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Contentious Sales in Islamic Banking and Finance: Analysis on their Proximity to *Ribā*

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Abstract
This article discusses four controversial sales in Islamic banking and finance, each having the potentials to be used as legal stratagems (*ḥiyal*) to cover up the *ribawi* transactions: *bayʿ al-ʿīnah*, *tawarruq*, *bayʿ al-dayn*, and *bayʿ al-wafāʾ* (or *bayʿ al-istighlāl*). Yet, Islamic bank and finance industries in the world rely on such types of sales in their transactions. Malaysian Islamic banks and capital markets depend heavily on *bayʿ al-ʿīnah* and *bayʿ al-dayn*, while the Gulf Cooperation Council (GCC) countries rely a great deal on *tawarruq* and *bayʿ al-wafāʾ* (or *bayʿ al-istighlāl*). Regarding *tawarruq* as a sale contract in Islamic banking and finance, Muslim economists have put forward its negative macro-economic implications. Similarly, some Shariʿah scholars who have endorsed some of the aforementioned sales are now re-questioning their validity. Not only have individual scholars had contrary opinions but institutional Shariʿah standard bodies at the international level also differ on them. Furthermore, the term "Shariʿah compliant" itself

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seems inadequate to reflect the true intention and objectives (*maqāṣid*) of the Shariʿah in the transaction contracts of Islamic banking and finance employing those four contentious sales.

Keywords
Ribā, ḥiyal, Shariʿah compliance, Islamic capital market, *ṣukūk*, Islamic jurisprudence, AAOIFI, securitisation, jurists, Gulf Cooperation Council (GCC), contentious sale.

Introduction

Islamic banking and finance industry has been growing tremendously for the last 30 years all over the world with its potential still unfolding. It is now making inroads into India, Africa, Japan, Europe, and Canada. Despite its impressive progress, the concern raised is on the Shariʿah quality of the industry. Although in theory, Islamic banks should use equity financing contracts, the predominant transaction contracts in practice are based on sale contracts which are, in fact, dubious sales. This article tries to show that, at the global level, there are four major contentious sales which are the backbones of the current Islamic banking and finance practice. The four sales are *bayʿ al-īnah, tawarruq, bayʿ al-dayn*, and *bayʿ al-istighlāl*. Such sales have a high propensity to be misused as a medium to circumvent the prohibitive *ribā*. Muslim scholars in the past disputed the validity and lawfulness of these sales. Currently, Muslim economists have also joined in the debate, especially on *tawarruq*, by analysing the impact of these controversial sales on macroeconomic condition, and hence, have tried to deal with it from the point of view of *maqāṣid al-Sharīʿah*. Although these contentious sales appear as normal sales, they serve substantially as vehicles to arrive at *ribā* from a different direction.

Ribā and sale

The fact that Islam prohibits *ribā* and permits sales (*al-bayʿ*) does not mean that every type of sale is permissible in Islam. The majority of Muslim exegetes consider the phrase "*aḥall Allāhu al-bayʿ*" in the Qurʾān[1] as a general term (*ʿāmm*) which may be qualified with more specific (*khāṣṣ*) non-permissible sales.[2] Many *aḥādīth* spell out specifically certain prohibited types of sale, particularly the ones which prevailed in the time of the Prophet, such as the sales of unharvested fresh dates for dried dates by measure; dried grapes for fresh grapes; unripe fruits; unharvested for harvested wheat; sale deals which are sealed once a buyer touches goods without examining them; and sales involving uncertainty and speculation.[3]

In this regard, the *ḥadīth* plays the role of specifying what is considered general in the Qurʾān (*takhāṣīṣ al-ʿāmm*). In fact, most of the prohibited sales in the *ḥadīth* are related to and contain elements of *gharar* and *ribā* in them. Based on the understanding of these two important concepts, Muslim jurists then developed certain methodologies, especially *qiyās* (analogical reasoning), to detect the existence of such prohibitive elements in the new forms of sale. To begin, the most controversial sale is the *bayʿ al-ʿīnah*.

1. *Al-Baqarah* (2): 275.
2. See, for example, Abū Bakr Aḥmad ibn ʿAlī al-Rāzī al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, vol. 1 (Beirut: Dār al-Kitāb al-ʿArabī, n. d.), 469. Regarding this particular verse, he commented that the term *al-bayʿ* (sale) is general, while the term *al-ribā* is specific. Other exegetes considered it *mujmal* (brief) instead of *ʿāmm* (general), hence the qualifier of the former is *tafṣīl* (detail). However, al-Qurṭubī considered *ʿāmm* to be more correct. See also al-Qurṭubī, *al-Jāmiʿ li Aḥkām al-Qurʾān*.
3. Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and its Contemporary Interpretation* (Leiden: Brill, 1999), 33–34. See also Abdullah Alwi Haji Hassan, *Sales and Contracts in Early Islamic Commercial Law* (Islamabad: Islamic Research Institute, 1994), Chapter VI.

Bayᶜ al-ᶜīnah

This is one of the types of sales prohibited by the *ḥadīth* and is the subject of controversial debates by Muslim jurists of the past. There are many English translations of "*bayᶜ al-ᶜīnah*" such as "double sale,"[4] "same-item sale-repurchase,"[5] and "buy-back contract."[6] The term "*al-ᶜīnah*" is derived from the following *ḥadīth*: "When you trade in *ᶜīnah*, take the (sic) cow's tails, contend with plantation, and leave striving (in the cause of God), then God will inflict upon you a disgrace that He will not lift until you turn back fully to your religion," as narrated by Abū Dāwud and al-Bayhaqī on the authority of Ibn ᶜUmar. The original phrase as rendered in Arabic is *idhā tabāyaᶜtum bī al-ᶜīnah* in which the proscription of *ᶜīnah* is stated explicitly. In fact, Abū Dāwud located this *ḥadīth* under the heading "*Bāb fi al-Nahy ᶜan al-ᶜĪnah* (Chapter on the Prohibition of *ᶜĪnah*)"[7] while al-Bayhaqī under "*Bāb mā Warada fī Karāhiyyat al-Tabāyuᶜ bi al-ᶜĪnah* (Chapter which Includes Reprehension of Trading in *ᶜĪnah*)."[8]

Although the word *ᶜīnah* is cited specifically in the *ḥadīth*, no definition is given. A report narrated by al-Dāruquṭnī and others, however, is commonly used as the interpretation of *bayᶜ al-ᶜīnah*. Such a report as narrated by the wife of Abū Isḥāq al-Sabīᶜī is as follows: "I visited ᶜĀ'ishah, may God be pleased (sic) with her, and then came the mother of Zayd ibn Arqam's child asking the (sic) question: "O the mother of faithful, I

