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Ḥīlah of Tawarruq: A Fundamental Analysis of Its Adaptation in Islamic Financial Services

حيلة التورق: التحليل الأساسي لتكييفه في عمليات التمويل الإسلامي

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Abstract

This paper aims to critically review the application of tawarruq in Islamic financial services. On one hand, it is proclaimed as a Sharī'ah-compliant mode, while on the other hand, it has also been deemed non-compliant. In terms of the aspect of ḥīlah, this review intends to examine the basic mechanism of financial tawarruq and compare it with 'īnah and ribā jāhiliyyah arrangements in order to outline the borderline of permissibility and prohibition. This paper applies the doctrinal methodology specified in Sharī'ah law, with cross reference to the contemporary Sharī'ah resolutions; whereby the observations, documents and records will be comparatively reviewed for establishing a critical evaluation. The review identifies areas that require further clarification regarding the adaptation of tawarruq into the modern financial system. The results indicate that the tawarruq mechanism differs slightly from 'īnah, which possess the most similarity with the ribā jāhiliyyah attributes. In certain aspects, tawarruq could be considered a permissible ḥīlah or makhraj, particularly within the current financial and economic landscape, provided that certain parameters are observed. These findings are crucial for harmonizing different Sharī'ah views, facilitating the adaptation of the concept, and ensuring its effective implementation at the operational level. This is necessary to address the current situation of Islamic financial services in the dominance of conventional finance.

Keywords*: *Ḥilah/ Ḥiyal, Tawarruq, 'Īnah, Ribā Jāhiliyyah, Islamic Finance.

ملخص البحث

يهدف هذا البحث إلى مراجعة تطبيق التورق في عمليات التمويل الإسلامي بشكل نقدي. تم الادعاء على أن التورق متوافق مع أحكام الشريعة الإسلامية من جهة، وغير متوافق معها من جهةٍ أُخرى. وفيما يتعلق بجانب "الحيلة"، تعزم هذه المراجعة إلى دراسة الآلية الأساسية للتورق المالي بالمقارنة مع "العينة" و"ربا الجاهلية" من أجل تحديد حدود الجواز والتحريم. طبقت هذه الورقة المنهجية الفقهية في قانون الشريعة الإسلامية، مع الإشارة إلى قرارات الشريعة المعاصرة. وتمت مراجعة الملاحظات والوثائق والسجلات ومقارنتها لإنشاء تقييم نقدي، حيث كشفت هذه المراجعة عن بعض المجالات التي تحتاج إلى مزيد من الوضوح فيما يتعلق بالتكييف مع النظام المالي الحديث. تظهر النتيجة أن آلية التورق تختلف قليلاً عن "العينة" التي هي أكثر تشابهًا مع صفات "ربا الجاهلية". من ناجية أخرى، يمكن أن يكون التورق حيلة مشروعة أو مخرجًا، وخاصة في المشهد المالي والاقتصادي الحالي شريطة أن تتم مراعاة معايير معينة. تعد هذه النتيجة ضرورية لمواءمة وجهات النظر الشرعية المختلفة، وتكييف المفهوم، وتنفيذه على المستوى التشغيلي من أجل معالجة الوضع الحالي للخدمات المالية الإسلامية في ظل هيمنة التمويل التجاري التقليدي.

الكلمات المفتاحية: الحيلة/الحيل، التورق، العينة، ربا الجاهلية، التمويل الإسلامي.

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Contents

1. Introduction

In today's banking and finance industry, various products and services that are proclaimed as *Sharīʿah*-compliant have been introduced across different financial sectors. However, many of them have been found to be associated with stratagem (*ḥīlah*) due to the reliance of Islamic banking and finance on the conventional system. *Tawarruq* is often utilized as an alternative to interest-based conventional instruments, which are considered *ribā*. The nature of *tawarruq*, which aims to provide cash liquidity, makes it suitable for most facilities offered by conventional finance, particularly in the banking and capital market sectors. In the case of Malaysia, *ʿīnah*, which attracts more fundamental issues, was used before *tawarruq*. Although *tawarruq* is generally less controversial than *ʿīnah*, it still raises concerns from a *Sharīʿah* perspective and should not be applied without limitations.

In light of the above, research on *tawarruq* has garnered significant attention, particularly in relation to the issues that arise from its application in the Islamic financial system. These issues have been extensively discussed among *Sharīʿah* scholars, following the *fatwās* or resolutions issued by authorized *fiqh* bodies. Notably, the prohibition of the *tawarruq* mechanism in modern banking, as stated in the latest collective *Sharīʿah* ruling by the Organisation of Islamic Cooperation ("OIC") International Fiqh Academy, has had an impact on the Islamic banking and financial industry. These ruling positions the application of *tawarruq* as carrying a high risk of non-compliance with *Sharīʿah* principles.

Literature Review

Nasrun (2014) explained that *Sharīʿah* issue on *tawarruq* is an extension to the issue of *ʿīnah*. The discussion by classical *fiqh* scholars on *tawarruq* and *ʿīnah* encompasses the *ḥīlah* for *ribā* where most of them ruled that the two-party *ʿīnah* is regarded as prohibited *ḥīlah*. Oppositely, several *Shāfiʿī* exponents permitted it due to the contract being independent of each other. However, it is only permitted without pre-arrangement (with or without written contract or by *ʿurf*) and where it fulfils the sale and purchase requirements.

