to contemporary rulings and practice. The historical discussion on *tawarruq* is presented chronologically covering two broad eras. The first period termed as the 'early Islamic era' covers around the first 150 years starting from the Prophet's lifetime and ending with the period of the *tabi'een*.⁹ The second period is called the 'age of the jurists' and includes the time span starting with the origins of the different jurisprudential schools in the Sunni tradition and the views of the jurists representing these schools. The goal of the paper is to examine the historical opinions on *tawarruq*, see the extents to which the rulings of present-day jurisprudential bodies conform to these and then evaluate the contemporary practice of the instrument in the Islamic financial industry.

⁷ Standard number 30 in Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), *Shari'a Standards*, Accounting and Auditing Organization for Islamic Financial Institutions (Bahrain: 2010).

⁸ The ruling was issued by the International Islamic Fiqh Academy in its 19th session which was held in Sharjah, United Arab Emirates during 26 – 30 April 2009. The ruling is available at <http://www.isra.my/fatwas/topics/commercial-banking/financing/tawarruq/item/342-oic-fiqh-academy-ruled-organised-tawarruq-impermissible-in-2009.html>

⁹ *Tabi'een* refers to Muslims born after the Prophet's (PBUH) lifetime and who saw one of the companions. Their era started after the companions' generation ended. This new era began at roughly 90 AH (or around 710 CE). See T. Alwani, *Usul al fiqh Al Islami Source Methodology in Islamic Jurisprudence* (Herndon: The International Institute of Islamic Thought, 1990), p. 14.

Note that while exploring discussions on *tawarruq* in early historical texts, one also encounters discussions on *inah*.¹⁰ In fact, there appears to be some confusion about the concepts of *inah* and *tawarruq* as both are discussed under the heading of *inah* in some earlier classical texts.¹¹ Consequently, some of the jurists would mention rules of *inah* when they intended to discuss *tawarruq*. This becomes apparent upon closer scrutiny of the transactions discussed in these texts. Thus, in some earlier cases there may be no explicit ruling on *tawarruq*, but it can be deduced from edicts on *inah*. An implication is that those who permit *inah* contracts would obviously also allow *tawarruq*, but the contrary may not be true.

2. *Riba, Tawarruq and Inah*

The basic norm for commercial transactions and contracts under Islamic law is that all acts are permissible unless there is a clear injunction to the contrary.¹² A key prohibition in economic transactions recognized by *Shari'ah* is *riba* (literally meaning increase or growth). Although it is common to associate *riba* with interest, it has much wider implications and can take different forms.¹³ The common premise is that *riba* arises from unequal trade of values in exchange.¹⁴ The *riba* practiced during the pre-Islamic period (*riba jahiliyya*) arose when the debtor was unable to pay the due amount on the maturity date and the repayment date was postponed in return for an increase in the amount owed. The majority of jurists have expanded the Quranic prohibition of *riba* to cover all forms of interest-bearing loans. The debate on *tawarruq* surrounds on whether in substance it constitutes *riba*. Before examining the views of different scholars the concepts of *tawarruq* and *inah* are presented.

The word *tawarruq* originates from the word *wariq*, which means silver coin. Subsequently, the word was used mostly when seeking money (silver) and linguistically used for the process

¹⁰ *Bay al-'inah* is similar to *tawarruq* in the sense that a person gets cash through sale of asset of commodity, with the exception that both sales are between the original seller and buyer with no third party involved. For a discussion see Section 2.

¹¹ As the goal of using *tawarruq* and *inah* is to get cash using sale contracts, classical scholars sometimes discussed these together. For example, some Hanafi jurists discussed the mechanics of classical *tawarruq* in their books under the heading of forbidden sales in general and the subject of *inah* sale or *riba* in particular without using the word *tawarruq* explicitly. Their views are discussed in Section 3 in detail.

¹² M.H. Kamali, *Islamic Commercial Law: An Introduction*, Oneworld Publications (Oxford 2000), p 66. See also Fatwa No. 1 in Dallah Albaraka, *Fatawa: Shari'ah Rulings on Economics*, Dallah Albaraka Group (Jeddah: 1994).

¹³ For a discussion on *riba* see M.H. Fadel, 'Riba, Efficiency, and Prudential Regulation: Preliminary Thoughts', *Wisconsin International Law Journal*, 25 (4), (2008): 655-702.

¹⁴ M. N. Siddidi, *Riba, Bank Interest and the Rationale of its Prohibition*, Islamic Research and Training Institute, Islamic Development Bank (Jeddah: 2004).

through which money is sought.¹⁵ *Tawarruq* can be defined as a purchase of a commodity for a deferred payment and the buyer selling it for cash to a third party. In terms of the contractual relation, there are three different parties: the seller (creditor), the buyer (*mustawriq*) who is looking for liquidity, and the third party who purchases the commodity from the *mustawriq*. The purpose of the second sale is to get the cash. Note that in this transaction there are two separate sales without any pre-arrangement between the parties involved. Classical *tawarruq* in this sense is basic, individual and un-arranged.