4. Frank E. Vogel and Samuel L. Hayes, III, *Islamic Law and Finance: Religion, Risk, and Return* (The Hague: Kluwer Law International, 1998), 183.
5. Mahmoud A. El-Gamal, *Islamic Finance, Law, Economics, and Practice* (New York: Cambridge University Press, 2006), 70.
6. Muhammad Taqi Usmani, *An Introduction to Islamic Finance* (1998), 135, accessible at http://attahawi.files.wordpress.com/2010/01/an-introduction-to-islamic-finance.pdf.
7. Sunan Abī Dāwud, *Kitāb al-Ijārah*.
8. Sunan al-Bayhaqī, *Kitāb al-Buyūᶜ*.

sold a slave to Zayd ibn Arqam for 800 dirhams deferred, then I bought him (slave) back for 600 dirhams in cash." ʿĀ'ishah said, "Woe to what you sold and bought. Indeed his *jihād* with the Prophet has become void, unless he repents."[9]

The validity of the above *ḥadīth* on *ʿīnah* and its interpretation is, however, subject to differences of opinion among Muslim traditionists (*muḥaddithūn*) and jurists (*fuqahā'*). In fact, all *ḥadīth*s with "*ʿīnah*" are not free of criticisms. Some of the criticisms are related to the chain of transmission (*sanad*) while others to the text (*matn*). In general, however, all the *aḥadīth* under discussion strengthen one another to the extent that they could be upgraded from the level of weak (*ḍaʿīf*) to good (*ḥasan*) reports.[10] Nevertheless, jurists remain divided on the validity of *bayʿ al-ʿīnah*.

Mālikite and Ḥanbalite jurists ruled *bayʿ al-ʿīnah* as invalid (*bāṭil*). Abū Ḥanīfah, however, considered it defective *(fāsid*), while al-Shāfiʿī ruled it as a valid sale (*ṣaḥḥ*). On the text (*matn*) of the afore-mentioned *ḥadīth* of ʿĀ'ishah, the latter commented that it is implausible that a person of ʿĀ'ishah's calibre should judge the *jihād* of Zayd with the Prophet as void simply because of an issue related to *ijtihād*. In his book *al-Umm*, al-Shāfiʿī explains: "If someone buys or sells something, and we ourselves consider the transaction as unlawful (*muḥarram*) while he himself considers it lawful (*ḥalāl*), we are not in a position to say that God should erase his deed at all."[11]

Despite validating the sale, Shāfiʿīte jurists consider it *ḥarām* (unlawful) if the intention is known to be bad.[12] Al-Ghazzālī, in his *al-Mustasfā*, clearly states the position of Shāfiʿite jurists on the issue of *ḥalāl* (lawful) and *ḥarām* (unlawful), on the one hand, and *ṣiḥḥah* (valid) and *buṭlān* (invalid), on the other,

9. Sunan al-Dāruquṭnī, *Kitāb al-Buyūʿ*.
10. ʿAbd al-ʿAẓīm Abū Zayd, *Al-ʿĪnah al-Muʿāṣirah: Bayʿ am Ribā* (Aleppo: Dār al-Multaqā, 2004), 29.
11. Al-Shāfiʿī, *Al-Umm*, vol. 3, p. 78.
12. Abū Zayd, *Al-ʿĪnah al-Muʿāṣirah*.

as follows: "To say something unlawful is different from saying it valid and invalid."[13] So, they separate the issue of validity and lawfulness in a contract. The former pertains to legal impact in court (*qaḍā'an*), while the latter the punishment and reward in the hereafter (*diyānatan*). Thus, a person who transacts *bayʿ al-ʿīnah* with the intention of circumventing *ribā* is sinful, though his sale is valid accordingly. The Shāfiʿite school is known for its notion of non-effectiveness of intention on contract. In Mālikite and Ḥanbalite schools, however, intention will affect the validity of a contract. The Ḥanafite jurists tend to opine like the Shāfiʿites who do not consider bad intention as affecting the contract, but, instead of saying the contract valid (*ṣaḥīḥ*), the former would deem it defective (*fāsid*). Following the view of the majority, the Shariʿah standard AAOIFI have ruled *bayʿ al-ʿīnah* as invalid, and yet formal Malaysian jurists, who claim to follow the Shāfiʿite school, have ruled it as valid.

Such juristic debate is best left as it is. The following section will discuss *bayʿ al-ʿīnah* from its proximity to *ribā*. Interestingly, God contrasts sale and *ribā* in the verse mentioned earlier; "God has permitted sale and prohibited *ribā*." However, this does not necessarily mean that *ribā* and sale (*al-bayʿ*) are always mutually exclusive. In fact, there are transactions which are apparently sales but are deemed to be *ribawī*. The *ḥadīth* on *ribā al-faḍl* is a clear example of the possibility of a *ribā* and sale taking place at the same time. Such a type of sale is termed *ribawī* sale. Deferment and unequal exchange in quantity are known to be the two main sources of *ribawī* sales. If a sale is transacted on the spot and the counter-values are of the same kind in equal quantity, *ribā* will never be involved in it. If, however, (i) a sale is not on the spot, or (ii) the counter-values are of the same kind but not equal in quantity, or (iii) both, then the possibility that *ribā* would take place is high. Examples of *ribā* are as follows: (i) sale of money for the same

13. Al-Ghazzālī, *Al-Mustaṣfā*, vol. 2, p. 36.

amount of money with delay, (ii) sale of money for different amount of money on the spot; and, (iii) sale of money for different amount of money with delay. The last two examples show that sale of money for money in different amount is confirmed to be *ribā*. The emphasis on "different" may either mean less or more. If "more" is meant, a universal statement for the sake of simplicity can thus be made that sale of money for more money is *ribā*. A *ribawī* sale of money as such can take place both on the spot as well as at a deferred time. The possibility of the sale of money for more money in on-the-spot sale is, however, excluded by reason. This is because rational persons would not exchange money for money in different amounts on the spot. However, people are willing to exchange money for more money on deferred exchange. Hence, *ribā* would occur along with man's tendency to exchange money for more money with deferment, such as to exchange RM95 today for RM100 after a year, or to buy government bond for RM95 today to be redeemed for RM100 when it matures after a year. An exchange of money for more money in deferment with the involvement of a certain financial instrument, like bonds, is, however, literally not called loan, but sale. Hence, buying government bonds in the above example is sale and not loan, as people are said to buy bonds and sell bonds. However, the purpose of loans, especially those with interest, can perfectly be achieved through this literal sale. By "literal sale" means it is only from a mere letter or linguistic use that it is called sale, when essentially and technically, it is a loan. In both corporate and public finances, people are actually giving loans to government when they buy government bonds and receive principal plus interest when they sell it back. In reality, this is loan mediated by the bond. The unmistaken element of sale-like-loan transaction is, however, not only the element of bond, but also the element of repurchase. Loan basically can be "divided and ruled" to be like sale in a repurchase transaction.

