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Jurisprudence on Tawarruq: Contextual Evaluation on Basis of Customs, Circumstances, Time and Place

A Thesis Submitted to the University of Durham

In Fulfilment of the Requirements for the Award of Master Degree

By

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Supervisor

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School of Government & International Affairs

Durham University

2011

Sign and Declaration

‘The thesis is the result of my own work. Material from the published or unpublished work of others which is used in this thesis is credited to the author in question in the text’.

Dedication

To Mohammad Al-Eshaikh and Mashaël Al-Hoqbani, my parents

Acknowledgements

First of all, I gratefully thank Allah for giving me strength and ability to complete this study.

Then, I would like to express my deep and sincere gratitude to my supervisor, Professor Habib Ahmed, Sharjah Chair in Islamic Law & Finance, for his helping to choose this topic which is valuable in Islamic finance in recent practice. Also, I want thank him for his constructive comments, his valuable advice and for his efforts and expertise on providing relevant references.

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Table of Contents

Abstract	i
-----------------------	----------

Glossary of Transliterated Technical Terms.....	ii
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Chapter 1 : Introduction and Methodology

1.1. Background and Research Problem	1
1.2. Scope of the Study and Research Questions	1
1.3. Objectives of the Research.....	2
1.4. Methodology	2
1.5. Structure of the Thesis.....	3
1.6. The Significance and Originality of the Study	4

Chapter 2 : Introduction to *Usul Al-Fiqh*

Introduction	5
2.1. Definition of <i>Usul Al-fiqh</i>	6
2.1.1. Differences between Fiqh and Usul Al-Fiqh	6
2.2. The Four Schools of <i>Fiqh (Madhabs)</i>	7
2.2.1. The Hanafi School	7
2.2.2. The Maliki School.....	7
2.2.4. The Shafi'i School	8
2.2.5. The Hanbali School.....	8
2.3. Legislative Sources	9
2.3.1. The Primary Sources.....	9
2.3.2. The Secondary Sources.....	12
2.3.3. Tertiary Sources	15
2.4. The Sources of the Four Schools	25
2.5. Legal Concepts & Principles Related to <i>Tawarruq</i>	27
Summary	27

Chapter 3 : Traditional *Tawarruq* in the Past Time

Introduction	29
3.1. Classical <i>Tawarruq</i>	30
3.1.1. The Usage of <i>Tawarruq</i> Term.....	30
3.1.2. Inah and its Relation to <i>Tawarruq</i>	31
3.2. Classical <i>Tawarruq</i> during the Early Islamic Eras.....	32
3.2.1. The First Islamic Era.....	33
3.2.2. The Age of the Tabi'een (Followers).....	35
3.2.3. The Age of the Mujtahids (qualified jurists).....	37
3.2.4. The Noticeable Feature of the Four Imam's Era	38
3.2.5. The Four Schools Views on Classical <i>Tawarruq</i>	38
3.2.6. Period after the Age of Mujtahids.....	44
3.3. Arguments on Classical <i>Tawarruq</i>	45
3.3.1. Arguments that Support Permissibility	45
3.3.2. Arguments that Support the Prohibition	47
3.3.3. Reasons for the Different Views and Arguments	48
Summary	48

Chapter 4 : A Critique of the Development of *Tawarruq*: Concept, Practice and Ruling during Contemporary Times

Introduction	50
4.1. Organised <i>Tawarruq</i>	51
4.1.1. Organised <i>Tawarruq</i> Definition	51
4.1.2. Analytical Review of Previous Research on <i>Tawarruq</i>	52
4.1.3. Conditions of Organised <i>Tawarruq</i>	53
4.2. Reverse <i>Tawarruq</i>	54
4.2.1. The Concept of Reverse <i>Tawarruq</i>	55
4.2.2. The Purpose of Reverse <i>Tawarruq</i>	55
4.3. Comparison between Organized and Reverse <i>Tawarruq</i>	56
4.4. Views of Contemporary Scholars on Contemporary <i>Tawarruq</i>	56
4.4.1. Jurists' Verdict on Organised <i>Tawarruq</i>	56
4.4.2. Arguments against the <i>Tawarruq</i> Practices.....	58
4.4.3. Arguments Supporting <i>Tawarruq</i> Practices	60

4.4.4. Jurists' Verdict on Reverse Tawarruq.....	61
4.5. The Examination of <i>Tawarruq</i> 's Impact on the Contemporary Economy.....	61
4.6. Islamic Finance Principles & Contemporary <i>Tawarruq</i>	64
4.7. Shari'ah objectives (<i>maqasid</i>) & Contemporary <i>Tawarruq</i>	65
Summary	66

Chapter 5 : Analysing and Comparing *Tawarruq* Stages

Introduction	68
5.1. The Importance of Studying the Reality of Changing <i>Fatwas</i>	68
5.2. The Effect of the Four Elements on <i>Tawarruq</i> Ruling	69
5.2.1. The Role of Time	69
5.2.2. The Role of Place.....	72
5.2.3. The Role of Circumstances	77
5.2.4. The Role of Customs	80
5.3. Reasons for Changing Fatwas According to the Four Elements.....	81
5.4. Types of Islamic Ruling Influenced by the Four Elements.....	84
Summary	85

Chapter 6 : Conclusion and Recommendations

Future Research Questions.....	90
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Bibliography	91
---------------------------	----

Appendix	91
-----------------------	----

Abstract

This dissertation investigates the legal causes of the difference in rulings on *tawarruq*, a controversial product used in contemporary Islamic finance practice. The research examines the diversity of rulings on *tawarruq* and explores the underlying reasons on which these are based upon. Rulings of Islamic law are generally influenced by four factors: time, place, customs and circumstances. These elements have an impact either individually or collectively on rulings. The aim of the dissertation is to study the differences in *tawarruq* rulings in light of these four factors. The aim of the dissertation is accomplished by analysing historical evolution of the rulings on *tawarruq* over five stages: the first Islamic era, the age of the *tabi'een* (followers), the age of the *mujtahids* (qualified jurists), period after the age of the *mujtahids* and contemporary times. This thesis then examines the current rulings and forms of *tawarruq* as applied in Malaysia and Gulf Countries (Saudi Arabia, United Arab of Emiratis, Qatar, Bahrain and Kuwait) in the light of four factors identified above. The findings of this study underline the fact that the four factors (time, place, customs and circumstances) have an important influence on the rulings on *tawarruq*, both in the past and the present.

Glossary of Transliterated Technical Terms

Transliteration	Translation¹
‘Illah	Effective cause
Ahl al-Ra’y	People of opinion
Ajam	Non-Arabs
Al-jawaz	Permissibility
Al-karahah	Disliked
Al-wariq	Silver coin
Bai bithaman ajil	Deferred payment
Fatwa	Islamic legal opinion
Fiqh	Jurisprudence
Ghara	Risk
Gharar Fahish	Excessive risk
Hadith	Prophetic tradition
Hajj	Pilgrimage
Haram	Forbidden
Hila	Legal artifice
Ijarah	Lease
Ijma	Consensus
Ijtihad	Juristic inference
Inah	A contract which the purchaser buys an asset for a deferred payment and then the seller will buy it back at cash with lower price.
Istihsan	Juristic approbation
Istishab	Presumption of continuity
Istislah (maslahah mursalah)	Considerations of public interest
Istisna’	An exchange transaction with deferred delivery, applied to specifications given to order items
Janib	High quality of dates

¹ From variety of sources.

Madhab	School of jurisprudence
Mafasid	Harm
Maslahah	Benefits
Mudharabah	An investment partnership between capital and work whereby the investor provides funds to the business owners in order to undertake the business activity.
Mujtahids	Qualified jurists
Murabaha	A sale in which the payment of all or part is deferred for an agreed period
Musharaka	Partnership
Mustawriq	The buyer in tawarruq contract
Qard hassan	Gratuitous loan
Qiyas	Juristic analogy
Qiyas khfi	Hidden analogy
Qur'an	The revealed scripture
Ra'y	Considered opinion
Riba	Usury
Riba al-nasiah	Deferred usury
Sadd al-dhara'i	Blocking the means
Salam	A contract that include an advanced payment for the purchase of a commodity to be delivered a later date in accordance with specified conditions.
Shari'ah	Islamic law
Shari'ah	Islamic law
Sunnah	Prophetic actions and traditions
Tabi'een	Followers
Talji'ah	It is a sale that one of the parties has been enforced to make the contract.
Tawarruq	A sale of a commodity to a buyer on deferred payment, then, the buyer sells the commodity to a third party for cash price

Tawarruq mundhabit	restricted tawarruq to Islamic law
Tawheed	Doctrine of Oneness
Urf	Custom
Wakalah	Agency

Chapter 1 : Introduction and Methodology

1.1. Background and Research Problem

The creation of an Islamic finance system dates back to the beginning of Islam. The examination of business practises began with the inception of Islam, with a view to identifying practices which are in conflict with Islamic teaching. The process of identifying and scrutinising the business practise is continuing to this day. As Islam has spread out of Arabia to other geographical regions; new situations, businesses practises, cultures and customs have appeared and need to be accommodated in the light of Islamic teaching and principles. In recent days, with the rapid development of Islamic finance products, Islamic jurists have to cope with this situation to supply the market with the approved Shari'ah products, which means to be securitised in the light of Islamic principles and teaching.

Historically, Muslim jurists, after the death of Prophet Mohammad (*pbuh*) and with the stretch size of the Islamic region and spread of Islam in different geographical regions, had to take the position of intellectual and religious leadership. They were approached by local people looking for guidance regarding any religious matter. Islamic law, to some extent, operates according to Ibn al-Qayyim (d. 1349) statements: "Islamic rulings change with changing customs, circumstances, and with time and location, and in consideration of the intention of the one engaged in the matter" (Ibn al-Qayyim 1973, vol.3, p.20). Accordingly, the jurists' ruling on Islamic financial products which are the purpose of this thesis can differ from one place to another. Therefore, Islamic jurists in their interpretations of such financial matters have no rules or principles apart from the explicit rules of the Qur'an and Sunnah. In this essence, the rules of Islamic financial products and services might vary depending on Islamic jurists and their perspectives. This is the purpose of this thesis: to examine the ruling of one Islamic financial product namely *tawarruq* from historical perspective in the light of Ibn Al-Qayyim's statement.

1.2. Scope of the Study and Research Questions

This study intends to analyse the *fatwa* and its changing status in Islamic financial products. There are a number of financial products, such as *murabaha*, *musharaka* and *ijara*. However, this study will focus on examining *fatwa* on the *tawarruq* contract in depth, from the past to

the present. In addition, there are four factors that will be implemented in this study to assess *fatwa* on *tawarruq* in the past and present namely: time, place, custom and circumstances.

There are four research questions that the thesis intends to answer:

- 1) On which basis did the rules of Islamic jurists change?
- 2) How consistent *tawarruq* ruling was in the past?
- 3) In contemporary time, how do Islamic scholars perceive *tawarruq*?
- 4) Were the legal Islamic jurists activating the customs, circumstances, time and place to reach a decision?

1.3. Objectives of the Research

The main aim of this research is to explore and examine *tawarruq* from different perspectives in order to establish the impact of the four factors mentioned above upon changing *fatwa*. The key objective of this study is to critically appraise the influence of these factors on forming *fatwa* as well as on Shari'ah scholars' thinking.

1.4. Methodology

The present study uses all available primary and secondary resources. This research primarily bases on library-collected information, such as textbooks, journal articles and scholars' written opinions. The majority of these sources can be accessed via libraries and online materials. As this thesis deals with the Islamic law mainly in the history of trading I need to travel to Saudi Arabia in order to obtain the materials needed, as the thesis will be written in English and many of these materials are written in Arabic I will need to reformulate this information in English.

The important primary and secondary sources for this thesis are:

- i. The Holy Qur'an
- ii. The Sunnah or Hadith
- iii. Law Journals
- iv. Economics Journals
- v. Contemporary and Historical Textbooks.

Data collected from the above sources are analysed and examined in the light of Ibn al-Qayyim statements: “Islamic rulings change with changing customs, circumstances, and with time and location, and in consideration of the intention of the one engaged in the matter” (Ibn al-Qayyim 1973, vol.3, p.20). This statement plays a central role to form and organise the flow of the analysis to achieve the aim and objective of this research. Further, as this study investigates the legal sources and methods that Islamic finance derived from, it will provide a detailed description of the Islamic methodology in order to have a proper foundation on Islamic rulings.

1.5. Structure of the Thesis

In order to achieve the research objectives, this thesis will be divided into six chapters:

Current chapter, as an introduction chapter aims to provide an overview of the objectives and scope of the study. It will furthermore provide and outline the research questions and the methodology in order to provide the conceptual framework that will guide the study.

Chapter two will introduce the concept of *usul al-fiqh* which is the foundation of the rulings. It will also outline the Shari’ah principles and will examine the primary, secondary and tertiary sources in Islamic law. Also, it will indicate the four schools of thought and will show their spread geographically.

Chapter three will analyse *tawarruq* ruling in the past and how *tawarruq* has been implemented, aiming to examine the jurists’ rulings in different times from historical perspectives, including the age of the four schools of thought. This will mainly examine if the time and place influence *tawarruq* ruling. It will conclude with the causes of different arguments on this issue.

Chapter four will provide an intensive study of the concept of organised and reverse *tawarruq*. A comparison between these two types will be given in order to achieve a deep understanding of the distinctions between them. It will also serve the current debate on *tawarruq* between Islamic jurists. This aims to investigate the contemporary time and whether it affects the ruling of *tawarruq* or not.

Chapter five will assess the impact of the legal elements based on the previous chapters. It will explore the reasons behind the function of the element on *tawarruq* ruling. In addition, it

will identify which Islamic rulings are influenced by the element. Also, it will include some findings.

Chapter six will conclude the research finding by summarising the findings of the research and highlighting the main results in the thesis. The chapter will also include the recommendation.

1.6. The Significance and Originality of the Study

Fatwa as an Islamic ruling given by scholars is considered an important figure to shape the Islamic banking and financial industry. Islamic Finance, as part of the industry, has been considerably affected by the changing status of *fatwa* by Islamic scholars in different jurisdictions. It means that a scholar in one jurisdiction might have a different view to his counterpart in other jurisdictions on the same issue. This has led to a debate between Islamic scholars in different jurisdictions about why and how these differences occur between jurists. Thus, the aim of this study is to examine the rulings on *tawarruq* in the past and present on the basis on four factors (customs, circumstances, time and place). This is to examine their ruling on the same issue. This will contribute extensively to literature on *tawarruq* by answering why the jurists differ in their ruling in the current time. It will also ask what are the hidden factors involved but not generally known to most users of Islamic finance, even some scholars. No previous researches have been conducted on this issue. Thus, the findings of this study will add considerable value to the academic literature as well as enrich the knowledge of those involved in Islamic finance by understanding some of its methodologies in issuing *fatwa*.

Chapter 2 : Introduction to *Usul Al-Fiqh*

Introduction

For the last thirty years Islamic finance has developed from basic financial instruments to more complex structures. The complexity is attributed mainly to three factors, first: to meet the Shari'ah standards, second: to comply with local regulations, third: to meet the market demands for more innovation to absorb the liquidity in Muslim countries. Yet most Muslim markets are not adequately furnished with laws that comply with Shari'ah requirements. This is due to a number of reasons, some of which are attributed to politics and the influence of a western legal system.

Notwithstanding, the most important part in Islamic finance is compliance with the rules and principles of Islamic law. Defining the term compliance is somehow critical between jurists¹. This is because the differences between them are apparent in Islamic schools of thought. Shari'ah compliance is an integral part of any structure of Islamic finance. Any breach of the fundamental rules of Shari'ah will render the contract null and void. Hence, it is significant for jurists to revise from time to time the new aspects of finance concerning the contemporary day.

Thus, the current developments in Islamic finance have required jurists to conduct comprehensive searches of the spiritual and other Shari'ah sources. This is required to assess the validity of such sources, in terms of acceptance and proof, in order to be used as a proven source.

This chapter presents the emergence of the four schools of thought in the Sunni tradition in different locations and time scale. This chapter will study and evaluate the sources and the methodology of Islamic law. It will shed light upon three main groups of sources, which are primary, secondary and tertiary sources. It will examine to what extent these sources are flexible to cope with changing circumstances and other factors associated. This will evidently show the different methodology for the four schools of thought. This chapter concludes with the research reflection.

¹ It is important to highlight that some issues which are considered unquestionable and have clear cut agreements between jurists. For example, *riba* is severely prohibited.

2.1. Definition of *Usul Al-fiqh*

All definitions of *usul al-fiqh* can be divided into two aspects: definition as a composition of two words and definition as a term. Firstly *usul al-fiqh* as a genitive construction, *usul* is the plural of *asl*, which is in the lexical meaning, expresses the principles or foundations. As a technical term, *usul* means the proof. *Al-fiqh* literally is understanding, and in technical sense denotes 'Islamic jurisprudence' (Rizvi 2004). Secondly, *usul al-fiqh* (as a term made up of both words) a method by which the rules of Islamic law are derived from their sources. It embodies the framework and basic approach for the development of the law (Al-Sulaiman 2011, p.27).

2.1.1. Differences between *Fiqh* and *Usul Al-Fiqh*

Fiqh and *usul al-fiqh* are a separate science, both of them have different purposes. The objective of *usul al-fiqh* is to help jurists to deduce new rules of *fiqh* from the indications provided in the sources. In terms of *fiqh*, the purpose is to extract the Islamic rules from the evidence found in Islamic sources. Simply, *fiqh* is the law itself, while *usul al-fiqh* is the method for the jurist. The principle difference between *fiqh* and *usul-al fiqh* is that the former term is the implementation of Islamic sources; whereas, the latter is the theory of a series of interpretations and deductions from primary and secondary sources. This means that *fiqh* is the body of legal judgments derived by *usul al-fiqh*. The relationship between these two terms can be illustrated by the relationship between the rules of logic to philosophy, or the rule of grammar to a language. That is to say, *usul al-fiqh* provides a balance for the extraction of the new rules from the sources. As a result of that, *fiqh* cannot be learned in isolation from Islamic sources, and these sources are the primary concern to *usul al-fiqh*. Hence, a sufficient knowledge of the methods and interpretations of the sources is required for an appropriate understanding of the Shari'ah text (Kamali 1991, p.1-2).

There are two other differences can be deduced. First, is that in *usul al-fiqh*, the sources are studied in general; whereas, *fiqh* deals with detailed sources of Islamic law. For example, *usul al-fiqh* studies the Qur'an generally as a source, while *fiqh* deals with individual quotations, to deduce the rules. Second, *usul al-fiqh* is mainly fixed and unchangeable. In contrast, *fiqh* tends to be changed according to the location, time, customs and circumstances. This is because the methodology of law does not change, while the law its self can differ.

2.2. The Four Schools of *Fiqh* (*Madhabs*)

Islamic jurisprudence has four great schools of *fiqh*, comprising the majority of legal systems, with different schools of thought. These four schools began and developed in the second and third centuries of Islam. Adherence to one of the schools of jurisprudence is not an obligation however. Some nations prefer following one school while others have a mixed methodology. Although different countries follow different schools, these four schools are respected by all the Muslims communities (Weeramantry 1988, p.49). In this section is presented a historical summary of the emergence of the main Islamic Schools of *fiqh* and their methodology. In addition, it examines the spread of these schools through Islamic countries.

2.2.1. *The Hanafi School*

Abu Hanifah Numan ibn Thabit, who was born in Kufah in Iraq around 700 A.D., is the originator of the first school of Sunni Islam. This school of thought derived from the ancient school of Iraq.

It has been followed by the majority of Muslims over Islamic eras, For example; Hanafi *madhab* was favoured by the Abbasid caliphs as well as being officially adopted by the Mughal Empire in India and the Ottoman Empire. This has led to the widespread presence of this school. Today, The Hanafi School is dominant in Turkey, Albania, Syria, Jordan, and Lebanon, as well as Central Asia, Afghanistan, Pakistan, China, India and Iraq (Weeramantry 1988, p.50).

2.2.2. *The Maliki School*

The second school of religious jurisprudence (*fiqh*) is the Maliki School that appeared in 795 A.D. It was found by Malik Ibn Anas, who was born in Medina in 710 A.D. His famous work is *Al-Muwatta*, which was the earliest book in a collection of the Prophet's (*pbuh*) traditions. It is a code of law that is supported by roughly 2000 Hadiths (prophetic actions and traditions). Thus, this school has been considered as one of the greatest authorities on the traditions of the Prophet Mohammad (*pbuh*) because Maliki scholars rely heavily on the Hadiths. The other primary work of the originator is *Mudawana*, a source of the Maliki jurisprudence. These two books (*Muwatta* and *Mudawana*) are prominent sources in Maliki jurisprudence. This was transmitted by Malik's disciples, who spread the school westwards. The most famous pupils are Ibn Qasim, Yahya Al Masmudi, al-Qayrawani and Ibn Wahab (Kattan 1996, p.350-356).

This school was originally referred as the school of Hejaz. The most notable distinguishing feature of this school is the reliance on the practice of the first three generations of Medinan people as a source of law. This is because the Qur'an was mostly revealed there and most of the legal practices established in Medina.

The school is followed by the majority of the Muslim population of North Africa, as well as West and Central Africa. It is also practiced by large communities in Kuwait and Bahrain (Mahmassani 1961, p.26).

2.2.4. *The Shafi'i School*

This school was known after Al-Shafi'i Mohammad ibn Idris. He is from the Quraysh, which is the tribe of the Prophet Mohammad (*pbuh*). He was born in Gaza in the year 767 A.D. He travelled to several places including Medina where he was a pupil of Imam Malik and belonged to the school of Medina, and also Iraq where he studied with a great Hanafi jurist Mohammad Al-Shaybani. These journeys led him to decide to have his own school. As a consequence of a close knowledge of Maliki and Hanafi schools, his outcome was a comparison of those two schools of thought (Kattan 1996, p.356-360).

The major contribution of Imam Shafi'i to Islamic law is his book *al-Umm*, which is about Shafi'i *fiqh*. In addition, *Al-Risalah* in *usul al-fiqh* has been ascribed to him, in which he has examined the sources of jurisprudence. These books have been considered a foundation of Shafi'i jurisprudence.

Baghdad and Cairo were two cities in which Shafi'i was teaching his jurisprudence. Then, his *madhab* widely spread through the Islamic world. During the centuries preceding the emergence of the Ottoman Empire, it prevailed in the central part of the Islamic regions. In modern times, the Shafi'i School is predominant among the Sunnis of Syria, Palestinian Territories, Lebanon, and United Arab Emirates and in Egypt. However, Egypt has traditionally shared influence with Malikism. Also, some South East Asian countries adhere to this school, such as Malaysia (Mahmassani 1961, p.28-29).

2.2.5. *The Hanbali School*

Among the four established Sunni schools of legal thought in Islam, the Hanbali School has the latest emergence in 855 A.D. This school of law is attributed to Abu Abdullah Ahmad ibn Hanbal who was a teacher of the Hadith in Iraq. One of his chief works is *Al-Musnad*, which

is a collection of more than 40, 000 of traditions that are attributed to the Prophet Mohammad (*pbuh*) (Abu Zayd 1996, p.355).

Hanbali School is the least widespread of all four schools. The famous followers of this school are Ibn Taymiyah (d. 1325), Ibn al-Qayyim and Mohammad ibn Abd al-Wahhab. In modern times, Hannibalism prevails in Saudi Arabia and Qatar which is considered as an official *madhab* there. Also, it has many adherents in Iraq. (Weeramantry 1988, p.50).

2.3. Legislative Sources

Islamic legal sources refer to the legal evidence by which Islamic rules can be deduced. These sources have been classified in various ways, depending on the purpose of the division. The common clarifications are the following: Firstly, Islamic sources have been divided depending on their acceptance into three sections. First, sources with unanimous acceptance are the Qur'an and Sunnah. These are unanimously agreed as legislative sources by all Muslims. Second, sources with a general agreement among scholars, these are *ijma* (consensus) and *qiyas* (juristic analogy). Finally, sources with general disagreement. There are more than fifteen sources, however, the most widely accepted are the *fatwa* of a companion, *istihsan* (juristic approbation), *maslahah mursalah* (considerations of public interest), *urf* (custom), *istishab* (presumption of continuity) and *sadd al-dhara'i* (blocking the means). Secondly, the sources can be divided depending on their authority of proof in Shari'ah into two types, which are independent sources classified as primary sources and dependent sources classified as secondary sources. The dependent sources derive the authority and legality from one of the primary sources. Finally, the sources are also grouped into transmitted proof, which are sources with a strong chain of trustworthy narrators. These are Qur'an, Sunnah, *ijma* and the *fatwa* of a companion, and, rational proof, which requires rational justification (Kamali 1991, p.10-11). For the consistence of flow the thesis will adapt the first division.