Early jurists identify different forms of *inah* and, as such, scholars have different opinions on the technical definition of *inah*. One of the common definitions among early scholars is that *inah* is a credit sale of a commodity for a delayed payment of price at a fixed future date along with the repurchase of it for lower cash price by the seller.¹⁶ Thus, sales in *inah* are fictitious and used by the seller of the commodity merely as a means to create a debt resembling a loan with interest. The second form of *inah* is when an intermediary buys the goods for a deferred price on behalf of the person who requests *inah* sale, and then, the seeker of *inah* sells it back to the seller for a lower price in cash. The difference between the second type and the first one is the existence of an intermediary, while the rest of the structure is similar. Another form of *inah* would involve using lending and a credit sale to charge interest.¹⁷ For example, a person would lend £100 to a borrower and then sell something that is worth £50 for £100 to the borrower. Eventually, the borrower pays the £100 loan along with an extra £50 as excess on the original price of the commodity purchased.

Whereas the buyer and seller are the same persons in the case of *inah*, in essence this sale appears akin to *tawarruq*. The purpose and structure of the first sale in both cases from the buyer's point of view are similar. In both transactions, the ultimate aim is the acquisition of money and the first seller sells the commodity on credit for a price greater than that prevailing in the market. Additionally, both transactions are deemed a ruse to avoid involvement in an interest-based loan. However, the difference between *inah* and *tawarruq* lies in the second sale. Whereas in the former the buyer sells the commodity back to the seller, in the latter the buyer sells the commodity to a third party who is neither arranged by

¹⁵ M. Ibn Mandhur, *Lisan al-Arab*, Vol.10, Dar Sader (Beirut: undated), p. 374.

¹⁶ Y. Al-Nawawi, *Al-Majmoo*, Vol.10, Dar Al-Fikr (Beirut: 1997), p. 163.

¹⁷ S. Bouheraoua, 'Tawarruq in the Banking System: A Critical Analytical Study of Juristic Views on the Topic' presented at the *Nineteenth Session on Tawarruq: Its Essence and Different Forms (the classical and the organised)*. April 26-30, 2009, organized by the International Islamic Fiqh Academy (IIFA) (Sharjah, 2009), p.12.

nor knows about the first seller. Hence, the commodity in individual *tawarruq* is at the *mustawriq*'s disposal who sells it in the market at the current price to acquire cash.

3. *Tawarruq* during the Early Islamic Era

The early Islamic era includes the period of Prophet Muhammad's (PBUH) lifetime and the period covering his companions (*sahaba*) and the followers of the companions (*tabi'een*).¹⁸ Views on *tawarruq* during the Prophetic era require examining his sayings (*ahadith*; *s. hadith*). A search of the Prophet's sayings indicates that there is neither any explicit text on this topic nor an implicit expression on the practice of such a deal. However, Al-Bayhaqi (d. 458 AH) reports a saying of the Prophet on *inah* as "If people deal with *inah*... Allah will humiliate them and He never changes their situation unless they go back and stick to Islam".¹⁹ There is another Prophetic saying that indirectly may have some implications for *tawarruq*.

The Prophet appointed a person as the governor of Khaibar who later brought to him *janib* (a high quality of dates) from there. The Prophet asked "Are all the dates of Khaibar like this?" and he responded "No, by Allah, O Allah's Messenger! But we take one Sa' of these (dates of good quality) for two or three Sa's of other dates (of inferior quality)". Allah's Apostle said, "Do not do so (as that is a kind of usury), but first sell the inferior quality dates for money and then with that money, buy *janib*".²⁰

Some scholars use the above *hadith* to emphasize that form of a transaction is more important than substance.²¹ However, while the Prophet approved two separate sales in the above *hadith* which is also the case in *tawarruq*, they are fundamentally different transactions. The former involves two different qualities of a commodity while the latter deals with a single good. Furthermore, the objective of the sales in the above saying is not to get cash, but exchange goods used for consumption. Another inference from the above saying is that if *tawarruq* was practiced during the Prophet's lifetime, it is expected to have prompted a view from him. However, there appears to be no record of this in the Prophetic traditions which

¹⁸ The word 'Prophet' throughout the book refers to Prophet Muhammad (peace be upon him). While it is common practice among Muslims to use the expression of veneration 'peace and blessings of God be upon him' after pronouncing the name of the Prophet, in this article abbreviation 'PHUB' is used.