So, if two parties involved in a repurchase transaction, they can perfectly achieve the objective of loan with interest, regardless of whatever type of the commodity as the medium. The commodity is not confined only to the financial instruments such as bonds and securities, but non-financial instruments as well such as books, land, cars, houses, tickets, etc.

Another example is in the buying and selling of Formula One tickets. Repurchase transaction of the item could be a medium for charging loan with interest. If, for instance, a person sells his ticket for RM80 deferred, and then repurchases the same ticket for RM60 cash, he is actually loaning RM60 now in order to get RM80 in future. In such an instance, the commodity hardly matters as it can be changed to anything, including the slave in the afore-mentioned *ḥadīth* by ʿĀ'ishah. Of more importance is the repurchase transaction. Indeed, this is exactly the nature of *bayʿ al-ʿīnah* which has been rendered, among others, as "same-item sale-repurchase," "buy-back contract" or "double sale."

Maintaining that repurchase transaction could be used as a medium for achieving loan with interest requires further elaboration. For instance, if the repurchase transaction is prearranged within the time of the deferred sale, then the purpose of such a transaction is clear, that is, to use a pretext of sale to cover up loan with interest. However, if pre-arrangement to repurchase within the time of deferred sale is not made, thus, it cannot be a loan with interest. For example, if a friend bought a home theatre set for RM800 in instalment payments a year ago, and wants to sell it back for RM600 in cash now to the original owner who agrees to the repurchase, such a transaction cannot ever be a loan with interest for two reasons. Firstly, no pre-arrangement to repurchase between the owner and his friend was made, and secondly, the sale-back is not within the deferred period. Hence, given the second reason, it qualifies as a genuine sale. On the contrary, should the

repurchase transaction be done within the deferred period, then the loan with interest charge stood. Thus, the closer the repurchase transaction towards the end of the deferred sale, the less is the charge of loaning. However, the more immediate the repurchase, the greater would be the blame.

The timing of the repurchase transaction plays a significant role in indicating whether it is a genuine repurchase or otherwise for it may indicate the intention of the repurchase transaction. If the repurchase transaction is done immediately after the contract of a deferred sale, then there is an indication that this is not a genuine sale. But if the repurchase transaction is concluded later, it cannot be said to be a cover up of loan. Rather, it could be a genuine repurchase transaction. This reservation is, in fact, maintained by the Shāfiʿite school of jurisprudence. Thus, not totally ruling out the possibility of a genuine *ʿīnah*, the Shāfiʿites give the parties involved in *bayʿ al-ʿīnah* the benefit of the doubt, as there is a possibility of a genuine "same-item sale repurchase" even within the period of deferred transaction. However, the Mālikites especially, view it from the high probability of misuse of *ʿīnah* to cover up interest charging. Since they are well-known for their methodology of *sadd al-dharīʿah* (blocking the means), the Mālikites, consequently, ruled *bayʿ al-ʿīnah* as invalid (*bāṭil*) and unlawful (*ḥarām*).

The method of *sadd al-dharīʿah* in *bayʿ al-ʿīnah* deserves in-depth study in Islamic banking and finance. For, if such a sale is applied in the field of banking and finance, the end result is hardly different from charging interest on loan. Institutional "intention" is easier to detect than individual or personal intention. In the time of al-Shāfiʿī (d. 820 / 204) and the history of Islamic civilisation, *bayʿ al-ʿīnah* was more on personal than institutional practice. He was right when he stated that the rulings (*aḥkām*) must be based on what is manifest (*ẓāhir*) rather than covert (*bāṭin*), because no one

exactly knows individual intention except God. However, today we deal with institutions, specifically banks and finances, whose *bāṭin* is known as money lenders. Logically, if money lenders use *bayᶜ al-ᶜīnah* but claim to practise genuine sales, it simply does not make any sense.

Parties involved in transactions are sometimes given due attention in Islamic law. For instance, selling grapes is permissible to an ordinary person, but not to a wine maker according to the majority of jurists. Similarly, selling swords to one's enemies is forbidden. Hence, sometimes the parties involved in buying and selling matters in Islamic transactions. In *bayᶜ al-ᶜīnah*, the parties involved are institutions of money lender. Similarly, the logic of prohibition must also be considered. If conventional banks operating Islamic windows practice *bayᶜ al-ᶜīnah*, it is clearly a cover up loan with interest. Full-fledged Islamic banks which practise such a sale, in fact, give a damaging model to conventional banks. As such, practice of this sale in Islamic banking and finance must be put to a stop gradually through *sadd al-dharīᶜah* for the good standing of the Islamic banking industry. Heavy dependence on *bayᶜ al-ᶜīnah*, considered among the major factors behind the growth of its Islamic financial system in Malaysia,[14] must slowly be reduced and removed. Interestingly, its counterpart Islamic banking in neighbouring Indonesia, which also follows the same Shāfiᶜite school of jurisprudence, disapproves *bayᶜ al-ᶜīnah*.

14. Afandi Awang Hamat, "Sales with Deferred Payment in Islamic Commercial Laws *(al-Inah* and *al-Tawarruq*) with References to Malaysian experiences," paper presented at "The Sixth International Conference on New Directions in the Humanities," Fatih University, Istanbul, Turkey, 15–18 July 2008.

Tawarruq

As a term, *tawarruq* is used only by the Ḥanbalite school of jurisprudence. Technically, they differentiate between *bayᶜ al-ᶜīnah* and *tawarruq*. One of the differences, they argue, is by looking at the person to whom the commodity is resold; if it is resold to a first party, then it is *bayᶜ al-ᶜīnah*, but if it is resold to a third party, then it is *tawarruq*. Claiming that this definition is from Imām Aḥmad, Ibn al-Qayyim says:

> *Al-ᶜīnah* occurs in the case of person who is in need of cash. As it is difficult for him to borrow money from a wealthy person, the former is compelled to buy a commodity from the latter and then resells it. If the buyer is the original seller, this is *ᶜīnah*, but if he resells it to other person, then this is *tawarruq*. His aim in dealing with the two subject matters is, however, the price.[15]

Other schools of jurisprudence, such as the Ḥanafites and the Shāfiᶜites, did not coin different terms for the two cases. Regardless of the second buyer being the first party or the third party, both are included in the generic term *bayᶜ al-ᶜīnah*. The Mālikites even go further in generalisation by locating *bayᶜ al-ᶜīnah* under the term *buyūᶜ al-ājāl*; they, however, gave legal judgement (*ḥukm*) on a case-by-case basis. To avoid confusion of the term, in this section the term "*tawarruq*" shall be used in accordance with the Ḥanbalite terminology.