Apart from that, majority of classical *fiqh* scholars permitted *tawarruq* due to the involvement of a third party as the end buyer. Conversely, *tawarruq* is disallowed by some *Hanbalī* exponents, i.e., Ibn Taymiyyah and his followers, either reprehensible (*karāhah*) or prohibited (*mamnū*' or *maḥẓūr*; and construed as *taḥrīm* by later period *Hanbalī* exponents) on the basis of gaining money with money (*darāhim bi darāhim*), which is still deemed as *ḥīlah* for *ribā*. Nowadays, most of the contemporary *fiqh* scholars opine the same as previous scholars who ruled *tawarruq* as permissible. However, customisation of the concept in the current banking and finance operation causes disagreement between scholars where many of them disallowed and considered it as *ḥīlah*, whereas some others allowed it as the contract validity of each transaction is accepted.

Back in 2003, the council of *al-Majma' al-Fiqhī al-Islāmī bi Rābitat al-ʿĀlam al-Islāmī* proposed a second resolution of *tawarruq* where it is not permissible due to the issue of fictitious commodity possession and enforcement of *wakālah*. On the other hand, the *tawarruq* concept was resolved as permissible in 2005 by the Shariah Advisory Council ("SAC") of Bank Negara Malaysia ("BNM") to be applied in deposit and financing products. However, the juristic reasoning of this resolution is quite generic and conceptual. In 2006, the Accounting and Auditing Organisation for the Islamic Financial Institution-AAOIFI's *Sharīʿah* Board resolved several *Sharīʿah* considerations in *tawarruq* arrangement that are practiced by Islamic banks, where the adaptation

of the *tawarruq* principle is subjected to strict regulations and restrictions.

Consequently, in 2009, under the auspices of the *al-Majmʻa al-Fiqhī al-Islāmī bi Rābitat al-ʻĀlam al-Islāmī's* resolution and backed with several research papers, the council of *al-Majmʻa al-Fiqhī al-Islāmī al-Duwalī* had come out with a definition of *tawarruq* and its verdicts. The resolution resolved that *tawarruq fiqhī* is permitted on the condition that it fulfils the conditions of sale and purchase in *Sharīʻah*. However, neither *al-tawarruq al-munaẓẓam* or *al-ʻaksī* are permitted as there is a cooperation between *mumawwil* and *mustawriq*, either explicitly or implicitly or as a common practice. This is considered as a deception to gain additional quick cash from the contract, which is classified as *ribā*. Despite such arguments, BNM has issued a new standard of policy document on *tawarruq* at the end of 2018. The standard recognised the application of the *tawarruq* concept in banking operation with *wakālah* contract inasmuch the application of dual *wakālah*. Similarly, the generic resolution has been provided by the *Sharīʻah* Advisory Council of Securities Commission Malaysia.

Nasrun and Asmak (2014a) summarized the ruling of *tawarruq* as follows:

Classical *tawarruq*	**Organized *tawarruq***
<u>Classical view</u> Permitted by the majority of scholars due to involvement of third party, which makes the trading permissible regardless of the higher price in deferred sale. Prohibited (or reprehensible) by some scholars due to *ʻillah* of gaining money with money (*darāhim bi darāhim*), which is considered as *ḥīlah*, regardless of the involvement of third party.	<u>Classical view</u> Not applicable (Evolution occurs in the modern age of Islamic finance)
<u>Contemporary view</u> Same view as the majority of classical *fiqh* scholars, i.e. permissible due to the involvement of third party, which is not considered as *ḥīlah.*	<u>Contemporary view</u> Prohibited by many scholars due to bank appointment as agent that is considered as *ḥīlah*, whereby the trading transaction is fictitious and unable to fulfil the possession requirement, and has similarity with *ʻīnah.* Permitted by some scholars under the basis of classical *tawarruq*, in which each of the transactions including *wakālah*, is valid and fulfils the *Sharīʻah* requirement.

Pursuant to the above, various researches, either doctrinal or fieldwork research, have been conducted to discuss the application of *tawarruq* in Islamic finance. The literature review conducted by Nasrun and Asmak (2014a) demonstrates that most of the studies discussed the fundamental theories, especially those concerning the area of jurisprudence of *tawarruq* concept. A few of the studies also discussed the application of *tawarruq* and its operational aspect in the financial products and services. However, detailed discussion on the financial *tawarruq* mechanism while connecting it to the concern of *ḥīlah* and comparative analysis on different *Sharīʻah* views of contemporary councils seems to be still lacking. A recent study by Dr. Mohamad Sabri et. al. (2023) analysed the application of *ḥiyāl* in *Murābaḥah* transaction from *Sharīʻah* perspective focusing on the Sri Lanka market. The study concluded that the practice of *ḥiyāl* is allowable

in Islamic Financial Institutions, Islamic capital markets, and Islamic investments. However, this study does not discuss in-depth the issue from the implementation perspective but rather from its fundamental theories.

In short, *tawarruq* is a core element whose application in Islamic finance needs to be articulated, especially at the operational level. The different *Sharīʿah* views on the permissibility and prohibition of *tawarruq* application could risk the *Sharīʿah* non-compliance in Islamic financial business operation especially for those who enter into cross border deal with different *Sharīʿah* jurisdiction, applies dual *wakālah* or applies Straight Through Processing ("STP") -automated process of commodity trading. Therefore, this paper aims to analyse the adaptation of *tawarruq* in Islamic financial instruments in order to provide clarity on the boundaries of its permissibility and prohibition specifically addressing the concern of *ḥīlah*.