¹⁹ A. Al-Bayhaqi, *Sunan Al-Bayhaqi*, Vol.2, Daerah Al-Ma'arif (Bombay: 1925), p. 293 .

²⁰ M. Al Bukhari, *Sahih al Bukhari*, Vol. 2, Dar ibn Kathir (Beirut: 1987), p. 767.

²¹ See for example ElGari, *Supra* note 3.

implies that *tawarruq* was either not practiced during his time or if it was, there was no objections to it from him.

After the death of the Prophet some companions started to give edicts (*fatawa*; *s. fatwa*) on some new transactions. This early period is interesting as it shows how the Muslim community evolved after the Prophet's death and started to give their views on different issues according to their understanding of the Prophetic traditions. Upon examining the companions' *fatawa*, explicit edicts on *inah* can be found. For example, narrations of the wife and uncle of the Prophet, Aisha (d.58 AH) and Abd Allah ibn Abbas (d.68 AH) respectively, indicate its prohibition. Aisha was asked about *inah* sale when a women said, 'I bought from Zaid a slave at 800 [deferred price], and then, I sold it to Zaid at 600 [cash price]'. Aisha responded, 'What a bad person, you bought and sold! Tell Zaid that he has spoiled his *jihad* with the Messenger of Allah, unless he repents'.²² This account shows Aisha's view on *inah* was prohibition. In addition, Ibn Abbas banned dealing with *inah* when he said 'Avoid *inah*, do not sell dirham by dirham and involve silk in between'.²³ This quotation shows explicitly that Ibn Abbas forbade *inah* sale because it is merely an exchange of money for money.

The first recorded use of the word *tawarruq* can be traced back to Ali bin Abu Taleb (d.40 AH) when he said, 'I would not abandon the *hajj* even if I had to do it through *tawarruq*' (Ibn al-Athir undated, p. 301-302).²⁴ Whereas this is not an explicit ruling on *tawarruq* this quotation indicates that the transaction was allowed, though with some reservation. Ali bin Abu Taleb's view on using *tawarruq* to go for pilgrimage implies permissibility of the contract since he would not accept to go to *hajj* by using money received by a forbidden sale. In Islam *hajj* is obligatory on people who have the ability to go to pilgrimage which includes having sufficient money. The disapproving notion is implied in the statement of Ali bin Abu Taleb as he would not use *tawarruq* except if that was the last option. This means that he would not deal with *tawarruq* unless it is necessary. Although the explicit usage of the term *tawarruq* in the post-Prophetic period suggests that it was practiced, its usage seems to be limited as the very few companions mentioned it in their *fatawa*.

The time of companions were followed by the period of the *tabi'een* which is considered significant in Islamic legal history. There were a number of scholars who issued edicts on new deals and situations that contributed to the development of Islamic jurisprudence.

²² A. Al- Daraqutni, *Sunan al Daraqutni*, Vol.7, Dar Al- Marifah (Beirut: 1966), p. 308.

²³ M. Ibn al-Qayyim, *E'alam Al-Moaqeen*, Vol.3, Dar Al-Jeel (Beirut: 1973), p. 382.

²⁴ A. Ibn al-Athir, *The End of Strange Words in Hadith*, vol. 2, Islamic Library (Cairo: undated), pp. 301-302.

Examining the edicts on *tawarruq* indicate that its practice continued to grow during this age. Wider use of the contract raised questions of the legality of its practice and required response from the jurists. While Ibn al-Qayyim, a scholar from the eight century AH cited a statement by *tabi'een* Umar ibn Abdul Aziz (d.101AH) “*tawarruq* is the basis of *riba*”²⁵ to support his own view on the transaction, other scholars from the period appear to permit it. For example, Saeed bin Musayyib (d.94 AH), considered one of the most knowledgeable jurists on transactions, was asked about an incident in which someone sold a commodity to his sister for a deferred payment and then she asked him to resell it in the market for a cash price. Saeed responded that it is prohibited for the seller to interfere in the second sale.²⁶ Thus, Saeed permitted individual *tawarruq* as long as the seller was not involved in a latter sale.