As a logical consequence of their legal judgment on *bayᶜ al-ᶜīnah*, the Shāfiᶜites maintained *tawarruq* as a valid sale. Among the Ḥanafites, Abū Yūsuf and al-Shaybānī differed in their opinions. The former ruled *tawarruq* as valid and not reprehensible, while the latter deemed it valid but reprehensible (*karāhah*). The Mālikites contended that legal judgment on *tawarruq* depends on the intention. If the

15. Ibn al-Qayyim, *Tahdhīb al-Sunan*, vol. 9, p. 253.

intention to cover up the prohibition becomes the norm in the society, *tawarruq* is not valid, but if it is not the norm, then the contract is valid.[16] As for the Ḥanbalites, there are two conflicting reports from Imām Aḥmad. One permits *tawarruq* while the other prohibits it. Ibn Taymiyyah and Ibn al-Qayyim were among the Ḥanbalite scholars who forbade *tawarruq*.

Islamic banking and finance in the Gulf Cooperation Council (GCC) countries allow *tawarruq* contract due to its permissibility according to some Ḥanbalite jurists and AAOIFI Shariah Standard (2008). Its controversy, however, was ignited when jurists of OIC Fiqh Academy (26–30 April 2009) issued a *fatwā* that the contemporary practice of *tawarruq* by Islamic bank is impermissible. The *fatwā* distinguished between the classical *tawarruq* which is permissible with certain conditions, and the new form of *tawarruq* known as organized *tawarruq* and reverse *tawarruq* which are not permissible.[17] In fact, the new form of *tawarruq*, rather than the classical one, is the one currently practised by Islamic financial institutions.

Responding to the *fatwā*, defenders of *tawarruq* for Islamic banks maintained that this contract is allowed when it is applied properly. Yusuf Talal DeLorenzo, one of the Shariah Board members of AAOIFI, was quoted as saying:

> Tawarruq from my perspective has been carefully researched and explained by AAOIFI . . . . AAOIFI has developed a standard through its own methodology which is very thorough and that standard, as far as I'm concerned, still stands.[18]

16. Abū Zayd, *Al-ʿĪnah al-Muʿāṣirah*, 39–40.
17. Resolution 179 (19/5) under the heading "OIC Fiqh Academy Ruled Organised Tawarruq Impermissible in 2009," as accessed at the International Shariʿah Research Academy for Islamic Finance (ISRA) Portal: http://www.isra.my/fatwas/topics/treasury/interbank/tawarruq/item/262-oic-fiqh-academy-ruled-organised-tawarruq-impermissible-in-2009.html.
18. Retrieved on 22 July 2013 from Financial Regulatory Forum Reuters, available at blogs.reuters.com/financial-regulatory-forum/2009/08/11/top-scholars-sanctions-islamic-tawarruq-structure/

The controversy between AAOIFI and OIC Fiqh Academy on *tawarruq* was perhaps initiated by a prominent Muslim economist, Mohammad Nejatullah Siddiqi, who two years before the *fatwā* was issued had suggested that such a contract must be debunked from Islamic banking practice.[19] The position of the OIC Fiqh Academy is further supported by Salman H. Khan who wrote, "Why Tawarruq Needs to Go – AAOIFI and OIC Fiqh Academy: Divergence or Agreement."[20] The write up, however, was challenged by Aznan Hasan, a Shariah Advisor to Bursa Malaysia, in his article titled "Why Tawarruq Needs to Stay: Strengthen the Practice, Rather than Prohibiting it."[21]

From the very beginning, even in its classical form, *tawarruq* was already a controversial contract. During the time when Islamic scholarship was represented, among others, by *fuqahā'* (scholars of jurisprudence), *tawarruq* had always been suspected as a kind of *ḥiyal* or legal stratagems to circumvent the prohibition of *ribā*. It was reported that ʿUmar b. ʿAbd al-ʿAzīz had said that "*Tawarruq* is capable of dragging one to *riba*."[22] As an example of *ḥiyal* of *tawarruq* in modern times, like the *ḥiyal* of *bayʿ al-ʿīnah*, a single car can potentially be used for dozens or even hundreds of *tawarruq* deals without moving from its spot. Our *fuqahā'* fortunately did not fail to record their reservations on *tawarruq*. Indeed, even though the contract

19. Mohammad Nejatullah Siddiqi, "Economics of *Tawarruq*: How its *Mafasid* Overwhelm *Masalih*," a position paper presented at the "Workshop on Tawarruq: A Methodological issue in Sharīʿa-Compliant Finance," 1 February 2007, available at http://www.siddiqi.com/mns/Economics_of_Tawarruq.pdf.
20. Published in *Islamic Finance news*, vol. 6, issue 35 (4 September 2009).
21. Published in *Islamic Finance news*, 18 September 2009, available at http://www.mifc.com/index.php?ch=151&pg=734&ac=535&bb=783.
22. Muhammad Taqi Usmani, "Verdicts On at-Tawarruq And Its Banking Applications," an article and paper presentation of the OIC Fiqh Academy (19th Session), available at the International Shariʿah Research Academy for Islamic Finance (ISRA) Portal: http://www.isra.my/articles/conference-series/oic-fiqh-academy/19th-session.html.

is valid if all the conditions are met, it is still reprehensible (*karāhah*) due to its misuse in covering up loans with interest. Nowadays, with their expert knowledge of economics as well as banking and finance, Muslim economists are in the position to enhance the ability of the present-day *fuqahā'* in dealing with certain controversial issues in *fiqh al-muʿāmalāt* (transactional jurisprudence). *Tawarruq* is one good example of such issues.

The views of such Muslim economists as Siddiqi ought to be taken into consideration by the present-day scholars of Islamic law, especially those who defend the practice of *tawarruq* for Islamic banking and finance. Siddiqi is not alone, for he is supported not only by other Muslim economists[23] but also by scholars of Islamic law. Among the scholars of Islamic law, Justice Muhammad Taqi Usmani had an inclination to prohibiting *tawarruq* for Islamic banking and finance. Although he is the Chairman of AAOIFI Shariah Board which permits *tawarruq*, his personal view of *tawarruq* for Islamic bank is very critical. He says:

> Since various jurisprudential conventions and seminars had unanimously agreed to have consensus on the ruling for the permissibility of *At-Tawarruq*, thus Islamic financial Institutions have started the financial procedures. And the ratio of exploitation of the tool of *At-Tawarruq* is so incessantly increasing in the circles of those institutions that it requires a pause for the scholars who are taking care of the application of the legal rulings with all its requirements and cautiousness about the evils of what can be the result of its misuse . . . . It may even be suggested on the basis of *Sadd Adh-Dharā'iʿ* (blocking the means to evil) that Islamic banks should be totally prevented from practising *At-Tawarruq*.[24]

23. He is supported by other prominent Muslim economists such as Muhammad Anas Zarqa, Abbas Mirakhor, Monzer Kahf, Mahmoud El-Gamal, etc.
24. Usmani, "Verdicts."

