

COMPARATIVE STUDIES IN UNDERSTANDING MAJALAH AHKAM JOHOR TEXT AND THE IMPLEMENTATION OF THE TAWARRUQ FINANCING IN MALAYSIAN ISLAMIC BANKING

Muhammad Azizur Rahman Ramli¹
Wan Mohammed Sallam Wan Sulaiman²
Mohd Afiq Ab Jalil³

¹Cluster Of Islamic Accounting, Finance and Banking, Universiti Islam Malaysia
(E-mail: azizur@uim.edu.my)

²Cluster Of Quran and Sunnah, Universiti Islam Malaysia
(Email: sallam@uim.edu.my)

³Cluster Of Muamalat, Universiti Islam Malaysia
(E-mail: afiq@uim.edu.my)

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Abstract: *Tawarruq, as one of the most commonly used financing products by Islamic banks, has attracted much criticism. One of these accusations is that it is used to evade interest. Tawarruq financing, despite being widely used by Islamic banks, has faced criticism for being accused of evading interest and for being misunderstood by the society. In this paper, we compare the modern tawarruq guideline with the text of the Majallah ahkam johor and identify its implementation. The Majallah al-Ahkām al-'Adliyyah, which was part of the legal text of the Ottoman Empire, was introduced in Johor during the reign of Sultan Abdul Hamid II (1876-1908). The book was brought to the Kingdom of Johor in Arabic in 1893 and later translated into Malay (Majalah Ahkam Johor) in 1913 during the reign of Sultan Ibrahim (1895-1959). This book is a legal reference work dealing with matters of Islamic civil law such as contracts of sale and lease and hibah. The use of the Majalah Ahkam Johor encountered obstacles in the courts due to the interference of the British administration in the legal and judicial system of the state. Nevertheless, the Muftis of Johor (1885-1941) played an important role in the economic and social affairs of the state through informative and authoritative arguments. Our methodology is qualitative and specifically includes a content analysis of the Majalah Ahkam Johor manuscripts. Our results show that the implementation of tawarruq needs to disclose more information about product features that are easier for customers to understand in order to avoid misunderstandings. Using terms from the Majallah Ahkam Johor can help improve customer understanding of the product.*

Keywords: *Tawarruq Financing; Islamic Civil Law; Majalah Ahkam Johor, Maqasid Syariah, Islamic Finance*

Introduction

Tawarruq is a financing product that involves two sale and purchase contracts. In the first contract, the asset is sold by a seller to a purchaser on a deferred basis. In the second contract, the same asset is resold by the purchaser to a third party on a cash and spot basis (BNM, 2021). Tawarruq Financing, despite being widely used by Islamic banks, has faced criticism for being accused of evading interest and for being misunderstood by the society. There are also issues surrounding the ownership of the underlying asset and the existence of shubuhah, with some calling it a legal trick to bypass the prohibition of riba. The Islamic Fiqh Academy of the World League has also deemed as organized tawarruq (Tawarruq Munazzam) as not allowed. These concerns pose a challenge for the regulation and implementation of the technology in the Islamic finance industry.

In this research, we aim to compare the modern Tawarruq guideline published by Bank Negara Malaysia with the text of the Majallah Ahkam Johor to identify similarities and to analyze modern Tawarruq financing. According to Zahari (2014), the Islam Legal Maxims (Qawaid Al-Fiqhiyyah) were collected from books such as "al-Ashbah wa al-Nazair," "Qawaid al-ahkam fi masalih al-anam," and "al-Majmuk al-mudhab fi Qawaid al-mazhab." However, the last book to collect the Islamic Legal Maxims in a codified form was the "Majallah Ahkam al-Adliyyah." This book was written to make it easier for untrained judges to understand the law when the Mahkama (al-Nizamiyah) was established in the Ottoman Chilaphate during the 13th Hijri century. The book took seven years to write and was first published on 26th Sha'ban 1292 H, which corresponds to the year 1876. It contains 99 Fiqh methods that refer to 1851 articles and is divided into two components: the main method and the subsidiary method. Each method is assigned a number that refers to a legal problem statement with a summary of the discipline of Fiqh and the principles of Fiqh. The main method is the basic method, used in most Fiqh issues that are agreed upon by the majority of scholars from various schools of thought, while the subsidiary Fiqh method (Furu') is general but not comprehensive. The limited Fiqh method refers to only one Fiqh problem. According to Zahari's study, 55% of the Fiqh methods in the "Majallah Ahkam" represent the limited method, 40% are subsidiary Fiqh methods, and 5% are main Fiqh methods. The scholars formed these Fiqh methods using the Istiqra' method, which is based on evidence and past Fiqh cases