Another *fatwa* can be traced to Hasan ibn Yasar al-Basri (d.110 AH), who was one of the erudite scholars during the *tabi'een* era.²⁷ In response to a trader’s query ‘I sell silk for a deferred price, and when the buyer is female , she usually says: sell it for me as you know the market’, Al-Basri replied ‘give the buyer the commodity and leave him. Do not sell it, nor buy it, only guide to the market’.²⁸ This account reveals several interesting features related to *tawarruq*. The first is that during Hassan’s age silk was one of the items used for *tawarruq*. This is also confirmed by a quotation from Ibn Abbas in which he described *inah* sale as merely exchange of money for money and silk is traded to execute it. In fact, during that time *inah* sale was called ‘the sale of silk’.²⁹

The second aspect of the ruling by Hasan al-Basri is that he approved *tawarruq* as long as the seller did not interfere in the second transaction. This is apparent in the phrase ‘give him the commodity and leave him’. Thus, if the seller did not interfere in the second sale, it would be permissible to obtain cash by the buyer by selling the good to a third party. This is confirmed when Hasan said ‘do not sell’ forbidding the re-sale of the commodity on behalf of those who had bought it from the trader. Interestingly, his caution ‘do not buy it’ implies barring the *inah* sale as doing this would constitute sale between two parties.³⁰ This narration validates individual *tawarruq* with some conditions, with the key one being non-interference of the

²⁵ *Supra* note 23, p. 201.

²⁶ A. Ibn Abi Shayba, *Musannaf Ibn Abi Shayba*, Vol. 8, Dar Al-Salafiah (Bombay: undated), p. 295.

²⁷ M. Al-Thahabi, *The Lives of Noble Figures*, Vol. 4, Al-Resalah Institution (Beirut: 1982), pp. 573-577.

²⁸ A. Al-Sanani, *Al-Musannaf*, Vol. 8, Al-Maktab Al-Islami (Beirut: 1982), p. 295.

²⁹ A. Ibn Abi Shayba, *Musannaf Ibn Abi Shayba*, Vol. 5, Dar Al-Salafiah (Bombay: undated), p. 24.

³⁰ *Supra* note 26, p. 295.

seller in the second sale.³¹ In conclusion, the *tabi'een* scholars generally accepted individual *tawarruq* contracts with the condition that the seller should not interfere in the second sale.

4. *Tawarruq* during the Age of the Jurists

The era of the *tabi'een* was followed by a long period of development of Islamic jurisprudence in which many scholars engaged in doctrinal and legal matters. As the contributions on legal methodology and jurisprudence during this period were extensive, it can be referred to as the age of the opening of *ijtihad*.³² A new feature of this age was the practice of pronouncing rulings on hypothetical situations that did not exist.³³ Although numerous scholars wrote on legal matters, most of these opinions did not extend beyond local jurisdictions. However, four scholars became prominent and their views and opinions became recognized and accepted by wider spectrum of people.³⁴ Covering more than a century and spread over different geographical regions, these scholars laid the foundations to the major schools of jurisprudence (*madhabs*) in the Sunni tradition.³⁵ A brief overview of the opinions on *tawarruq* of scholars from these four schools is given below.

4.1. Hanafi School

The early writings of scholars belonging to the Hanafi School reveal that there was some confusion between the concepts of *tawarruq* and *inah* and the jurists discussed the former under the heading of *inah* sale. This is evident in Al-Balki's observation on the definition of *inah* transaction by the Hanafis as 'the lender will sell a commodity to the borrower for twelve dirhams. Then, the buyer will resell it in the market for ten dirhams, in order that the owner can achieve two dirham as a profit through *inah* transaction, while the borrower will eventually get a ten dirham loan'.³⁶ This description is obviously of a *tawarruq* contract, even though it is called *inah*.

³¹S. Al-Suwaylim, *Tabi'een Rulings on Organised Tawarruq*, viewed 30 October 2010 <http://www.halal2.com/files/Tawarooq-%20Salaf.pdf>, (2004), pp. 4-5.

³²*Ijtihad* is defined as endeavour of a jurist to derive a ruling or judgment based on the evidence found in *Shari'ah*. See H. Ahmed, *Product Development in Islamic Banks*, Edinburgh University Press (Edinburgh: 2011), p. 230.

³³M. Kattan, *The History of Islamic Law*, Ma'aref (Riyadh: 1996), p. 326.

³⁴The scholars who initiated the four jurisprudential schools were Abu Hanifah (d.150 AH) in Kufah; Malik (d.179 AH) in Madinah; Shafi'i (d.204 AH) in Egypt and Ahmed bin Hanbal (d.241 AH) in Basrah.

³⁵The other major division being the Shia tradition. For a discussion on the evolution of jurisprudential schools see WB Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh*, Cambridge, Cambridge University Press, 2004) and AAB Philips, *The Evolution of Fiqh (Islamic Law and the Madhhabs)* (Kuala Lumpur, A.S. Noordeen, 2002).

³⁶N. Al-Balki, *Al-Fatawa Al-Hindiyyah*, Vol.3, Dar Al-Fikr (Beirut: 1991), p. 208.