2. Sharīʿah Analysis

2.1 *Sharīʿah* Debates on *Ḥīlah*

The word *ḥīlah* (plural is *ḥiyāl*) is related to the word *makhraj* (plural is *makhārij*) or 'way out', where *ḥīlah* (stratagem) is commonly associated with prohibition and *makhraj* is associated with permissibility. Moreover, *ḥīlah mashrūʾah* or permissible *ḥīlah* is called *makhraj*. In this sense, Ibn Nujaym (1999) had mentioned that: *"Our scholars R.H. had different views in such interpretation, where some of them chose the book of hiyāl and others opted for the kitāb of makhārij"* (p.350).

2.1.1 Meaning of *Ḥīlah*

The origin of the *ḥīlah* comes from the verb *ḥāl*, and the *alif* in it is derived from *waw*. The verb *ḥāla yaḥūl* has several meanings, one of which is mentioned as the changes, deviation, or overturn (Al-Muʾjam al-Wasīt, n.d.). Lisān mentioned: ...the haul: the ḥīlah (stratagem) and power. Ibn Sidah said: "al-ḥawl, al-ḥayl, al-ḥiwal, al-ḥīlah, al-ḥawil, al-miḥalah, al-iḥtiyāl, al-taḥawwul and al-taḥayyul, all of that: the cleverness, excellence consideration and ability regarding subtle effluence. And the ḥiyāl and ḥiwal: are the plural of ḥīlah" (Ibn Manzur, 1993, 11|185).

Contemporary Arabic dictionaries define the ḥīlah as: (1) The cleverness, excellence of consideration, and ability regarding subtle effluence of the matters (at wit's end); (2) Ingenious means in attaining the objective, Allah said, "...they cannot devise a plan, nor are they able to direct their way" [al-Nisāʾ: 98]; (3) The khadīʿah (deception): cinematic ḥiyāl: ingenious means of filming and directing (also called "cinematic khidaʿ"); The science of ḥiyāl: the mechanic/ mechanical. (Al-Muʾjam al-ʿArabī al-Asāsī, n.d., p.368)

It is clear that the derivation of the word *ḥīlah* revolves around the meaning of change and overturn, and the year is called *ḥawl* due to changes in time and its passage (Aḥmad Saʿīd Ḥawwā, 2007). Therefore, it can be understood that the linguistic meaning of *ḥīlah* is to transform or change something into something else intelligently or by an ingenious means towards achieving the specific objective or intention. Such technical meaning does not deviate from its linguistic meaning.

Technically, various definitions have been associated with *ḥīlah*. It is worth noting that some *Sharīʿah* scholars opined that *ḥīlah* is prohibited while others opined that it is permissible. Therefore, the term was defined according to their opinions. Among these definitions are as follows:

i. From Prohibition Viewpoint

Ibn Qudāmah (1968) said: "And ḥiyāl are all prohibited, not allowable in anything of the Dīn. It is presenting the permissible contract with prohibited intention, deception and succeeding what is forbidden by Allah, and making the prohibition become permissible, omitting the obligation, pushing away the right or else" (4|43).

It is also mentioned by Ibn Taymiyyah (1987): "Ḥīlah*:* to intend omitting the obligation, or making the prohibition become permissible, via an action that is not intended by which that action was made for, or for what is guided. He wants to transform the Sharīʿah rules as he did not intend for the reasons that were made for such rules,

and he creates the occasion for something that follows and not something to be followed or intended by the rules. Even he creates the reason that denies the intention of the rule. Thus, achieving the result by conduct based on the form of Sharīʿah and not its essence and substance. And that is a deception against Allah, mocking His verses and playing around with His boundaries" (6|17).

ii. **From Permissibility Viewpoint**

Al-Ḥamawī (1985) said: "Al-ḥiyāl the plural of ḥīlah therefore, the cleverness and excellence of consideration, and it refers to legitimate saviour for those who were tested with religious incidents in which they are unable to attend except with the cleverness and excellence of consideration, and that is called the ḥīlah" (1|38).

iii. **From Both Viewpoints**

Ibn al-Qayyim (1991) said: "Ḥīlah is a specific type of conduct and action by which the doer makes changes from one state to another. Then he achieves it with custom application via concealed method and conduct in order to achieve the man's purpose. And it is not understood except with intelligence and cleverness. And this is more specific of its topic in the origin of language, either the intention is permissible or prohibited" (3|188).

Similarly, al-Shātibī (1997) mentioned: "The ḥīlah in a way that is permissible in its form, or not permissible of omitting the rule or changing it to another rule, in which it will not omit or change except with that mediator. It is executed to achieve the objective and intention, with a knowledge that is not legislated for him" (3|106). Ibn Ḥajar al-ʿAsqalānī (1960) also said: "(The book of al-ḥiyāl) is a plural for ḥīlah, that is attainment of the objective via a concealed method" (12|326)

Based on those definitions, it can be understood that the technical definition of *ḥīlah* reflects the concept of altering or manipulating *Sharīʿah* rules, regardless of whether such changes are deemed permissible or prohibited. Perhaps the third definition is preferable because, in the case of *ḥiyāl*, some of them are prohibited while others are permissible (namely *makhraj* - plural *makhārij*) depending on the context and situation.