2.3.1. The Primary Sources

In Islamic law, there are two authentic and fundamental sources, namely, the Qur'an and Sunnah. Both of them are essential in forming any rulings. The following part will explain the sources.

2.3.1.1. *The Holy Qur'an*

Qur'an is not amendable which is unlike other man-made laws (Doi 1984, p.37). Qur'an is defined as the book which contains the miraculous Arabic speech of God revealed to his messenger the Prophet Mohammad (*pbuh*), him by the Archangel Jibriel. This has been transferred to us via an indisputably authentic chain of authority (Abdul-Hannan 2008, p.6). In this definition, miraculous speech shows that the Qur'an is an inimitable book that no one is able to reproduce. Although Arabic is the language of the Qur'an, its objective and scope are universal, comprehensive and not specific or restricted to a particular era or place (Kattan 1996, p.39- 40). Qur'an was revealed to the Prophet Mohammad (*pbuh*) over a twenty three year period. The legislation in Qur'an was revealed intermittently in accordance with the incident and requirement of events in Islamic society for the purpose of the preparedness of new Muslims to substitute their customs with the new rulings (Mahmassani 1961, p.66-67).

The glorious Qur'an is the first and fundamental source of Islamic jurisprudence. All Muslims form a consensus on this and its authenticity. Muslim scholars are in agreement with the fact that Qur'an contains legal and quasi-legal material (Hallaq 1999, p.3). For instance, legislation was introduced in selective matters of ritual, oaths, marriage, charities, usury and rules regarding commercial contract such as sale, purchase, loan and lease. These legislations mostly have been given in broad outlines except a few rules for which the Qur'an has given illustrative details. Therefore, the ambiguity of some of the laws which are stated in the Qur'an is left to the Sunnah and other sources for interpretation and clarification. In other words, the status of the Qur'an as a guidance book for Muslims morally and spiritually, and a primary source of Islamic law do not mean that it deals with every problem, since the Qur'an is not a code of rules and it does not aim to present the details of legal laws. Thus, it can be found that some financial transactions have not been mentioned in the Qur'an; however, Qur'an states the general financial principles. For example, while the *istisna'* contract is not explicitly mentioned in the Qur'an, it falls under the generality of "Allah has permitted trading" (Qur'an 2:275).

It is essential in Islamic jurisprudence to note that, in the Qur'an, the legal verses are definite; however, various rules can be deduced from the same verse depending on different interpretations. This is one of the causes for disagreement among Muslims scholars. According to one scholar, a rule is derived from a particular verse while this verse is silent on the same point according to another. Therefore, it can be seen in Islamic financial rules that

one jurist may argue an issue on the basis of Qur'an whereas, the other will argue on the basis of Sunnah (Hasan 1970, p.47).

2.3.1.2. *Sunnah*

Sunnah literally means in general, a pathway, behaviour or conduct. It presents more specific meaning in technical terms; it refers to the model conduct of the Prophet Mohammad (*pbuh*) (Hasan 1970, p.48). It represents Prophet Mohammad's (*pbuh*) all speeches, actions and agreements during his prophecy (El-Ashker & Wilson 2006, p.33). An additional meaning of Sunnah in Islamic jurisprudence is that the rule derived from the Prophet's sayings, acts as an approval of other actions (Weeramantry 1988, p.34).

Sunnah is the second authoritative source of Islamic law. This authority derives from the Qur'an, which has stressed the obedience to the Prophet Mohammad (*pbuh*): "whoever obeys the Messenger verily obeys God" (4:80). In another place the Qur'an puts emphasis on the rules of Qur'an and Sunnah; both are compulsory and no one of the believers has a choice to not follow them: "whenever God and his Messenger have decided a matter, it is not for a faithful man or woman to follow another course of his or her own choice" (33:36). Furthermore, the Prophet has reported to believers to hold both the Qur'an and Sunnah: "I left two things among you. You shall not go astray so long as you hold on to them: the Book of Allah and my Sunnah" (Al-Bayhaqi 1925, p.420). These verses and the Prophet's (*pbuh*) sayings have shown that the Qur'an is in conformity with the Sunnah; however, if a conflict between these two sources appears, it needs first to be reconciled; otherwise the Qur'an overcomes (Weeramantry 1988, p.34). This is because the Qur'an has priority over the Sunnah which is clearly shown in the Hadith of sending Muadh bin Jabal to Yemen, when the Prophet had asked Muadh bin Jabal, before he sent him to the Yemen as a judge: "on what basis would he judge if he was confronted with a problem?" Muadh responded that he would judge on the basis of the Qur'an and then on the Sunnah, and finally, he would use his own judgment (Al-Nasa'i 1999, p.58).

For more comprehension of the Sunnah source, knowledge of its type is required. In Islamic jurisprudence, Sunnah as a source is divided into three main sections: verbal, actual and tacitly approved (Haron 1997, p.73). The verbal Sunnah is a major part of this source, which consists of the statements of the Prophet Mohammad (*pbuh*) on any topic. For example of verbal Sunnah, Prophet Mohammad (*pbuh*) said on *salam* contract that "Buy fruits by paying their prices in advance [only] on condition that the fruits are to be delivered to you according

to a fixed specified measure within a fixed specified period”. The actual Sunnah consists of his deeds and practice as well as the actual rituals, such as his performance of prayer or dealings in such sale, lease and loan. The third variety is an implied approval of Sunnah, which includes the conduct of his companions that the Prophet approved or kept silent about (Kamali 1991, p.52). For instance, in the previous narrated Hadith, when the Prophet approved Muadh’s reply. This contributed to the distinction between what is included in the Sunnah field and others, which is needed, especially in the demonstration and proof of economic transactions.

2.3.2. *The Secondary Sources*

Recently, many rules of development in Islamic finance investments are based on the secondary sources. Secondary sources are usually used, particularly *qiyas*, to form new ruling. It is important to stress that any ruling derived from the secondary sources is not stable and constant. It means that it can be changed, but one exception is some *ijma* cases. The following part will illustrate the issue clearly in light of the two sources *ijma* and *qiyas*.

2.3.2.1. *Ijma* (Consensus)

Ijma, linguistically, has two meanings: an unanimous agreement upon a matter and a decision on something. The former meaning necessitates the later one, since there is no consensus upon opinion without a decision. *Ijma* in technical usage means the consensus on any particular matter among qualified legal scholars after the death of the Prophet Mohammad (*pbuh*). This agreed rule becomes definite and fixed in Islamic jurisprudence. In the definition, the agreement on any subject includes all financial, intellectual, linguistic and customary matters. In addition, the reference to any period after the death of the Prophet Mohammad (*pbuh*) precludes the agreement during the Prophet’s Life because he had the overriding authority for legislation. Hence, the *ijma* can occur only after the death of the Prophet (*pbuh*) (Farooq 2006, p.2).

In Islamic law, *ijma* is a third source after the Qur’an and Sunnah. *Ijma* derives its validity and infallibility as a source of law from the primary sources. The Qur’an and Sunnah have given an assurance of the validity of *ijma*. For instance, God has said, “And anyone who splits off from the Messenger after the guidance has become clear to him and follows a way other than that of the believers, We shall leave him on the path he has chosen, and land him in Hell, What an evil refuge” (Qur’an 4:115). In this verse, where the Qur’an states “the way of the believers” refers to their consensus. To give a demonstration from the Sunnah, the

Prophet authenticated the infallibility of the consensus of Islamic scholars with the following sayings: “My community will never agree unanimously upon an error” (Haron 1997, p.74). Moreover, the value of *ijma* can be seen from a different angle, which is that the individual’s view on a matter may not produce a sufficient and effective opinion to accommodate the occurring issue in the light of the principle sources; whereas the unanimously agreed opinion can formulate a proper decision for the community (Weeramantry 1988, p.40). The importance of *ijma* during the development of Shari’ah emerges from the support of the Muslim community in some matters. A further crucial role for *ijma* is that of providing the binding interpretations of the Qur’an and Sunnah, as well as the ensuring the correct interpretation of these primary sources. Moreover, *Ijma* enhances the authority of Speculative rules since they become after *ijma* definitive and binding (Farooq 2006, p.2). Hence, *ijma* plays a fundamental role in Islamic law’s development. Overall, by any means *ijma* cannot repeal a text of the Qur’an or Sunnah, instead, *ijma* needs to be in harmony with these primary sources to gain an acceptance.

Notwithstanding the unanimous agreement among Muslim scholars on this source, different judicial schools have different principles upon which to base their acceptance. For instance, Hanafi School based it on equity, Maliki School on consideration of public interest and they restricted it to the people of Medina and Shafi’i School on analogical reasoning. Also, Hanbali School based it on the tradition of the Prophet (*pbuh*) given in the narrowest sense by accepting the only consensus of the Prophet Mohammad’s companions, whereas, other schools accept it in any period (Weeramantry 1988, p.40).

According to the *ijma* definition, the existence of an absolute and universal consensus is vital for the authority of this source. This means all scholars, from a variety of regions, ethnicities, colours and schools of thought have to be in agreement on one decision. If, for example, a minor of disagreement occurs, this will prevent the possibility of *ijma*. From this perspective, there is a gap between this condition and the reality because the occurrence of such an *ijma* is mainly impossible in the present. (Al-Sulaiman 2011, p.46).

However, in the financial field it has been recently recorded that one of the scholars quoted a consensus. He said on *tawarruq* contracts that jurists in this era unanimously agreed on prohibiting *tawarruq* (asharqalawsat, 2007). This consensus is not *ijma* as an obligatory source because there has been a debate among Muslim scholars on this matter. As said above, it is nearly impossible to obtain the definitive *ijma* in later Islamic eras.

2.3.2.2. *Qiyas* (Juristic Analogy)

Qiyas, linguistically, has two meanings; comparison and measurement (Haron 1997, p.75). It means in a technical sense, the extension of a Shari'ah ruling to a new situation since the latter has the same effective cause as the former (Abdul-Hannan 2008, p.20). In short, *qiyas* can be defined as judicial reasoning or analogical deduction.

Qiyas derives its authority from primary sources as a fourth source in Islamic law. First, Qur'an states clearly the authority of *qiyas* in the following verse: "when there comes to them some matter touching (public) safety or fear, they divulge it. If they had only referred it to the Messenger or those charged with authority among them, the proper investigators would have tasted it from them (direct). Were it not for the grace and mercy Allah unto you, All but a few of you would follow Satan" (Qur'an 4:83). This verse encourages jurists to exercise reason and exert their reasoning faculty (Haron 1997. p.75). Second, the Sunnah also shows the *qiyas*' authority in Hadith, as in the case when Prophet (*pbuh*) sent Muadh Bin Jabal to Yemen, which is referred to earlier in this chapter (Al-Nasa'i 1999, p.58). This Hadith does not express analogical reasoning explicitly; however, *qiyas* falls essentially under the meaning of his usage of individual judgement.

The development of *qiyas* as a term started from *ra'y* (considered opinion). The simplest form of analogical deduction is *ra'y*, which played a vital part before *qiyas* become dominant. In the early Islamic era, the term *ra'y* was general and included *qiyas* and other varieties of *ijtihad* (juristic inference). Thus, the practice of *qiyas* began prior to the usage of its term. It began in the Prophet's period and continued after his demise. Then, after the early Islamic periods, *qiyas* became dominant and played a key role in Islamic jurisprudence, since human life requires changeable rules according to different circumstances. *Qiyas* is a source that provides adaptation to the changing needs of a rapidly developing society as well as keeping Islamic law alive and contemporary (Hasan 1970, p.53).

The usage of *qiyas* is restricted to the failure of the previous three sources to solve the problem. This means the jurists have to find a proper solution for the new case, first, in the Qur'an, Sunnah and a definitive *ijma*. In the case of non-existence and availability in these sources, it is allowed to use *qiyas* because *qiyas* can only be used when it is necessary. The necessity occurs when there is no narration concerning the matter that is being dealt with. Another condition for *qiyas* practice is the requirement of a special scholar (*mujtahid*), in

order to be capable of exerting and performing this function correctly (Weeramantry 1988, p.41).

In order to have an integrated understanding of the applications of *qiyas*, its types will be briefly outlined with some examples. In Islamic jurisprudence, *qiyas* has been divided into three types, namely, analogy of the superior, analogy of equal and analogy of inferior. Firstly, analogy of the superior, which is the effective cause,¹ is more obvious in the new case² than the original one³. To give a simple example, the Qur'an has stated the prohibition of saying a single word of contempt towards parents. By analogical deduction, this prohibition incorporates beating and lashing, however, these are forbidden because the effective cause is more evident in the latter than the original case. The second variety is the analogy of equal, which implies the effective of cause has equal effect upon the original and new case. To illustrate this type, the Qur'an has forbid the devouring of the orphan's property. By analogical reasoning, the prohibition of all other abuse of his property, such as destruction and mismanagement, are equally prohibited, owing to the equal effective cause in both cases. The final sort is analogy of the inferior which refers to when the effective cause in the new case is weaker than it is in the original. For instance, the reason for considering wheat as a *riba* commodity is edible (according to Shafi'i School) and measurement (according to Hanafi School). These two effective causes can be applied to an apple; however, they are less clear in the new application (Kamali 1991, p.214-216).

In conclusion, the *qiyas* source is considered a great gate for the growth of Islamic finance. All new instruments and products have not been stated explicitly in the primary sources. Also, *ijma* source seems impossible to conduct in this era. However, these three sources have some contract rulings that can be extended to the new cases by *mujtahids*, whether through analogy of the superior, the equal or of the inferior.

2.3.3. Tertiary Sources

A number of sources may be included under this title, but for the purpose of this study the sources will be minimized to six. They are *fatwa* of companion, *istihsan*, *istislah*, *urf*, *istishab* and *sadd al-dhara'i*. The main characteristics of these sources are their ability to conform with changes and evolution throughout Islamic ages. In other words, they have the distinct

¹ It a proper attribute that is found in both the original and new case.

² Shari'ah is silent on its ruling.

³ It has a rule by a text of the Qur'an or the Sunnah or explicit *ijma*.

feature of modification depending on the surrounding circumstances, provided that it does not contradict Shari'ah. The following part will evaluate the sources.

2.3.3.1. *Fatwa* of Companion

There is no consensus about who is the companion of the Prophet Mohammad (*pbuh*). Most jurists believe that the companion is anyone who met the Prophet Mohammad (*pbuh*) while believing in him as long as he died as a Muslim; whereas, the minority add the continuity of the companionship in the definition (Ibn Hajar u.d, vol.10, p.443). Both opinions have justifications and cannot be ignored; however, the latter is stronger than the former because the continuity of this relationship is essential for having sufficient understanding of Shari'ah as well as the qualification of being a companion. *Fatwa* of companion means a companion's opinion concerning any matters reached by way of exertion.

This sort of exertion can be classified as a source of law. However, schools of thought argued on the basis of four different opinions. The first opinion is held by the majority, Imam Malik, Imam Shafii and Ahmad bin Hanbal. Their view is based on the acceptance of the companions' *fatwa* as an absolute proof and has the priority over *qiyas*¹. This is because the companions were the most diligent in observing the Qur'an and Sunnah. They supported their view from the Qur'anic verses and Sunnah; the Qur'anic text says "the first and foremost among the emigrant and helpers and those who followed them in good deeds, God is well pleased with them, as they are with him" (Qur'an, 9:100). This verse demonstrates that who followed the companions has received praise from God; also this verse implies the command of God to follow them (Ibn Qayyim 1973, vol.4, p.440). Additionally, in the Sunnah, the Prophet said "my companions are like stars; whoever you follow will lead you to the right path" and also, in other places he stated: "honour my companions, for they are the best among you" (Kamali 1991, p.212-213). These quotations were argued by the opponents.

The opponent argued on the basis that both of the sources evidence described the companions in plural, which means it is not necessary for an individual's view to be praised as acceptable evidence. Furthermore, they do not include orders to obey the companion; they only show the companion's status and dignity. In response to this, it is clear that Shari'ah considers them as upright persons and individuals, and also that those who follow them are praised in the Qur'an.

¹ This view does not mean to overlook the tradition and deeds of the Prophet Mohammad (*pbuh*).

The opponents are Hanafi jurists; they do not concern the ruling of a companion as a source in Islamic law. They quoted a Qur'anic verse which said: "Consider, you who have vision" (Qur'an 59:2). This text instructs the jurists to exert their effort to deduce a proper ruling without any distinction between the companions and other scholars. So that means *ijtihad* is obligatory for anyone who is capable of exerting a new rule. In addition, this text directs scholars to rely on legislative sources without imitating anyone, including the companions. Further evidence: the proponents quoted the *ijma* of companions on the view that one companion does not bind the rest (Al-Ala'ey 1986, p.58).

Those two opinions carry weight and each of them has reliable evidence. In my opinion, *fatwa* of companion can be taken as guidance as their *fatwas* have a status in Islamic law.

The importance of *fatwa* of companions is attributed to several factors. The closeness and direct access to the Prophet Mohammad (*pbuh*) during his prophecy impact on their understanding to Islamic law. Also, the intimate knowledge of the legislation in the Qur'an and Sunnah is an important factor when considering their *fatwa* as an Islamic proof. This made the companions familiar with the circumstances that had surrounded the revealing of Qur'an, which is essential for proper inference from the primary sources. Consequently, they become more capable to render *fatwa* on a wide range of matters, as well as giving their *fatwas* a reputation in Islamic sources.

From an Islamic finance perspective, a financial matter can be found in companions' *fatwas* more explicitly than in a text from the primary sources. An example of this will be demonstrated in the following chapter.

2.3.3.2. *Istihsan* (Juristic Approbation)

There was a dispute on the technical meaning of *istihsan*. Some defined *istihsan* as the changing of a rule that was reached by *qiyas* or established by general principle to another ruling which is reached by stronger evidence. Others state that *istihsan*, basically, is taking the strongest evidence (Ibn Taymiyah u.d, vol.1, p.401). However the majority preferred the first definition and restrict the usage of *istihsan* on changing a rule that was reached by *qiyas* or established by general rule.

For more clarification of the preferred definition, the stronger evidence which authorizes the exception from a decision reached by *qiyas* can be one of the following: textual evidence from primary sources, *ijma*, *qiyas khfi* (hidden analogy), *urf*, necessity, or consideration of

public interest. These are the types of *istihsan* which will be illustrated briefly with some financial examples (Al-Ashqar 2004, p.145-146).

Istihsan which is found in a text from primary sources can be referred to *ijarah* (lease). Sunnah has excluded the hire contract from the general rule in Islamic finance. This general principle is that an object must exist at the time of the contract to avoid *ghara* (risk) and to be admissible. However, *istihsan* based on Sunnah validates *ijarah* despite the fact that the object of this transaction is usually non-existent at the time of the contract. In the Sunnah, the Prophet has tacitly approved *ijarah* since it has been in practice in his time and he did not prohibit it. In other words, according to *qiyas ijarah*, a contract is invalid while *istihsan* validates it by evidence shown in the Sunnah, which is a stronger proof than analogy.

Exceptional *istihsan* which is authorised by *ijma* can be illustrated with reference to the contract of manufacture of goods. *Istihsan* has validated this contract when the purchaser orders a certain commodity from a craftsman to produce it while *qiyas* would forbid it due to the non-existent object. This permissibility is authorised by stronger evidence which is the consensus among companions on the acceptance of dealing with the manufacture of goods. This variety is close to *istihsan*, which is found on custom.

It is evident from the previous types and examples that *istihsan* is a dependent and integral part of Islamic law. It plays a vital role in the adaptation of Islamic law to the changing needs in communities since *istihsan* primarily adopts the rules that match the reality. It considers the ruling approved by prevalent customs, or by public interest, to have priority over *qiyas*. This is to enable changing time and place as effective elements in Islamic law.

Istihsan is a form of *ra'y* (personal opinion) which is a jurist decision of the appropriate solution for a particular problem. This is based on his understanding of the objective and general spirit of Shari'ah. As mentioned earlier, the usage of exercising personal opinion (*ra'y*) must be formulated in the light of the purposes and general principles of Shari'ah. Also, the absence of evidence in superior proofs which are the Qur'an, Sunnah, explicit *ijma* and a stronger *qiyas* is an additional requirement for practicing *ra'y*.

Istihsan has generally been validated by the main schools of jurisprudence except Shafiah School. However, different schools have different principles to base decisions on. For instance, Maliki jurists accepted *istihsan* as a part of *istislah* (consideration of public interest). In addition, Hanafi jurists based their acceptance of *istihsan* on other principles.

They considered *istihsan* as a subsidiary source that avoids hardship and rigidity that might result from literal application of law, also, seeking easiness and facilities to Islamic ruling. They quoted different evidence based on their perspective on *istihsan*. For example, they mentioned in their books that the purpose of *istihsan*, which is to ease and facilitate, is enunciated explicitly in the Qur'an and Sunnah. In the Qur'anic text it is stated clearly: "God intends facility for you, and He does want to put you in hardship" (Qur'an 2:185). Also, in the Sunnah, the Prophet expressed that: "The best of your religion is that which brings ease to the people" (Kamali 1991, p.17-218).

In conclusion, it can be seen from previous briefs of *istihsan* that it is not a source in Islamic law. However, it is a way of balancing various solutions that may exist for a certain issue and then deciding which is the strongest. Hence, *istihsan* has been used by all *mujtahids*, even those rejected. Therefore, this source will not be expressed explicitly as evidence among jurists who discussed Islamic finance rulings. However, *istihsan* will be used through their methodologies to achieve a new ruling according to Islamic law.

2.3.3.3. *Istislah* (Considerations of Public Interest)

Istislah literally means bring benefit or prevent harm. It is synonymous with *maslahah*. In a technical sense, it is defined as a deduction of a rule which is proper and harmonious with the objectives of the Lawgiver (*maqasid al-shari'ah*), by which is secure benefit and prevent harm. These purposes are the five essential values, namely, life, religion, intellect, lineage and property, which Shari'ah aims to protect and promote. Basically, safeguarding of these five objectives is *istislah* (Zarkashi 1994, p.350).

According to some jurists, *istislah* is a proper ground for legislation¹. The principle objective of *istislah* is the realization of benefits for the people. This objective has been described in the Qur'an as a purpose of revelation "O mankind, a direction has come to you from God; it is a healing for the ailments in your hearts and it is a guidance and mercy to believers" (Qur'an 10:75). Also, in another passage, God has declared in an affirmative sense, "It is not within His intentions to make religion a means of imposing hardship" (Qur'an 22:78). This is affirmed by the Prophet (*pbuh*) Hadith "No harm shall be inflicted or reciprocated in Islam" (Al-Razi 1979, p.241). These quotations are considered the strongest evidence that support *istislah*.

¹ Scholars are in agreement that *istislah* is not a proof regarding two issues: devotional matters and the specific Shari'ah injunctions such as inheritance and penalties. Thus, it is a proof in respect of financial issues which are related to the subject of this thesis (Kamali 1991, p.27).

To illustrate *istislah* types with some financial examples, it has three sorts depending on the consent of Shari'ah. First, variety that Shari'ah has upheld it. This sort is unanimously validated and accepted by all schools of jurisprudence. For instance, *istislah* validates sale since it brings benefit and prevents harm and Shari'ah has approved this *istislah* in the Qur'an "Allah has permitted trading" (Qur'an 2:275). Thus, all scholars are agreed on the permissibility of sale. The second section shows that Shari'ah has nullified, whereas *istislah* approves it. In this case, all Muslim scholars agree on rejecting this variety and follow the rule of Shari'ah, since it is definitive and no longer open to debate. To give an example, *istislah* approved *riba* (usury) because it is beneficial; however, according to Shari'ah, this is unacceptable *istislah* since it is declared in the Qur'an "Allah has permitted trading and forbidden *riba*" (Qur'an 2:275). These previous types show that Shari'ah has priority over personal opinion *ra'y*, which *istislah* falls under. On the other hand, the third type is where Shari'ah has neither upheld nor nullified, while *istislah* approves (Ghazali 1992, p.173 -174). To give an explanation, a new instrument in financial transaction which is approved by *istislah* and Shari'ah was silent. This type has been divided into three sections, namely, the essential *istislah*, the complementary *istislah* and the beautifications *istislah*. All of these sections are designed to achieve the five objectives of Shari'ah, however, in three different stages, depending on the extent of the needs of this *istislah* (Ibn Qudamah 1978, p.169).