Early Hanafi jurists differed on the rulings on *inah*, which as indicated above, was not distinguished from individual *tawarruq*. While some of them disliked (*al-karahah*) *inah*, others permitted it. Among scholars who abhorred *inah* was Mohammad bin Al-Hasan (d.189 AH), a respectful Hanafi jurist, who stated ‘I hate this sale so much and it is the invention of those who eat *riba*’.³⁷ Hanafi scholars who approved *inah* include Abu Yusuf (d.182 AH), one of Abu Hanifah’s pupils. He permitted *inah* sale as he did not consider it as prohibited *riba*.³⁸

Unlike his predecessors, a later Hanafi scholar Ibn Al-Hummam (d.861 AH) made a distinction between *inah* and *tawarruq*. Furthermore, he used the contrasting Hanafi views on *inah* for rulings on these two different transactions. Specifically, he used Abu Yusuf’s view on *inah* to make *tawarruq* contract permissible and agreed with Al-Hasan’s ruling of disliking *inah*.³⁹ The ruling on *inah* reflected the view of the majority of the scholars of that time who rejected obtaining the cash through bilateral contracts. Al-Sarkasi (d.1090), a later Hanafi jurist, expressed his disliking for *inah* when he said that he hates the man who when asked for a loan by his brother, responds by selling a good for delayed payment, instead of lending.⁴⁰ Ibn Abideen (d.1252 AH) cites Ibn Al-Hummam’s rulings and concludes that his view is upheld by a number of Hanafi scholars.⁴¹ In conclusion, for the majority of the scholars from the Hanafi School the bilateral *inah* is disliked, but individual *tawarruq* whereby the *mustawriq* sells the commodity to a third party is permitted.

4.2. Maliki School

The Maliki School of jurisprudence emerged in Medinah, the city where the Prophet’s sayings were known and found abundantly. Hence, early Maliki jurists followed the Prophetic traditions closely and had a strong view on *inah*. They ruled the revocation of these contracts if the commodity used in the sale was still available. However, they did not include *tawarruq* contracts in prohibited sales. This is evident in the writings of a famous Maliki jurist Ibn Rushd (d.520 AH) in which he narrates that the founder of the school, Imam Malik, was asked about a person who assists others by selling a commodity to someone in need for a deferred price and then the buyer sells it to a third party who was present with them. Eventually, the person who first sold the commodity would buy it back from the third party at

³⁷ M. Ibn Abideen, *Radd al-Mukhtar ala al-Dur al-Mukhtar*, Vol. 4, Dar Al-Fikr (Beirut: 1992), p. 114.

³⁸ M. Al-Haskafi, *Al-Durr Al-Mukhtar with Hashiyat Ibn Abideen*, Vol. 4, Dar Al-Fikr (Beirut: 2000), p. 310.

³⁹ A. Ibn Al-Hummam, *Fath Al-Qadeer*, Vol.16, Dar al-Kutub al-Ilmiyah (Beirut, undated), p. 221.

⁴⁰ M. Al-Sarkasi, *Al-Mabsut*, Vol. 14, Dar Al- Marifah (Beirut, undated), p. 36.

⁴¹ *Supra* note 37, p. 311.

this same place. Malik responded: ‘this is not a good deed’ since there was an arrangement between the first seller and the third party; thus, the third party is considered as a covering for *inah* sale.⁴² The implication is that Imam Malik would accept the transaction if the third person was independent of the first seller. This is confirmed by Maliki scholar Al-Qarafi (d. 683 AH) who asserts ‘Surely, we only forbid when the second sale is arranged by the first seller’.⁴³ Overall, it can be concluded that even though *tawarruq* is not mentioned explicitly in Maliki jurisprudence, it appears to be permissible as long as there is no interference by the first seller in the second sale.

4.3. Shafi’i School

Idris Shafi’i, the initiator of the Shafi’i School, authorized *inah* sale in his jurisprudence book *Al-Umm*.⁴⁴ He strongly supported the permissibility of the *inah* and concluded his argument by saying ‘why can I not sell my property for whatever I and the buyer want?’⁴⁵ Agreeing with this, the followers of Shafi’i School ruled in support of the permissibility of *inah* without any dislike or aversion. For example, Al-Mawardi (d.450 AH) a Shafi’i scholar strongly argued against the prohibition of *inah* and concluded that *inah* does not mean *riba*. On the contrary, *inah* prevents people who want cash to engage in *riba* and whatever prevents *haram* (forbidden) practice is deemed a preferred deal.⁴⁶ There is no explicit mention of *tawarruq* contracts in Shafi’i books either independently or as a form of *inah*. However, as *tawarruq* involves the buyer selling the commodity to a third person for a lower cash price instead of the first seller, it can be safely concluded that it also will be permitted by the scholars of the Shafi’i School.