2.1.2 Types of *Ḥīlah*

Despite referencing the Qur'ān and *Hadīth* texts to address the aforementioned *Sharīʿah* disputes, the evidence provided regarding the prohibition or permissibility of all *ḥīlah* scenarios remains inconclusive. Furthermore, a number of scholars differentiate between the permissible and prohibited *ḥīlah* as well as *ḥīlah* that is disputed on its permissibility and prohibition. As such, *ḥīlah* could be divided into three basic types, namely prohibited *ḥīlah*, permissible *ḥīlah*, and *ḥīlah* that is disputed on its legitimacy.(1)

i. **The Prohibited *Ḥīlah***

Prohibited *ḥīlah* refers to the transformation of juristic ruling by a person who does not intend to attain the objective that has been set by *Sharīʿah*, but rather aims for something forbidden. For example, a man has *māl* (wealth) and is obliged to pay *zakāh*. If he intends to avoid *zakāh*, he will (for example) give the wealth (*hibah*) to his wife before the end of the *ḥawl* (period) of *zakāh*, and his wife will give it back to him after that. Such practice is prohibited *ḥīlah*. Another example is *ḥīlah* by a hypocrite (*munāfiq*) who says *shahādah* without the intention for Islam but merely to protect his blood and wealth, or a woman who converts into Islam to marry a weak and old man not for the intention of Islam but rather to inherit his fortune (Aḥmad Fahmī Abu Sinah, 1967).

ii. **The Permissible *Ḥīlah***

Permissible *ḥīlah* refers to the transformation of juristic ruling by a person who intends to attain legitimate benefits or remove the harm or damage. It is also called *makhrāj* (way out) since it intends to escape from the difficulty of *muʿāmalāt* and the reality of life. The difference between prohibited *ḥīlah* and permissible *ḥīlah* is that the latter does not intend to attain something forbidden and does not result in the abrogation of the

Sharīʿah ruling. For example, a man rents out his house and worries that the tenant may go missing or may procrastinate, so he makes *ḥīlah* to protect his right by stipulating into the lease a guarantee of so-and-so rich person for tenant's liability, and then the guarantor agrees. Another example of a permissible *ḥīlah* is when a person has both a debt obligation owed by an insolvent debtor and an obligation to pay *zakāh*. In this case, the person can employ a *ḥīlah* by settling the debt by paying the *zakāh* amount to the insolvent debtor and then immediately receiving the same amount back to fulfil the debt settlement (Aḥmad Fahmī Abu Sinah, 1967).

iii. **Disputed *Ḥīlah* on Its Legitimacy**

This type of *ḥīlah* has received numerous disagreements amongst jurists. Al-Shāṭibī (1997) divided *ḥīlah* into three categories as well, according to their agreement and opposition to legitimate interest:

1. No objection on its invalidity, such as *ḥīlah* of the hypocrites.
2. No objections on its permissibility, such as uttering the words of disbelief due to enforcement.
3. The matter is obscure and ambiguous, as there are irresolute views in which the matter is not elucidated with clear and constructive evidence unlike the first and second type. It also does not elucidate the objective of *Sharīʿah* that is agreed upon, nor manifests different views on *maṣlaḥah* which is prescribed by *Sharīʿah* on the obligation. Thus, this type of *ḥīlah* has disputes in it where it is permissible if it is not against the *maṣlaḥah*. Otherwise, it is prohibited.

Similarly, Ibn al-Qayyim (1991) divides *ḥīlah* into several types based on Ibn Taimiyyah's opinion with some additions. However, it still goes back to three main types as discussed earlier, namely prohibited, permissible, and arguable on its legitimacy.

2.1.3 Point of Disagreement about *Ḥīlah*

Majority of jurists have different views regarding the third type of *ḥīlah*, particularly whether it is forbidden or permissible. An example of such *ḥīlah* is *muḥallil* marriage where the advocators believe that the marriage is in accordance with the Qur'ān and Sunnah because the man marries the woman and they have coition, which is aligned with the verse ﴿ حَتَّىٰ تَنكِحَ زَوْجًا غَيْرَهُ ﴾ (al-Baqarah: 230): until she marries another husband, and the *hadith* of Rifa'ah. Furthermore, the marriage is *maṣlaḥah* and is witnessed by the *Sharīʿah*, namely being a peace making between husband and wife regarding their relationship and intimacy. Nonetheless, those who oppose such concept posit that the Prophet ﷺ prohibited it, where he said ((لَعَنَ اللَّهُ الْمُحَلِّلَ وَالْمُحَلَّلَ لَهُ)): Allah cursed the *muḥallil* and the *muḥallal lahū*)), and of it is the *mutʿah* marriage that causes damage because of its similarity in terms of temporary period (Aḥmad Fahmī Abu Sinah, 1967). The reason for the difference between them is "What is considered in the contract is their expressions or their meanings?", or in other words, "Are objectives and intentions taken into consideration in the contracts?".

Meanwhile, several scholars posit that the intentions and objectives of contracts should be taken into consideration and that the contracts are invalid unless its intentions and objectives are aligned with *Maqāṣid al-Sharīʿah*. In addition, the contracts are also invalid if the contracting parties' intentions and objectives are against *Maqāṣid al-Sharīʿah*. According to them, the basis of this invalidity is *ḥīlah* with a legitimate method. It is sufficient for them to have the appearance of *ḥīlah* via indication and case evidence, and not necessary to have explicit appearance (Aḥmad Saʿīd Ḥawwā, 2007).

Ibn Ḥajar al-ʿAsqalānī (1960) said: "Ibn al-Munir said that Al-Bukhari had widened the scope in deriving the rules, and it is famous among the observers, in carrying out the hadīth about ibādah to cover the muʿāmalāt. Followed by Mālik in an opinion on the basis of Sadd al-Dharā" and acceptance of the Maqāṣid, even if the expression corrupts but the intention is valid, then the expression is nullified, and the intention is validly or

invalidly carried out. He said, the basis is Sadd al-Dharā'' based on this ḥadīth, and the ḥīlah is invalid based on the stronger evidence" (12|327).