The question that needs to be asked is: can the new issues derive their ruling from *istislah* independently or not? In other words, does the third type have a legal authority in Islamic law? Schools of jurisprudence dispute its validity as a source. It has been accepted by Maliki jurists, whereas others have rejected it generally. The proponents of *istislah* have supported their view with the practice of companions. Companions formulated many new rules on the basis of *istislah*, such as making some prisons, on which Shari'ah was silent. In fact, all schools have used it generally because their *ijtihad* harmonize with the objectives of the Shari'ah as well as bringing benefits and preventing harm to the people, which are essentially in *istislah*. This is confirmed with the statement that, agreed by the majority, all Islamic laws have sought to secure *istislah* and satisfy the interests of the people (Halabi 1999, p.124).

The strongest opinion on the validity of *istislah* has been held by some of Hanbali jurists. This view holds that three main conditions must be fulfilled in order to validate *istislah*. First, the interest that *istislah* aims to achieve must be genuine, not specious, a genuine benefit is a proper ground for legislation, not a mere suspicion or speculation. This needs a sufficient contemplation of the possible benefits and harms that might result from a particular

istislah. Then, these probable benefits must outweigh the harms in order to enact this rule with its basis in *istislah*. The second condition is that *istislah* must be universal and benefit generally the whole community and not just a specific group of people. This condition requires ascertaining the beneficiary category and excluding the interest of a few individual people. This is because *istislah* validity derives from the concept of securing the welfare of society. Finally, *istislah* needs to be in harmony with the principle of Shari'ah and not in conflict with the primary sources and *ijma* (Al-San`ani 1986, p.209). Thus, the claim of permissibility of *riba* on the grounds of *istislah*, due to its benefits in modern times, is not acceptable because of the explicit text in the Qur'an that forbids *riba*. On the whole, the purpose of all of these conditions is to prevent arbitrary rules in Islamic legislation.

In conclusion, one of the cases for the usage of this source is the changing of rules according to the requirement of the growth of a community. Using *istislah* to change the fatwas has been authorized by the jurists (Habash u.d, p.57). *Istislah* is essential in the adaptation Islamic law with the changing of locations, periods, customs, and circumstances; because each age and place has a particular interest and benefit. If the lawgiver did not validate *istislah*, this would disrupt the interests of society. Hence, the changeable rules have to be modified on the basis of *istislah*.

2.3.3.4. *Urf* (Custom)

Urf is a noun derived from an Arabic root which means literally 'things that are familiar and known'. Technically, it is defined as a collective habit of a large number of people that is of sound nature. Hence, habits which are used individually are excluded from the definition of *urf* (Asmari 2000, p.92-93). An instance of *urf* as a basis of *ijtihad* in the area of transactions, is the concept of *gharar fahish* that is an excessive risk in the contracts which vitiates the transactions. The excessive risk opposes the minor *gharar* which is permitted in contractual agreements because it is often unavoidable. To ascertain the amount of minor *gharar* in a particular contract is determined by the common *urf* and reference to the practice among traders and persons who are engaged in similar contracts.

All main *fiqh* Schools generally accepted *urf* as a valid ground for legislation. They have quoted some Qur'anic and Sunnah texts in support of *urf*. The explicit verse that provides a clear authority is the command to the Prophet (*pbuh*): "Keep to forgiveness, and enjoin *urf*, and turn away from the ignorant" (Qur'an 7:199). Thus, according to this text, the Shari'ah

approved *urf* as a legal ground in the determination of its rules relating to permissibility and prohibition (Habash u.d, p.61).

In order to validate *urf*, there are four conditions that must be fulfilled. These requirements will be illustrated with instances in the transactions area. Firstly, a custom must be a prevalent and widespread phenomenon. This means that the *urf* must be practiced by either all or shared by a large number of people. Hence, the limited usage of *urf* or individual practice is precluded from authoritative *urf*. Secondly, this common practice must be present prior to a contract or a particular incident occurring. In commercial transactions, the effect custom is not given to subsequent phenomenon; it is just given to the current *urf*. This condition is related to the interpretation of some documents which are influenced by the prevailing customs in the period they were written. Thus, these documents are proper for a particular time and place where those customs were prevalent; however, they need to be modified when the customs are different. Thirdly, the common *urf* must not contravene an explicit stipulation of a valid agreement. The general basis is that a specific understanding between parties always takes priority over the prevalent customs because the agreements in a contract are stronger than the *urf*. Consequently, *urf* is only invoked when there is no clear agreement existent. Lastly, custom must be in harmony with the principles of Shari'ah in order to constitute a valid basis of *urf* for legal decisions. When the common *urf* contravene an explicit text in the Qur'an or Sunnah, such as usury, there is no doubt that the custom must be rejected (Al-Zarqa 1989, p.219-222).

To give an example of these conditions, when a person buys a house, the items that included in this contract by *urf*, must be widely practised at the time of this sale and also fulfilled all other terms.

The essential value of *urf* emerges in *ra'y*, such as *istihsan* and *ijtihad* (juristic inference). To illustrate this, *ra'y* has often been formulated in the light of prevailing *urf*. The rules of *fiqh* are, for the most part, harmony with the common customs in the absence of an explicit ruling in the Qur'an or Sunnah. Consequently, the changing of the prevailing customs due to the differences of time, place or circumstances leads to adjustment and changing of those rules. This can be exemplified by some of al-Shafi'i views in Iraq that had been changed by him when he went to Egypt, owing to the different place and customs that he encountered. Similar to *ra'y* is Sunnah, which shows the significant effect of *urf* during Prophet Hood. Customs during the Prophet's (*pbuh*) time have been incorporated within the tacit approval Sunnah,

when these customs were not expressly nullified by him. This sort of *urf* has been transmitted by the companions who referred to it by such “we used to do such and such while the Prophet (*pbuh*) was alive” (Al-Ashqar 2004, p.156).

Although, the similarities between *urf* and *ijma* are considerable, differentiations between them exist. It is beneficial to be clear on the differences between them, which can be summarised into four points. First, custom can exist with the agreement of the majority and it is not affected by disagreement from the minority, whereas *ijma* demands a consensus from all *mujtahids* in a certain period when *ijma* exists. A minor dissension or dispute among qualified scholars can prevent a valid *ijma*. Second, the agreement of the *urf* by all or most people of the community without any distinction between laypersons and scholars. *Ijma*, on the other hand, accepts only the view of qualified *mujtahids* and laymen have no say on juridical issue. Third, the legal decisions which are based on customary usage are liable to be changed when the *urf* is no longer used due to different circumstances. Hence, these rules are open to the possibility of fresh ruling, however; the rules based on *ijma* prevent a new *ijtihad* on these agreed matters since they are fixed and unchangeable. Also, *urf* needs a period of time for existence, which means the continuity is an essential element for *urf* occurrence. However, this requirement is not necessary for *ijma* since it exists once the consensus is concluded (Kamali 1991, p.252-253). A final distinction can be given that custom is limited usually by a certain place and it tends to be a local or national practice. *Ijma*, on the other hand, must have a consensus among Muslims scholars across all places and countries.

2.3.3.5. *Istishab* (Presumption of Continuity)

Istishab literally means companionship. In technical usage, it refers to a rational proof which is presumption of continuity of the pervious facts in the absence of other proofs. For example, when the contract is concluded, it presumes the continuity of its validity till the change is established by the evidence. This proof has been validated by the Shafi'i and Hanbali jurists, while others do not deem it as evidence in Islamic law (Al-Ashqar 2004, p.176).

Istishab has been used commonly in contract applications. For instance, the actual contract of sale will be valid until the invalidity is proven by acceptable means. Also, temporary contracts, such as lease, cannot be presumed valid on a permanent basis by *istishab* since there is a specific period in the contract. *Istislah*, also, is proof of the continuation of the negative, for example, a purchase of a new car from a trader with the proviso that it hasn't

been used, but then the purchaser claims that the car is not new. This claim will be acceptable under *istishab* unless there is evidence to the contrary.

For more explanation of *istishab*, this proof is divided into four varieties, as follows. The first type is the presumption of original absence, which means a fact that did not exist in the past is presumed non-existent in the present until the contrary is established. For example, in transactions area, the claim from a trader to his partner that he has not made any profit from the business is accepted by the presumption of original absence until the partner proves the contrary. The opposite variety is that the presumption of original presence. This refers to the existence of a fact or a rule in the present owing to its existence in the past. This presumption continues until the change is proven. To give an illustration, *istishab* presumes the presence of the responsibility to the purchaser to pay for the commodity until the non-payment is proven. The third type is the presumption of the continuity of the principles or rules. For instance, there is a rule of permissibility of *mudharabah*; *istishab* presumes the continuity of this ruling until the change is established. On the other hand, when there is no rule available on a matter; it will be presumed that it is permissible according to the principle in Islamic law that when the law is silent the permissibility will be the rule. This rule has been declared in a Qur'anic text that "It is He who has created for you all that is in the Earth" (Qur'an 2:29). The last variety is the presumption of the continuity of attribute. This can be clarified by presuming the continuing of the validity of a certain contract. The attribute of the validity remains until the contrary is proven. From all of *istishab* varieties, it can be concluded that this proof is not a method of a juristic deduction in its own right; however it is mainly concerned with implementing other evidence for validity and continuity (Ghazali 1992, p.159-160).

It is important to note that *istishab* can only be employed when there is no availability of other legal sources. The jurists can apply it on a particular issue after the searching of all proofs, starting with the primary sources. In the case of the existence of other evidence on a particular matter, *istishab* cannot be used. This is because the stability of a rule in the law is legalised by its evidence and there is no need for any presumption. Although, *istishab* has been considered as proof by some schools of thought, it has not been deemed a strong basis of legislation in Islamic law, owing to its probability. As a result of this, it has the latest ground in the legislation.

2.3.3.6. *Sadd Al-dhara'i* (Blocking the Means)

Sadd, literally, is the blocking, while *dhara'i* is a plural that indicates the obtaining of a certain result. In juridical usage, it is defined as a blocking of the lawful means that lead to evil or unlawful activities (Al-Ashqar 2004, p.195).

Dhara'i has been divided into four types, depending on how frequent the means lead to evil. The first sort is the means that result in certain evil or harm. An instance of this would be trade or commercial transactions during the prayer times, which lead to the omission of praying with Imam. Secondly, the means which mostly lead to harm and hardly ever result in benefits, such as selling weapons during war. The third type of means is those which are often consequences of unlawful acts such as deferred sales leading to *riba* (usury). The final variety of *dhara'i* is that which seldom leads to unlawful ends and usually leads to benefit, such as selling grapes to a fruit dealer.

The schools of *fiqh* are in agreement over blocking the first type of *dhara'i* (means) and on permissibility of the final sort; however, they differ on the other two types which are most likely, and frequently lead to evil. Maliki and Hanbali jurists consider these sorts to be prohibited and blocked, whereas Hanafi and Shafi'i rule in favour of the permissibility of these means (Al-Nammlah 1999, p.1016-1017).

In terms of financial applications, there are a number of contracts that sometimes lead to *riba*. The permissibility of these contracts depends on how frequently they lead to usury. For example, *inah* sale¹ definitely leads to *riba*, as this sale is considered as a means to usury. Thus, this contract is not accepted in Islamic law.

2.4. The Sources of the Four Schools

The four schools differ in their methodology of law. Each school has different sources to rely on in order to deduce a new rule. To link the early discussions, this section summarises the methodology of the Islamic schools of thought.

The sources of Hanafi School were pointed out by the originator when he said: "If I do not find my answers in the Qur'an or in the Hadith, I will seek the views of the Prophet's companion from whose opinion I would not deviate to the opinions of others. But when it comes to Ibrahim al-Shabi, then, he counted a number of other *mujtahids*, well, they are the

¹ The definition of *inah* sale will follow in the next chapter.

people who had restored to independent interpretation and I would do likewise”. In addition, Hanafi jurists strongly asserted that the changing of law according to the differences of times, places and circumstances. In other words, Hanafi methodology involved the major four sources of jurisprudence in its hierarchical order; the Qur’an, the Sunnah, *ijma* and *qiyas*. Hanafi School, in addition, relies heavily upon *istihsan* as a source of their decrees (Kattan 1996, p.331).

As discussed, the Maliki sources are the Qur’an, the Sunnah, *ijma* and *qiyas*. It is considered to be a more traditional school in comparison with Hanafi, as Maliki followers are stricter on adhering to the text from the Sunnah. Also, it refers to the companion’s *fatwas*, *istihsan*, *Sadd al-dhara’i* and *istislah*.

As other schools, shafi’i accepts the Qur’an, Sunnah, *ijma* and *qiyas* as sources of Shafi’i doctrine. However, he rejected what is called *istislah* in maliki jurisprudence and *istihsan*, which is authorised in Hanafi *madhhab*. The methodology of this *madhhab* also includes the companion’s *fatwa* and *istishab*. In other words, Shafi’i School has based its ruling on the primary and secondary sources and some of the tertiary sources.

According to Hanbali School, the paramount sources of legal authority are the Qur’an, Sunnah and the *fatwa* of the companions, if nothing contradicts them. In addition, this school gives less authority to *ijma*, as well as limiting the scope for using *qiyas* in deriving Islamic law. Consequently, it has a reputation for strict adherence to the Qur’an and Sunnah. In other words, Hanbali School stipulates authority to four sources of jurisprudence; the Qur’an, the Sunnah of the Prophet (*pbuh*), *ijma* and *qiyas*. However, analogical reasoning is only applied if direct material cannot be found in the primary sources. Generally, this school adheres to the scripture and traditional sources; therefore, it is considered the most conservative school of law (Ibn Badran 1981, p.113).

From the above, it can be said that the main distinction between Hanfi *madhhab* and the rest of the schools of *fiqh* is the doctrine of placing more reliance on *ra’y* than on traditions. In this *madhhab*, they mostly rely on reasons, logic, *ra’y*, *qiyas*, and putting more emphasis on the *istihsan*, and public interest in the formulation of laws. Thus, it was known as *Ahl al-Ra’y* (people of opinion). The strong Hanafi reliance on *ra’y* was due to the lack of access to the Prophet’s sayings in Iraq in that period as they merely referred to the Sunnah that was transmitted by companions residing in Iraq. Therefore, this school became slightly more liberal than the other three schools which rely more on traditions (Kattan 1996, p.332).

In conclusion, the four Islamic schools agreed on the authority of primary and secondary sources. Tertiary sources, where the dispute occurred, have distinguished the methodology of these schools.

2.5. Legal Concepts & Principles Related to *Tawarruq*

Islamic jurisprudence has a great number of principles and legal maxims. These principles fall under different concepts. This section selects two concepts that are more relevant to *tawarruq*.

Firstly is the concept of *hila* (legal artifice). It is used to obtain a desirable legal outcome through lawful means. It is a mean by which a person could legalise a certain act which is originally considered prohibited. It means that the use of *hila* is to circumvent Riba or any illegal act. Among scholars, this method is acceptable when used to attain a lawful end. Among schools of thought *hila* gains acceptance by Hanafi and Shafi'i Schools. However, they differ in the application of *hila*. Hanbali and Maliki Schools considered *hila* illegal (Ahmed 2011, p.21)¹.

Secondly, principles on Islamic jurisprudence are based on necessity and concession. Both of them are deployed in accordance to an established legal maxim. It is used to change status from lawful to unlawful in a very strict application and the status must be retrieved when the difficulty ceases to exist (Ahmed 2011, p.21).

Summary

This chapter has introduced *usul al-fiqh* by clarifying the concept of *usul al-fiqh*, providing a brief outline of the main schools of fiqh and finally discussing the Islamic legislative sources.

It has started with the definition of *usul* and shown that *usul* is the basis of *fiqh*. This means the distinction between *usul al-fiqh* and *fiqh*. The main difference is that *usul* is concerned with the methods applied to deduce an Islamic ruling while *fiqh* is concerned with the Islamic ruling related to our deeds.

The chapter identified the four schools of Islamic jurisprudence in the Sunni tradition. All four schools use the Qur'an as a primary source, followed by the Sunnah of the Prophet

¹ For more details on *hila* refer to (Horii 2002).

Mohammad (*pbuh*), then the scholar's consensus and *qiyas*. They only dispute the tertiary sources. The chapter has also shown the places and countries influenced by these schools in the present time. It can be said that Hanafi School spread eastward, whereas Maliki westward. Shafi'i prevailed in Greater Syria and South East Asia, while Hanbali has the least followers.

Finally, the chapter studied the Islamic sources and divided them into three groups; primary, secondary and tertiary sources. Primary sources (Qur'an and Sunnah) have been accepted universally as spiritual sources. The financial rules that are derived from them have a comprehensive and timeless character. These rules are stable in different eras, locations and circumstances. They have the power to supersede and cancel incompatible customs with such ruling.

Secondary sources include consensus among Muslims jurists and analogical deduction. The rules based on *ijma* are binding and final; however, it seems impossible in modern times to make such *ijma*. On the other hand, most Islamic financial rules are based on *qiyas*.

The tertiary sources comprise a number of legal sources. According to these sources, most derived rulings can be modified in accordance with the changing of the four elements (time, place, custom, circumstance).

Chapter 3 : Traditional *Tawarruq* in the Past Time

Introduction

Tawarruq contract is discussed in Islamic jurisprudence books. The word *tawarruq* is linguistically taken from the word *al-wariq*, which means silver coin. In this sense, *al-wariq* is also the given name of a person who has a plenty of silver coins. Afterwards, the word was used mostly when seeking silver money, while this term is used now for seeking paper money. This is considered a valid linguistic usage as it is derived from a word that has a similar meaning (Ibn Mandhur u.d, p.374). This is because the creditor, through *tawarruq*, becomes rich since he has increased his liquidity, either in the form of silver coins or in the form of contemporary paper money (Al-Zuhaili 2009, p.2). *Tawarruq* can be defined technically as a purchase of a commodity for a delayed payment, and then the buyer sells it on for cash to someone else (not the first seller). *Tawarruq* in this sense is basic, individual and un-arranged.

Tawarruq contract was practiced in the early days of the Islamic era. The practice was influenced by four central elements (time, place, customs and circumstances). However, at present, many studies have been conducted about the modern *tawarruq*. Some of these papers discuss the scholarly views on the contemporary practice of *tawarruq*. On the other hand, the early practice has not been studied extensively by researchers. On this basis, it would be beneficial to undertake the classical form and discover the early jurists' opinions and their evidence.

This chapter presents the classical form of *tawarruq*. It examines the jurists' views over the Islamic eras, particularly the era of the four Islamic schools of jurisprudence. The views of Islamic jurists are cited from the early compilations in order to corroborate the early dispute on *tawarruq*. This examination focuses on the four Islamic Schools of thought, as they have influenced the contemporary scholars. The aim of this chapter is to study the roots of different opinions on *tawarruq* in the past, whether they stem from time factors, place, custom or different circumstances.

3.1. Classical *Tawarruq*

Classical *tawarruq* has been confused with other contracts. This term can be characterised by the following. First, in terms of the contractual relation, there are three different parties. The first party is the seller (creditor). The second party is the buyer (*mustawriq*), who is looking for liquidity, and finally, the third party, who purchases the commodity from the *mustawriq*. Secondly, in terms of the legal control of the contract, there are two separate transactions without any pre-arrangement between the parties. Finally, in terms of the contract's purpose, the aim of the second sale is to get the money.

There are two common reasons for dealing with individual *tawarruq*. These have been indicated in jurists' books. The first reason is when a person is in need of cash and he does not find a lender or does not want to ask anyone for a loan. Thus, he buys a commodity on credit in order to sell it to obtain the cash. The other cause is when someone requests a loan from a trader; the trader has no cash but he offers him a certain commodity for cash price on a delayed payment basis. The aim is to assist the *mustawariq* to sell it in the market and obtain the money without any profit to the trader. However, this rarely happens since the trader wants to benefit from the contract. Thus, the common form of the contract involves requesting the trader to accept a delayed payment, then; the trader will sell the commodity to the *mustawariq* for a higher price than it is in the market. The higher price is due to the consideration of the delayed payment (Bouheraoua 2009, p.9).

3.1.1. The Usage of *Tawarruq* Term

During the third Islamic century, the common use of the term *tawarruq* was begun by Hanbali jurists. Ibn Muflih (d.1362), one of these jurists, stated that if a person is in need of money and, therefore, he buys what is worth one hundred for two hundred, it is acceptable, since this is cited by Imam Ahmad, and it is the term of *tawarruq* (Ibn Muflih 1997, vol.6, p.467) While, jurists, prior to the Hanbali age, discussed classical *tawarruq* in their research and books, generally under the forbidden sales, specifically under the subject of *inah* sale or *riba*, without using the word *tawarruq* explicitly.

However, an erudite scholar, Ibn al-Qayyim, cited a statement by Umar ibn Abdul Aziz, who lived in the beginning of the second century of Islam, who said that “*tawarruq* is the basis of *riba*”. If this statement is confirmed to him, this would be an indication that *tawarruq* had been used in the technical sense since the second century of Islam. This is because some

studies claim that they have not come across the statement in any of the authentic transmitted books (Uthmani 2009, p.2).

Also, it can be argued that there was an explicit technical usage of *tawarruq* before the second century by Imam Ali bin Abu Taleb, who lived in the first century. He stated that “I would not abandon the *hajj* (pilgrimage) even if I had to do it through the *tawarruq*”. Above all, the well-established term of *tawarruq* was begun by the Hanbali jurists in the third Islamic century, even if there were some few usage of this word earlier.

3.1.2. *Inah and its Relation to Tawarruq*

Scholars have differed in opinion on the technical definition of *inah*. This is because of their differences of opinion regarding the forms of *inah*. However, one of the common definitions among early scholars is that *inah* is a sale of a commodity for a delayed payment until a fixed date, and then the seller repurchases it for lower cash price (Al-Nawawi 1997, p.163). An example of this case is that the purchaser buys a commodity for 200, the deferred price, and then sells it back to the seller for 150 cash price. In this case, the seller basically loaned the buyer 150 in order to get 200 at a future date. Thus, it is considered that interest based lending (*riba*) as the difference between the two numbers is 50, which is the interest upon lending 150.

From the above clarification, it can be seen that *inah* is a fictitious sale since it does not conclude with a genuine sale. It is merely used as a means to achieve the *riba*. In fact, *inah* is a loan with interest that is provided by the creditor (the seller). This was stated by Ibn Hajar (d.1371) when he said that, despite the validity of *inah* sale, theoretically as it fulfils all sales' conditions; it includes a cheat and trick to achieve *riba* which cause the sin for those who practice the *inah* sale (Ibn Hajar u.d, vol.12, p.337).

As mentioned, the differences that appeared on *inah* definitions are a result of a variety of its forms. These forms have been mentioned in early jurists' books. The first common variety, which is the basic form of *inah*, is that a person sells a commodity to another for a deferred payment and then buys it from him at a lower price in cash. The second form 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 distinction between the second type and the first one is the existence of an intermediary, while the rest of the contract's structure is akin. The next form can be illustrated by an

example of a person who lends £100 from another. Then the lender sells something that is worth £50 for £100 to the borrower in order to benefit from the higher price of his selling. Eventually, the £100 loan will remain on the borrower to be repaid along with the £50 that he had paid over the original price of the commodity purchased. This sort consists of lending and selling in order to cover the interest that is included in the lending (Bouheraoua 2009, p.12). It can be noticed from these varieties of *inah* that despite the differences of their procedures, the essence of all forms is purchasing a commodity for a higher deferred payment in order to sell it for immediate cash.

The essence of *inah* sale appears akin to *tawarruq* contract. The process and purpose of the first selling in both contracts is similar¹. In both contracts, the first seller will sell the commodity on credit for a price greater than the cash market price, since the main aim in both transactions is the acquisition of money. Additionally, both transactions are deemed a trick to avoid involvement in an interest based loan. However, there is a distinction between them; *inah* implies the act of selling a commodity on credit, and then the seller buys it back at a cash price less than the selling price; whereas, the buyer (the second part in the transaction) in *tawarruq* is not the seller himself. In *tawarruq*, the buyer will sell the commodity to a third party who has neither arranged nor knows about the first sale. Hence, while the requester of *inah* will return the commodity back to the seller, the commodity in individual *tawarruq* is at the *mustawriq*'s disposal. It is in his possession to sell it in the market at the current price to acquire cash.

3.2. Classical *Tawarruq* during the Early Islamic Eras

This section will examine the topic during the most prominent era of Islam by providing some of the jurists' views on individual *tawarruq*. The study will start from the Prophet's time and his companions' era and then move to the following Islamic eras, including the age of the main four schools of jurisprudence until pre modern times. The aim is to present the jurists ruling on *tawarruq* through different periods in order to notice the differences between these rulings. Also, to examine to what extent classical *tawarruq* was used as a source of liquidity in different periods. Moreover, analysing the technical term of *tawarruq* during different ages and looking at how the similar contracts affect the clear version on *tawarruq*.