Some of the later followers of the Shafi’i School, however, disapproved *inah*. For instance, Ibn Hajar (d. 852 AH) maintained that despite the validity of *inah* sale from a legalistic perspective as it fulfils all conditions of a sale, it includes a ruse to achieve a *riba*-based loan.⁴⁷ As a result, he concludes that it is sinful to practice the *inah* sale. Zakariya Al-Ansari (d.926 AH), one of the later Shafi’i jurists, said, ‘*inah* sale is disliked because it imposes burden upon the person who is in need since it puts him in a situation where the seller will sell a property at an enormous delayed price, and then buy it from him for an insignificant

⁴² M. Ibn Rushd, *Al-Bayan wa Al-Tahsil*, Vol. 7, Dar Al-Gharb Al-Islami (Beirut: undated), p. 89.

⁴³ A. Al-Qarafi, *Al-Furuq*, Vol.3, Dar al-Kutub al-Ilmiyah (Beirut: 1998), p. 268.

⁴⁴ M. I. Shafi’i, *Al-Umm*, Vol.3, Maktabat Al-Kulliyat Al-’Azhariyyah (Cairo: undated).

⁴⁵ *Ibid.*, p. 78.

⁴⁶ A. Al-Mawardi, *Al-Hawi al-Kabir*, Vol. 5, Maktabat Dar Al-Baz (Makkah: undated), pp. 287-290.

⁴⁷ A. Ibn Hajar, *Fat’h al-Bari*, Dar Al-Fikr (Beirut: undated), p. 337.

cash price'.⁴⁸ Similarly, Al-Sharbini (d.977 AH) and Al-Ramli (d.1004 AH), some of the later Shafi'i followers, opined in their commentaries that *inah* sale is disliked.⁴⁹

4.4. Hanbali School

As the Hanbali School was the last to emerge, the writings show a clear distinction between the concepts of *tawarruq* and *inah*, with the former taking an individual place in books of jurisprudence instead of being discussed under other transactions such as *inah*. There are, however, two opinions on classical *tawarruq* attributed to Imam Ahmad, the founding jurist of the school. Whereas the first one is that *tawarruq* is disliked (*al-karahah*), the other is that it is permissible (*al-jawaz*).⁵⁰ The difference in opinions is contextual and arises due to different circumstances under which the response to questions was given. Imam Ahmed emphasised that the circumstances that surround the questioner should be considered when the *fatwa* is issued.⁵¹ Consequently, the disapproving ruling was applied to a person who would not need cash while the permissibility ruling is applied to a needy person.

A couple of prominent Hanbali jurists Ibn Taymiyah (d.728 AH) and his pupil, Ibn al-Qayyim (d.751 AH) took the former view of Iman Ahmad and forbid *tawarruq*. While presenting the various types of sales, Ibn Taymiyah opined that a transaction is forbidden when a person's intention is neither to benefit from the commodity nor to engage in trade of the commodities. Instead, the goal is to get cash through *tawarruq* since he is in need and cannot borrow.⁵² This is confirmed by his student Ibn al-Qayyim who declared, 'My sheikh (Ibn Taymiyah) prohibited *tawarruq*, and people asked him again and again to allow it, but he still prohibited *tawarruq*'.⁵³ He argued that the effective cause ('*illah*') of banning *riba* exists in *tawarruq*. Moreover, *tawarruq* is worse than *riba*, because it entails a higher cost and losses. He concluded that *Shari'ah* would not forbid a lower-harm (*riba*) and allow a higher-harm (*tawarruq*).⁵⁴

The dominant view of the later scholars of the Hanbali School moved towards the permissibility of *tawarruq*. For example, Ibn Muflih (d.763 AH) opined that *tawarruq* was

⁴⁸ Z. Al-Ansari, *Asna Al-Matalib*, Vol.4, Dar al-Kutub al-Ilmiyah (Beirut: undated), p. 104

⁴⁹ M. Al-Sharbini, *Mughni Al-Muhtaj*, Vol. 2, Dar Ihya Al-Torath (Beirut: undated), p. 39 and M. Al-Ramli, *Nihayat al-Muhtaj*, Vol. 3, Dar Al-Fikr (Beirut: 1984), p. 460.

⁵⁰ M. Ibn Muflih, *Al-Furu*, Vol. 4, Dar al-Kutub al-Ilmiyah (Beirut: 1997), p. 171.

⁵¹ A. Ibn Jebreen, *The Demonstration of Shifa'a Al Aleel*, Dar Al-Qassem (Riyadh: 2000), p. 42.

⁵² A. Ibn Taymiyyah, *Fatawa Ibn Taymiyyah*, Vol.29, Dar Al- Wafa (Cairo: 2005), p. 442.

⁵³ M. Ibn al-Qayyim, *E'alam Al-Moaqeen*, Vol.3, Dar Al-Jeel (Beirut: 1973), p. 170.