Al-Shāṭibī (1997) said: "What is proven is that the rulings were established for the benefit of the devotees, in which the accepted actions are in accordance with them, due to the objective of Sharīʿah that is distinguished clearly. If the exterior and interior of conduct are originally legitimate, then there is no doubt on it; but if the exterior is legitimate but the maṣlaḥah is the opposite, then the action is not valid nor legitimate. This is because the legitimated action is not what is intended by itself, rather other matter that is its meaning (i.e., the maṣlaḥah) that is legitimated for its sake. Such action is not of this legitimated manner" (3|120).

Another group opines that the vestige of intention and objective in validating the rules is applicable for *'ibādat* and not *mu'āmalāt*. What is required in *mu'āmalāt* is of the elements and conditions without looking into the intentions and objectives. However, they suggest that the intentions and objectives are another aspect related to sinfulness towards Allah Ta'ālā. Thus, they allow the legitimate action, but sometimes they say it is reprehensible or prohibited outright (Aḥmad Saʿīd Ḥawwā, 2007).

Al-Shāfiʿī (1990) said: "The reason why I prefer it is that every contract is valid in its form, and not invalidated by the suspicion or custom between the seller and purchaser. I allow it based on the validity of its form and I hate the intention, but if the intention appears explicitly then the sale is invalid. As such, I detest a man who buys a sword for killing, but it is not prohibited for the seller to sell it to someone who seems to have used it for killing unjustly, because if he does not use it for killing then the sale is valid. And also, I detest a man who sells the grapes to whom seems to produce the khamr (alcoholic drink) but his sale is valid because he sold a halāl good, and maybe the buyer will not use it to produce the khamr forever, like the sword purchaser who will not use it for killing forever. And I invalidate the mutʿah marriage. If a man marries a woman with a valid contract but he intends to sustain the marriage just for a day, less or more, then the marriage is valid. But it will be invalid forever if the contract is invalid" (3|75).

Ibn Hajar (1960) explained that al-Shāfiʿī stipulated reprehensible (*karāhah*) to use *ḥīlah* in alienating the rights, and some of his exponents said that it is *karāhah tanzīhiyyah*. But according to many of their scholars such as al-Ghazālī, it is *karāhah tahrīmiyyah*, and the intention is sinful based on the Prophet's ﷺ saying ((وَإِنَّمَا لِكُلِّ امْرِئٍ مَا نَوَى)): and for every person is what he intended)). For those who intend to do *ribā* with the sale contract, then he falls into *ribā* and is not free from sin even in the form of sale. For those who intend the *taḥlil* (making a marriage permissible) with the marriage contract and having coition based on promise, then it is cursed and he is not free from sin even in the form of marriage. Any act that is permitted by Allah but intended for prohibition, or making permissible what is prohibited by Allah, is considered sinful. There is no distinction in terms of resulting in sin between the act itself and other stratagems employed to carry out prohibited actions, even if there is a preservation or attempt to justify it.

Based on these arguments, this group takes into consideration the intentions and objectives in the aspect of *ḥalāl* and *ḥarām*, and not in the aspect of validity and invalidity of the contract, and the other group (*Mālikiyyah* and *Ḥanābilah*) considers the intentions and objectives in the aspect of *ḥalāl* & *ḥarām*, and validity & invalidity of the contract, and thus conforming to their initial stance of the saying on *Sadd al-Dharā''* and *ḥīlah* (Aḥmad Saʿīd Ḥawwā, 2007).

Concerning the subject matter of discussion, the dispute on *ḥīlah* as well as its function and role in *tawarruq* arrangement could result in the oppositeness of juristic opinions and rules, thus reflecting into the verdict of *tawarruq* and its adaptation in modern financial transactions. In many cases, *tawarruq* is applied as an alternative to *ribā* -based financial instruments. Therefore, it is essential to examine the implementation of the *tawarruq* arrangement and its financial

requirements in order to determine whether it falls under the category of prohibited *ḥīlah* or *makhraj*.

2.2 Examining Attributes of *Ribā Jāhiliyyah*

As discussed earlier, the issue of *ʿīnah* and *tawarruq* (originally *tawarruq* was discussed under the rubric of *ʿīnah*) echoed the *ḥīlah* for *ribā*, that is *ribā* associated with money lending like *ribā nasīʾah* or *ribā jāhiliyyah* – *ribā* that was practiced during the *jāhiliyyah* (ignorance) period. Therefore, it is essential to examine the attributes of *ribā*. At its core, such *ribā* is the additional amount of money that will be generated from the principal amount lent by the lender/creditor to the borrower/debtor under the loan contract or other equivalence. The subject matter (i.e., money) is not exchanged with any goods, benefits, monetary items, or other currency, or else, it is categorized as an exchange contract. In modern finance, this addition is called interest. *Ribā* can also occur in a situation where the payment or settlement is delayed and interest or charge, often known as late payment charge, is imposed due to that.

This mechanism was described by al-Rāzī (1999) in interpreting verse 275 of Sūrat al-Baqarah about *ribā*, where he said: "For ribā nasīʾah, the matter is famous and well-known during jāhiliyyah period. They lend the money and collect the specific amount every month and the principal remains. When the debt settlement date arrives, they will demand the principal. If the debtor is not able to pay, then they will increase the additional amount and extend the tenor. And this is ribā that they practice during the jāhiliyyah period."

He also said in interpreting verse 130, Sūrat Āl ʿImrān: "During the jāhiliyyah period, a man borrowed a hundred dirhams from another man for a certain period of time. When the time arrived, the debtor was unable to pay, so he added the amount and extend the tenor, and perhaps the amount became two hundred. Then when the second period of time arrived, he did the same again. Again and again for several periods of time. And that is the reason why the hundred is doubled" (7 |71).