In this particular issue, the OIC Fiqh Academy has taken a concrete measure by issuing a verdict to disallow *tawarruq* to be practiced in Islamic banking. Besides putting it under the purview of Islamic law, *tawarruq* must also be scrutinised from the economic aspect. Here is the role of Muslim economists like Siddiqi and others to see the implication of *tawarruq* in the financial and economic system. This particular angle of observation surely has not been the subject matter of Islamic law. However, both Muslim economists and scholars of Islamic law meet at the domain of *maqāṣid al-sharīʿah* (the objectives of Sharīʿah) to repel *mafāsid* (public harms) and promote *maṣāliḥ* (public benefits). At this juncture, Siddiqi argued that the organised *tawarruq* by Islamic finance would lead to debt proliferation, instability in the economy, inequity in the distribution of income and wealth, and even destruction of the environment. His economic analysis reveals that *tawarruq* will not help society to escape from the present debt-based economic system. On the contrary, *tawarruq* does help towards enhancing the debt-trap of the present capitalist system. The same bad economic consequences would also be resulted from *bayʿ al-ʿīnah*.

If scholars have forbade *tawarruq* and *bayʿ al-ʿīnah*, what is then the alternative? Such is the oft-cited poser by supporters of *tawarruq*. At the micro level, individuals who genuinely need cash may resort to *rahn* (Islamic pledge) or *kafālah* (Islamic third party guarantee). Such contracts are definitely not controversial from the very beginning. With these transactions, the fulfilment problem of the need of the client is met. The problem arises with the Islamic banks which will not gain as much profit as they would in *tawarruq*. Shareholders of such a contract should give more priority to non-contentious transactions than maximisation of dubious profits. Further details can be read in other articles that study this aspect. Nevertheless, alternatives to *tawarruq* are

available if Islamic banks put their will to it. At the macro level, particularly the bank liquidity management, Islamic banks may resort to *qurūḍ mutabādilah* (reciprocal exchange of free interest loans). A once-surplus-turned-deficit Islamic bank may borrow funds free of charge from a surplus Islamic bank, when in a previous time before fortunes were reversed, the current deficit bank had loaned to the current surplus bank. Such an alternative is feasible if the association of Islamic banks put their heads together to organise with or without the help of the central bank of Malaysia. Even though the *qurūḍ mutabādilah*, a non-profitable business in which *qarḍ* is used, is not without issues, it is less contentious than *tawarruq*. Arguably, *qarḍ* is not supposed to be used for business. Yet, profitable and non-profitable businesses do exist. More issues on *qurūḍ mutabādilah* is available elsewhere.

Bayʿ al-dayn

Literally, *bayʿ al-dayn* means sale of debt. Discussions of *bayʿ al-dayn* and its nature are quite lengthy in the *fiqh* literature. This article, however, deals only with one of the most important aspects of it, namely sale of receivables with discounts which is currently practised by Islamic banking and finance. By way of example, Taqi Usmani explains the nature of *bayʿ al-dayn* as follows: "If a person has a debt receivable from a person and wants to sell it at a discount, as normally happens in the bills of exchange, it is termed in Sharīʿah as Baiʿ-al-dain."[25] According to Usmani, *fuqahāʾ* are unanimous on the point that *bayʿ al-dayn* with discount is legally not allowed. Its prohibition is actually a logical consequence of the prohibition of *ribā*. For, a "debt" receivable in monetary terms corresponds to money, and every exchange of money for money in the same denomination must be at par value. Hence, logically a decrease or increase from one side of the exchange is tantamount to *ribā*.

25. Usmani, *Introduction*, 150.

Similar to *bayᶜ al-ᶜinah*, Malaysia is perhaps the only country whose some of its Sharīᶜah scholars allow sale of debt with discount. In its second meeting on 21 August 1996, the Shariah Advisory Council (SAC) of the Securities Commission Malaysia unanimously agreed to accept the principle of *bayᶜ al-dayn* as one of the concepts for developing Islamic capital market instruments.[26] Sano Koutoub Moustapha in his defence for the permissibility of *bayᶜ al-dayn* with discount argues:

> The *dayn* is not only the right, but also represents the goods which were sold. Therefore, it can be sold at a discount price as well as its original price. Moreover, it is known that the creditor has the full right to waive his *dayn* or transfer it to somebody else. Accordingly, he should have the right to give it to anybody else other than the debtor at a price he may wish with the condition that he neither hurts the debtor nor increases his debt.[27]

The above argument in fact has been anticipated by Taqi Usmani. He criticised the failure of the *bayᶜ al-dayn*'s defender to understand the difference between commodity, on the one hand, and debt created by the sale of that commodity, on the other. In the latter case, the debt represents money and not the sold commodity anymore. He puts forward his argument as follows:

> Some scholars argue that the permissibility of baiᶜ-al-dain is restricted to a case where the debt is created through the sale of a commodity. In this case, they say, the debt represents the sold commodity and its sale may be taken as the sale of a commodity. The argument, however, is devoid of force. For, once the commodity is sold, its ownership is passed on to the

26. See *Resolutions of Securities Commission Shariah Advisory Council* (2d edition, 2006), 16.
27. Sano Koutoub Moustapha, *The Sale of Debt as Implemented by the Islamic Financial Institutions in Malaysia* (Kuala Lumpur: International Islamic University Malaysia (IIUM), 2001), 57.