⁵⁴ *Ibid.*, p. 182

acceptable by citing Imam Ahmad.⁵⁵ After discussing *tawarruq* jurisprudence of his school, Al-Mardawi (d.885 AH) concludes that permissibility is the supported view of the majority of the Hanbali scholars.⁵⁶ Al-Bahoti (d.1051 AH), another prominent Hanbali jurist confirms this by asserting there is no disagreement among Hanbali jurists on the permissibility of *tawarruq*.⁵⁷

5. Contemporary Rulings on *Tawarruq* and Appraisal with the Past

In this section, the judgments on *tawarruq* by two key contemporary international jurisprudential bodies are examined in light of the historical discourse and then compared with the practice of the transactions in the Islamic financial industry. Ahmed notes a key difference in the nature of law-making and methodologies used by contemporary jurisprudential institutions compared to their classical counterparts.⁵⁸ Unlike the rulings of the past which followed the respective historical schools of jurisprudence, the resolutions of international bodies such as AAOIFI and IIFA reflect unification of opinions of across various jurisprudential thought. This is evident from the composition of members in the *Shari'ah* advisory boards of these organizations which include scholars and jurists from different countries representing diverse schools of traditional jurisprudence. Thus, resolutions from these international jurisprudential bodies exemplify unified legal opinions on different issues and do not represent any specific historical school of thought.

AAOIFI (2010: 525) defines *tawarruq* as ‘the process of purchasing a commodity for a deferred price determined through *musawama* (bargaining) or *murabaha* (mark-up sale), and selling it to a third party for a spot price so as to obtain cash’.⁵⁹ Similarly, IIFA Resolution 179 (19/5) of 2009 defines *tawarruq* as ‘a person (*mustawriq*) who buys merchandise at a deferred price, in order to sell it in cash at a lower price. Usually, he sells the merchandise to a third party, with the aim to obtain cash’.⁶⁰ The resolution then concludes that ‘this is the classical *tawarruq*, which is permissible, provided that it complies with the *Shari'ah* requirements on sale.’⁶¹ The definitions provided by both jurisprudential bodies are similar to a classical *tawarruq*.

⁵⁵ M. Ibn Muflih, *Al-Furu*, Vol. 6, Dar al-Kutub al-Ilmiyah (Beirut: 1997), p. 467.

⁵⁶ A. Al-Mardawi, *Al-Insaf*, Vol. 4, Dar Ihya al-Turath al-Arabi (Beirut: 1979), p. 337.

⁵⁷ M. Al-Bahoti, *Sharh Muntaha al-Iradat*, Vol.2, Dar Al-Fikr (Beirut: undated), p. 158.

⁵⁸ H. Ahmed, ‘Islamic Law, Investors’ Rights and Corporate Finance’, *Journal of Corporate Law Studies*, 12 (2) (2012): 367-392.

⁵⁹ *Supra* note 7, p. 525.

⁶⁰ *Supra* note 8.

⁶¹ *Ibid*.

As indicated, contemporary Islamic banks use organized *tawarruq* to provide financing on the asset side and accept deposits on the liability side of the balance sheet. The practice of organized *tawarruq* by Islamic banks, however, is different from the classical concept. The IIFA resolution describes organized *tawarruq* practiced by Islamic banks as:

The contemporary definition on organized *tawarruq* is: when a person (*mustawriq*) buys merchandise from a local or international market on a deferred price basis. The financier arranges the sale agreement either himself or through his agent. Simultaneously, the *mustawriq* and the financier execute the transactions, usually at a lower spot price. Reverse *tawarruq*: it is similar to organized *tawarruq*, but in this case, the (*mustawriq*) is the financial institution, and it acts as a client.⁶²

The above definition of *tawarruq* is clearly as variance from the classical concept whereby the seller is not allowed to interfere in the second sale of the buyer (*mustawriq*). This is also emphasized in the items 4/7 and 4/8 of the AAOIFI standards as shown below.⁶³

4/7: The client should not delegate the institution or its agent to sell, on his behalf, a commodity that he purchased from the same institution and, similarly, the institution should not accept such delegation. If, however, the regulations do not permit the client to sell the commodity except through the same institution, he may delegate the institution to do so after he, actually or impliedly, receives the commodity.

4/8: The institution should not arrange proxy of a third party to sell, on behalf of the client, the commodity that the client purchased from the institution.