In the context of Malaya, the "Majallah Ahkam al-Adliyyah" was translated into Malay and used by the Johor government. According to Abd Jalil Borham (2012) and Haidar (2003a), this law was gazetted in the Johor state constitutional law and was based on Shari'ah principles as stated in Article 1801. As a result, it became mandatory for the government to follow, as long as it did not conflict with the principles of Shari'ah law. The relationship between the Johor government and the Ottoman government had a positive impact on the development of Islamic law in Johor and the implementation of the "Majallah Ahkam al-Adliyyah" was used in the Johor government. This can be seen in the use of "Majallah Ahkam al-Adliyyah" as Islamic civil law since 1893, as stated in clauses 49 and 57 of the Johor state government constitution (Abd Jalil Borham, 2012). Hence, "Majallah Ahkam Johor" is considered a unique reference, as it encompasses both Fiqhi principles and the objectives of Islamic law in its Islamic civil law system.

Literature Review

There are two point will be discussed in literature review, the criticism of tawarruq financing and how the tawarruq financing and maqasid Syariah can be blend together.

The Criticism Of Tawarruq Financing

Several studies have shown that Islamic finance should not only have a different theoretical approach compared to conventional finance, but it should also have different practical applications. In theory, Islamic banking is based on the principle of profit and loss sharing rather than the interest-based deposit and lending practices of conventional banks. However, it has been difficult to demonstrate that Tawarruq, as it is practiced in Malaysia, is significantly different from a loan involving Riba. (Habeebah S. F. & Ndeye D. N. 2017). Also, the doubt arises among the industry players on the real physical asset; whether it really exists especially when it involves huge numbers of transactions. But, regarding the issue of the underlying asset ownership, Bursa Suq Al-Sila' (BSAS) provides a fully electronic system that will recognize and verify ownership through electronic certificates (e-certificate). The contract specifications will also be given to every single asset and will be made known to all parties (Mansor, 2009). BSAS only allows for real commodities which have real value to be transacted such Crude Palm Oil.

Then, a key problem on this criticism is related of al-hayl al-Fiqhi occurs in a complex legal state where the evidence is not clear (qati'e). This means that the Shariah does not explain a similar meaning and similar prohibition for it. For example, the Shafi'i school of thought that requires bay'inah and this view does not eliminate the meaning of the sale because it has a complex meaning that is not explicitly stated by the Shariah (Abdulrahman kailani, 2000).

Approach Of Tawarruq Financing Based On Maqasid Syariah

According to (Soualhi, 2015) Younus Solihi (2015), classical scholars such as Imam Qarafi emphasized that the formation of contracts must achieve its objective, which is the protection of rights for contracting parties and the elimination of hardship and harm in contracts. Moreover, Imam Ibn Taymiyah and Ibn Qayyim al-Jawzi questioned contracts that are in opposition to the above objectives. They rejected trick contracts such as 'Inah and Tawarruq. (al-Qarāfi, n.d; Ibn Qayyim, 1955; Ibn Rushd, 1988). Contemporary scholars such as Sheikh Abdul Sattar Abu Ghuddah (Abū Ghuddah, 1997) try to highlight the objectives of Islamic contracts in contemporary transactions. These include the principle of justice in exchange contracts, the right of option, justice, kindness, and security for the contracting parties.

Rather works in hayl fiqhi, the concept of Maqasid al-Shariah can be applied in the modern economy and it is called the maqasid-based consumer preference index (MCPi). At best, three reasons why maqasid al-Shariah is considered as the theory that leads to the development of MCPi. Firstly, maqasid al-Shariah ranks preference according to the hierarchy of basic needs and considering wants is only made when all the magnitude of basic need is met. Secondly, maqasid al-Shariah offers consumption and spending according to Islamic worldview elements, where overspending and wastages are prohibited in any halal decision related to consumption and spending. (Amin H, Suhartanto D, Ghazali Mohd Fahmi Ali, Muhammad Rizal, Hamid Abdul Razak, Dzuljastri. 2021).