> purchaser and it is no longer owned by the seller. What the seller owns is nothing other than money. Therefore if he sells the debt, it is no more than the sale of money and it cannot be termed by any stretch of imagination as the sale of the commodity.[28]

Bayʿ al-dayn is extensively applied in Malaysian Islamic financial markets. The so-called Islamic Private Debt Securities (IPDS) are structurally designed on the basis of *bayʿ al-dayn*.[29] Some of Malaysian Islamic bonds are sold at par value. However, such bonds are based on *bayʿ al-ʿīnah*. Commenting on the unacceptabilty of such bonds in the Middle East, Rosly remarks:

> It is worthy to note that *bayʿ al-dayn* at par value is permissible. All *fuqahas* agree on this point, including those from the Middle East. However, the Malaysia *bayʿ al-dayn* is supported by *bayʿ al-ʿinah*. Jurists from the Middle Eastern countries have rejected *bayʿ al-ʿinah*, as the contract is considered invalid. In this way, *bayʿ al-dayn* in Malaysian Islamic bonds are not well accepted in the Middle East, even though these bonds are sold at par value.[30]

Indeed, nothing can be worse when *bayʿ al-dayn* is combined with *bayʿ al-ʿīnah* in the process of engineering financial instruments under the name of Islamic bonds. Rosly and Sanusi, in their co-authored article, made the following findings and conclusion: ". . . this study finds no significant Shariʿah justification of *bayʿ al-ʿinah*. While trading of Islamic bonds at a discount using *bayʿ al-dayn* has been found unacceptable by the majority of the ulamaʾ (*Jumhur ʿUlama*) including al-Shafie."[31] The prevalence

28. Usmani, *Introduction*, 150.
29. Saiful Azhar Rosly, *Critical Issues on Islamic Banking and Financial Markets* (Kuala Lumpur: Dinamas Publishing, 2008), 435–439.
30. Ibid., 454.
31. Saiful Azhar Rosly and Mahmood M. Sanusi, "The Application of *Bayʿ al-ʿInah* and *Bayʿ al-Dayn* in Malaysian Islamic Bonds: An Islamic Analysis," *International Journal of Islamic Financial Services* 1, no. 2 (1999).

of Islamic Debt Security (IDS) issuance in Malaysia, which they call *ṣukūk*, is in fact structured on the basis of *bayʿ al-dayn* and *bayʿ al-ʿīnah*.[32]

The issue of *bayʿ al-dayn* is not only limited to the sale of *murābaḥah* receivables, which can be said to be the sale of pure debt, but also involves the sale of mixed debt in the case of "Mixed Islamic Fund." Except for some Malaysian Shariʿah scholars, there is in fact no disagreement among the majority of the international Shariʿah scholars about the impermissibility of selling *murābaḥah* receivables with discounts. Therefore, the debt from *murābaḥah* alone cannot be securitised to become a negotiable instrument in the financial market. However, the issue arises when *murābaḥah* receivable is allowed to be securitised if the debt is mixed with other portfolio. The disagreement arises on the issue of proportion of the debt as one of the criteria of securitisation.[33] Taqi Usmani proposed "majority rule" of non-debt assets to be one of the criteria. El-Gamal, however, criticised it as paradoxical. In regard to the nature of this mixed portfolio and its criteria for securitisation, Usmani states:

> Murabahah is a transaction which cannot be securitized for creating a negotiable instrument to be sold and purchased in a secondary market . . . . However, if there is a mixed portfolio consisting of a number of transaction like musharakah, leasing, and murabahah, then this portfolio may issue negotiable certificates subject to certain conditions (p. 147)

32. *The Islamic Securities (Sukuk) Market*, Islamic Capital Market (ICM) Series (Petaling Jaya: Lexis Nexis and Securities Commission Malaysia, 2009), 49–55.

33. Sometimes the *ṣukūk* derived from this mixed portfolio is called "blended assets" *ṣukūk*. Some argue that when an object consists of two substances and one of those is prohibited under Shariʿah, the object can still be construed as Shariʿah-compatible if the quantity of the non-compatible substance is insubstantial. They argue with a *qiyās* of a ring made of gold and silver which is permissible for a Muslim male to wear if the quantity of the gold substance is insubstantial. *Global Islamic Finance Report (GIFR) 2010* (London: BMB Islamic UK Limited), 93–94.

> . . . This may be called a Mixed Islamic Fund. In this case if the tangible assets of the Fund are more than 51% while the liquidity and debts are less than 50% the units of the fund may be negotiable.[34]

The above "majority rule" of illiquid assets, according to El-Gamal, is paradoxical in the sense that it can be devised in such a way as to turn this majority to become the minority instead. This manoeuvre finally would arrive at securitisation of minority pool of the illiquid asset portfolio. Hence, the criteria of at least 51 per cent of non-debt or illiquid component of the fund become meaningless. He gives an interesting hypothetical case to show his contention as follows:

> Consider the case wherein an Islamic financial provider wishes to securitize a large portfolio of receivables, of which 36 percent are lease-based and 64 percent are *murabaha*-based. According to the "majority rule" of mixed securitization, one can bundle all of our lease-based receivables with half of the *murabaha*-based receivables and sell the mixed portfolio at a negotiable (market) price. One can then use the same structuring principles to strip the leasing-based component of the portfolio and buy it back at market price, only to bundle with the remaining half of the *murabaha*-based receivables, which can thus be sold at market price. The net result is that the 51 percent rule, articulated above, has been synthetically used to generate a 36 percent rule.[35]

This so-called majority rule is in fact not agreed upon by all scholars. Some Shari'ah scholars, from different Shari'ah Supervisory Board, even opined that the percentage of the pool illiquid assets can be 33 per cent.[36] Those who contend

34. Usmani, *Introduction*, 218.
35. El-Gamal, *Islamic Finance*, 106.
36. Usmani, *Introduction*; and Yasemin Zöngür, "Comparison between Islamic and Conventional Securitization," *Review of Islamic Economics* 13, no. 2 (2009): 88.

for at least 51 per cent argued with a juristic principle of "*li al-akthar ḥukm al-kull*" or the majority deserves to be treated as the whole. While those who contend for a 33 per cent perhaps would have argued with the *ḥadīth* of *waṣiyyah* (bequest) from Saʿd b. Abī Waqqāṣ that "*al-thuluth kathīr*" (one third is a lot). Yet, some Shariʿah boards contend to be as little as 30 per cent.[37] Regardless of their differences pertaining to minority-majority portfolio issue, Shariʿah scholars seem to agree that *murābaḥah* receivables can be securitised as long as it is attached and bundled with other tangible or illiquid assets.

Another issue of this mixed fund is related to pricing. Since debt cannot be sold below par value, how can the mixed fund that consists of *murābaḥah* receivables be priced. No direct answer is available on this particular issue. Taqi Usmani has given a hint through the issue of share pricing when it represents the combination of liquid and illiquid assets. On the basis of Ḥanafite jurisprudence, according to him, whenever an asset is a combination of liquid and illiquid assets, the price of the combination should be more than the value of the liquid amount contained therein. If the share is sold at the price less than the value of the liquid asset, such an exchange falls within the definition of *ribā* and this is not allowed.[38]

The hint from pricing of the share in the above case perhaps can be used as a guideline for the mixed fund pricing. In this case, the fund consisting of *murābaḥah* receivable cannot be sold below the value of the receivable itself. The question is, however, how do you control the market to ensure the price of the fund is always above the value of receivable? In the case of share, perhaps it is true that "it is difficult to imagine a situation where the price of a share goes lower than its liquid assets," as pointed out by Taqi Usmani. But in the

37. Engku Rabiah Adawiah bt. Engku Ali, "Securitization in Islamic Bonds and Debt Securities: Issues and Alternatives," *IIUM Journal of Economics and Management* 15, no. 1 (2007): 61.