¹¹ The purpose of *inah* and *tawarruq* is the same (to obtain cash). Also, the process of the first selling in both contracts is similar. However, the entire process is different.

Eventually, the impact of the locations and periods variety on the matter of *tawarruq* will be examined.

3.2.1. *The First Islamic Era*

The first era of Islam has to be divided into two periods; the Prophet Mohammad (*pbuh*) time and the era of his companions after his death. The purpose of this division is that the features of the Muslim community started to change after the Prophet's (*pbuh*) life ended. Thus, *tawarruq* contract after the Prophet's (*pbuh*) death will be studied separately to that during his lifetime, as the circumstances differed.

The first age to be discussed is the Prophet Mohammad's (*pbuh*) Lifetime. *Tawarruq* sale during this time requires examining the Hadith of the Prophet (*pbuh*) in order to find out whether this contract was known in that period or not. After searching the Prophet's sayings, it can be said that there is no explicit text from the Prophet (*pbuh*) about this topic, or even an implicit expression of such a deal, neither is there an indication of the practice nor about the ruling. However, there is a saying by the Prophet Mohammad (*pbuh*) about a close contract to *tawarruq* which is *inah* sale. He said: "If people deal with *inah*... Allah will humiliate them and He never changes their situation unless they go back and stick to Islam" (Al-Bayhaqi 1925, p.293). Despite the Prophet's ban on *inah* sale, which is a comparable transaction to *tawarruq*, this does mean, or even lead to, the forbidding of individual *tawarruq* since they are considered two different contracts in some aspects. In addition, there is another text in the Sunnah that indicates a similar contract to *tawarruq*. The Hadith is that the Prophet (*pbuh*) appointed a person as the governor of Khaibar who later brought to the Prophet (*pbuh*) *janib* (a high quality of dates) from Khaibar. The Prophet (*pbuh*) asked, "Are all the dates of Khaibar like this?" He responded, "No, by Allah, O Allah's Messenger! But we take one Sa' of these (dates of good quality) for two of 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*. (Al-bukhari 1987, p.767). In this contract, it has two separated transactions as the contract of *tawarruq*. The Prophet (*pbuh*) approved the type of the contract that includes two sales. Although, there are some similarities between this contract and *tawarruq*, this ruling cannot be definite on *tawarruq*.

The above indicates that *tawarruq* contract was not practiced and the people were unaware of it during the Prophet's time. If *tawarruq* contract was practiced during the Prophet's time, this would require a clarification of this form of the transaction by the Prophet (*pbuh*).

Classical *tawarruq* was not practiced during this age because of *tawarruq* was not recorded. The reason for the non-existence of *tawarruq* sale can be attributed to two points. The first factor is that there was no need for such a contract during the time of the Prophet (*pbuh*), since people were cooperative and acted as benefactors. They provided *qard hassan* or a gratuitous loan, without acquiring any benefit from such a loan since the creditor asked for reward from God. Thus, there was not any exigency or even requirement to invent a transaction to provide the cash for needy people. The second attributed reason is that the companions during the Prophet's time were far from using the trick in a contract to merely obtain cash since they were honourable, as God and His messenger Mohammad (*pbuh*) have honoured them in the Qur'an and Sunnah.

The second period of this first era is the time of the Prophet's companions after the death of the Prophet. There were some companions who gave *fatwa* on the new transactions that faced them. The most prominent of these companions are Aishah, who is the Prophet's (*pbuh*) wife, Ali Bin Abu Taleb, who is the Prophet's (*pbuh*) cousin and the fourth Caliph, Ibn Abbas and others. The main juristic feature in this period is that issuing *fatwas* is relied on the Prophets' companions only; therefore, *tawarruq* transaction will be examined through their *fatwas* in order to identify the situation of *tawarruq* during their age.

After examining the companions' *fatwas*, an explicit *fatwa* on *inah* sale can be found. It was narrated that Aishah and Abd Allah ibn Abbas had forbidden it. For instance, Aishah 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". Aishah 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' (Al-Daraqutni 1966, p.308). This shows Aisha's view on a contract that is similar to *tawarruq* is strict prohibition. The strictness is understood when she answered about dealing with such a sale with a strong expression.

However, an explicit text about *tawarruq* contract mentioned by Ali bin Abu Taleb has been transmitted. He said, "I would not abandon the *hajj* even if I had to do it through the *tawarruq*" as well, as Aishah said something in the similar vein (Firoozye, 2009). This can be considered the first explicit usage of the term *tawarruq* among the first Islamic generation, even if it is not explicit on *tawarruq* ruling. This quotation indicates that *tawarruq* was allowed, however disapproved. *Tawarruq* permissibility, according to Ali bin Abu Taleb's view, can be understood from his quotation, since he would not accept to go to *hajj* through

money received by a forbidden sale. This is because in Islam the ability to go to pilgrimage is required, thus, the *hajj* is not obliged to those who do not have sufficient money. The disapproving view can be seen in the statement by Ali bin Abu Taleb that he would not use *tawarruq* except if he needed to deal with it. This means that he does not approve dealing with *tawarruq* unless it falls under the necessity principle.

The explicit usage of the term *tawarruq* in this period refers, undoubtedly, to the existence of such a deal among the commercial contracts. This early practice of *tawarruq* contract among dealers can be ascribed to two factors, first, to the increase in people's need for liquidity, and second, to the expansion of the Islamic state, which leads to new transactions that meet the requirements of such a development. However, the usage of *tawarruq* contract, in that age, was still small and limited, as the companions did not mention it in their *fatwas* plentifully, neither did they show it ruling explicitly. The non-spread of the contract may be attributed to the lack of communication between people. *Tawarruq* was only practiced by traders who were familiar with it. Due to these circumstances of the time, the knowledge of the *tawarruq* concept is restricted to a small group of people.

In light of the above, it can be noticed that the *tawarruq* transaction was in its infancy stage because of the limited practice and inadequate spread. This is the main difference between the two periods of the first Islamic age. In the first period (the Prophet's (*pbuh*) time) *tawarruq* contract seems not to exist; it did start in the next period, but only in a few limited situations. This shows the impact of time in constructing contracts that cope with the era, such as *tawarruq* sale, which is found under the needy circumstances of liquidity source that is acceptable in Islamic law. However, the effect of time during the first century of Islam on the structure of contracts was minor, since the classical contracts, such as sale and leasing, was sufficient for the period's requirements.

3.2.2. *The Age of the Tabi'een (Followers)*

Before examining *tawarruq* contract in this period, a brief overview will be given of the precise meaning of *tabi'een* age. This will be done by clarifying the definition of the *tabi'een* and specifying the approximate time of the beginning of this period. *Tabi'een* means a Muslim who born after the Prophet's (*pbuh*) lifetime and saw one of the companions. Their era started after passing the preceding period when the companion's generation ended. Then a new era began, at roughly 90 A.H. and around 710 A.D. (Al-Alwani 1990, p.14). The companions' period was followed by the time of the *tabi'een*, which is considered one of the

vital periods of Islamic eras. This is because *tabi'een* played a key role in the development of jurisprudence. There were a number of scholars who became responsible for *fiqh*, and gave *fatwas*, such as Saeed bin Al-Musayyib and Al-Hasan Al-Basry. These scholars responsible for issuing *fatwas* were given a structure of the new deals and situations that emerged in their era.

Practice of *tawarruq* continued during *tabi'een* age, as it is in the companion's age. However, it began to expand among people who were in need of money since they would not be able to obtain the liquidity through neither *riba* nor *inah* sale, as they are forbidden in Islamic law. As practice of *tawarruq* started to grow, there were a number of questions on the legality of practicing individual *tawarruq* which required several *fatwas* to be given by *tabi'een* jurists on this contract. This will be studied through some samples of the *tabi'een* verdicts on *tawarruq*. The first sample is the Saeed bin Musayyib's *fatwa*, who is considered one of the most knowledgeable jurists in the transactions. He was asked about someone who 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 if the seller interferes in the second sale (Ibn Abi Shayba u.d, vol.8, p.295). It can be seen that Saeed permitted individual *tawarruq* as long as the first seller is not involved in a later sale. The second *fatwa* was issued by Hasan ibn Yasar al-Basri, who was one of the erudite scholars during the *tabi'een* era. He gave many *fatwas* on the financial dealings which were practiced during his age, since traders were questioning him about the Islamic ruling on some of their dealing. One of these traders said to Hassan "I sell silk for a deferred price, and when the buyer is women, she usually says: sell it for me as you know the market". Al-Hasan said: "Give the buyer the commodity and leave him. Do not sell it, nor buy it, only guide to the market" (Al-Sanani 1982, p.295). This tradition includes a number of indications.

The first indication from the above narration is about the common deals during Hassan's age. When the trader said, "I sell silk", it indicated that using silk for obtaining cash was dominant during the early Islamic eras. This indication is confirmed by an Ibn Abbas quotation when he described *inah* sale, he said that it merely money for money and the silk commodity is traded to execute the virtual sale. It means that buyer and seller used to use silk commodity in the past to execute *inah*. It means that a commodity that is used to cover acquiring the cash was silk; therefore, *inah* sale was called in that time the sale of silk (Ibn Abi Shayba u.d, vol.5, p.24). Similarly, *tawarruq* sale has a similar purpose to *inah* sale in obtaining money. Thus, silk was a prevalent commodity in this type of contract.

The second indication is on the ruling of *tawarruq* according to Hassan's view. His response to the previous tradition was explicit on preventing the seller from interference in any way when collecting cash for the buyer. For this he said: "give him the commodity and leave him". This citation implies that when the seller does not interfere with the second transaction, it would be permissible to obtain cash through such a deal. This deal is considered an individual *tawarruq* contract since the trader asked about selling on deferred price, then the women buyer sold it in the market to a third party.

The third point on this tradition examines his response in detail to conclude with his precise ruling on individual *tawarruq*. When Hassan said: "Do not sell" he means preventing the re-sale of the commodity on behalf of those who had bought it from the trader. This saying includes the acceptability of the contract when this condition is fulfilled. Also, when he said: "Do not buy it" he means prohibiting the *inah* sale, as the deal will be just between two parties. Finally, when he said: "only guide to the market" means do not even guide him to another buyer to purchase the commodity in cash. This tradition validates individual *tawarruq* with some conditions. The main condition is that preventing any interference in the process of *tawarruq*, thus, he said: "give him the commodity and leave him" which summarised all the previous terms (Al-Suwaylim 2004, p.4-5).

In conclusion, it can be noticed that *tawarruq* contract was known since the first Islamic century, before the emergence of *madhabs* (schools of jurisprudence). Also, the *tabi'een's* *fatwas* were more explicit and crucial in *tawarruq* ruling as the practice began to increase in the period. They generally accepted *tawarruq* contract; however, with some conditions.

3.2.3. The Age of the Mujtahids (qualified jurists)

After the *tabi'een's* period, the time of *mujtahids* started. This age was famous for a number of scholars who were issuing *fatwas* in doctrinal matters, including financial transactions. The most prominent scholars of these *mujtahids* are the four Imams; Abu Hanifah, Malik, Shafi'i and Ahmed bin Hanbal. The views of four Imams became a school of jurisprudence. They appeared roughly at the same time; however, it is known that they emerged in different regions; Abu Hanifah in Kufah, Malik in Madinah, Shafi'i in Egypt and Ahmed bin Hanbal in Basrah. This section will shed light on this age, as it will show the main characteristics of this specific time. Then, it will move on to the impact of different places on the issue of *tawarruq* ruling by showing the opinions of the four schools which originated in different regions. These views are demonstrated by giving evidence from their documented books, and

the statement of their jurists. Finally, this section examines whether the early jurists view is different from the later followers to the same School on this issue- examining the influence of time.

3.2.4. *The Noticeable Feature of the Four Imam's Era*

The era of the four imams started after the age of *tabi'een*. It started from the early second century of Islam. This age was the time of the opening of *ijtihad*, due to the considerable number of *mujtahids*. The large number of *mujtahids* led inevitably to the writing of the Islamic jurisprudence, as it had not been written on separate books before this age. Other reasons for this writing were the expansion of Islamic countries, which called for the writing of the Islamic jurisprudence in order to easily spread the Islamic ruling among the people. Hence, many scholars wrote their opinions and views, however, most of these opinions did not spread. The only schools that have prevailed over the eras are the four main *madhabs*.

Moreover, this age is described as Muslims belong to different nations that included Arab and *ajam* (non-Arabs) such as Persians, Romans. This has an influence on the *urfs* (customs) of the Muslim community. Another effect of the *ajam* entrance in Islamic society was new events and situations that required modification and adjustment in order to suit society. Moreover, the expansion of material life and social life since the increase in liquidity and funds in comparison with the previous periods was noticeable. Also, giving *fatwa* on hypothetical situations was one of the practises (Kattan 1996, p.326). Some jurists searched for solutions and gave *fatwas* to this hypothetical case before they occurred. However, proceeding this era scholars were issuing *fatwas* only on events that were present and they did not assume any hypothetical situations.

3.2.5. *The Four Schools Views on Classical Tawarruq*

This section will highlight the rule of *tawarruq* contract according to the Hanafi, Maliki, Shafi'i and Hanbali Schools. In some cases the rules of *inah* sale will also be presented for two reasons. First, in some of these *madhab*, there was confusion between the concept of *inah* and *tawarruq* contracts as both contracts called *inah* sale in their books. Consequently, some of their jurists mentioned the rule of *inah* sale when they intended *tawarruq* contract. Their intention, whether it was *tawarruq* or *inah*, can be determined by the context in which they describe the transaction. This underlines the importance of authenticating the *madhab's* view with a citation from their document and statements of their reliable jurists. The second motive

is that when there is no explicit rule on *tawarruq*, its ruling can be deduced from *inah* ruling. For example, who allows *inah* contract, obviously, allows *tawarruq* contract.

3.2.5.1. Hanafi School View

As mentioned previously, Hanafi School is the earliest *madhab* and emerged from what is contemporarily called Iraq. This has had an impact on Hanafi School, especially when relying heavily on rational evidence, such as *qiyas* and *istihsan*, more than tradition and Sunnah. This is because, during Abu Hanifah's time, Iraq had a fewer of the Prophet Mohammad's (*pbuh*) Hadith in comparison with Medina. This made Hanafi jurists recourse to the rational proofs in order to fill their need for evidence. However, the locative impact did not have a significant effect on the issue of *tawarruq* because of two points. First, there was not any explicit tradition of the Prophet Mohammad (*pbuh*) on *tawarruq*; thus, as all other schools rely on evidence other than the saying from the Prophet (*pbuh*). Secondly, as noticed in early Hanafi books, the ruling of the Prophet (*pbuh*) on the issue of *inah* sale, which is close to *tawarruq*, was known in Iraq.

In Hanafi school of thought, there was confusion between the two different contracts, namely, *tawarruq* and *inah*, which happened because the majority of Hanafi jurists included *tawarruq* under *inah* sale. These two contracts are unlike in their structure and even their rulings. Thus, it seems that Hanafi jurists differed on the ruling of *inah* sales (as a general word that includes individual *tawarruq*). Some of them disliked *inah* sale, including Mohammad bin Al-Hasan, a respectful Hanafi jurist, as he said "I hate this sale so much and it is the invention of those who eat *riba*". Also, Al-sarkasi (d.1090), one of the Hanafi jurists, pointed out the Hanafi ruling in his book when he illustrated *inah* sale, he said that it is disliked in our *madhab* to respond to someone who asked a loan by refusing in order to sell him a delayed payment (Al-Sarkasi u.d, p.36). Whereas, other scholars such as Abu Yusuf, Abu Hanifah's pupil, permitted *inah* sale and he did not count it as a *riba* (Al-haskafi 2000, p.310)

This combination of two terms (*tawarruq* and *inah*) led to differences in the interpretation of *inah* sale. Some of them interpreted *inah* sale as *tawarruq* contract. This can be demonstrated by the words of one who spoke on defining *inah* transaction: "the lender will sell a commodity to the borrower for twelve Dirhams. Then, the buyer will resell it in the market for ten Dirham, 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" (Al-Balky 1991, p.208). This description is obviously of a *tawarruq* contract, even if the jurist called it *inah*.

On the other hand, there are some Hanafi jurists who described *inah* sale as a bilateral contract.

After this stage of confusion, a later Hanafi scholar, Ibn Al-Hummam (d.1457), made an agreement between the two Hanafi views on *inah* transaction, which are the disliked (*al-karahah*) and permissibility. He determined that the permissibility ruling is applied on *tawarruq* contract; whereas, the disliked ruling is a rule for the *inah* sale, since obtaining the cash through bilateral contract is rejected according to the majority of the jurists (Ibn Al-Hummam u.d, p.221). This is an acceptably weighty opinion as it can be read clearly in the Hanafi books. Therefore, many Hanafi followers adopted this view as well as passing their *fatwas* according to it. For example, Ibn Abideen said, after he cited Ibn Hummam's statement, that this view is upheld by a number of Hanafi scholars (Ibn Abideen 2000, p.311). Thus, Abu Yusuf's statement on *inah* is applied on *tawarruq* contract, while Al-Hasan's statement applies to bilateral *inah*.

Over all, it is finally apparent that in Hanafi School the bilateral *inah* is disliked when the commodity is returned to the first seller. However, what is known as an individual *tawarruq*, when the commodity is sold to a third party, was neither disliked nor prohibited by the Hanafi leaders.

3.2.5.2. Maliki School View

Maliki *madhab* emerged in Hejaz, where the Prophet's traditions were in abundance. Maliki jurists followed the Sunnah strictly and, therefore, they have the strictest views on *inah* contract. He derived their view on *inah* from the Sunnah of Prophet (*pbuh*). They ruled with the contract revocation as long as the commodity is available. However, they did not include *tawarruq* contract in their prohibited sales, as it appears from their statement that *tawarruq* is allowed in their *madhab*. This can be demonstrated by one famous Maliki jurist, Ibn Rushd (d.1198), when he cited in his book that Imam Malik was asked about a person who assists others by selling a commodity to one that is 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 sold first would buy it from him later at 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 to be covering an *inah* sale (Ibn Rushd u.d, p.89). Apparently, Imam Malik would accept the transaction if the third person was not in agreement with the first seller. When the third person does not resell the commodity to the first seller, then the

contract would have been valid by him, as Al-Qurafi said: "Surely, we only forbid when the second sale is arranged by the first seller" (Al- Qarafi 1998, p.268).

Overall, it can be concluded that *tawarruq* is not mentioned explicitly in Maliki School; however, it can be said from their statement, particularly the Ibn Rushd citation, that classical *tawarruq* is permissible in this school.

3.2.5.3. Shafi'i School View

The originator of Shafi'i School is Imam Shafi'i who explicitly authorized *inah* sale, which is generally prohibited in other schools, in his jurisprudence book (Al-Umm). This book was written when he moved to Egypt. In this book, he elaborated his view by giving evidence on the legality of *inah* without disapproving of such dealing. He strongly supported the permissibility of the explicit *inah* when he concluded his argument by saying, why can I not sell my property for whatever I and the buyer want? (Shafi'i u.d, p.78). Agreeing with this, the followers of Shafi'i School ruled in support of the permissibility of *inah* without any dislike or aversion. Likewise, Al-Mawardi (d.1058) overstated in his controversial discussion against the prohibition of *inah*, and responded to the evidence that shows the impermissibility of such a deal. At the end of his argument he claimed that *inah* does not mean *riba*; however, it is rather a factor that prevents *riba*, and whatever prevents *haram* (forbidden) practice is deemed a preferred deal (Mawardi u.d, p.287-290).

However, some of the later followers ruled in favour of the disapproving opinion on *inah* sale with the authenticity of the contract. For instance, Zakariya Al-Ansari (d.1519), one of the later Shafi'i jurists, said, "*inah* sale is disliked because it imposes upon the person who is in need since it puts him in a situation where he will sell a property at an enormous delayed price, and then buy it from him for an insignificant cash price" (Al-Ansari u.d, p.104). In addition, Al-Sharbini and Al-Ramli, some of the later Shafi'i followers, mentioned in their commentaries that *inah* sale is disliked (Al-Sharbini u.d, p.39, Al-Ramli 1984, p.460).

On the other hand, *tawarruq* contract is neither mentioned in Shafi'i books independently nor as a form of *inah*. However, the obvious result from their previous discussion is that selling the commodity to a third person for a lower cash price is worthier and more appropriate than selling back it to the first seller. So, according to Shafi'i School, the permissibility view of classical *tawarruq* is accepted.

3.2.5.4. Hanbali School View

Hanbali School was the latest of the schools of jurisprudence to emerge. This has an effect on giving a clear picture of *tawarruq* and a separated concept from *inah* sale. During their time, *tawarruq* contract started to take an individual place in jurisprudence books; whereas, it had been previously included under other transactions. Therefore, the view of Hanbali School on classical *tawarruq* can be explicitly found without any confusion between this and other contracts.

In Hanbali books, there are two different opinions on classical *tawarruq* cited by Imam Ahmad. These two views are *al-karahah* or *al-jawaz* (permissibility) (Ibn Muflih 1997, vol.4, p.171). This can refer to the differences on situations since it is known that the *fatwa* of Imam Ahmad has the advantage of considering the variety of circumstances. He sometimes gives a *fatwa* on an issue, and then when asked about the same matter, he might give a different rule to suit the situation. This is because Imam Ahmed emphasised that the circumstances that surround the questioner should be considered when the *fatwa* is issued. Consequently, the binary views of Imam Ahmed on *tawarruq* are attributed to the multiple of the context and situations. The disapproving ruling can be applied to a person who does not need cash while the permissibility ruling is applied to a needy person.

However, the preferred and dominant view in this school is the permissibility of *tawarruq*, without considering the other view of their Imam. As Al-Mardawi (d.1480), a respectful Hanbali jurist, said while discussing *tawarruq* jurisprudence, that permissibility is the supported view of our school and the followers are firm on it (Al-Mardawi 1979, p.337). In this statement Al-Mardawi affirmed that the supported view in Hanbali School is that classical *tawarruq* is permissible, as well as that the majority of the Hanbali followers are of this opinion. Furthermore, Al-Bahoti (d.1641), a prominent Hanbali jurist, apparently stated there is no disagreement among Hanbali jurists on the permissibility of *tawarruq* (Al-Bahoti u.d, p.158) since this is the only view that is adopted by this school.

Although it is clear that the view of the Hanbali School of Thought is the acceptability of classical *tawarruq*, the late Hanbali jurist Ibn Taymiyah and his pupil, Ibn al-Qayyim, tended to forbid such a transaction. Ibn Taymiyah, while presenting the various types of purchase, said that when a person's intention is neither to benefit from the commodity or the commodities trade, but to get cash through *tawarruq* transaction, since he is in need and cannot borrow, is forbidden (Ibn Taymiyah 2005, vol.29, p.442). In E'alam Al-Moaqeen, Ibn

al-Qayyim said, “My sheikh (Ibn Taymiyah) prohibited *tawarruq*, and people asked him again and again to allow it, but he still prohibited *tawarruq*. Furthermore, he added that the ‘illah (effective cause) of banning *riba* is achieved in *tawarruq*. However, *tawarruq* is worse than *riba*, because *tawarruq* entails a higher cost and losses. Therefore, Shari’ah does not forbid a lower harm (*riba*) and allows a higher harm (*tawarruq*) (Ibn al-Qayyim 1973, vol.3, p.170). These jurists took a different approach in their *madhab*. As in their period there were many people who came into Islam but, unfortunately, the misguidance and deviation spread greatly and true Islam and Sunnah was hard to find. Consequently, there were many devious ways of interpreting Islamic law to achieve people’s whims. Hence, the appropriate rule on *tawarruq* would be prohibition.

In conclusion, the impact of location can be summarized by the emergence of Abu Hanifah in Iraq and how this influenced his *madhab*, even if this did not have a significant impact on the issue of *tawarruq*. Also, the appearance of Imam Malik in the Hejaz has an impact on his view on the issue of *inah*, as we mentioned earlier. In addition, Imam Shafi’i adopted a contradictory view to the rest of the *madhabs* on the *inah* issue when he was in Egypt. Finally, it can be concluded with the impact of the time factor when Imam Ahmad, who expressed the issue of *tawarruq* explicitly, while the three imams before him did not mention it independently. The reason for this is the delayed time of the emergence of his school compared to the other Schools. During Imam Ahmad time, the concept of *tawarruq* contract was settled and separated from the concept of the *inah* contract.

3.2.5.5. *The Disagreement between Later Jurists and their Madhab*

After presenting the verdict of classical *tawarruq* in each *madhab* independently, it would be appropriate to study the differences between the later scholars’ opinion and the early jurists. This will indicate the role of time, as the later lived in a different time. The section will answer this question: Did the later followers of the four schools agree with their early jurists? Or did they disagree with them on the issue of *tawarruq* because of the time differences.