Also Maqasid al-Shariah as a measurement to measure the Islamic banking products. Which are sourced from two sets of Shariah requirements and the social requirement. The first type of

product satisfies both legal and social obligations. The second product meets only the legal requirements, disregarding social obligations. The third product appears to be in line with Islamic law in form, but not in substance. The Maqasid has two aspects in relation to Islamic financial products. First, the Shari'ah Supervisory Board (SSB) has the responsibility of ensuring that Maqasid is met at the contract level, which requires both the form and substance of Islamic law to be fulfilled. Second, the Board of Directors (BOD) determines whether the products are Shariah-based or Shariah-compliant. The SSB also monitors the products to prevent them from being pseudo-Islamic, in order to fulfill the Maqasid al-Shariah. (Ellida F. A., Mariyam S., Nursulaim A. M., Saidu M. J., Samia I. D., N Aishath M. 2017). Therefore, important issue in the literature is the functions of Maqasid Syariah can be highlighted through the existing Islamic Legal Maxim in the Majallah Ahkam Al-adliyyah in Islamic banking products in Malaysia. It can even be used as a Shariah parameter to refine and improve the Islamic banking products.

Research Methodology

The type of approach of this research is qualitative research. For this study, we analyzed the data collected from interview, Tawarruq guidelines from Bank Negara Malaysia and Majallah Ahkam Johor (article 245-250). We do the thematic analysis and it is appropriate method to understand experiences, thoughts, or behaviors across a data set

Result And Discussion

Three broad themes emerged from the analysis. First, there is similarity between tawarruq guidelines, majallah ahkam johor and disclosure sheet. Second, maqasid syariah approach in tawarruq financing. Third, understanding of tawarruq financing.

Similarity Between Tawarruq Guidelines, Majallah Ahkam Johor and Disclosure Sheet

The most interesting finding in Majallah was that the basis of sales in Islam involves both selling at a cash price and selling with a deferred payment, which is considered a conditional sale. As a result, anyone claiming that the payment is deferred must provide proof through witness testimony or other evidence. Further more, there is similarity between the tawarruq concept and the Bay Wafa' in Majallah for example :

Article 118 : A sale subject to a right of redemption is a sale in which one person sells property to another for a certain sum of money, subject to the right of redeeming such property, upon the price thereof being returned.

This article is referred to article no 32 :

Article 32. Any want, whether of a public or private nature, is so dealt with as to meet the exigencies of the case. The validity of sale subject to a right of redemption is of this nature. The inhabitants of Bokhara having fallen badly into debt, this procedure was put into operation in order to meet the exigencies of the case.

The article 32 describe the article 118 is permissible because of the *hajah* and the need of the merchant to take the debt. However The Council of the International Islamic Fiqh Academy of the Organization of the Islamic Conference, holding its 7th session in Jeddah, Kingdom of Saudi Arabia, on 7–12 Dhū al-Qi'dah 1412h (9–14 May 1992), stated that Bay Wafa' is type of sale is in fact “a loan which generates a benefit”; therefore, it is a fraudulent practice of Ribā, and

is considered invalid by the majority of scholars. Then this contract is not permissible in Shariah. However, according to (ECCHIA, S, 2014)) Bay wafa, bay salam and muzara'ah were used in real estate transactions, trading in agricultural commodities, and tax farming in ottoman chilaphate. The interconnected markets allowed creditors to reduce information and monitoring costs, and easily acquire the commodity used as security for the loan, which was the same commodity exchanged on other connected markets. The increasing privatization of land and commercialization of the agricultural sector led to the stipulation of these contracts becoming a tool for local notables to invest in peasants' landholdings and manage a sales network for agricultural products.

Also, according to Resolution No. 179 (5/19) Structured tawaruq in contemporary terminology means the case of a person who buys a good on credit from local or international markets. Then the seller (the financier) arranges selling of the good, either directly or through an agent or in collusion with the buyer (the mustawriq), at a cash price, which is (in most cases) lower than the purchase price. Hence, the similarity between the Maqasid Syariah and The Fiqhi principle is the *hajah* and the need of the muslim society. To solve the problem arise Bursa Sil'A can make a difference to the exit of the criticism of Tawarruq Munazzam.