We can therefore understand from the above explanation that *ribā* in lending transactions occurs in two ways. First, the additional amount charged to the principal as the tenor is deferred for repayment. In modern finance, it is called interest and/or any fee charged to the principal. The principal might be paid in amortization periodically or bullet payment (i.e., total payment) at the end of the tenor. Second, the additional amount charged due to the inability to pay on the settlement date. In modern lending, the addition can be charged via price restructuring at the end of the tenor and via late payment charges if the periodic instalment is not paid on time. For the purpose of this discussion, the initial focus will be on comparing the *ʿīnah* and *tawarruq* mechanisms.

Furthermore, al-Rāzī (1999) described the reasons for the prohibition of *ribā* which holds significant relevance when evaluating the matter of *ḥīlah* in commodity trading. He proposed several aspects that form the reason for the prohibition of *ribā*:

i. *Ribā* is construed as taking other people's wealth without any exchange, because a person who trades one dirham with two dirhams either by cash or deferment, then it results in additional dirham without any exchange. And the human's wealth is related to his needs and has its utmost sanctity. Prophet ﷺ said: ((حُرْمَةُ مَالِ الْإِنْسَانِ كَحُرْمَةِ دَمِهِ)): *Sanctity of human's wealth is similar to the sanctity of his blood*)). And taking the human's wealth without any exchange is prohibited. If it is said: Why is it not allowed to preserve the principal for a certain period of time in exchange for some additional dirham? This is because if the principal is held by the owner, he can utilize it for business and generate profit from it. And then, if it is given to the debtor and he can benefit from it, then it is not much different to charge additional dirham in exchange for the benefit of the money received by the debtor. Then we said: Indeed, this benefit that you all mentioned is an imaginary matter, as it may or may not produce results, while taking additional dirham is a certain matter, so

passing away the certainty for an imaginary matter is a sort of harmfulness.

ii. Some of them said: Allah Taʿālā prohibits *ribā* from the angle that it forbids people from occupying themselves with profit-making activities. When the owner of dirham engages in a *ribā*-based contract to generate additional dirham, it diminishes the opportunities for legitimate profit-making in livelihood activities. It creates a situation where the individual no longer needs to endure the challenges and hardships associated with earning a living through legitimate means such as business trading or engaging in demanding industries. And that leads to a cessation of the benefits of the creation, as it is known that the interests of the world are not well-ordered except via business trading, occupation, manufacturing, and building construction.

iii. It is said: the reason for the prohibition of *ribā* contracts is that it leads to the elimination of kindness among people via the benevolent loan. If the souls are good, then the dirham is lent and repaid as such, but *ribā* takes from the needy one dirham for two dirhams, thus leading to the eradication of sympathy, kindness, and *iḥsān*.

iv. Normally, the lender is rich, and the borrower is poor. It strengthens the rich by allowing the taking from the weak poor what is not an extra, and that is not permissible with the mercy of the Most Merciful.

v. The prohibition of *ribā* is evidenced by the text, and it is not necessary to make known the underlying reasons of the creations, and it obliges in breaking off the *ribā* contract, even if we do not know the viewpoint of it.

Item (i) thus gives a logical explanation on the difference between sale and *ribā* based on Allah's saying in the following verse:

﴿ذَٰلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا﴾

That is because they say: "Trading is only like ribā," whereas Allah has permitted trading and forbidden ribā. [al-Baqarah: 275].

The people during the *jāhiliyyah* period claimed that the result of trading transactions and *ribā* is just the same and no difference in terms of profit and addition obtained from both transactions. However, this claim is labelled as *shubhah* or imaginary by scholars as the *ribā* is something certain and obliged to be paid by the borrower. Meanwhile, for trading, there is still a risk of getting or not getting the profitable result, whether the risk is well-mitigated or not. Even well-mitigated risk and control describe no difference with *ribā*-based money lending; indeed, the detailed mechanism portrayed the inherent risk that differentiates both arrangements. According to Dr. Saʿīd Ḥawwā (2007), business or trading activities face either profit or loss. And the expertise, individual effort, and circumstances of livelihood will determine the profit and loss. However, *ribā* activities are limited to profit in any situation. This is the main difference between *ribā* and trading, and the subject of *ḥalāl* and *ḥarām*.

Based on the essential elements of the contract, the attribute of *ribā* in relation to the above discussion could be determined as follows:

	ELEMENTS	DESCRIPTION
1.	Contracting Parties	Lending and borrowing relationship: ● Lender (Creditor). ● Borrower (Debtor). ○ Agent (s) – may involve either for lender, borrower or both.
2.	Subject Matter	● Cash – given by the creditor to be utilized by the debtor and repaid by the debtor to the creditor with additional cash.
3.	Form of Contract	● Lending Contract, i.e. Loan (with interest/ usury/ *ribā*).

4.	Purpose & Attainment	● Lender (creditor) – to generate additional cash. ● Borrower (debtor) – to obtain and utilize cash.

To determine the *ribā*-based arrangement, the above elements and their criterion should be fulfilled in such monetary transactions. Therefore, the adaption of *ʿīnah* and *tawarruq* in financial services should be examined based on those elements and criteria in evaluating the *ḥīlah* for *ribā*.

2.3 Measuring *Ḥīlah* of *ʿīnah* and *Tawarruq*

As discussed earlier, the permissibility or prohibition of *ḥīlah* can be measured based on intention or purpose vis-à-vis the method used or how the transaction is executed. It may be assumed that those who practice *ʿīnah* or *tawarruq* intend to avoid *ribā*-based lending, while the creditor or the seller obviously aims for profit despite their concern on *Sharīʿah* or non-*Sharīʿah* compliant way of gaining the profit. Nevertheless, intention, purpose, or objective is quite subjective and hard to be determined unless indication is sighted. Therefore, this analysis will focus more on the method or mechanism used for *ʿīnah* and *tawarruq* in comparison to the aforesaid attributes of *ribā jāhiliyyah*.