Firstly, Hanafi School, their later scholars agreed with the early jurists such as Ibn Abideen and Ibn Al-Hummam. Although, they did not mention any conflicting views on *tawarruq* with those of the early jurists, they distinguished and separated the *inah* term and *tawarruq* term, which had been considered one term by the early Hanafi jurists. Furthermore, the later Hanafi jurists solved the confusion and disagreement among their early scholars on the *inah* issue. They stated that the former Hanafi jurists disliked dealing with the bilateral *inah* and

they permitted its practice when conducted between three contracting parties. Thus, the issue of *tawarruq* became clearer and individual among the later scholars of this School; because it is known that time has an impact on the development of terms and concepts.

The Maliki School is the only school in which the latecomers' jurists did not disagree with their early scholars, or even elaborate the issue of *tawarruq*. The later jurists followed the strict opinion in their *madhab* about *inah* contract, which is the revocation of the contract as long as the product is available. Moreover, they did not add and illustrate the issue of *tawarruq* and show this issue independently in their books, as the later scholars of Hanafi School did.

On the other hand, like the Maliki jurists the later scholars of Shafi'i School did not explicitly mention the issue of *tawarruq*. However, they changed their *fatwa* on the issue of *inah* sale. They ruled with the disapproving opinion on dealing with such a transaction. This is due to the changing of time, since the later jurists noticed that the deception to deal with *riba* was prevalent during their period.

Finally, the Hanbali School is the only school which has expressed the issue of *tawarruq* by their early scholars. The former jurists permitted the deal of classical *tawarruq*, while some of the later scholars prohibited in order to cope with their time.

3.2.6. *Period after the Age of Mujtahids*

In later times, as the concept of *tawarruq* was cleared, scholars introduced specific requirements in order to deal with *tawarruq* properly. This was due to the great deal of *tawarruq* transactions. Consequently, there were many people who dealt with it in an inappropriate way. Thus, Islamic scholars wrote these conditions to deal with *tawarruq* according to Islamic financial law.

Some conditions were stipulated for practicing classical *tawarruq* in order to stay far away from *riba* and *inah* sale. Four terms were required for dealing with *tawarruq* contract. First, the person who seeks *tawarruq* must be in need of the money. However, if he is not needy, it would not be permissible to deal with *tawarruq*, such as those who deal with this transaction to lend to others in order to become wealthier. Second, the inability to obtain liquidity through other permissible means, such as *qard hassan* (gratuitous loan), is required before seeking the cash through classical *tawarruq*. This is because when the person can obtain money through other deals rather than *tawarruq*, he would not consider a needy person to use

individual *tawarruq*. The third condition is that the contract should not include anything that resembles *riba*. For example, saying that I will sell the ten for fifteen since it, in this case, resembles exchanging money with a different quantity, which is an explicit *riba*. The solution to this is to say to the *mustawriq*: I will sell this commodity for such and such for a deferred payment. The final term is that the *mustawriq* must not sell the goods until he takes possession of them, because the Prophet (*pbuh*) forbade selling goods until the merchant has them in his own possession (Uthman, 2009 p.8).

Stipulating these conditions indicates the maturity of the *tawarruq* term in the later times. The *tawarruq* term passed through several stages; it was not known at the beginning of Islam, then was limited in its practice, and was combined with the *inah* afterward, then it became independent and took its individual place for more elaboration and then its conditions were stipulated.

3.3. Arguments on Classical *Tawarruq*

The aim of this section is to gather the verdicts regarding classical *tawarruq* for the two scholarly views. These are permissibility, either by absolute permission or disapproved permission, the other is prohibition. As mentioned earlier, the main schools which allowed *tawarruq* are Hanafi, Shafi'i, Maliki and Hanbali; however, some of the later Hanbali followers adopted the prohibition view.

3.3.1. Arguments that Support Permissibility

Jurists who permitted *tawarruq* have proved their view using evidence from the Holy Qur'an, the Sunnah of the Prophet (*pbuh*), reason evidence and the general Islamic principles. Their evidence can be divided into two main categories; general proofs in the permissibility of the financial transactions and evidence on the permissibility of *tawarruq* transaction. However, some of this evidence is refuted by the opponents of *tawarruq*, although the proponents have responded to that. In this section I present the strongest and most important evidence they quoted.

There are a number of proofs and evidence on the permissibility of the financial transactions generally, which include *tawarruq* transaction. In the Qur'an, it says "Allah has allowed trade and has prohibited *riba*" (Qur'an 2:275). The word trade in this verse denotes the generality of all sorts of trade as it allows all types of sale. Thus, *tawarruq* falls under this generality. In addition, *tawarruq* contract is included in the legal maxim that says, "The principle of

sayings, actions, contracts and conditions is permissibility”. Moreover, *tawarruq* is permissible on the basis of the legal maxim that says “The original rule about all things is permissibility”. These legal maxims are suitable for *tawarruq* as there is no particular evidence on prohibiting *tawarruq*. They are clarified by the principle which is, “The original rule about all useful things is permissibility and the original rule about all harmful things is prohibition”. Visibly, the intention of *tawarruq* is to acquire liquidity, which is a benefit that provides the essentials that are in need. Therefore, it is argued that classical *tawarruq* is acceptable in Islamic law because it includes providing assistance to the people who are in need without causing any harm (Al-Zuhaili 2009, p.10).

However, the opponents argued by saying that quoting such general evidence and principles are acceptable as long as there is no specific evidence that prohibits the contract or the sale. In fact, there are a number of quotations from the Prophet’s sayings that forbid *inah*; and *tawarruq* sale is considered a type of *inah* sale. As a result of this, the cited evidence and principle by the supporters is not acceptable on *tawarruq* contract since it is forbidden by evidence from the Sunnah. On the other hand, the proponents responded to this argument by considering *tawarruq* sale types of *inah* sales to be not appropriate because of the many differences between them. In addition, the earlier mentioned Hadith Abu Sa‘id Alkhudri confirms that bilateral parties are different in their ruling to the triangular parties. Therefore, *inah* sale (consisting of bilateral parties) would have a different ruling from *tawarruq* contract (included triangular parties) (Uthman, 2009 p.10).

The second quoted evidence by the proponent is from the Hadith of Abu Sa‘id Alkhudri. Evidently, this tradition proves the permissibility of the two separated contracts as long as the second contract is not with first seller. Therefore, this Hadith shows that the traditions that prohibit *inah* do include *tawarruq*, since the intention of achieving access to *riba* does not exist as the second sale is not made with the first seller. However, the intention of *tawarruq* is merely to obtain liquidity, and the role of such transactions is to merely cover this intention. Further evidence on the permissibility of *tawarruq* is that *tawarruq* is in line with reason since *tawarruq* achieves the needs of the community as well as satisfying the people’s interests. In fact, *tawarruq* fulfils the people’s interests and makes life easier; also, it does not go against the Shari’ah (Uthman, 2009 p.11).

3.3.2. Arguments that Support the Prohibition

There is much evidence that supports the prohibition opinion on practicing classical *tawarruq*, including:

1. Those who prohibited *tawarruq* quoted the Hadith of the Prophet, which has been mentioned earlier, “If people deal with *inah*...” They claim that the word *inah* generally includes every transaction that aims to acquire cash in the present through buying goods for a higher delayed price. Thus, it includes both contracts bilateral *inah* (resell to the first seller) and triangular *inah* (sell to a third person), which is called *tawarruq*. However, what is mentioned previously can be said here: considering *tawarruq* sale as a type of *inah* sale is not acceptable (Al-Zuhaili 2009, p.14).

2. It is known in Islamic law that the sale of *talji’ah* is prohibited. This is a type of sale which is contrary to what it appears to be, since there is an obligation on any contractual parties to complete it. The opponents of *tawarruq* sale deemed it to be a sale of *talji’ah*, since the *mustawriq*’s need enforced him to deal with such a contract, which is the actual meaning of the sale of *talji’ah* (Al-Zuhaili 2009, p.14). Ibn al-Qayyim pointed out this evidence when he said that *inah* is mostly practiced by a person who is forced to obtain money from another who has the liquidity and does agree to lend his money without any benefit. Hence, the wealthy person sells to the compelled person a commodity in order to get profit from such a deal. Also, Imam Ahmad, in his disapproving opinion on *tawarruq*, indicates that the person who is in need might be forced to deal with *tawarruq* sale (Ibn al-Qayyim 1973, vol.3, p.182). Furthermore, it can be noticed from the reality that who deals with *tawarruq* is compelled to engage in such a sale (Uthman, 2009 p.13-14). .

3. *Tawarruq* is a trick to achieve access to *riba*; however, *tawarruq* does greater harm than *riba*. The harm that is in the *riba* is actualized in *tawarruq* with the addition of cheating and deceiving. This is because the intention in *tawarruq* is to sell money with money, rather than the sale itself, which makes the transaction longer and, eventually, the parties fall into *riba*. Al-Zuhaili argues this evidence by saying that the intention of the person who seeks the cash is to avoid *riba*. Thus, he did not involve in *riba* (usury) or *inah* sale as his aim is to avoid the prohibition (Al-Zuhaili 2009, p.9).

4. Dealing with *tawarruq* involves many damages and risks. One of the main harms is the rise of the debt, since the *mustawriq* borrows, for example, 1000 and he has to return 1500.

Consequently, *mustawriq* will lose money rather than gaining money. However, Al-Zuhaili says that the person who seeks cash through *tawarruq* should know his situation and circumstances in order to avoid loss (Al-Zuhaili 2009, p.9).

In conclusion, there is no explicit text that prohibited *tawarruq*, as classical *tawarruq* among *inah* forms is not acceptable due to the noticeable differences between these contracts. Also, including *tawarruq* under the permissibility of the contract in Abu Sa'id Alkhudri Hadith is not certain as the contracts are different in several points.

3.3.3. Reasons for the Different Views and Arguments

The dispute among scholars on the issue of *tawarruq* contract can be attributed to several reasons. The first cause is the differences among schools in their methodology, upon which they base their decisions. For example, according to Hanafi and Shafi'i Schools, one of the financial principles is that the validity of a transaction is only given when it satisfies the required conditions and pillars. Also, they do not consider blocking the means as a source to rely on unless there is a text that forbids such transactions; while other schools pay attention to this particular principle (Al-Zuhaili 2009, p.11). The second reason behind the dispute on *tawarruq* is the absence of an explicit text from the primary sources on the dealing with such a contract. In the Sunnah, there is explicit evidence that prohibited *inah* contract, while *tawarruq* is not mentioned explicitly. As a result of this absence, the ruling can be changed according to the variety of the times, place, customs and circumstances. However, if there is an explicit text on *tawarruq*, this will result in a fixed ruling through different situations.

Summary

The chapter has studied the term of *tawarruq* by presenting the literal and technical meaning and examining the first explicit use of this term. *Tawarruq* is an arrangement whereby a person, in need of liquidity, purchases a commodity from a seller on credit at a higher price and then sells it at a lower price. The person who acquires liquidity in this way is called *mustawriq*. In this sense, the first common use was in the age of Hanbali School.

The chapter moved on to *inah* contract to show its relation with *tawarruq*. The main difference between *inah* and *tawarruq* is that a *mustawriq* sells the commodity to a third party, while in *inah* the buyer resells it to the same seller from whom he had bought the commodity.

Next, the chapter analysed *tawarruq* through the previous Islamic eras. It has discussed the views of four main schools in Islamic jurisprudence on *tawarruq* transaction. This can be summarised by saying that the supported view in all the four *madhabs* is the permissibility ruling of *tawarruq*, except that there is a view in the Hanafi and Hanbali schools that disapproves of it. The prohibited ruling was adopted by some of Hanbali's later followers, such as the erudite Hanbali scholar Ibn Taymiyah and his student Ibn al-Qayyim. Although, Maliki School did not mention *tawarruq* explicitly in their compilations, they stipulate a condition to forbid *inah* sale, which is selling the commodity to the first seller. This term excludes *tawarruq* contract from the prohibition ruling. Also, there was no direct mention of *tawarruq* in the books of the Shafi'i School; however, their ruling of permitted *inah* contract is considered an indication for permitting *tawarruq* since *tawarruq* does noticeably less harm than *inah*.

Finally, the evidence shown by the proponents and opponents of *tawarruq* practice and the cause of this disagreement was presented. The dispute stems from the absence of a text from primary sources on *tawarruq* ruling.

Chapter 4 : A Critique of the Development of *Tawarruq*: Concept, Practice and Ruling during Contemporary Times

Introduction

The previous chapter looked at *tawarruq* in the early eras. This chapter will move on to contemporary times. *Tawarruq* has been used as an Islamic instrument, mainly since 2000 A.D., by a number of Islamic Financial Institutions (IFIs) in Saudi Arabia, and then followed by others including IFIs in Qatar, Kuwait, Bahrain and the United Arab Emirates (Dabu 2009, p.5).

In the modern period, *tawarruq* transaction has become structurally more complex than in the previous ages. This is attributed to the development of financial transactions and the demand from the market to accommodate liquidity. This development on *tawarruq* transaction has been expanded to cover new aspects of this type, for example, organised and reverse *tawarruq*. Shari'ah is the source of which *tawarruq* is based upon and by which it is legalised. In this period, the expansion has been different from the past. The objective of this chapter is to examine the current time and circumstances to conclude whether they have influenced the Shari'ah ruling on *tawarruq*.

Although it has been the cause of much debate and argument on the legality of *tawarruq* under Shari'ah, it has been widely used for liquidity management and as a mode of finance. It is considered recently as the key financing model for more than £600 billion in the Islamic finance industry (News Centre Financial Industry, 2009). This shows the significance of this instrument in serving the investment opportunity and liquidity needs of the Islamic financial industry.

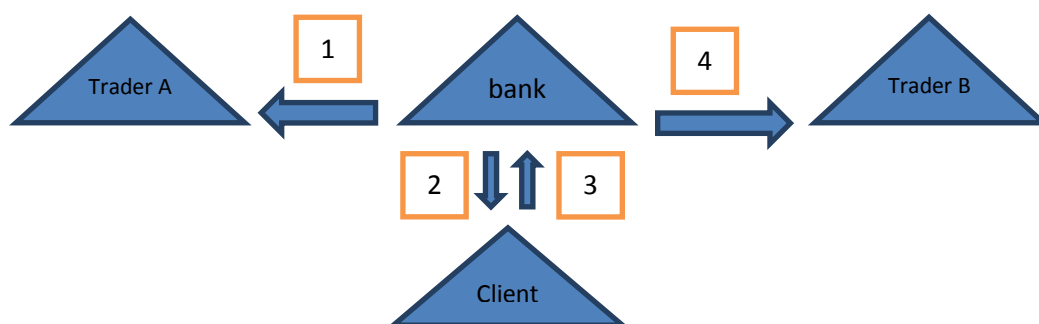
This chapter is divided into three subsections. Firstly, contemporary types of *tawarruq*, namely organised and reverse *tawarruq*, are considered an innovative liquidity management tool in Islamic finance industry. This section will aim to present a holistic and integrated understanding of organised and reverse *tawarruq*. Secondly, this chapter will compare the three types of *tawarruq*, which are: classical *tawarruq*, organised *tawarruq* and reverse *tawarruq*. Finally, the chapter will examine to what extent the contemporary times, varieties of location and different circumstances have had an impact on *tawarruq* ruling.

4.1. Organised *Tawarruq*

In commercial contexts, this contract tends to be known as a ‘financial *tawarruq*’ which is meant to be attributed to a bank as the main practitioner. While in academic usage it is commonly expressed as ‘organised *tawarruq*’. It is an indication to the procedure of the contract (Al-Shalhoob 2007, p.3). It has been argued that the two terms ‘banking *tawarruq*’ and ‘organised *tawarruq*’ have different applications. Banking *tawarruq* is an arranged transaction and is preceded by *murabaha* for the client while ‘organised *tawarruq*’ does not precede other transactions. To illustrate the difference between them, in banking *tawarruq* the bank does not have the commodity from the beginning. As a result of this, when the client requests liquidity through *tawarruq*, the bank needs to buy a commodity for the client, then sell it to him at a deferred price. However, in organised *tawarruq*, the bank will already possess the commodity (News Centre Financial Industry, 2009).

4.1.1. Organised *Tawarruq* Definition

Organised *tawarruq* is defined as a client’s request for cash by appointing the bank to sell on his behalf the goods in the market instantly, in return for immediate cash. To clarify this, the bank plays a major role in the transactions by buying the goods on behalf of the client (who seeks cash) from the market at deferred price. Then the bank sells this commodity in cash to a third party as an agency contract, and then hands the cash over to the client (Khayat 2009, p 5).



It can be deduced from the above that there are four steps to finalising the contract. Firstly, the bank buys the goods from the international or local market according to the contract between the bank and the client. The next step is when the bank sells that merchandise to the client at a deferred price. Then, the client appoints the bank as an agent to sell the purchased commodity on his behalf at a cash price. The last stage is where the bank resells the commodity conditionally or customarily on behalf of the client to a different purchaser.

4.1.2. *Analytical Review of Previous Research on Tawarruq*

The procedures of *tawarruq* financing, according to the Shpeer study, are the arrangement process of two transactions through the bank for the client via selling a commodity to the client on a deferred payment. Then, the bank sells that commodity on behalf of the client in the market at cash price and credits it to the client's account (Shpeer 2009, p.22).

The above explanation does not indicate whether the bank's possession of the goods preceded the client's request or came after. Also, there is no indication about the prior owner of the commodity before the bank's purchase, is he the third party in the transaction or other. The mentioning of these two points is essential since they have an impact on the validity of the contract as it is required in the Shari'ah. However, in some cases the bank purchases the goods after the client's demand for *tawarruq*. An additional note is that the commodity type that is included in *tawarruq* transactions is not mentioned. It is considered a legal weakness to miss the clarification on whether the ruling on deferred payment transactions would be influenced by the type of commodity or not. This is because Shari'ah prohibits exchanging money on deferred payment with certain commodities such as silver and gold. Over all, Shpeer's description considers the relationship between the bank on one hand and the client and third party on the other. However, from an Islamic point of view, the scrutiny of the entire process necessitates an accurate decision.

Al-Saidi studied the procedure of organised *tawarruq* in the banking system. He described it as if the bank purchases a quantity of metal from the international market. The bank may use an intermediary to act on his behalf at this stage. Afterwards, those goods which are kept in international storage have a certificate that includes the specification, quantity, reference number, location and the bank's ownership of the commodities. After this acquisition the bank retails them through organised *tawarruq* programs (Al-Saidi 2003, p.4). For instance, the bank buys 20 tons of zinc for £40 million from the international market. Then, the bank divides this commodity into a number of applications that suit the client's request. After the client's possession of, for example, one ton of zinc for £2 million in instalments payments, the bank becomes an agent to sell them on behalf of him for £1.8 million at cash price and credit the money (£2 million) to the client's account.

Saidi's clarification overcomes the missed points in the previous description by identifying the type of commodity with the quantity of metal. The definition limited the commodity with the metal. However, in the reality the commodity can be other than the metal such as sugar,

furniture or electrical goods. Moreover, the definition has another non-realistic restriction which is determining the source of the metal by the international market while some banks deal with local markets, as it is in Saudi Arabia. An additional point in Saidi's study is that it does not decide whether the original price is declared to the client or not. This information is important for the client in Islamic law (Al-Shalhoob 2007, p.5).

In light of what has been said above, the following mainly describes organised *tawarruq* that should be practised in the market. *Tawarruq* financing has an arranged mechanism; the bank should possess the commodity prior to interring in the transaction (not gold or silver) and two elements should be undertaken cash price for the commodity and hold a certificate which affirms the bank's ownership. Then the client buys the commodity for a deferred payment with an indication of the original price that has been paid. The final point is when the client appoints the bank an agent to sell the commodity to a third party (not the first seller) for immediate payment. The bank hands over the money to the client and then the instalment process will take place.

4.1.3. *Conditions of Organised Tawarruq*

Some jurists, who allow the organised *tawarruq*, validate organised *tawarruq* when all its stipulations are fulfilled. These stipulations have been divided into general conditions and particular conditions. The general conditions are the terms for a valid sale since organised *tawarruq* is a sale transaction. In addition, *tawarruq* has its own stipulations as a stand-alone contract because *tawarruq* has additional characteristics and particular features in comparison with the sale. Thus, this part presents *tawarruq* conditions, starting with the general terms followed by the particular terms.

Organised *tawarruq* has more than five general terms as a type of sale. First of all, the ownership of the merchandise or goods before selling them is required. This means that the sellers in organised *tawarruq*, whether the bank, broker or the client, are obliged to possess the goods before selling them to another purchaser. In Islamic jurisprudence, scholars unanimously agree on the necessity of owning the commodity before offering it. Although, some banks do not acquire the commodity before the sale, especially in the case of high cost goods, such as those valued over £20 million. In such a contract, it is considered not valid and not acceptable in Islamic law since it involves an instalment payment for a commodity that has not yet been acquired. Moreover, this will result in the absence of a price and subject matter while selling to the client. This consequence is also prohibited according to Islamic

rulings. The second condition is that the commodity must be specified for the purchaser. In organised *tawarruq*, whoever is the seller (the bank, the Islamic institution or the market) has to describe the goods in detail and identify a specific commodity to the buyer. Thirdly, in deferred payment, the details of the payment must be agreed upon between the seller and the buyer in advance. The payment in organised *tawarruq* is invariably deferred, as this deferred payment is a prerequisite to obtaining the client's requirement for the liquidity. Thus, the rule between the parties (the bank and the client) is the explanation in detail of the manner of payment, such as an instalment every month for five years or one payment after three years. A further condition for a valid sale is the avoidance of usury, especially in organised *tawarruq*, since it includes a deferred sale. The contracting parties must avoid dealing with goods that are forbidden to be paid on credit because they would be involved in *riba al-nasiah* (deferred usury) (Al-Shalhoob 2007, p.6-7).

On the other hand, there are additional particular conditions that must to be undertaken by organised *tawarruq* to gain validity. First, avoiding selling the commodity back to the seller (either to the bank or the prior owner before the bank's purchase) is required for the permissibility of organised *tawarruq*. This is considered an essential requirement in order to avoid *inah* sale, which is prohibited by the Prophet Mohammad (*pbuh*). The reason behind this is that the client has already bought the commodity from the bank by instalment payment at a higher price than the cash price. Thus, when the client sells the commodity to the bank at cash price for less than what the client had paid, the transaction would be null and void in Islamic law. The way out of this invalidity is to sell the purchased commodity to a third party. Additionally, the delivery of the commodity in organised *tawarruq* must be instant, because the transaction is based on a deferred payment. The consequence of deferred delivery is a sale of debt for debt, which is a prohibited contract in Islamic law (Al-Shathly 2009, p.28).

4.2. Reverse *Tawarruq*

Requesting *tawarruq* does not apply to individuals only but also to the bank itself. The bank does not merely provide *tawarruq* contracts; it also requests this contract. The bank becomes a *mustawriq* in order to obtain the customers' deposits and then increase the bank's liquidity. This form is known as a reverse *tawarruq*, which has become a widespread financial instrument. Reverse *tawarruq* is a substitute for dealing with interest based deposits in Islamic finance. This section will provide insights into the structure of reverse *tawarruq* and its ruling in accordance with Islamic law.

4.2.1. *The Concept of Reverse Tawarruq*

Reverse *tawarruq* is a type of *tawarruq* which can be defined as a customer appointing the bank to buy a particular commodity at a cash price. Then, the bank purchases it from the client for a deferred payment with a profit agreed upon in the contract (Shpeer 2009, p.30). For instance, the customer hands over a certain amount of money, for example, one thousand pounds, to the Islamic bank and then assigns the bank to buy a specific commodity with that amount. Next, the agent (bank) resells the purchased commodity to itself for a deferred payment with a profit that is agreed upon between the bank and the client, such as one hundred and ten thousand.

The reason for naming this transaction reverse *tawarruq* is that the client, customary in banking transactions, is the indebted buyer and the bank is the credit seller. However, in reverse *tawarruq* these roles are reversed (the client becomes a creditor and the bank is the debtor). It is called *tawarruq* because the client acquires the liquidity needed through selling a commodity. Also, it is known in the banking system under names such as direct investment, inverse *murabahah*, proxy investment and other marketing names (al-Suwaylim 2007, p.38-39).

