

**LEGAL *ISTINBĀṬ* METHOD OF USING *TAWARRUQ* CONTRACTS ON
FINANCING IN SHARIA FINANCIAL INSTITUTIONS
(COMPARATIVE STUDY OF INDONESIA AND MALAYSIA)**

THESIS

BY: RIFQATUS SALSABILA

NIM 19220034



**DEPARTMENT OF SHARIA ECONOMIC LAW
FACULTY OF SHARIA
UNIVERSITAS ISLAM NEGERI MAULANA MALIK IBRAHIM
MALANG
2023**

**LEGAL *ISTINBĀṬ* METHOD OF USING *TAWARRUQ* CONTRACTS ON
FINANCING IN SHARIA FINANCIAL INSTITUTIONS
(COMPARATIVE STUDY OF INDONESIA AND MALAYSIA)**

THESIS

BY: RIFQATUS SALSABILA

NIM 19220034



**DEPARTMENT OF SHARIA ECONOMIC LAW
FACULTY OF SHARIA
UNIVERSITAS ISLAM NEGERI MAULANA MALIK IBRAHIM
MALANG
2023**

STATEMENT OF THE AUTHENTICITY

In The Name of Allah,

With consciousness and responsibility toward the development of science, the writer declares that thesis entitled:

LEGAL ISTINBATH METHOD OF USING TAWARRUQ CONTRACT ON FINANCING IN SHARIA FINANCIAL INSTITUTION (COMPARATIVE STUDY OF INDONESIA AND MALAYSIA)

Is truly writer's original work which can be legally justified. If this thesis is proven result of duplication or plagiarism from another scientific work, it as precondition of degree will be stated legally invalid.

Malang, March 14, 2023

Writer



Rifqatus Salsabila

NIM 19220034

APPROVAL SHEET

After reading and correcting thesis of Rifqatus Salsabila Student ID 19220034,
Department of Sharia Economic Law, Syariah Faculty of The State Islamic
University Maulana Malik Ibrahim of Malang entitled:

**LEGAL ISTINBATH METHOD OF USING TAWARRUQ CONTRACT
ON FINANCING IN SHARIA FINANCIAL INSTITUTION
(COMPARATIVE STUDY OF INDONESIA AND MALAYSIA)**

the supervisor stated that this thesis has met the scientific requirements to be
proposed and to be examined on the Assembly Board of Examiners.

Malang, March 21, 2023

Acknowledged by,
The Head Department of
Sharia Economic Law (*Muamalah*)



Dr. Fakhruddin, M.HI.
NIP 197408192000031002

Supervisor,



Ramadhita, M.HI.
NIP 19890922015031004

PROOF CONSULTATION

Name : Rifqatus Salsabila
NIM : 19220034
Study Program : Sharia Economic Law
Supervisor : Ramadhita, M.HI.
Title of Theses : Legal Istinbath Method of Using Tawarruq Contract on
Financing in Sharia Financial Institution (Comparative
Study of Indonesia and Malaysia)

No.	Day/Date	Consultation Materials	Signature
1.	Thursday, December 1, 2022	Title of Research	1. <i>f</i>
2.	Monday, December 5, 2022	Background, Statement of Problem	2. <i>f</i>
3.	Friday, December 9, 2022	Proposal Acc	3. <i>f</i>
4.	Wednesday, February 1, 2023	Research of Method	4. <i>f</i>
5.	Wednesday, February 8, 2023	CHAPTER I	5. <i>f</i>
6.	Wednesday, February 15, 2023	CHAPTER II	6. <i>f</i>
7.	Friday, February 24, 2023	CHAPTER III	7. <i>f</i>
8.	Monday, March 6, 2023	CHAPTER III	8. <i>f</i>
9.	Tuesday, March 14, 2023	CHAPTER IV	9. <i>f</i>
10.	Tuesday, March 21, 2023	Thesis Acc	10. <i>f</i>

Malang, March 21, 2023
Acknowledged by,
Head Department of
Sharia Economic Law (*Muamalah*)



Dr. Fakhruddin, M.HI.
NIP 197408192000031002

LEGITIMATION SHEET


The Assembly Board of Thesis Examiners of Rifqatus Salsabila NIM 19220034, student of Department, Syari'ah Faculty of The State Islamic University Maulana Malik Ibrahim of Malang entitled:

**THE LEGAL *ISTINBĀṬ* METHOD OF USING *TAWARRUQ* CONTRACTS
ON FINANCING IN SHARIA FINANCIAL INSTITUTIONS
(COMPARATIVE STUDY OF INDONESIA AND MALAYSIA)**

Has been certified to pass in examination on Friday, May 12th, 2023 .