38. Usmani, *Introduction*.

case of mixed funds, such as in unit trust or mutual funds, it is easy to observe that mixed fund price falls below the value of the receivable, especially if the proportion of the receivable constitutes the majority.

Bayʿ al-wafāʾ and *bayʿ al-istighlāl*

Both *bayʿ al-wafāʾ* and *bayʿ al-istighlāl* are combined as the latter is just an extension of the former. For *bayʿ al-wafāʾ*, different schools of jurisprudence have different names for it. Mālikite jurists call it *bayʿ al-thunyā*, Shāfiʿite jurists call it *bayʿ al-ʿuhdah* or *bayʿ al-nās*, and Ḥanbalite jurists call it *bayʿ al-amānah*.[39] But the most popular name, *bayʿ al-wafāʾ*, is the term used by the Ḥanafite jurists. In addition to its popularity and for the sake of consistency, therefore, the term "*bayʿ al-wafāʿ*" is used in this article. Although there is no standardised English translation for it, *bayʿ al-wafāʾ* basically refers to a sale with condition that once the seller pays back the price, the buyer must return the commodity. This commodity normally refers to immovable property (*ʿaqār*) such as house and landed property.

Historically, this sale was known as early as the second century of Hijrah, as Imām Mālik (d. 178 A. H.) mentioned in his *al-Muwaṭṭaʿ*. However, it perhaps became rampant only in the fifth century Hijrah when people in Bukhārā and Balkh who were in shortage of cash needed it from those who were in surplus, but the latter were neither willing to lend the former money for free nor willing to charge them interest. Finally, they agreed to a mechanism in which those in need were getting the money and the affluent were getting benefit from advancing their money.[40] Normally, they would sell a commodity to get some cash with an agreement that when the cash was returned,

39. Muṣṭafā Aḥmad Zarqā, *Al-ʿUqūd al-Musammāt fi al-Fiqh al-Islāmī: ʿAqd al-Bayʿ* (Damascus: Dār al-Qalam, 1999), 155.
40. Ibid., 156.

so would the commodity. During the period, the buyer in *bayʿ al-wafāʾ* can enjoy the usufruct of the commodity. If during the period the commodity, such as a house is leased back to the seller, this transaction is called *bayʿ al-istighlāl*.

Muslim jurists and scholars in the past and the present had different opinions regarding the validity of *bayʿ al-wafāʾ*. Some had viewed it as a normal and valid sale, some considered it as defective sale (*bayʿ fāsid*), and some others held it not different from the contract of *rahn* (mortgage) but the mortgagor gave permission to the mortgagee to enjoy the usufruct, hence, it is permissible according to the Ḥanafite school of jurisprudence. Contemporary scholars like Muṣṭafā Zarqā and his father, Aḥmad Zarqā, consider all the three views together and call it "*al-qawl al-jāmiʿ* (the comprehensive opinion)," thus, ruling *bayʿ al-wafāʾ* as a valid sale.[41] Nevertheless, they maintained that *bayʿ al-wafāʾ* must apply to immovable properties only, and not movable ones (*manqūlāt*).[42] However, in the opposing camp, Rafīq Yūnus al-Maṣrī contended that both *bayʿ al-wafāʾ* and *bayʿ al-istghlāl* are nothing but legal stratagems (*ḥiyal*) to circumvent *ribā*. He put these two sales under the heading "*al-hiyal wa al-makhārij al-ribawiyyah*" in his book *al-Jāmiʿ fī Uṣūl al-Ribā*.[43]

The concept of *bayʿ al-wafāʾ* has been controversial since the beginning. Mālikite and Ḥanbalite jurists, as well as early Ḥanafite and Shāfiʿite jurists, ruled that *bayʿ al-wafāʾ* is defective, as it is viewed as legal stratagem to reach illegitimate ends of *ribā* by way of legitimate sale.[44] However, the later Ḥanafite and Shāfiʿite jurists often declared it valid though

41. Ibid., 161.
42. Ibid., 163.
43. Rafīq Yūnus Al-Maṣrī, *Al-Jāmiʿ fī Uṣūl al-Ribā* (Damascus: Dār al-Qalam, 1991), 172–178. See also idem, "Renting an Item to Who Sold it: Is it Different from *Bayʿ Al-Wafaʾ* Contract?," *J.KAU: Islamic Economics* 19, no. 2 (2006): 39–42.
44. El-Gamal, *Islamic Finance*, 74.

immoral. Yet, in many cases, their jurists declared it not even immoral.[45] Institutionally, the *Majallah* or the Ottoman Civil Code created in 1876 based on Ḥanafite jurisprudence, in its article no. 118 and 119 approved *bayʿ al-wafāʾ* and *bayʿ al-istghlāl* respectively. But this controversial sale which had been popular since the fifth century Hijrah, has been abolished by modern Arab civil codes which legally allow interest banking charge, signifying that the necessity to resort to *bayʿ al-wafāʾ* has ceased.[46] With the recent establishment of Islamic banking and financial institution, *bayʿ al-wafāʾ* or more specifically *bayʿ al-istghlāl*, however, have been revived and practiced again, thus reigniting the controversy. As Muslim economists are more exposed to conventional economics and finance, they consider *bayʿ al-wafāʾ* a variation of *bayʿ al-ʿinah* based on its substance rather than its form of sale. One such economist is El-Gamal. This view has been supported by an Islamic legal institution at the calibre of OIC Fiqh Academy which declared it unlawful in the resolution no. 66 (1412H / 1992).

Bayʿ al-istighlāl, which is the derivative of *bayʿ al-wafāʾ*, is mainly practised in the Islamic capital market. What is called *ijārah ṣukūk* nowadays in the GCC countries is none but *istighlāl ṣukūk*. The originator of this *ṣukūk*, be it government or corporation, would sell its asset to *ṣukūk* holders (via SPV) and then lease it back to the originator for a certain period of time in which the originator would finally repurchase the asset. Its simple mechanism is sale-leaseback-repurchase which is the essence of *bayʿ al-istighlāl*. *Ijārah ṣukūk* with this structure was historically the first *ṣukūk* structure marketed at the global level. The sale and lease-back arrangement in *ijārah ṣukūk* has also been approved by the Shariah Board of AAOIFI. However, as al-Amine has pointed out in his study, this *ṣukūk* has been criticised on the basis that it involves *bayʿ al-istighlāl*.