4.2.2. *The Purpose of Reverse Tawarruq*

The pervasion of reverse *tawarruq* throughout Islamic banking reflects the competition between Islamic banking and commercial banks to attract customer deposits. Islamic financial institutions and banks have resorted to this transaction in order to achieve some of their objectives and principles. The avoidance of a loans is one the main principles in Islamic finance. This principle stands beside the aim of introducing a legitimate alternative for Islamic banks to provide the necessary liquidity for financing their business. Reverse *tawarruq* is a legal access to a similar outcome to the term deposit in commercial banks. Deposit means a saving account used to save the money for either a fixed time or with optional to withdraw with a prior notice. The depositor will receive a certain percentage in return for keeping the money for fixed period. The outcome in both matters is the obtainment of cash from the client for a specified term. Consequently, this contract would promote the Islamic banks dealing owing to the profit realization for their depositors (al-Suwaylim 2007, p.39).

4.3. Comparison between Organized and Reverse *Tawarruq*

There is a considerable resemblance between organised and reverse *tawarruq*. For example, the containment of two sales connected with each other which make them an *inah* sale. Also, in both contracts the client appoints an agent on his behalf. In addition, usually both contracts lose the actual delivery of the commodity, which violates one of the pillars of a valid contract according to Shari'ah.

However, they differ in a number of the following aspects. First, organised *tawarruq* is considered a source of liquidity for the client. On the other hand, reverse *tawarruq* is a liquidity source for the bank itself. Second, in organised *tawarruq* the bank buys and sells on behalf of the client whereas, the bank's agency in reverse *tawarruq* sells for itself. Third point, the client in organised *tawarruq* is the debtor and he adheres to paying instalments to the bank, while in reverse *tawarruq* the client is the creditor, and he can give discount and request for the bank to receive the debt soon. In addition, reverse *tawarruq* enables the client to receive some of the deferred payment before the agreed date on the basis of the principle (give discount and receive soon). This is when the client cancels a part of his profit in order to obtain the capital and the rest of the profit earlier. This process cannot be applied in organised *tawarruq*. Finally, the bank in organised *tawarruq* does not guarantee any liabilities of the capital for the client, however, in reverse *tawarruq* the bank guarantee both the capital and profit, which makes reverse *tawarruq* such a loan that brings benefit (Shpeer 2009, p.34).

4.4. Views of Contemporary Scholars on Contemporary *Tawarruq*

After the theoretical study on organised and reverse *tawarruq*, in terms of their concepts, procedures and conditions, this section will discuss scholarly opinion from an Islamic point of view. This will be done by providing evidence and arguments for and against their views. This discussion will lead to an assessment of whether *fatwa* ruling in organised *tawarruq* has been influenced by a set of factors such as time, location, custom and circumstances.

4.4.1. Jurists' Verdict on Organised *Tawarruq*

Shari'ah jurists have divided into two main views on organised *tawarruq*. Some prohibit practicing *tawarruq* through Islamic banking and consider it a ruse for *riba*; whereas, the others permit it since it is distinct from *inah* sale due to the involvement of the third party. However, the proponents of organised *tawarruq* do not agree on conforming all forms of

tawarruq with Islamic law. This is because any modification of the structure can influence the ruling of the contract. Therefore, they stipulate a number of conditions, as illustrated earlier, for its acceptability. The prohibition opinion is followed by the majority of contemporary jurists, including Al-Salous and Hussain Hamed Hassan, who states that the scholars in this era unanimously decided upon the prohibition of practicing organised *tawarruq* (asharqalawsat, 2007). Furthermore, one of the main contemporary supporters to this view is Taqi Usmani (Usmani 2003, p.9). On the other hand, the opinion of permissibility has been adopted by some contemporaries such as Sheikh Abdullah Al Mani', Abdul Qader Al-Amari and other respectful scholars (Shpeer 2009, p.26).

The conflicting views among scholars can be attributed to a number of factors. Firstly, the dispute on practicing *tawarruq* by Islamic financial institutions among contemporary scholars reflects the earlier disagreement amongst the jurists on the classical *tawarruq*. As presented earlier, the classical *tawarruq* was permitted by the majority of early scholars. However, some jurists ruled for the disapproval of such a contract, while others, including Ibn Taymiyah, ruled that classical *tawarruq* is forbidden. The second factor is that the differences in the methodological premises on which scholars based their opinions on. To illustrate this, some jurists based their view on the general principle that legalizes sales; hence, they would not forbid any transaction unless there was explicit evidence. On the other hand, some scholars started their verdicts by comparing juristic opinions, with a tendency to uphold the majority view. However, others have a cautious attitude towards the bank's contracts since they observed and noticed the banks' business dealing. The ambiguity on these businesses placed on whether they will be executed correctly or not. Hence, it has led those scholars to deal with them cautiously and sometimes sceptically. Others focused on the purposes and objectives of the contracts. Thus, they accept the contract when it conforms to the Shari'ah objectives and reject the contract if it is against these objectives, even when there is no explicit text for the prohibition. Thirdly, the ambiguity of *tawarruq* procedures in the bank systems and the obscurity of its detail process are deemed one of the current dispute causes. This ambiguity is attributed to the banks' disclosure policy. They present their *tawarruq* transactions in such an abridged manner with a lack of detail. This has impeded the understanding of the nature of the contract. Also, they sometimes present their instrument under the name of an acceptance practice such as *murabahah* and *wakalah* etc. The fourth cause of the current dispute is the first decision of Islamic Fiqh Academy. It ruled for the

permissibility of classical *tawarruq*¹ without determining the ruling of contemporary *tawarruq*. This led to the application of this ruling on organised and reverse *tawarruq* by some financial institutions. Some banks explicitly referred to this ruling and used it as justification for dealing with *tawarruq* without mentioning the conditions of such a contract that were stipulated in the *fatwa*. Lastly, there are conflicting views about the effects of organised *tawarruq* on the economy. Some economists present a positive effect of such transactions on the entire economy, while others present negative assessments of it. The result of the positive effect of organised *tawarruq* on the economy will be the permissibility vice versa with the prohibition (Bouheraoua 2009, p.3-5).

4.4.2. Arguments against the Tawarruq Practices

The arguments and evidence that support the prohibition views on practicing *tawarruq* can be shown from a macroeconomic and Islamic outlook. From a macroeconomic perspective, recently there has been an increase in indebtedness in the finance industry due to the introduction of *tawarruq* in Islamic finance. The increase of indebtedness led to monetary fluctuations and unsteadiness in the economy; owing to the introduction of debt instruments such as *tawarruq*. In organised *tawarruq*, the client becomes a debtor since he sells the commodity to a third party for less than the deferred price. Hence, *tawarruq* creates a debt and also encourages the *debt* finance. This finance is essentially unfair because the finance provided goes to the most credit worthy and then it redistributes the wealth in favour of the suppliers of finance, regardless of the actual productivity of the funding provided. It is also inequitable because of the uncertainty about the value that could be involved in the long term. This is referred to as the concept of exchanging money with money by using purchase and sale of commodities. Consequently, allowing organised *tawarruq* leads to the rapid expansion of the debt market (Fahmy et al. 2009, p.8).

Furthermore, this variety of instruments will boost the speculation role, which will reach a level unparalleled by any other market. Also, there is no standard that evaluates the quality of a repaid debt as agreed. The debt prices can be manipulated by a false new or manufacturing rumour; therefore, they are susceptible to fluctuations. On the other hand, the markets for goods, commodities and services are less exposed to the debt than the market with debt instruments such as speculation. Thus, the disallowing of *tawarruq* and the abolishment of the debt market together has been approved (Fahmy et al. 2009, p.8).

¹ Their ruling on *tawarruq* will be examined in the next chapter.

An additional harm caused by organised *tawarruq*, which has been pointed out by Kahf, is that *tawarruq* in Islamic finance should be disallowed since it can be realistically worse than usury, since organised *tawarruq* involves higher costs and losses (Kahf & Barakat 2005, p.14). In order to clarify the greater harm in *tawarruq* contracts, we will assume that there are two clients who seek cash and they are involve in usury and organised *tawarruq* respectively. The first client applies for an interest loan, a form of usury, and borrows 20,000 for 22,000, which will be paid off within 3 years, while the other client is financed through organised *tawarruq*. He will buy a specific amount of iron for 22,000 from the bank, and then the bank will sell it on the client's behalf in the market for 20,000. The result from both contracts is the receipt of 20,000 for 22,000 to be paid. This shows the resemblance of the consequences between these contracts, which is that the repaid cash is larger than that received. However, the cash received by organised *tawarruq* engages the client in a complex procedure of buying and selling a certain commodity which might cause loss on the client-side due to the changing in a commodity's price. Therefore, Islamic law would not prohibit the usury and allow organised *tawarruq*, which is more risky than usury.

Another harm caused by organised *tawarruq*, according to Al-Shalhoob, is that the client would not be sure about the commodity's price since it is subject to the prevailing price in the market. So, the expected cash amount generated by the organised *tawarruq* is not determined. Furthermore, a bank usually does not consult the client about the selling price if it is acceptable by him before proceeding with the sale. Commonly, the selling price on behalf of the client is lower than the price which the bank bought it for (Al-Shalhoob 2007, 4).

From an Islamic point of view, on the other hand, the process of organised *tawarruq* falls under the Prophet's (*pbuh*) prohibition of a sale containing a stipulation. In organised *tawarruq*, the client requests that the bank sells the commodity on his behalf. However, if the bank is not obligated to do the second transaction which is selling the commodity on behalf of the client, the client would not be interested to deal with the first transaction (buying the commodity from the bank). Also, he would not enter into a complex process if the bank did not promise to hand over the money. This combination of the sales and customary or explicitly stipulations leads to the forbidding of this contract (Kahf & Barakat 2005, p.14).

In addition, the seller's obligation to be an agency on behalf of the buyer to sell the commodity to a third party makes the contract an *inah* sale, which is religiously forbidden. This resemblance between organised *tawarruq* and *inah* sale exists.

Moreover, the bank has the liquidity in order to be invested. Thus, this type of financial transaction is considered a mode of investment that the bank pursues in return for a fixed percentage. Therefore, this will lead to the real purpose for this practise, which is to disguise interest based lending mechanisms under this type of investment, which makes it different from permitted *tawarruq* (classical form). As a result of this the contract will be invalidated.

Furthermore, this contract leads in many cases to violation of the requirements of legal gain in Shari'ah law, such as the actual delivery of the commodity. These requirements are necessary for the validity of any transaction (Al-Zuhaili 2009, p.17). As a consequence of violating the requirements, the contract will be impermissible.

4.4.3. *Arguments Supporting Tawarruq Practices*

Here the arguments underline the economic enhancement that will be achieved by applying organised *tawarruq* as an alternative to the interest which is harshly prohibited by Shari'ah. As a mode of financing, individuals will be able to receive immediate cash (Shpeer 2009, p.28). To demonstrate, as it has been mentioned earlier, *tawarruq* is a key financing instrument for more than £600 million within the Islamic finance industry. Therefore, the sudden withdrawal of this finance instrument can affect the industry considerably, especially those who rely on *tawarruq* instruments for liquidity management and the supply of working capital funds. Moreover, the necessity requires the permissibility of banking *tawarruq* since it is a form of Islamic funding that contributes to covering many essential requirements, such as funding the government's trade deficit (Al-mani' 2003, p.352).

From an Islamic perspective, those who support the permissibility issue in this respect have based their argument on the permissibility of classical *tawarruq* and, thus, quoted its evidence to prove the acceptability of organised *tawarruq* in Islamic law. For instance, the Qur'an states that "God has permitted sale but prohibited *riba*" (Qur'an 2:275) which is a general principle in Shari'ah law that states that any sale is religiously permitted except certain varieties that are specifically prohibited; however, organised *tawarruq* has not been explicitly forbidden in the religious texts. Therefore, this indicates the permissibility of this contract in Islamic law (Al-mani' 2003, p.342). Strictly speaking, both views raise controversy on this issue and have strong evidence; however, the last part of this chapter will outweigh the proper view for this age.

4.4.4. *Jurists' Verdict on Reverse Tawarruq*

The contemporary jurists' views on reverse *tawarruq* are divided into two opinions. The impermissibility opinion is adopted by Al-Suwilum and Al-Salous; whereas the opposite view is supported by Sheikh Abdullah Al Mani' (Shpeer 2009, p.36). Generally, those who prohibit organised *tawarruq* are supporting the forbidding of reverse *tawarruq* and vice versa.

Reverse *tawarruq* is akin to organized *tawarruq* since their structures are comparable to each other; however, the *mustawriq* in reverse *tawarruq* is the bank. A result of this, most of the reasons and evidence supporting the rejection of organised *tawarruq* are found in this transaction. Furthermore, reverse *tawarruq* includes a deposit period for the interest earned, which falls under the concept of the Islamic financial principle: (each loan that brings a benefit is *riba*). Therefore, this benefit derived by reverse *tawarruq* is in fact forbidden in Islamic law (Shpeer 2009, p.37). Similarly, the arguments that allow organised *tawarruq* can be applied to reverse *tawarruq*.

4.5. **The Examination of *Tawarruq*'s Impact on the Contemporary Economy**

Given the fact that each *tawarruq* contract includes a debt which is consistently larger than the cash received by the *mustawriq* (client) is essential on examining the impact of *tawarruq*. The consequence of practicing such a contract on the economy can be demonstrated through macroeconomic analysis for both: the creation of new debt and the debt produced is greater than the cash obtained by *tawarruq*.

The consequences of debt finance (or debt creation) on the current economy is the first aspect looked at in evaluating the impact of *tawarruq* contracts in modern times. The outcome of debt increase can be traced from the current applications of aggressive debt-financing. Siddiqi said that this increase is due to the flood of liquidity resulting from oil booms which led to the isolation of the financial markets from real assets. As a result of this isolation, the pyramid of financial instruments is inverted with a small asset base. This substitution has transformed *tawarruq* contracts from assets markets to debt markets, where the links with the real market have been cut off. Hence, the emergence of *tawarruq* in the contemporary economy has intensified the debts creation. It is significant to bring to light the common claim that *tawarruq* transactions integrate real and financial sectors since each transaction involves a purchase and sale of real assets; this differs from interest-based lending, which

does not contain any real assets. This common assertion is not sustainable as it has been noted by observers that in *tawarruq* contracts the goods are just virtual, there is no real movement of the goods as such as a single car is used for dozens of transactions without moving the car from its spot. Consequently, *tawarruq* contract is unhinged from the real market (Siddiqi 2007, p.1-2).

Furthermore, he added that debt finance alone cannot create additional wealth for society. This is because a similar amount of borrowed money is deduced from the net wealth. The cash received via a debt instrument can be invested to result in actual wealth. However, the cash invested is also likely to be equal or less than the wealth created. Each case has an economic consequence. In the case of additional wealth, it is a larger amount than the cash input and sources used, and society becomes wealthier to the extent of the gain in wealth after the debt is returned. Meanwhile, when the wealth created is equal to the cash received through a debt, society after the debt is repaid continues unchanged since there is no profit achieved. On the other hand, if additional wealth is less than the cash invested and, therefore, the resources used, the net wealth of society will decrease after the debt is deducted. This deduction is required because the debtors have to return the debts to the creditors who are in favour of wealth redistribution. A similar situation is applied in the case where the cash invested is entirely loss (Siddiqi 2007, p.1-2).

Moreover, the creation of new debt through such *tawarruq* enhances the role of speculation. In the debt market, speculation plays a role as every market; however, it reaches a level that is unmatched by any other markets. The great scope for speculation happened due to the large volume of debt as the debt instruments were practiced in the market. These instruments are very heterogeneous because the prospect of debt repayment differs from debt to other, depending on a number of elements; the country of origin, the debtor, and the guarantor. Also, there is no standard for evaluating the quality of debts with respect to their recoverability. In addition, the price of debt is vulnerable to wide fluctuations in response to news or even rumours. There are many examples of parties playing with debt prices by means of manufacturing rumours or providing false news. These factors have shown that the financial market, which is dominated by debt instruments, is much more speculative than the market for goods and services (Siddiqi 2007, p.3).

What is more, the expansion of the debt market through *tawarruq* and other instruments increases society's division. This means that the poor people become poorer while the rich

richer. It can be demonstrated that the use of debt tools create more demand for suppliers of finance as the market grows and the economy expands. Furthermore, debts have led to the wealth being concentrated among the few people who have the privilege of offering the required guarantee for the debt. This has a negative impact upon the majority of society who cannot afford to incur such debts. Hence, their own enterprises and projects cannot be financed to develop the economy. As a consequence, financial loss will occur due to the deadlock created by businesses with a shortfall of money (Asharqalawsat, 2009).

The examination of the consequence of debt financing has stressed the fact that has been earlier indicated. The practice of debt instruments in the market, including *tawarruq* contract, is inefficient as well as inequitable. The inefficiency of this method can be noticed by the fact that the finance is channelled to the wealthiest borrower and not to the wealth production. In addition, the inequity is attributed to that mentioned earlier: that the wealth is redistributed in favour of the creditors who are involved in the process. This redistributed wealth ignores the actual productivity of the finance provided. Overall, it is better to avoid debt markets; however, practicing *tawarruq* contracts will intensify the debt market. As a result of doing this, society will suffer on both counts of injustice and inefficiency.

The second aspect of examining the consequences of *tawarruq* is to expose the harm when the debt is larger than the cash received, since, as it is noted above, the debt is created through *tawarruq* contracts is invariably larger than the amount of cash that is transferred to the client. This disparity between the debt and the repayment leads to the compulsion to produce further wealth using the received cash; however, this cannot be guaranteed through the enterprise. As a result of the prospect of non-existing wealth, or even the usage of cash in non-productive activities, is an unhandled situation, except through inequity solutions. This can be solved either by the existing wealth being transferred to the creditor or if the debtor creates more debts in order to extinguish the original debt. This shows obviously the injustice and illness of this regime that is based on an interest lending system. On the level of the entire economy, the economic growth through the compulsion for cash loans that invariably require larger repayments has destructive consequences. It is one of the factors that lead to the overuse of natural resources which devastates the environment. This is because the increased payment must be paid in a definite time. This raises the anxiety levels in the community by enforcing firm timetables all rounds. It also leads to the commercialisation of practically all fields of life, such as family life, education, health, architecture, and agriculture, when these fields come under the debt financing with the additional payment at a

specific time (Siddiqi 2007, p.3-4). Therefore, contemporary *tawarruq* in the long term can have destructive consequences.

In brief, it can be seen that both matters have negative effects on the current economy; the creation of new debt and the created debt is greater than the received cash, which is invariably involved in *tawarruq* contracts.

4.6. Islamic Finance Principles & Contemporary *Tawarruq*

After presenting the harm caused by the debt market expanding, it will be valuable to show the principles of Islamic financial institutions. IFIs have some principles to operate in light of it. The aim is to examine whether practicing *tawarruq* contracts in these days is compatible with their principles or not. The two basic principles that IFIs have to adhere to are the following. First, the prohibition of interest in Islamic banks gives them a distinct advantage over the conventional banks. Conventional finance bases its economy on interest lending, as most transactions are based on loans and borrowing. In the last few decades, borrowing has become a serious business, especially after the oil booms, as it makes it easy to borrow due to the huge liquidity. This has resulted in considerable consumer debt; also, government loans have increased dramatically on the third world states with little probabilities of repayment. Through this reality, Islamic banks stand with the principle of considering borrowing as a volunteer work rather than a source of profit. The forbidding of *riba* shifts lending from the business to the voluntary sector. However, by allowing *tawarruq*, this sabotages the unique characteristic of Islamic finance by practicing a lending instrument for business and making profit. As a consequence of the easy borrowing in Islamic finance, this will put Islamic financial institutions under the compulsion to lend to make profit from the surplus liquidity, as it is with the conventional financial institutions (Siddiqi 2007, p.3).

The second feature of the Islamic economy is that of linking the money supply with the needs of the real market. This link between the financial and real market is a one to one between financial and real assets. Therefore, the Islamic banking system is more stable than conventional banking because money is only created against real assets; this is the most efficient way to keep inflation under control. However, debt instruments cannot be attributed to this system since they do not reflect a real asset. *Tawarruq*, as mentioned earlier, creates debts which make the hiatus between the financial and real market larger in the economy. This conflicts with the main Islamic economic advantage over the conventional economy in the effective integration between the financial and real market. Therefore, allowing *tawarruq*

practice in modern times through Islamic financial institutions acts like a virus in that it sabotages the immune system of the Islamic economy (Siddiqi 2007, p.3)

According to the concept of *hila*, on the other hand, the proponents have used it to accept contemporary *tawarruq*. They restricted its usage in the initial stages of Islamic finance in order to contribute to development. This permissibility was only apparent in the inception of Islamic finance in order to support its growth. However, this allowance does not mean that leeway was given that conflicted with Shari'ah objectives¹. Although, applying the objectives is essential in Islamic law, it has to be gradual. Thus, when Islamic finance reaches a mature stage, contemporary *tawarruq* would be not permissible (Haneef 2009, p.15).

In conclusion, Islamic finance principles indicate the prohibition of contemporary *tawarruq*. Hence, *tawarruq* should be banned since conducting this contract does result in a circulation of the commodities as there is no a genuine link between the real and financial sectors. Also, these days, Islamic finance has reached a level where it can dispense with the *tawarruq* instrument.

4.7. Shari'ah objectives (*maqasid*) & Contemporary *Tawarruq*

Shari'ah aims to promote the well-being of all mankind. Its objectives are classified into three main categories in descending order of importance, beginning with the essential objectives, followed by the complementary benefits, and then the embellishment interest. The essential objectives lie in safeguarding the five essential values, namely, religion, life, intellect, lineage and, finally, wealth. Whatever ensures the protection of these five interests is required by Shari'ah (Chapra 1995, p.118). The second category of Shari'ah objectives is the complementary interests. It is defined as benefits and needs which are not essential, but they aim to eliminate the hardship and severity. Failing to achieve these interests will not make the life impossible but harder. The final class of the objectives is the refinements interest. The life without achieving this objective will be neither impossible nor hard. However, it leads to improvement and the attainment of that which is desirable (Kamali 2008, p.2).

In order to protect Shari'ah objectives *Ijtihad* has been validated. In this sense *fatwas* should be in harmony with the Shari'ah goals. Promoting wealth is one of the main features of the *maqasid*. Thus, *fatwa* in relation to the financial transactions should be issued and used to protect the wealth.

¹ The objectives have been clarified in the second chapter on *istislah*.

In this sense the use of *fatwas* to prohibit *tawarruq* are considered one of the tools to implement the Shari'ah objectives to protect the society. For example, IIFA based their prohibition of contemporary *tawarruq* on Shari'ah objectives. They stated that 'To ensure that Islamic banking and financial institutions adopt investment and financing techniques that are Shari'ah-compliant in all activities, they should avoid all dubious and prohibited financial techniques, in order to conform to Shari'ah rules and so that the techniques will ensure the actualization of the Shari'ah objectives (*maqasid* Shari'ah). Furthermore, it will also ensure that the progress and actualization of the socioeconomic objectives of the Muslim world. If the current situation is not rectified, the Muslim world would continue to face serious challenges and economic imbalances that will never end' (IIFA resolution no. 179 (19/5), 2009). This proves *tawarruq* products do not fit with the objectives of the Shari'ah or *maqasid*.

Summary

In conclusion, this chapter has shown, firstly, an overview of two contemporary forms of *tawarruq*, namely; organised and reverse *tawarruq*. The overall look has included their concepts, conditions, some comparisons between these modern contracts, and the jurists' views and arguments regarding them.

Organised *tawarruq* is a process arranged by a financial institution whereby the client appoints the institution to sell for a delayed payment and buy it for an immediate payment in order to obtain the liquidity for the client. This is in contrast to reverse *tawarruq*, as the client appoints the institution to buy a specific product for a cash price, then the bank buys it for a deferred payment, with a profit agreed upon. These two contracts oppose each other; the *mustawriq* in organised *tawarruq* is the client; whereas, it is the institution in reverse *tawarruq*.

The arguments for and against contemporary *tawarruq* have been shown. The arguments rely heavily quotation from Islamic sources. They quote evidence from the primary, secondary and tertiary sources. The arguments also refer to macroeconomic analysis by showing the consequences of *tawarruq*. The chapter has analysed the consequences of practicing *tawarruq* within the current economic environment. Relying on *tawarruq* can have destructive consequences. These consequences refer to the impact of debt finance. *Tawarruq* constantly generates debt; this generated debt is invariably larger than the cash received.

Finally, contemporary *tawarruq* has been examined to determine to what extent it is compatible with Islamic finance principles. One of the key principles in Islamic finance is the integration of the real and the financial markets. Although contemporary *tawarruq* involves selling and buying commodities, it is not a genuine sale. This is because Islamic banks mostly use the commodity virtually, without changing the commodity itself. Therefore, it can be seen that one commodity could be used a number of times without changing its position.