The IIFA resolution supports the above views and concludes the following with regards to the involvement of the bank with the second sale:

It is not permissible to execute both *tawarruq* (organized and reversed) because simultaneous transactions occurs between the financier and the *mustawriq*, whether it is done explicitly or implicitly or based on common practice, in exchange for a financial obligation. This is considered a deception, i.e. in order to get the

⁶² *Ibid.*

⁶³ *Supra* note 7, p. 526.

additional quick cash from the contract. Hence, the transaction is considered as containing the element of *riba*.⁶⁴

The resolutions of both AAOIFI and IIFA show close similarity with the majority of the historical views. Both resolutions maintain that classical individual *tawarruq* is permissible. This is in line with the majority view of the classical jurists who did not accept *inah* but permitted individual *tawarruq*. The historical evidence shows that individual *tawarruq* was accepted starting from the times of the companions of the Prophet (Ali bin Abu Taleb d.40 AH), the *tabi'een* (Saeed bin Musayyib's d.94 AH and Hassan bin Yasar al-Basri d.110 AH), the Hanafi jurists (Al-Hummam d.861 AH), and majority of the Hanbali scholars (Ibn Muflih d.763 AH, Al-Mardawi d.885 AH and Al-Bahoti d.1051 AH).

In general, the resolutions of the two jurisprudential bodies show a unified position on the 'organized *tawarruq*'. AAOIFI ruling states that the bank should neither interfere nor arrange a third party for the second sale. The IIFA resolution takes a stronger position and interprets any dealing of the bank after the sale has been carried out to the client as *riba* and deception and, as such, concludes such arrangement to be prohibited. These views are similar to those by classical scholars such as Saeed bin Musayyib's (d. 94 AH), Hassan bin Yasar al-Basri (d. 110 AH), Al-Qarafi (d. 683 AH) who proscribed interference of the first seller in the second sale by the *mustawriq*.

A provision Section 4/7 in the AAOIFI standards, however, diverges from both the historical opinions and the contemporary IIFA ruling on *tawarruq*. The provision stipulates that if 'the regulations do not permit the client to sell the commodity except through the same institution, he may delegate the institution to do so after he, actually or impliedly, receives the commodity.'⁶⁵ AAOIFI goes on to explain the reason for allowing this as follows: 'Permissibility of resorting to proxy of the institution when the client, by virtue of law, cannot sell the commodity directly, is meant to safeguard the deal from being nullified by the law'.⁶⁶ Thus, the bank can act as an agent only when the law and regulations proscribes the client to sell the commodities bought.

6. Concluding Remarks

⁶⁴ *Supra* note 8.

⁶⁵ *Supra* note 7, p. 526.

⁶⁶ *Ibid.*, p. 531,

As seen from the above discussions, the historical discourse on *tawwaruq* shows diverse views. In the initial deliberations of most schools such as Hanafi, Maliki, and Shafi'i, *tawarruq* was not discussed explicitly. The early Shafi'i scholars approved *inah*, and by extension *tawarruq*. The majority view of the classical jurists appears to be acceptance of individual *tawarruq*. Its acceptance was implied from the very early times when Ali bin Abu Taleb (d.40 AH) used the term approvingly and approved by scholars among the *tabi'een*. While the early writings of Hanafi jurists did not distinguish between *inah* and *tawarruq*, later scholars such as Al-Hummam (d.861 AH) declared the latter to be permissible. This became the predominant view for the school. The early views of the Hanbali School indicate permissibility of *tawarruq* to fulfil needs. Whereas the dominant view of the scholars from the school is that of permissibility, two influential scholars (ibn Taymiyah and Ibn al-Qayyim) took a strong view against *tawarruq* and declared it not permissible. Although, the classical scholars permitted individual *tawwaruq*, they were apprehensive about the involvement of the initial seller in the selling of the good by the *mustawrik* (initial buyer) and deemed it not legitimate. This is evident from the rulings of Saeed bin Musayyib's (d.94 AH), Hassan bin Yasar al-Basri (d.110 AH), Al-Qarafi (d.683 AH) who prohibited the interference of the seller on the second sale.

Contemporary resolutions of both AAOIFI and IIFA show very close resemblance to the historical views on *tawarruq*. Similar to the majority of the past rulings, both jurisprudential bodies permit individual *tawarruq* and deem interference of the first seller in the second sale impermissible. AAOIFI's ruling, however, has an additional novel feature related to the role of the first seller in the second sale. It allows a bank to act as an agent of the *mustawrik* and sell her product if the law and regulations prohibit the buyer to do so. As credit sale (*murabahah/bai-muajjal*) by Islamic banks is allowed in most countries where organized *tawarruq* is practiced, the regulations would not prohibit clients to sell commodities they own. Once a bank sells the commodities to their clients they legally own these and have the right to dispose of these at will. The fact that many Islamic banks structure their organised *tawarruq* products in which they act as agents even when there are no legal/regulatory restrictions on the clients is a clear violation to the basic principles of *tawarruq* transactions outlined by both past scholars and contemporary jurisprudential bodies.