ʿĪnah mechanism is exemplified as follows:

	ELEMENTS	DESCRIPTION
1.	Contracting Parties	<u>Leg 1 – Deferred Sale</u> Sale and purchase relationship: ● Seller (Creditor). ● Purchaser/Buyer (Debtor). ○ Agent (s) – may involve either for seller, buyer or both. <u>Leg 2 – Cash Sale</u> ● Seller (Debtor). ● Purchaser/Buyer (Creditor). ○ Agent (s) – may involve either for seller, buyer or both. The contract relationship for cash obtainment is only between these two parties: ● Creditor – as seller in 1st leg; and buyer in 2nd leg. ● Debtor – as buyer in 1st leg; and seller in 2nd leg. Even the cash proceeds are obtained via commodity sale and additional cash is generated via deferred sale, which is different from direct money lending. The contract relationship which is between these two parties bears similarity with lending or loan contract if the contract is pre-arranged or organized either by agreement or custom. Note: the arrangement for Leg 1 and Leg 2 could be vice versa, thus the following explanation will be <u>applicable to the opposite way.</u>
2.	Subject Matter	● Commodity. ● Cash – given by the creditor to be utilized by the debtor resulting from the 2nd leg of sale transaction; and repaid by the debtor to the creditor with additional cash resulting from the

		1st leg of sale transaction.
3.	Form of Contract	● Sale Contract – two sale contracts between the same parties i.e. deferred and cash sale contract; where the second contract will be executed subsequent to the first contract, if both sale contracts are pre-arranged or organized either by agreement or custom.
4.	Purpose & Attainment	● Creditor (as seller in 1st leg; and buyer in 2nd leg) - to generate additional cash. - in Islamic finance, for those who apply it, this additional cash is construed as profit and reflected as income in the creditor's financial statement. ● Debtor (as buyer in 1st leg; and seller in 2nd leg) - to obtain and utilize cash.

For tripartite *ʿīnah* (or even more), the overall mechanism and elements are like the above except that there is an additional contracting party in the arrangement, which is described as follows (mainly on the difference):

	ELEMENTS	DESCRIPTION
1.	Contracting Parties	Leg 1 – Cash Sale (or may be Deferred; if it is the case, then the debt obligation may also be set-off against the Leg 3) ● Seller – commodity supplier. ● Purchaser/Buyer (Creditor). <u>Leg 2 – Deferred Sale</u> ● Seller (Creditor). ● Purchaser/Buyer (Debtor). <u>Leg 3 – Cash Sale</u> ● Seller (Debtor). ● Purchaser/Buyer - commodity supplier. The contract relationship for cash obtainment is between three parties: ● Commodity Supplier – as seller in 1st leg; and buyer in 3rd leg. ● Creditor – as buyer in 1st leg; and seller in 2nd leg. ● Debtor – as buyer in 2nd leg; and seller in 3rd leg. The commodity supplier functions as a proxy or facilitator to this *ʿīnah* arrangement. The supplier may or may not receive any remuneration from the Creditor for its function.
2.	Subject Matter	● Commodity. ● Cash – given by the commodity supplier (despite the set-off with

		the Creditor, if any) to be utilized by the debtor resulting from 3rd leg of sale transaction; and repaid by the debtor to the creditor with additional cash resulting from 2nd leg of sale transaction.
3.	Form of Contract	● Sale Contract – three sale contracts (deferred and cash sale) between the three parties i.e. deferred and cash sale contract; where all the contracts will be executed subsequently if they are pre-arranged or organized either by agreement or custom.
4.	Purpose & Attainment	● Creditor (as buyer in 1st leg; and as seller in 2nd leg) - to generate additional cash or profit/income. ● Debtor (as buyer in 2nd leg; and seller in 3rd leg) - to obtain and utilize cash. ● Commodity Supplier (as seller in 1st leg; and as buyer in 3rd leg) – functions as a proxy or facilitator for Creditor and Debtor, in which it may or may not be remunerated.

It is worth noting that this analysis does not consider the situation where the commodity returns to the seller or original seller (in case of tripartite *ʿīnah*) not due to pre-arrangement or organized, but rather due to market movement or selling back due to desperate measures without the intention to do so at the initial stage.

In the case of *tawarruq*, the mechanisms and elements are like *ʿīnah*. However, other than the seller or initial seller, there is an additional contracting party where the commodity is sold, which is described as follows (mainly on the difference):

	ELEMENTS	DESCRIPTION
1.	Contracting Parties	<u>Leg 1 – Deferred Sale</u> ● Seller (Creditor). ● Purchaser/Buyer (Debtor). **The seller may purchase the commodity from the supplier or trader prior to selling it to the purchaser, like tripartite *ʿīnah.* The sale could be in cash or deferred subject to their deal. <u>Leg 2 – Cash Sale</u> ● Seller (Debtor). ● Purchaser/Buyer – another user/trader. The contract relationship for cash obtainment is between three parties at least: ● Creditor – as seller in 1st leg; Creditor may acquire the commodity from another party before.