Chapter 5 : Analysing and Comparing *Tawarruq* Stages

Introduction

It has been wisely stated that the variation in jurisprudential rulings varies with the given situations of a case in a certain place and time. This statement has been explored in the previous chapters. As seen earlier, the changing *fatwa*, according to the four factors, have made Islamic law flexible in terms of legislation, since it can anticipate the challenge of social changes as well as remaining adjustable to any socio-cultural and geographical conditions in any location in the world. This is considered one of the key Islamic law features. Consequently, Islamic law is characterised with the ability to suit the alterations of society and changes in customs.

Ibn al-Qayyim, the distinguished jurist, emphasised the principle of changing Islamic law in response to different situations. He indicated that the ignorance of this principle had caused such hardships and pressures and this had led to serious errors in Islamic law. The Shari'ah's structure signifies the observation of human interests. Hence, "whatever means injustice not justice, mercilessness not mercy, and impairment not benefit cannot be related to Shari'a, even if a relation may be indicated through a certain interpretation" (Ibn Qayyim 1973, vol.3, p.20). Afterwards, some take the statement and apply it to everything, even on fixed rulings; however, if we go back to the full quote in context, then we would understand that this is not what Ibn al-Qayyim meant.

This chapter will clarify the types of ruling that were intended by Ibn al-Qayyim in his statement. Moreover, the role of the four legal norms (time, place, custom and circumstance) will be analysed through the previous chapters on *tawarruq* stages. In addition, the chapter will finally deduce the reason for changing *fatwas* according to these legal norms. It is divided into four sections to compare *tawarruq* in its stages and examine the types of ruling that are influenced by the four legal norms.

5.1. The Importance of Studying the Reality of Changing *Fatwas*

The adjustment of the financial ruling according to the circumstances, customs, place and time requires studying the reality. Studying the reality involves a number of requirements, such as being familiar with the lifestyle of people in order to understand their habits. Also, understanding their potential benefits and harms is required when studying the reality in order

to determine need and necessity. This is because a decision that suits a particular period of time or place might not be compatible with another; in addition, a matter can be seen as a necessity for some people while for others it is not. Thus, studying the reality ensures that the *fatwa* does not conflict with society's needs and people's necessities.

Applying this to passing the *fatwa* on *tawarruq* contract entails studying the reality that surrounds the situation according to the four legal elements. For instance, in the past when the majority of the jurists issued the permissibility of *tawarruq*; this was a result of their reality calls. In their situation, dealing with *tawarruq* achieved the community interests, and met the people's needs, in addition to the fact that the contract did not cause any harm. The recent prohibition of *tawarruq* also results from studying the present reality, precisely, the reality in financial economics, also, from the results of the reliance on the debt market. In contemporary times, it has raised the harm of exercising *tawarruq*, which did not occur previously. *Tawarruq* has become a cause of instability in the economy, and a subject of long term damage. Furthermore, the benefits that may be achieved through *tawarruq* contracts can be achieved through other available alternatives. On this basis has come the recent *fatwa* from (IIFA) that forbids *tawarruq*.

5.2. The Effect of the Four Elements on *Tawarruq* Ruling

Time, place, customs and circumstances have an impact on *tawarruq* ruling. This impact of the four elements on the ruling of *tawarruq* can be analysed in the light of the previous chapters. This section will determine to what extent the varieties of time, location, change of customs and circumstance can influence *tawarruq* contract and its ruling. This will be shown by dividing this section into four parts as follows: the impact of time, the effect of location, and eventually, the customs and circumstances influence on the contract studied.

5.2.1. The Role of Time

Time has affected *tawarruq* contract in two different ways; economically and from the jurisprudence perspective. First: on the economic field; financial transactions over the ages have developed because of the evolution of the economic system to meet the needs of the people of each time. Likewise, *tawarruq* contract, from the economic perspective, has been influenced by the time factor on a number of points.

The first point is that time has an impact on the prevalence of practicing *tawarruq* for gaining liquidity. Dealing with *tawarruq* was hardly known at the beginning of the Islamic era, since

there were occurrences of its practice at that time, as *qard hassan* was sufficient to meet their necessities. However, when Islam started to spread and the need for liquidity increased, *tawarruq* contracts began to spread through people in need. This spread of the contract owes to the necessity of meeting their period's requirements.

Historically, practicing *tawarruq* in financial sector has roughly completed one decade. *Tawarruq* has stood firstly in Islamic financial banks and has been recently followed by conventional banks. At the beginning of this century, organised *tawarruq* was introduced in Saudi Arabia as a first practice of this contract through financial institutions. At that time, it was characterised as a Shari'ah-compliant contract; therefore, the usage of *tawarruq* has expanded. To be more precise, the first Islamic bank that offered organised *tawarruq* was NCB (National Commercial Bank), under the name, *al-tayseer*. Then, it was followed by SABB in October 2000, under the name, *mall*. Then, Al-Jazira Bank and Samba Financial Group have introduced organised *tawarruq* from the end of 2002. It is called *dinar* and *tawarruq al-khair* respectively (Al-Shalhoob 2007, p.3). *Tawarruq* has become dominant in Islamic banks in Saudi Arabia and other Gulf countries. It has, also, exceeded the border of Islamic banks to commercial banks and Gulf countries to reach others such as eastern Asia and European countries.

On the other hand, reverse *tawarruq* has dominated in recent years. At the beginning of its historical practice, it was considered as a lawful product due to the permissibility of the basic form of *tawarruq*. Consequently, Islamic banks have provided reverse *tawarruq* and, therefore, move away from Islamic deposit, which is one of the impediments to banking growth.

In conclusion, contemporary times have enhanced the role of *tawarruq* contracts to a degree unmatched by any other time, due to bank support, as the banks that support the Islamic financial instruments (including *tawarruq*) have widely increased. However, in recent times, it has been noted that this rapid increase in practicing *tawarruq* has started to slow down as some Islamic banks are shunning *tawarruq*. This is due to the recent decision to prohibit *tawarruq* by the International Islamic Fiqh Academy¹. The Islamic Fiqh Academy takes into account the reality of the economy in the present time. Above all, it has been shown dealing with *tawarruq* on the timeline. This results in a number of practiced *tawarruq* increases over

¹ Resolution number 179 (5/19) in its 19th Session (26-30 April 2009) <http://www.fiqhacademy.org.sa/>.

the ages, as the time requirements become more complex. However, the recent reduction of applying *tawarruq* has contributed to the recent forbidding.

The second main point is the development of the *tawarruq* structure over Islamic ages. This can clearly be seen through the comparison between *tawarruq* in the past and *tawarruq* in modern times. *Tawarruq* was a simple transaction between individuals and the aim was only to obtain money. Add to that the fact that *tawarruq* was only one type (classical *tawarruq*) as this sort satisfied the need and necessitate during that age. Also, the common commodity that is used in *tawarruq* transactions was silk, a role which disappeared over time. All these characters were in line with the uncomplicated requirements of earlier eras. On the other hand, the transaction became more complicated in contemporary times. It organized, arranged and included specific procedures since the financial institution provides the liquidity in organised *tawarruq*. *Tawarruq* development doesn't stop at that point; reverse *tawarruq* has become a dominant instrument in Islamic financial institutions. It becomes the bank's source for liquidity. This liquidity is the basis of many Islamic bank activities (News Centre Financial Industry, 2009). Overall, recent times have introduced two types of *tawarruq* contracts, namely: organised and reverse *tawarruq*, used in order to supply the customers and the financial institutions with liquidity. Adding to these developments is that the commodity is usually conducted has differed from the past. It is now the metals available in international markets especially zinc, nickel, tin, copper, and bronze; because they are essential minerals that are in daily exchange globally. Generally, the essence of contemporary *tawarruq* is to supply the banks with a great amount of liquidity while *tawarruq* was only used for assisting the client and providing his necessities.

The second time aspect is that the effect of the jurisprudence field on *tawarruq*. The jurisprudence concept of *tawarruq* has developed during the Islamic eras. In early Islamic ages, *tawarruq* concept was confused with the concept of *inah* sale in jurisprudence literatures. Then, in the third Islamic century, the financial concepts developed when the confusion between the *inah* concept and *tawarruq* concept was overcome. This matter was resolved when the financial concepts during that age were settled. Moreover, introducing a clear condition for *tawarruq* after a period of time was a result of the settled concept of *tawarruq*. In addition, the Islamic ruling of *tawarruq* has been influenced by the time factor. It has been changed due to the differences in *masalih* and *mafasid* (harm) over time. Generally, the early jurists tended to be permissible of the contract whereas today the tendency is toward prohibition.

However, there are some essential points on *tawarruq* that did not change over the ages. First of all, the use of the *tawarruq* term to indicate this type of feature, whether the usage is single as it is in the early times or genitive, such as organised *tawarruq* in contemporary times. The second point is regarding including a third party in the past and present times in order to avoid dealing with *inah* sale. Furthermore, the usage of a commodity in *tawarruq* remains over throughout time, whether the possession of it genuine or not. What is more, the containment of two transactions which finally incur debt is a stable character of dealing with *tawarruq*. Finally, over time, practicing *tawarruq* is based on the financial principle of avoiding *riba*.

Strictly speaking, this has proven that time affects the essence of the transactions and how *tawarruq* practice particularly has been developed in Islamic finance. All in all, the time factor, especially in contemporary times, has a noticeable effect on *tawarruq* contract economically. Modern time has influenced the use and structure of *tawarruq*. At the beginning of this century, *tawarruq* was practiced in a minor field of finance, but just recently *tawarruq* has been heavily used by financial institutions.

5.2.2. *The Role of Place*

There is no doubt that the spatial environment has an influence on the people's thinking and behaviour. Therefore, it can be seen that rural areas are different to the city, the warm country is different from the cold country and the east is different from the west. Each place has an effect on its community. It must take into account these differences and changes to achieve the justice that the Shari'ah law aims to achieve. This was explicitly ruled by the early scholars when they considered the different locations as an obligatory reason for changing opinion. Thus, the variety of place is one of the causes of changing *fatwas*. A good example of changing *fatwa* according to different place is contemporary *tawarruq*.

Contemporary *tawarruq* is widely practised in most of the Muslim countries with a degree of variation in its application. Since Islamic law is based on different schools of thought, which are mainly located in different geographical locations, this has an impact on the interpretation of Islamic financial transactions, and *tawarruq* is one of them.

Gulf countries are considered one of the most significant regions for practicing *tawarruq*. For instance, Dubai in the United Arab Emirates deals intensively with *tawarruq* contracts as the Dubai Financial Group, which is the financial holding company for Dubai Group, has conducted the biggest *tawarruq* deal, for a \$1.5bn facility in 2008. At that time, this facility

was the largest commodity which incorporated more than 20 banks from across the Middle East, Asia and Europe. Another example of Gulf countries' intensive application of *tawarruq* is in Saudi Arabia. In KSA, *tawarruq* funding, which is relatively new in comparison with other instruments, occupies first place in the Islamic finance industry, representing 183 billion riyals. This accounts for 67% of the total amount of funding in the Saudi Islamic finance market, while the *murabaha* financing instrument, which is the oldest Islamic mode of financing, accounts for 64 billion riyals of the total amount of funding in the market. The rest of the financial instruments (*musharakah*, *istisna'*, *salam*, leasing, speculation, sales commission, and direct investment) comprise just 10% of Islamic finance. (News Centre Financial Industry, 2009). Furthermore, recently, Qatar has offered *tawarruq* as cash management option to the clientele provided by the Al-Safa Islamic window under Qatar Commercial Bank (News Centre Financial Industry, 2009). The prevailing use of *tawarruq* in Gulf countries owes to the easy usage of this instrument by the banks' employees and customers in the Islamic banking industry, in addition to the lower risk of such a deal compared to the other financial instruments.

On the other hand, Malaysia, for example, has a different situation. Despite the popularity of *tawarruq* in Islamic finance, almost all Malaysian Islamic banks rely strongly on *Bai' Bil thaman Ajil* (BBA), which is a form of agency based deferred payment and *inah* contract, which is prohibited outside Malaysia. However, the Malaysian Islamic bank, RHB, which is one of Malaysia's largest Islamic financial institutions, on Aug 13th, 2009, launched a new *tawarruq* product that is based on mobile phone airtime. This new product has the advantage of addressing airtime as an underlying asset as the ready purchaser and E-Pay as a ready seller for this commodity. The other advantage of introducing the use of airtime surrounding other commodities is the creation of more attractive product to banks and their clientele alike. The promoters also state that the way *tawarruq* transactions are conducted will be revolutionized due to the new airtime-based structure (News Centre Financial Industry, 2009). Also launched in Malaysia is Bursa Suq Al-Sila, which is a fully-electronic platform. This platform is an international commodity platform which can facilitate commodity-based Islamic financing transactions that is compatible with the Shari'ah principles such as *tawarruq* (News Centre Financial Industry, 2009).

However, according to Al-Mani' opinion, the implementation of *tawarruq* would be different between states (the Gulf countries and Malaysia). As the banks often use the international metal exchange; Al-Mani' stated that the banks ought to substitute the metal commodity with

local goods. This is because the commodities that are bought from international markets, such as New York or London, are commodities that are unknown to the customer. The customer does not know either the quantity or the type of the commodities purchased, as he only assigns the bank to be an agent to sell the commodities for him, without knowing the details of the commodities that he has bought. Also, the pressure exerted by many clients of the banks encourages localising *tawarruq*. Hence, the banks are compelled to modify their practices by using local commodities that are produced within their country (Isra, 2008). Consequently, the implementation of *tawarruq* contract will differ from one place to another according to the prevailing market and the commodities available in the market. This is because local commodities change depending on the state. For example, the common goods in Malaysia are palm oil, and rice in Saudi.

After observing the very common practice of *tawarruq* in the Gulf countries, and also the recent development of this product in Malaysia, I will move on to present the various rulings on *tawarruq* in these countries.

The variation of Shari'ah authority is the main element that affects *tawarruq* ruling according to different places. This is because each place tends to have its own authority in order to adopt the ruling to their geographical conditions, and also to the diversity of the prevailing needs and circumstances of the countries. For example, Saudi Arabia based their Islamic authority on Hanbali School, whereas, in Malaysia it is based upon that of the Shafi'i school. These Shari'ah authorities have different methodologies upon which to base their *fatwas*. One important aspect related to the four Islamic schools of thought, which is followed in different Muslim communities, is that they have different methods for issuing *fatwas*. For instance, Hanbali School is considered the strictest school, while Shafi'i School is a combination of Hanafi and Maliki methodologies. Clearly, this would have a key role in changing the *fatwas* according to the locations.

The Islamic Fiqh Council, which is based in Makah in Saudi Arabia, studied the original manifestation of *tawarruq* and stated in its fifteenth session that the original *tawarruq* is a Shari'ah compliant transaction as long as the contract agreements are compatible with Shari'ah. However, the council in its seventeenth session clarified and specified its concerns with *tawarruq* as practiced and concluded with the impermissibility of organised *tawarruq* and reverse *tawarruq*, and concluded that they are not Shari'ah compliant as they contain a hidden element of *riba* (Agha 2009, p.25).

Some, such as Husain Hamid Hassan, referred the prohibition of *tawarruq* to the improper implementation by Islamic banks and financial institutions. The applications of most Islamic and conventional banks with Islamic windows have been criticised for not being implemented according to Shari'ah rules. For example, in many banks in Saudi Arabia although they have Shari'ah advisers, the implementation of *tawarruq* is not in compliance with Shari'ah. This is attributed to the absence of a monitor on the practical implementation of Islamic financial products in some places. Besides that, in other places ambiguities exist on the implantation of *tawarruq*. With regard to some places, there are doubts and ambiguities on whether their banks adhere to the allowed *tawarruq* or whether they comply with the conditions for its validity. This ambiguity has led to the forbidden ruling (Isra, 2008).

However, the Shari'ah authority in Malaysia has a distinct attribute regarding this issue. As *tawarruq* contract includes deferred payment (*bai bithaman ajil* (BBA)); the Malaysian High Court Ruling declared a major decision relating to the BBA contract in April 2009, which was the invalidity of BBA as it is tantamount to a loan (*riba*). This caused considerable anxiety in Malaysian Islamic financial institutions due to the fear of a prospective increase in BBA contracts with uncertainty about their agreement validities. The impermissibility of BBA was overturned by the Malaysian Supreme Court. The Malaysian Appeal Court decided that BBA agreements are valid. This is because these agreements cannot be compared with loan agreements as BBA transactions are sale not a money lending contracts. (News Centre Financial Industry, 2009). Moreover, in Malaysia there were some *fatwas* on *tawarruq* contract, precisely: a top Malaysian religious scholar said in June 2009 that organised *tawarruq* should be allowed as it is facilitating the \$1 trillion Islamic industry. Also, Akram, who sits on the Malaysian central bank's Shari'ah Advisory Board, affirmed the permissibility of practicing *tawarruq* in Islamic banks (News Centre Financial Industry, 2009).

The different decisions reached in the two regions result in a variety of reactions in both countries, with different consequences. In Gulf countries, as seen above, *tawarruq* is firmly embedded in the Gulf finance industry and an undiversified revenue stream for many of their Islamic finance institutions. The prohibition ruling on *tawarruq* has an immense impact as it is one of the most common liquidity management tools used in Islamic financing. Also, the withdrawal might lead to loss of revenue and also, loss of profit as the income must be cleansed from profit sources that are forbidden in order to preserve the Shari'ah compliance. In addition, some argue that the recent forbidding of *tawarruq* has had a negative impact on

the Islamic finance reputation of the Gulf countries (Opalesque Premium Alternative News, 2009). Despite the prospective effects of the withdrawal of the *tawarruq* instrument, its use in the Middle East is already in decline. The ruling of the Fiqh Academy has been welcomed in many Islamic banks that are based in Gulf countries as this modification is considered a movement away from replicated and disingenuous transactions towards the growth of substantive and genuine Islamic finance. This maturity in the Islamic finance industry buttresses it as an autonomous viable alternative to conventional finance. This is evident when conventional finance has been ruined by speculation (hedge funds), derivatives, excesses of leverage and the bifurcation of assets from debt and on-sale (collateralized debt obligations), each of which is prohibited in Islamic jurisprudence. Over all, these days there are more and more Islamic banks which are shunning *tawarruq* contracts in gulf countries such as Saudi Arabia in order to follow the proper rule of *tawarruq* in the contemporary period (Agha 2009, p.25).

However, the Malaysian reaction toward *tawarruq* is entirely different. There is further confirmation of the practice of *tawarruq* as they launched their new commencement on the *tawarruq* product. This commitment is derived from and supported by their Islamic authority. This is contrary to what happened in Indonesia. The National Shari'ah Board (DSN) there was asked to approve *tawarruq* contract. Recently, DSN has introduced 14 conditions to be taken into account with practicing *tawarruq*. As these conditions are rigid, they are also converting *tawarruq* to *murabahah* contract. At the end, introducing *tawarruq* was postponed as the conditions are stringent (Ahmed 2011, p.123).

All in all, the *fatwa* ruling in one financial instrument is not always the same in all countries. The place where the contract would take place is considered essential before giving the *fatwa*. It is because *fatwa* will consider the location/jurisdiction of the contract. In *tawarruq*'s instance, this can be exemplified by the ruling of *inah* contract. It differs from one place to another. In Malaysia, for example, dealing with *inah* is permissible according to the Shafi'i School (Shaharuddin, 2009). However, in Saudi Arabia, such a deal is forbidden based on the view of Ahmad bin Hanbal, as discussed in chapter 3. This instance shows that the differences in the methodologies based on the Shari'ah authorities in different states have an impact on the financial rulings. In the above discussions, the great impact of locations on financial instruments is evident. The implantation and the ruling differ according to location.

5.2.3. *The Role of Circumstances*

Islamic rulings respond to diverse circumstances and needs as they are universal in nature. One of Islamic principles is that difficult circumstances require leniency, which means that when the matter becomes constricted, the law becomes more flexible. The mufti should take into account the differences between these circumstances when issuing his *fatwa* according to the given situation. As a result of this, those who use jurist's *fatwa* must acknowledge the circumstances in which the *fatwa* was issued. This is because the *fatwas* are issued in order to respond to the reality of evolving conditions and circumstances faced by Muslims.

For example, some *tawarruq fatwas* were issued in accordance with specified circumstances. Imam Ibn Hanbal emphasised the importance of the matters (circumstances) surrounding the situation in his *fatwas* on *tawarruq*. He permitted *tawarruq* when it is used by those in need of financial support. This situation is excluded from his prohibition on classical *tawarruq*. In this example the role of circumstance is activated to bring benefits to those who are in need.

Additionally, the circumstances of implementing *tawarruq* have changed. Classical *tawarruq* was conducted by individuals, while contemporary *tawarruq* is an organisational contract. To illustrate this, in classical *tawarruq*, the first party (seller) does not arrange the second transaction, but the *mustawriq* sells the purchased commodity to a third party. Whereas organised *tawarruq* requires appointing the bank to sell the commodity on behalf of the client (*mustawriq*) to a third party. Thus, the only one who involved in the two transactions in the classical form is the second party (*mustawriq*), while it is the bank in the modern form. This change of the contract's circumstances has an impact on the main purpose of the transaction. In organised *tawarruq* the aim is to have legal access to the loan with interest since the commodity is used to cover lending money with interest, while this cannot occur in classical *tawarruq* since there is no agency in such a contract (Usmani 2003, p.59).

These days, other circumstances can have different rules. To demonstrate this, practicing *tawarruq* at an individual level might have a different rule. This needs to look at the debt's impact on individual practice. Debts at individual level would not harm the economy, unlike practising *tawarruq* through banks. It is harmless since the corruption in the financial system occurs only when the money is created through the debt mechanism which causes proliferation. Hence, on the basis of individual practise, debt is relatively different from the organised debt market. It is because the impact differs between the act at the macro level and at the micro level (Siddiqi 2007, p.4). Therefore, *tawarruq* contract is allowed to be practiced

individually as it benefits certain individual cases in obtaining the money for serving their essential needs without harm.

Other circumstances that can influence the *fatwa* on *tawarruq* are the different positions of the scholars. As noted earlier, *tawarruq* is one of the most commonly discussed issues by contemporary scholars. One of the causes of different rulings is the different circumstances that surround the scholars. Here I will present in detail the recent debate on *tawarruq* contract and then will show clearly how the different circumstances around the scholars can affect the *tawarruq* ruling.

Contemporary scholars who discuss the issue of *tawarruq* can fall into two categories; scholars who have a Shari'ah background without involvement in Islamic finance and scholars who are actively involved in the field of finance.

After the decision by the International Council of Fiqh Academy on the prohibition of organised *tawarruq* and reverse *tawarruq*, there has been opposition by some scholars, such as Sheikh Nizam Yaquby, Mohd Daud Bakar and Mohammad Akram Laldin, who are active in the industry. Their arguments will be discussed.

Yaquby claimed that *tawarruq* is a useful transaction and can be used as a compatible contract with the Shari'ah standards in Islamic finance when it is applied properly. Also, "centuries-old Islamic finance tools needed to be reconciled with the procedures of the modern banking system" Yaquby said "All these Islamic finance tools have certain amounts of organization and we must know that (given) modern contracts within the existing frameworks and legal structures, it is very difficult to do something which is not organised,". Yaquby, in particular, wields influence in the Gulf Arab region. He is known as one of the most powerful people in Islamic finance since he is actively engaged with a range of financial institutions worldwide. He sits on the advisory panels of 46 banks and financial institutions, according to Funds@Work, including the Central Bank of Bahrain, Islamic Bank of Britain, IIFM, AAOIFI, HSBC Amanah, Abu Dhabi Islamic Bank, Citi-Islamic etc. He also added "there were hardly any alternatives to *tawarruq* as a tool to satisfy legitimate financing needs, to which he gave more weight than how it is implemented". He, then, explained his view from a Shari'ah perspective "How can Shari'ah allow something which is burdensome on a person... and not allow something which is organised and well done, and this man who is in dire need for cash will not suffer a lot". He concluded with his support of the Bahrain-based

AAOIFI standard which provides the function of checking and preventing the abuse of *tawarruq* (The Islamic Finance Portal, 2009).

In addition, Laldin, who advises Malaysia's central bank, which oversees the world's largest Islamic bond market, and also advises HSBC's Islamic banking arm, disagreed with the declared decision of the International Council of Fiqh Academy on *tawarruq*. He argued that further study is needed on organised *tawarruq* since the contract is focused on debt creation rather than the activities in the economy in which is considered one of the most important key principles of Islamic finance. However, organised *tawarruq* ought to be allowed since Islamic law allows commodity *murabaha*, but the usage of such a commodity in Islamic finance is not ideal as it does not encourage real economic activities, but basically provides cash. Islamic finance now emphasises real economic activities, rather than some sort of artificial arrangement that is being done.