From the content analysis, we found the similarity between the documents is that they discuss the terms of payment in a sale and purchase contract, specifically regarding the payment of the price. They address different aspects of payment, including the payment method (deferred, instalments, bullet lump sum), the time frame for payment, the definite ascertainment of the payment period, and the consequences of default or failure in payment. The documents emphasize the importance of the agreement between the contracting parties regarding the terms of payment, and the right to claim compensation for loss in case of a default or failure in payment.

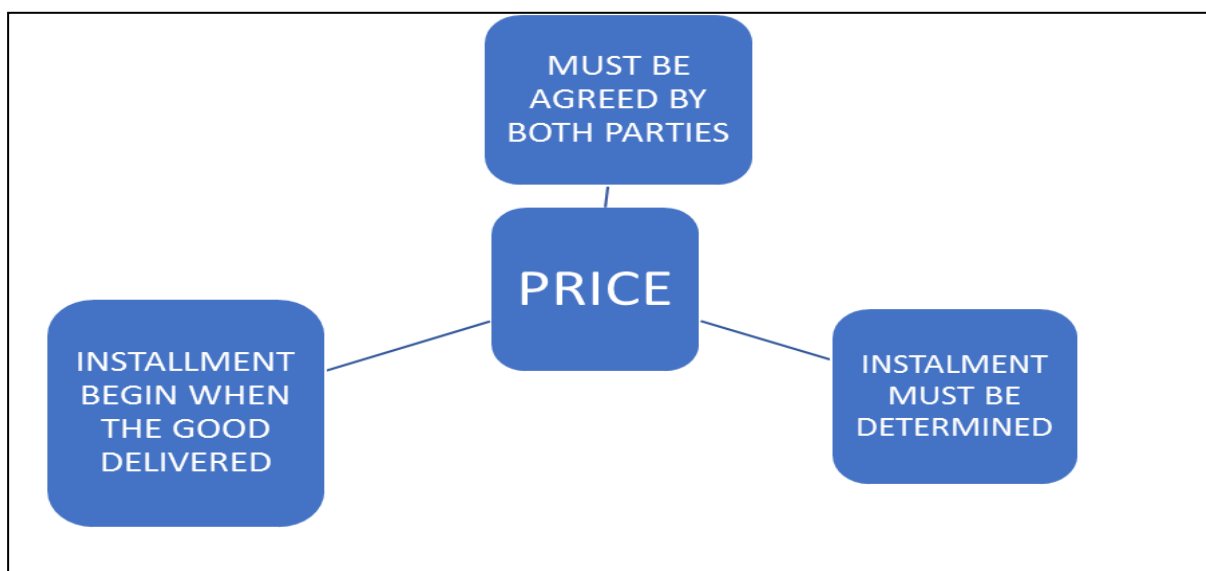


Figure 1: Similarity Of Content

Source : Author

From this figure the tawarruq guidelines stated :

Guidelines 14.3 The price of each sale and purchase contract in the tawarruq may be paid at any time after entering into the contract and on such terms as may be agreed by the contracting parties, including spot or deferred basis, or in instalments or a bullet lump sum payment.

This guidelines have similar meaning in the majallah ahkam johor as stated :

245. A valid sale may be concluded in which payment of the price is deferred and is made by instalments.

246. In the event of deferment and payment of the price by instalments, the period thereof must be definitely ascertained and fixed.

247. if a bargain is concluded with a promise for payment at some definite future date which is fixed by two contracting parties, such as in so many days, or months, or years time.....

248. If a bargain is concluded stipulating for payment at a time which is not clearly fixed, such as "when it rains " the sale is voidable.

249. If a bargain is concluded whereby credit is given for an undefined period, payment becomes due within one month.

250. The time agreed upon for deferred payment, or payment by instalments, begins to run from the time the thing sold is delivered. Example:- Goods are sold to be paid for in a year's time. The vendor after keeping them for a year, delivers them to the purchaser. The money must be paid after a period of one year from the date of delivery, that is, upon the expiration of precisely two years from the the time of the sale

Maqasid Syariah Approach In Tawarruq Financing

From the interview analysis, we do found the meaning of the benefit of the tawarruq financing. That can be match to charecteristic of the maqasdi syariah as discussed before..