		• Debtor – as buyer in 1st leg; and seller in 2nd leg. • Other User/Trader – as buyer in 2nd leg; not the creditor nor the party who sold the commodity to creditor before that. The cash proceeds are obtained via commodity sale and additional cash is generated via deferred sale. It is a bit different from ʿīnah and direct money lending where the contract relationship is between three different parties.
2.	Subject Matter	• Commodity. • Cash – given by the other user/trader to be utilized by the debtor resulting from the 2nd leg of sale transaction; and repaid by the debtor to the creditor with additional cash resulting from the 1st leg of sale transaction.
3.	Form of Contract	• Sale Contract – two sale contracts, i.e. deferred and cash sale contract between the two different parties; where the second contract will be executed after the first contract, where the first party should have no interest in the second contract.
4.	Purpose & Attainment	• Creditor (as seller in 1st leg) - to generate additional cash. - In Islamic finance, for those who apply it, this additional cash is construed as profit and reflected as income in the creditor's financial statement. • Debtor (as buyer in 1st leg; and seller in 2nd leg) - to obtain and utilize cash. • Other User/Trader (as buyer in 2nd leg) - to acquire commodity for their own purposes.

The above analysis describes a minimal difference between *ʿīnah* and *tawarruq* forms and scenarios. In comparison to the attributes of *ribā jāhiliyyah*, the difference is significant in determining the permissibility and prohibition of the transaction. In other word, we might say that the economic effect or substance of *ʿīnah*, *tawarruq* and *ribā*-based lending is similar. Nevertheless, it is essential to observe the form that is formulated by such differences.

3. Conclusion

The issue of *tawarruq* revolves around the matter of *ḥīlah* (stratagem) for *ribā*, as an extension to the *ʿīnah* issue. The absolute prohibition of *ribā* is based on the Qur'ān and Sunnah where any means or *ḥīlah* that intends for it is not

allowable. However, not all *ḥīlah* are prohibited, some of them, namely *makhraj/makhārij*, are allowable due to certain reasons and are not against *Maqāṣid al-Sharīʿah*.

Based on the *Sharīʿah* discussion, *tawarruq* has less of an issue than *ʿīnah,* where the latter is prohibited by the majority of *fuqahā',* while the former is permissible for those who need such mechanisms. It should be noted that the *tawarruq* mechanism is slightly different from *ʿīnah* that it has the most similarity with the *ribā jāhiliyyah* attributes. A number of scholars even deemed *tawarruq* like *ʿīnah* pursuant to *ḥīlah* for *ribā* that is to generate money for money. It is permitted by the majority of scholars as *tawarruq* does not present the intention and form of *ribā* in its transaction.

In one aspect, *tawarruq* could become a *makhraj* for those who need the cash, especially in the current financial and economic landscape where conventional finance that practices *ribā* is dominant. Despite that, any application of *tawarruq* that is arranged similarly to *ʿīnah* and/or does not fulfil the essential elements of a sale contract, mainly the possession and ownership of the subject matter, might be explicitly portrayed as an artificial sale transaction which leads to the issue of prohibited *ḥīlah*.

4. Recommendations

With respect to the modern Islamic finance, the application of *tawarruq* might become a *makhraj* for *ribā*-based conventional finance. However, certain conditions should be delineated to avoid any mere use of *tawarruq* and discourage other *Sharīʿah*-compliant modes. The parameters proposed below reflects the researcher's view on the boundaries of the application of *tawarruq* in financial activities.

i. Application of *tawarruq* should be restricted for the *ḥājah* (needs), either from the perspective of the customer, financial institution, or other stakeholders of the whole financial and economic system – in a situation where cash-based transactions, obligations created or liquidity management are required as an alternative to dominant conventional finance that simply operates with interest or fee-based transaction that is construed as *ribā* -based.

ii. There is no financing available for the one who in the needs stated above; on the basis of *qarḍ ḥasan* – as an alternative to *ribā*-based conventional finance.

iii. No other mode for financial purposes, such as *mushārakah, muḍārabah, istithmār*, permissible sale, and *ijarah*, that are durable based on the context and circumstance including the aspect of risk that differentiates the types of contracts applied.

iv. The sale contracts of *tawarruq* arrangement should be executed as real sale transactions and not artificial – all the essential elements of a sale contract should be observed and fulfilled accordingly, mainly the possession and ownership, as well as the payment or debt obligation.

v. *Tawarruq* mechanisms should not mimic *ʿīnah* where the commodity is deliberately organized to be returned to the original seller - it is not recommended to utilize *wakālah* contract that presents such similarity except out of need or to overcome any legal or regulatory restrictions, or any operational difficulties. In this situation, the principal should be known in the commodity sale and purchase transaction to reflect a true sale, especially those who are involved with multiple series of *tawarruq* arrangements.

vi. The wide application of *tawarruq* for the above scenarios is a sort of temporary solution – in a situation where the overall economic landscape and the governing law and regulation are yet to be conducive enough to cater for the Islamic finance.

It is worth noting that the above parameters may change, subject to the differing contexts and circumstances. Nevertheless, the author recommends further research to substantiate detailed outline on the practical and operational aspects. The requirements should be reflected into the respective legal documentations used and/or regulative policies. Moreover, an evaluation from the viewpoint of *Maqāsid al-Sharīʿah* might be essential for future development. In

addition, the conduciveness of the financial and economic landscape should be developed towards facilitating other *Sharī'ah* compliant modes, thus enabling Islamic financial institutions to transition away from conventional practices and instead focus on providing services aligned with Islamic principles.

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Endnotes

(1) Some scholars classified the type of *ḥīlah* based on the fiqh rules i.e. *wājib*, *mandub*, *jāiz*, *makruh* and *mahzur/ tahrim*. However, this classification will not be discussed here as it refers back to the basic classifcation of prohibited and permissible *ḥīlah*.