He refuted the argument that *tawarruq* can harm Islamic finance as it moves more deeply into riskier by saying "Banks must be ready to take extra risks, do extra jobs, and expand their role rather than just provide credit". He concluded with reluctance to some scholars' views, scholars who are now pressing for the application of *tawarruq mundhabit* after his statement: "However, banks are required to follow the structure's guidelines as well as *tawarruq* would still be used for now as the industry's heavy reliance on the structure means that many banks will close down without it" (The economic roya, 2010).

In the financial field, it found that Taqi Usmani is one of the Shari'ah scholars who supported the view of IIFA and forbade practicing contemporary *tawarruq*.¹ He pointed out that according to the source of *sadd al-dhara'i*, Islamic financial institutions should be totally prevented from practising *tawarruq*. He said that 'practicing *tawarruq* contract through international market is prone to be null and void because of the non-compliance with Shari'ah rules'. Also, he stated that 'if all of the conditions for a valid *tawarruq* are fulfilled, the transaction may be valid, but an extensive use is not advisable' (Usmani 2003, p26). As a result of his *fatwa* some of the Islamic banks have accepted it and stop offering *Tawarruq*.

¹ He is an Islamic scholar and a membership of a number of Islamic financial organisations such as the International Shari'ah Council for the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) in Bahrain. Although, the AAOIFI permitted *tawarruq* a few years ago, this did not prevent him from declaring it impermissible during the Fiqh Council session.

His *fatwa* was considered as slowing down the development of the industry. (News Centre Financial Industry, 2010).

As noted above, the critics were mostly the scholars involved in the finance domain, whereas, the other category of scholars supported the view of forbidding *tawarruq*. The number of scholars who are engaged in banking business is very limited; however they are more influential since they have power in Islamic financial institutions as they sit on Shari'ah advisory boards for the Islamic bank; whereas, the ruling of Fiqh Academy on *tawarruq* is not binding. Over all, involvement in finance can be seen as one of the circumstances that influence the scholar's *fatwa* on Islamic finance.

In conclusion, it is important to stress that changes on ruling do not imply that circumstances and contingencies can be used to free Muslims from Islamic law. Thus, dealing with *tawarruq* in order to have access to *riba* is impermissible to use under any circumstance. All in all, granting flexibility under temporary circumstance is separated from issuing verdicts for permanent situations.

5.2.4. *The Role of Customs*

Tawarruq contracts might be influenced by the prevalent custom in commercial transactions. The customs (common commercial practice) regarding *tawarruq* contract has changed. Some of these customs have an impact on the Islamic ruling. The type of rulings that have to change in consideration of the customs of the land are the rulings that are contingent on the customs of the people. This is the only ruling that changes with the differentiation of customs. The change on *tawarruq* customs can be seen through several aspects. These can be summarised in the following points:

First of all, some of *tawarruq* transactions include customary conditions which affect the ruling on the contract. In organised *tawarruq* the financial institution must buy the commodity on behalf of the client according to the prevalent commercial custom. Also, in reverse *tawarruq* the bank will act as an agent on behalf of the client to purchase and sell the commodity with the money that is located in his account, and an agent in selling to himself. This combination of two sales, in both contracts, is stipulated by the prevailing custom. The customary combination leads to the forbidding of *tawarruq* as it conflicts with Shari'ah law. The Prophet Mohammad (*pbuh*) says in the Hadith that "two sales in one sale are not permissible". In contemporary *tawarruq* the two sales (the cash and the instalment sales) are

connected by the commercial custom. Consequently, *tawarruq* contracts through banks become unacceptable in Islamic law as they include an invalid custom (Bouheraoua 2009, p.18). The reason for the agency is that the customer has no interest buying and selling the commodity while the seller in traditional *tawarruq* does deal with the second sale of the commodity. In other words, the client in contemporary *tawarruq* appoints the bank as an agent in buying and selling; whereas, in traditional *tawarruq*, the seller does not know the purpose of the purchaser. Therefore, contemporary *tawarruq* has been forbidden due to the change of the custom.

Secondly, there is the issue of the differing of the commercial custom on the issue of possessing the commodity. In contemporary *tawarruq* the banks usually do not in reality hold the commodity and also they often do not possess the goods. As a result of this custom, there is no circulation of goods between the seller (the bank) and the purchaser (the *mustawriq*) or between the bank and the international or local market. However, in classical *tawarruq*, the second party (seller) usually possesses the merchandise.

Also, contemporarily, the common commodity is different according to the commercial customs. For example, as seen earlier, the common commodity in Saudi Arabia is rice, while it is palm oil in Malaysia. This will have an impact on *tawarruq* when its commodities are localised.

5.3. Reasons for Changing Fatwas According to the Four Elements

Although *fatwas* differ because of the variety of situations, there are a number of reasons behind this change. In light of the previous chapters, it can be deduced that the changing of Islamic law according to the four legal norms has several reasons, including the following:

Firstly, changing the people's *masalih (istislah)* is considered an element for changing *fatwa* according to different times and places, since achieving human interest is a purpose of Shari'ah law; however, their interest varies according to time and place. The interests in one place might have negative consequences elsewhere. For instance, the later Shafi'i jurists took a different approach to *inah* sale and ruled with a different opinion to the early Shafi'i jurists. They disliked such a practice while it had been permitted by the early jurists. This is attributed to the interest at their time because it was used to circumvent Islamic law and exploit the people's need. Therefore, it was of more benefit in later times to reduce the dealing in *inah* sale whereas in the early period it suited the community to permit the

transaction¹. Above all, the changing of the *masalih* may change the *fatwa* depending on the time, place or situation, because what suits some people at one time may not suit those who come after them, and therefore differ in the view of legal provisions.

Secondly, need and necessity have a key role in changing *fatwa* according to differences in time and place. Different situations of necessity and need have a different ruling in Islamic law. This is because achieving societal requirements and needs is one of the Shari'ah objectives. Thus, the *fatwa* must not contradict the extreme necessities of the people, but it should be in harmony with it. As mentioned earlier, Ahmad bin Hanbal has two opinions on the issue of individual *tawarruq*; one is permissibility, while the other is disapproval. The permissible *fatwa* refers to the cases where there is a need for money, while the other *fatwa* is applied to a person who does not need such a contract. In both examples, the rule has changed because of the occurrence of necessity. Therefore, when need exists, this can be considered as one of the reasons to affect the Islamic ruling.

Thirdly, the means that result in an unlawful end differed at different times and places. These means must be blocked and prevented in the Islamic law because, in Shari'ah, what led to *haram* is *haram*. Blocking the means, or *sadd al-dharai*, is something that varies according to the differences of the times, place and circumstances. For example, *tawarruq* is a contract that results in a *haram*, such as cheating and exploitation of people's need; however, this result is sometimes certain while at other times rare. This variety differs according to the changing of time, place and circumstance. Thus, Ibn Taymiyah forbade dealing with individual *tawarruq* and ruled with a different view to his *madhab*, the view of permissibility. This is because, during Ibn Taymiyah's period, dealing *tawarruq* often lead to cheating and explicit *riba*, while in prior time's *tawarruq* rarely resulted in *haram*. All in all, the changing of *fatwa* may refer to the issue of blocking the means, as it varies in time, place and circumstance.

Also, *maqasid* al-shari'ah plays a central role in forming Shari'ah scholars' opinions as the differences among them are stemmed from their differences in implementing the *maqasid*. According to Al-Suwaylim *maqasid* is considered one of the criteria that applied during the process of issuing any ruling for Islamic financial products. He stressed that the purposes of Shari'ah are to focus on protecting the essential, complementary, and the embellishment objectives. As a consequence, the validity of such sale is mainly measured by the

¹ *Inah* sale is prohibited by a text from the Sunnah. As studied, in this case, using *istislah* is not acceptable.

achievement of *maqasid* to determine its acceptability. If the interest of the product is essentials, Islamic law will endorse it. Also, if the interest is a complementary, the law will maintain it. However, the financial instrument will be forbidden, if the interest is trivial and not equivalent to the value of money that paid for.

In addition, Al-Suwaylim applied *maqasid* criteria on *inah* sale. He explained that the product in the contract does not have any interest for the debtor, as it is not intended originally. Since the commodity does not achieve any benefit to the buyer. Therefore, according to *maqasid* criteria *inah* sale should be forbidden. (News centre financial industry, 2008)

On the other hand, Malaysia, as the follower of the Shafi School, supports *inah* sale. This controversial contract, which is deemed to involve *riba*, is practised by their financial institutions. To achieve Shari'ah objective on promoting the wealth, Malaysian scholars apply *maqasid* to justify this practice. They assert that when an institution or individual is in need of capital, *maqasid* method could be utilised. However, this has been criticised because it is mere justification for using the *hila* in Islamic financial industry to circumvent *riba* (Al-Sulaiman 2011, p.50).

Additionally, easing hardships and bringing facilities can change the *fatwa* according to time and place. This is because what is hard on people in a certain time or place may not prove difficult for others. The financial ruling can vary according to this factor since Shari'ah aims to bring relief to people and prevent hardship. Hence, Ibn Uthaymeen stated that preventing people from dealing with individual *tawarruq* imposes a hardship upon them because at the present time there is a need for money; however, there are few lenders. As a result of this, it would be acceptable in Islamic law to deal with individual *tawarruq* in order to ease hardships (Al-Moshaikh, 2004 p.125). As shown, this is one of the reasons that influence the changing ruling due to a change in time, place or situation.

What is more, the variety of legal authorities is a factor for changing *fatwa*. People in each time or place refer to their authority on many issues, including financial matters. This has a vital effect on the differences in legal decisions. It can be demonstrated that each country has a *madhab* that it belongs to; thus, they determine the ruling in the light of their followed *madhab*. Each *madhab* has an independent methodology which results in the differences among the *madhabs*. For example, we observe that in the past, western reputation was more liberal in comparison with the Arabian Peninsula. Similarly, these days, different countries

have a character on their liberality. Generally, differing on the legal authorities is an effective factor on the issue of changing Islamic *fatwa*.

5.4. Types of Islamic Ruling Influenced by the Four Elements

It is important to shed light on an essential principle of changing Islamic ruling. This principle shows the sort of ruling that can be changed. To demonstrate this principle, Islamic law is divided into two main categories, as follows:

First type is that a ruling that is based on a direct text from the primary sources, either the Qur'an or Sunnah. These rulings are fixed at all times and everywhere and in each case, since this textual evidence has the priority over the elements of time, place, customs and circumstances.

For example, the prohibition of *riba* is fixed because this rule is based on a text from the Qur'an, Allah Almighty says: (Allah has permitted trade and has forbidden interest) (Qur'an 2:275). Consequently, this rule does not change in the variety of circumstances. Similarly, if the ruling is proven by a text from the Sunnah, it would be constant over the ages. For instance, the prohibition of *inah* sale is confirmed by the Prophet (*pbuh*) saying: "If people deal with *inah*... Allah makes will humiliate them and He never changes their situation unless they go back and stick to Islam" (Al-Bayhaqi 1925, p.293). This category of ruling is not affected by the four factors because the text of the primary sources of Islamic law is stronger than them.

The second category is the ruling that is based on *ijtihad* without an explicit text, such as rules derived in the interest of people or *urf*. The interest or *urf* can be noticed by the reality that they are varying depending on time, place and circumstances. Hence, these rulings might change as they have been derived from a variable source.

As explained earlier, *tawarruq* did not refer to a text provided in the Qur'an or the Sunnah, but was based on *ijtihad* and interest. This interest and benefit change with time and place, or for any of the factors that affect their interests. All in all, knowing the differentiation between those rulings which may evolve and those which cannot is vital in issuing *fatwas*. This is needed to prevent changing Islamic rulings based on people's whims, desires and emotions, such as making *riba* permissible.

Summary

In conclusion, the various legal evolution of *tawarruq* has been analysed from three aspects. First of all, the chapter has highlighted the importance of studying the reality in order to issue *fatwas* correctly. Examining the reality is necessary for changing the *fatwa* according to time, place, custom or circumstance. This is because decisions on the legality of a contract are affected by the surrounding circumstances of the time, place or customs.

Then, the chapter has moved on to the heart of the matter by discussing to what extent do the modern time, variety of regions, commercial customs and different circumstances affect *tawarruq* ruling. *Tawarruq* ruling could be seen as one of the largest examples in Islamic finance of changing ruling according to a variety of factors.

These days, the debt market is expanding, despite its harm on the economy. *Tawarruq* contract as a debt instrument increases the harm on the entire economy. Therefore, disallowing practicing *tawarruq* is the appropriate rule in such a time.

Generally, the Shari'ah scholars that are based in the Gulf countries and Malaysia have reached a distinct decision from each other on *tawarruq*. The Islamic Fiqh Academy (IIFA), located in the Gulf region, declared the impermissibility of *tawarruq*; whereas, religious scholars in Malaysia permitted it. Thus, Islamic financial institutions in the Gulf region are shunning *tawarruq*, while in Malaysia the usage of *tawarruq* as a liquidity instrument is growing.

There are a number of customary changes on *tawarruq* contract. One of the main effects is the customary stipulation of involving two sales in *tawarruq*. This is considered a cause for the invalidity of practicing *tawarruq* through Islamic financial institutions.

The last issue that has been examined is the impact of the circumstances on *tawarruq* contracts. Practicing *tawarruq* at an individual level is deemed a circumstance that has a different rule from the practice through Islamic banks. The permissibility on *tawarruq* at that level is owing to the harmlessness of such practice on the economy. Other circumstances that have an impact on financial ruling are the circumstances surrounding scholars and their field. Scholars who are involved in the financial field tend to be more interested and cautious about the banks and the financial institutions benefits, while others focus on reaching the right decision according to Shari'ah.

Also, the chapter has determined the types of rulings that can change. Rulings that are based on *ijtihad* are the only ruling that are influenced by the four norms. These are what Ibn Qayyem meant in his statement on changing ruling. Finally, the reasons for the effective role of those four legal norms have been analysed. The reasons have referred to the variety of masalih, needs, hardship, means and legal authority.

We can conclude that the pressure of circumstance is the most compelling reason why the laws of Islam change and conform to public taste. Also, the feasibility of changing Islamic verdicts because of changing conditions and situations creates the chance for jurists to formulate the details of law in accordance to a given circumstance.

Chapter 6 : Conclusion and Recommendations

Fatwa has a high stature in Islamic finance studies. This is because Islamic finance is based on Islamic law. The aim of this thesis was to investigate the influence and involvement of the four central elements (time, place, custom and circumstance) on *tawarruq* rulings through the prominent Islamic ages. The research has analysed a number of *fatwas* issued on *tawarruq* in different eras, taking into consideration the locations and circumstances in this analysis. This investigation has aimed to assess the debate that has taken place recently on the matter of *tawarruq*. For example, Malaysia allows *tawarruq*, whereas the jurists in Saudi Arabia have disallowed it. However, earlier *tawarruq* was considered as a Shari'ah compliance product in Saudi. Thus, the goal of the research was to find out how *tawarruq* ruling was conducted.

Before analysing the changing *fatwas* on *tawarruq*, the research looked at identifying the methodology that Islamic ruling is derived from. The analysis found that *usul al-fiqh* is essential for a proper understanding of the Islamic *fatwas*. Thus, *usul al-fiqh* is a guide for accurate financial *fatwas*. In addition, the research found that each *madhab* of Islamic Schools of *fiqh* has their methodology to rely on; however, they agree on the ordering of the first four sources according to its importance namely Qur'an, Sunnah, *ijma* and *qiyas*. This agreement should minimize the dispute on the issue of *fatwas*. On the other hand, the four *madhab* differed on tertiary sources on the base of its validity in Islamic law. Such a dispute can be considered as a cause of the current disagreement on *fatwas* among scholars.

Chapter three investigates traditional *tawarruq* in the past Islamic era. It has shown the first technical usage of the term (*tawarruq*). It was used explicitly by Hanbali jurists since they had a clear vision of the term of *tawarruq*. The investigation goes through the main four stages of the eras of Islam. The first stage was divided into two periods. First, the prophet's lifetime, the result indicated that *tawarruq* contract was never dealt with; so, no ruling in this matter. Hence, it becomes changeable and flexible according to the four legal elements. Second was companions' time, in this time *tawarruq* started to be practiced; however, the practice was limited owing to its infancy stage.

In addition, the next stage was the age of *tabi'een*. It found that *tawarruq* in this period expanded among commercial dealers in order to fulfil the demand. Also, *tabi'een* jurists were mainly agreed on allowing classical *tawarruq*. Also, it found that *tawarruq* in the stage of *mujtahids* was not properly implemented, owing to misunderstanding of its meaning with the

term of *inah* among the early jurists of Hanafi, Maliki and Shafi'i schools. Moreover, it concluded that the supported view by the four schools is the permissibility of classical *tawarruq*.

Chapter three examined the differentiation between the early jurists and the later ones in a certain *madhab*. It underlined that there were some jurists who took at a different approach to the ruling of *tawarruq*, with their *madhab* owing to the dissimilarity of the time and place. The final stage is the ages after the era of *mujtahids*, when the conditions of *tawarruq* were clearly introduced. This is because the deal with *tawarruq* spread widely in order to meet their time development. Consequently, establishing some terms and conditions are essential to ensure the evolution of *tawarruq* is still approved by Islamic law.

The analysis in chapter four was on the contemporary *tawarruq*, regarding its practice and ruling. After an analytical critique of organised *tawarruq* definitions, the research concluded with a precise definition for organised *tawarruq*. Organised *tawarruq* includes an arranged mechanism which starts with the possession of the commodity by the bank and ends when the bank hands the cash to the client. The second form of contemporary *tawarruq* is reverse *tawarruq*. Reverse *tawarruq* is akin to organised *tawarruq*; however, the roles are reversed as the client becomes a creditor and the bank is the debtor. Also, the discussion in this chapter showed that the recent dispute on this contract with the arguments for and against the practice. Prohibiting and permitting the *tawarruq* are two opposite views that held by contemporary scholars on practising *tawarruq*. These conflicting opinions on *tawarruq* reflect the early dispute among the jurists on classical *tawarruq*. Afterward, the study found the causes that stayed behind this disagreement. The differences in the methodological premises that scholars based their views are one of the causes. Also, the obscurity of the procedures of *tawarruq* through Islamic banks is deemed as one of the cause of current disputes among Scholars.

Practising *tawarruq* through Islamic financial intuitions ought to be in harmony with the principles of Shari'ah. One of the main principles under Shari'ah is that any financial arrangement should be structured as to present asset-backed. However, in practice *tawarruq* commodity is not possessed by the buyer as he has usually no interest in it and usually it remains with the seller to use it as a vehicle to circumvent *riba*. Therefore, the research considered contemporary *tawarruq* as a contradicting instrument to the Shari'ah principles.

After investigating *tawarruq fatwas* at different times, places and circumstances, chapter five analysed the past and present times. The analysis shows the key role of studying the realities in issuing *fatwas*. Observing the reality ensures that the *fatwa* meets society's needs and people's necessities. Thus, the result is that *fatwas* on *tawarruq* contract entails the reality according to the four elements time, place, custom and circumstances.

Furthermore, this chapter analysed the four central elements, as they have an impact on the differing *fatwas* on *tawarruq*. First of all, through the last few decades, *tawarruq* contract has been developed remarkably to meet the time requirement. The research traced all developed features that occur in the contract of *tawarruq* from the early ages to the recent decade. For instance, the structure and procedure of *tawarruq* contract developed from a simple, individual, to a complex, organised and arranged through a certain procedure. A further developed feature is the sudden shift on the prevalence of practicing *tawarruq* from a limited practice to a great expansion. It became the first instrument for gaining liquidity before 2009 when IIFA passed its *fatwa*. Afterwards, some IFIs start to shun dealing with *tawarruq* due to the recent prohibition. Moreover, the time element clearly affected the *fatwa* on *tawarruq*. In modern times, according to the situation of the economy, the prohibition of *tawarruq* is compatible with the current economic situation.

In jurisprudence literatures, there was confusion between *tawarruq* contract and *inah* contract. In some cases, it found that *tawarruq* contract called *inah* contract. Through the Islamic eras, the term of *tawarruq* developed to describe a specific contract.

In addition, the study found that the noticeable effect of the role of place on *tawarruq*. There is a degree of variation on reliance on *tawarruq* contract as a source of liquidity. While some of the IFIs in Gulf countries are shunning *tawarruq*, Malaysia enhances its distinct attitude by launching a new *tawarruq* product which is based on mobile phone.

Furthermore, the implementation of *tawarruq* would be differed between both regions on the commodity of *tawarruq* in the case of localising of *tawarruq* products. By customizing *tawarruq* products, this will distinguish the implementation of *tawarruq* in each place by its local good.

Another noticed effect of the locations on *tawarruq* is the rule of *tawarruq* as it varies from one state to another. Each state has its Shari'ah authority; this variation causes the various rulings on *tawarruq*.

Additionally, the customs is another factor which affects the rule of *tawarruq* as the contract includes some customary conditions. Some of these conditions invalidate the contract, for instance, in organised *tawarruq* the financial institution will buy the commodity on behalf of the client. This prevalent commercial custom leads to the combination between two sales in one sale. This combination between two sales in one contract conflicts Shari'ah law. As a result of this custom, organised *tawarruq* is forbidden.

Finally, this research concluded that the surrounding circumstances play a role in forming *tawarruq* ruling. As indicated in this research *tawarruq* contract can be allowed under a certain situation when it comes to someone who is in need for a financial support. Also, it was found that the role of circumstances differentiate between practicing *tawarruq* at the individual level or by generalising its permissibility for the whole community or at the level of financial institutions. As it is allowed to be practiced in the first instance whereas it is prohibited in the two other cases.

Further finding relates to the surrounding circumstances revolving around scholars. In this sense scholars are divided into two categories. First, scholars who are actively involved in the financial field have more liberal attitude regarding the issue of *tawarruq*. Second, jurists who have a Shari'ah background without any participation in the field of finance show their conservative attitude toward *tawarruq*.

Future Research Questions

This thesis emphasises the vital role of the four central elements (time, place, custom and circumstance) which have an impact upon the development of Islamic finance. As the research result positively found the influence of the central elements on *tawarruq* ruling in the past. This result would help to support any changes on *tawarruq* ruling in the present. Any approach taken by any jurisdiction can be valid according to Islamic law, as long as they do not breach any fundamental principle in Islamic law.

Broadly speaking, the research recommends that further studies should be undertaken on other Islamic finance instruments to find their roots in the past and upon which ruling was issued. This would ease the conflicts and debates among Islamic scholars.

Appendix

Ruling on *Tawarruq* by International Council of Fiqh Academy (IIFA)

The International Council of Fiqh Academy, which is an initiative of the Organization of Islamic Conferences, in its 19th session which was held in Sharjah, United Arab Emirates, from 26 – 30 April 2009, decided on the following:

Having reviewed the research papers that were presented to the Council regarding the topic of *tawarruq*, its meaning and its type (classical applications and organized *tawarruq*), a resolution was passed. Furthermore, after listening to the discussions that revolved about the applications of *tawarruq*, the resolutions were presented at the International Council of Fiqh Academy, under auspices of the Muslim World League in Makkah.

The following were the resolutions:

First: Types of *tawarruq* and its juristic rulings:

Technically, according to the Fiqh jurists, *tawarruq* can be defined as: a person (*mustawriq*) who buys a 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. This is the classical *tawarruq*, which is permissible, provided that it complies with the Shari'ah requirements on sale.

The contemporary definition on organized *tawarruq* is: when a person (*mustawriq*) buys a merchandise from a local or international market on deferred price basis. The financier arranges the sale agreement either himself or through his agent. Simultaneously, the *mustawriq* and the financier executes 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.

Second: It is not permissible to execute both *tawarruq* (organised 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 additional quick cash from the contract. Hence, the transaction is considered as containing the element of *riba*.

The recommendation is as follows:

To ensure that Islamic banking and financial institutions adopt investment and financing techniques that are Shariah-compliant in all its activities, they should avoid all dubious and prohibited financial techniques, in order to conform to Shari'ah rules and so that the techniques will ensure the actualization of the Shari'ah objectives (*maqasid* Shari'ah). Furthermore, it will also ensure that the progress and actualization of the socioeconomic objectives of the Muslim world. If the current situation is not rectified, the Muslim world would continue to face serious challenges and economic imbalances that will never end.

To encourage the financial institutions to provide *qard hassan* to needy customers in order to discourage them from relying on *tawarruq* instead of *qard hassan*. Again these institutions are encouraged to set up special *qard hassan* fund.

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