Figure 2 : Tawarruq and Benefit

Source : Author

Agrobank offers and helps people in risky business ventures. Agrobank is one of the more advanced Islamic banks, without using conventional products. This is the main advantage of Agrobank because based on the research carried out there are no conventional banks and Islamic banks that offer special financing to the agricultural sector. The agricultural sector has high risks such as floods that will cause banks to incur losses. Furthermore, Agrobank uses Domestic Fund Injection funds from government grants to cover repayments from farmers. Therefore, Agrobank is able to offer funds to farmers to increase production.

“In terms of food security and risk management, we do have risk management. We have to make sure that the customer is registered with the district agency first. Inject funds so that we can increase production. The easiest and most successful way is to have a relationship with Islamic banking. The important thing is that it is not only Islamic banking, banks have to cooperate with the government.”

Understanding Of Tawarruq Financing

Also we do found from the intevieew analysis the challenges faced by Agrobank are in line with the collected data analyzed, which is that the community lacks understanding or exposure about the concept of *tawarruq*.

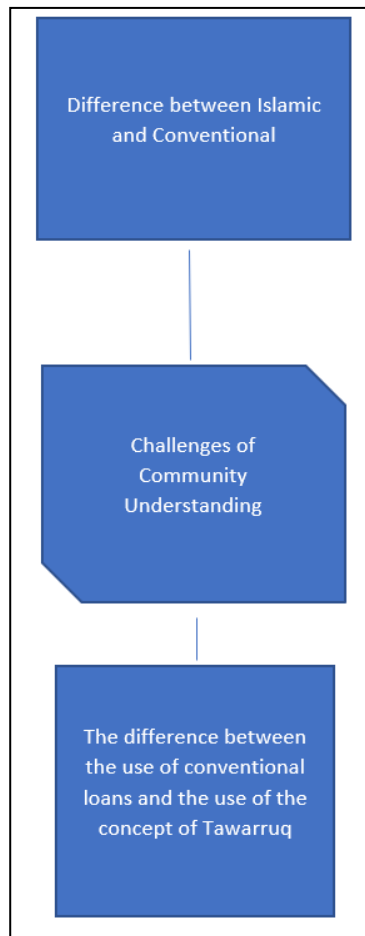


Figure 3 : Understanding Of Tawarruq

Source : Author

"They are going to Islamic banking, specifically for Tawarruq. During Tawarruq, the sale price is displayed. The selling price is RM 14,000. "Wait, I only borrowed RM 10,000, do I have to pay back RM 14,000?" you may wonder. The reason is because Tawarruq involves buying and selling. We do not dictate the monthly payment for this sale; we only inform you of the selling price. We sell it for RM 14,000, and you only have to pay a fraction of it. Thus, when people perceive Islamic banking as expensive, it is a misinterpretation. In reality, the monthly payment may only amount to RM 12,000 or RM 12,500. However, it is a challenge to change society's perception and understanding of the difference between Islamic and conventional banking, as well as between Tawarruq and loans or interest."

This refers to the understanding of society in differentiating between Islam and conventional. In addition, the community is also confused about the use of conventional loans and the use of the concept of tawarruq. Most people think the concept of tawarruq is just a disguise for Bai' al-inah.

Conclusion

The results obtained provide some action plans for practitioners' mainly Islamic banks and regulators to design the better offered tawarruq personal financing. Besides, concerning Islamic banks, the results indicate that the banks shall develop tawarruq personal financing, where the maqasid "implications" are found and for that better action plans through the enhanced Shariah-compliance practices are developed. These include proper documentation and better advertisement to the targeting customers. Besides, offering tawarruq personal financing funded via sadaqah funds should be prioritised to those poor and needy folks, where the discounted profit rate is offered for improving value-based intermediation, as well as an ummah, improved well-being.

In Tawarruq, therefore, one needs to exercise extra care and subject the product to an additional dose of investigation before accepting it as Shariah compliant especially, when the bank asserts that the terms of the Tawarruq based product are same as the credit term of other conventional financing products. Example a Tawarruq - Based credit Card. Based on the mechanism which allows short-term funding of an amount that closely matches the need of the customer, a credit card has recently been designed by an Islamic bank that uses the concept of Tawarruq.

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