45. Vogel and Hayes, *Islamic Law and Finance*, 39.
46. Al-Maṣrī, *Al-Jāmiʿ*, 178.

Taqi Usmani himself, as reported, was duly concerned with the overall *ṣukūk*-Shariʿah compliance issue in that about 80 or 85 per cent of them were non-Shariʿah compliant.[47] His views are expressed in "*Sukuk* and their Contemporary Application."[48]

The presence of controversial sales at the global level

According to Global Islamic Finance Report 2010, the asset size of worldwide Islamic banking and finance industry stood at about US$1 trillion.[49] Also, 614 registered Shariʿah-compliant institutions existed in 47 countries, 420 of which were dedicated Islamic financial services companies and the remaining 194 were conventional institutions with Shariʿah windows. The top 20 banks in GCC countries accounted for about US$200 billion assets in 2008. Interestingly, according to some estimates, in oil-producing countries alone, Islamic finance will account for 50 per cent of all banking assets by 2018. In South-East Asia, the Malaysian Islamic banking industry has undergone the most spectacular expansion over a short period of time. In 2010, Malaysia had 17 Islamic banks, 9 of which were subsidiaries of domestic banking groups, accounting for 17.4 per cent of total banking assets in the country.

The products of retail banking facilities are mainly *murābaḥah*-based. A 2008 survey conducted for ten leading Islamic banks in GCC countries showed that *murābaḥah* was the most popular financing contract offering for about 72 per cent of total financial portfolio.[50] However, it should be

47. See this report at http://emirateseconomist.blogspot.com/2008/03/80-of-islamic-bonds-declared-unislamic.html. See also Muhammed Ayub, "Islamic Banking in Pakistan: Time to Asses the Achievements," *Journal of Islamic Banking and Finance* 26, no. 1 (2009): 23.
48. Available at http://www.alqalam.org.uk/UserFiles/File/Mufti%20Taqi%20sukuk%20paper.pdf.
49. *Global Islamic Finance Report (GIFR) 2010*, 32–33.
50. Ibid., 39.

noted, that these *murābaḥah* facilities may include *tawarruq* arrangement. For, in the financial report, usually *tawarruq* is not declared, but only *murābaḥah* is simply because the bank would sell commodity to its client based on *murābaḥah* when it makes *tawarruq* arrangement. In its reporting, the bank would state *murābaḥah* financing in the asset side of the balance sheet, although subsequently the bank would help the client to sell the commodity to a third party. In the case of personal finance in GCC countries, however, it is very clear that "*tawarruq* is also being used to meet the financial needs of customers."[51] Similarly in the inter-bank markets, the activities are dominated by commodity *murābaḥah* whose underlying contract is no other than *tawarruq*.[52] The same applied in Malaysia in which its *murābaḥah* version called *bayᶜ bithaman ajil* (BBA) included *bayᶜ al-īnah* in its retail BBA arrangement.[53]

In capital markets, the use of *ṣukūk* as the most important financial instrument remains buoyant in Islamic countries. In South-East Asia, Malaysia has been seen as the centre of *ṣukūk* origination over the years. The contribution of *ṣukūk* issuance to total funds mobilised via bonds surged from 42 per cent in 2001 to 77 per cent in 2007, though it dropped back to 47 per cent during the economic downturn in 2008. Interestingly, by the end of 2008, it was reported that 87 per cent of all securities listed in Bursa Malaysia were declared Shariᶜah-compliant, accounting for 64 per cent of the total market capitalisation.[54] As previously discussed, Malaysian *ṣukūk* are dominated by *bayᶜ al-dayn* contracts with some even combined with *bayᶜ al-īnah*. In addition, most of the GGC *ṣukūk* are *ṣukūk ijārah* which is basically structured on *bayᶜ istighlāl*. Despite this, Malaysia and the GCC are the world leaders in the current *ṣukūk* issuance

51. Ibid., 44.
52. Ibid., 38.
53. Rosly, *Critical Issues*, 87–92.
54. *Global Islamic Finance Report (GIFR) 2010*, 57.

market. Indeed, both "accounted for 91.6 per cent of the total market in 2008."[55]

Finally, other countries, such as Pakistan, also raised the issue of Shariʿah quality of Islamic banking and finance despite the industry's encouraging development. According to Ayub, Pakistan had six full-fledged Islamic banks and 12 conventional banks operating Islamic banking branches. The total number of these branches crossed 500 at the end of 2008.[56] Although assets of Islamic banking in the country accounted only for 4.5 per cent of market share by the end of June 2008, the State Bank had announced its strategic plan to target 12 per cent market share of Islamic banking by 2012. Despite all this development, according to Ayub:

> . . . still the general public and majority of the Shariah scholars in the country are not satisfied on Shariah position of Islamic banking in vogue. A body of Ulama headed by Muftis from Jamia Islamia, Banuri Town, Karachi who considered the issue of Islamic banking in 2008, issued verdict that Islamic banking in Pakistan was not really Islamic.[57]

Conclusion

Major contentious sales are currently dominating the Islamic banking and finance industry in Gulf Cooperation Council (GCC) countries, Malaysia, and Pakistan. These countries constitute key players in the global market. Despite their achievements, questions on Shariʿah value of the industry have been raised. It is little wonder that due to these rampant uses of controversial sale phenomena, some scholars have started questioning the Shariʿah quality nomenclature for Islamic finance. They do not feel comfortable anymore with the term

55. Ibid.,100.
56. Muhammed Ayub, "Islamic Banking in Pakistan," 25.
57. Ibid., 26.

"Shariʿah compliant" for the term has been imbued with *ḥiyal* or legal stratagems to circumvent *ribā*. The nomenclature for the real Shariʿah quality product, according to some, should be "Shariʿah-based" instead.[58] Other terms also started emerging such as "Shariʿah observant," "Shariʿah friendly," "Shariʿah compatible," etc. Although some would consider that "there is no significant difference between them," yet, among the reasons for their appearance, according to *Global Islamic Finance Report 2010*, is because Shariʿah in Islamic banking and finance industry is "not implemented in its entirety."[59]

58. For example, see Rodney Wilson, "Introduction," in *Euromoney Encyclopedia of Islamic Finance*, ed. Aly Khorshid (London: Euromoney Institutional Investor PLC, 2009), xxi–xxii.
59. *Global Islamic Finance Report (GIFR) 2010*, 26.