Board of Examiners:

1. Dwi Fidhayanti, M.Pd.
NIP 199103132019032036

()
Chairman

2. Ramadhita, M.HI.
NIP 19890922015031004

()
Secretary

3. Risma Nur Arifah, S.HI., M.HI.
NIP 198408302019032010

()
Main Examiner

Malang, May 26th, 2023

()
Dean

D. Sudirman, M.A.
NIP 197708222005011003

MOTTO

يَقُولُ اللَّهُ تَعَالَى أَنَا عِنْدَ ظَنِّ عَبْدِي بِي

“I am according to the expectations of my servant to Me”

(HR. Ahmad)

ACKNOWLEDGEMENT

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Alhamdulillah rabbil'alamin, have given His *rahmat* and servan, so writer can finish this thesis entitled "***Legal Istinbāṭ Method of Using Tawarruq Contract on Financing in Sharia Financial Institution (Comparative Study of Indonesia and Malaysia)***". Peace be Upon into The Rasulullah Prophet Muhammad SAW who has taught us guidance (*uswatun hasanah*) to do activity correctly in our life. By following him, may we belong to those who believe and get their intercession on the last day of the end. *Aamiin*. From all the teaching, advice, guidance, and helps of service for us to finish this thesis, then with all humility the writer will expresses the gratitude which is unequaled to:

1. Prof. Dr. M. Zainuddin, M.A., as the Rector of The State Islamic University Maulana Malik Ibrahim of Malang.
2. Dr. Sudirman, M.A., as the Dean of Sharia Faculty of The State Islamic University Maulana Malik Ibrahim of Malang.
3. Dr. Fakhruddin, M.HI., as the Head of Sharia Economic Law (*Muamalah*) Department of Sharia Faculty of The State Islamic University Maulana Malik Ibrahim of Malang also the supervisor lecturer of the writer during her study.
4. Ramadhita, M.HI., as my thesis supervisor. The writer thanks for his spending time to guide, direct, and motivate to finish writing this thesis. The writer hopes that he and his family will be blessed by Allah.

5. All lecturers at Sharia Faculty of the State Islamic University of Maulana Malik Ibrahim Malang who have provided learning to all of us. With sincere intentions, may all of their charity be part of worship to get the pleasure of Allah SWT.
6. Staff of Sharia Faculty of The State Islamic University Maulana Malik Ibrahim of Malang.
7. The writer's parents and family who have supported and prayed for the writer so it can be made the writer stand tall until now and completing this thesis
8. And all parties that writer cannot mention one by one who have helped the writer, and provided prayers and motivation so that, this thesis can be completed.

With the completion of this thesis report, the hope that knowledge which we have gained during our studies can provide the benefits of life in the world and the hereafter. As a human who has never escaped fault, the author is very hopeful for the forgiveness, criticism and suggestions from all parties for future improvement efforts.

Malang, March 16, 2023

Writer,

Rifqatus Salsabila
NIM 19220034

PEDOMAN TRANSLITERASI

Dalam penulisan karya ilmiah, penggunaan istilah asing kerap tidak dihindarkan. Secara umum sesuai Pedoman Umum Ejaan Bahasa Indonesia kata asing ditulis (dicetak) miring. Dalam konteks Bahasa Arab, terdapat pedoman transliterasi khusus yang berlaku internasional. Berikut ini disajikan tabel pedoman transliterasi sebagai acuan penulisan karya ilmiah.

A. KONSONAN

Daftar huruf bahasa Arab dan transliterasinya ke dalam huruf Latin dapat dilihat pada halaman berikut:

Arab	Indonesia	Arab	Indonesia
أ	'	ط	t
ب	B	ظ	z
ت	T	ع	'
ث	Th	غ	gh
ج	J	ف	f
ح	h	ق	q
خ	Kh	ك	k
د	D	ل	l
ذ	Dh	م	m
ر	R	ن	n
ز	Z	و	w
س	S	ه	h
ش	Sh	ء	'
ص	s	ي	y
ض	ḍ		

Hamzah (ء) yang terletak di awal kata mengikuti vokalnya tanpa diberi tanda apa pun. Jika hamzah (ء) terletak di tengah atau di akhir, maka ditulis dengan tanda (').

B. VOKAL

Vokal bahasa Arab, seperti vokal bahasa Indonesia, terdiri atas vokal tunggal atau monoftong dan vokal rangkap atau diftong.

Vokal tunggal bahasa Arab yang lambangnya berupa tanda atau harakat, transliterasinya sebagai berikut:

Huruf Arab	Nama	Huruf Latin	Nama
أَ	Fathah	A	A
إِ	Kasrah	I	I
أُ	Dammah	U	U

Vokal rangkap bahasa Arab yang lambangnya berupa gabungan antara harakat dan huruf, transliterasinya berupa gabungan huruf, yaitu:

Tanda	Nama	Huruf Latin	Nama
أَيَّ	Fathah dan ya	Ai	A dan I
أَوْ	Fathah dan wau	Iu	A dan U

كَيْفَ : *kaifa*

هَوَّلَ : *hauila*

C. MADDAH

Maddah atau vokal panjang yang lambangnya berupa harkat dan huruf, transliterasinya berupa huruf dan tanda, yaitu:

Harkat dan Huruf	Nama	Huruf dan Tanda	Nama
تَ اِ	Fathah dan alif atau ya	Ā	a dan garis di atas
يِ	Kasrah dan ya	Ī	i dan garis di atas
وُ	Ḍammah dan wau	Ū	u dan garis di atas

Contoh:

مَاتَ : *māta*

رَمَا : *ramā*

قِيلَ : *qīla*

يَمُوتُ : *yamūtu*

D. TA MARBŪṬAH

Transliterasi untuk *ta marbūṭah* ada dua, yaitu: *ta marbūṭah* yang hidup atau mendapat harkat *fathah*, *kasrah*, dan *ḍammah*, transliterasinya adalah [t]. Sedangkan *ta marbūṭah* yang mati atau mendapat harkat sukun, transliterasinya adalah [h].

Kalau pada kata yang berakhir dengan *ta marbūṭah* diikuti oleh kata yang menggunakan kata sandang *al-* serta bacaan kedua kata itu terpisah, maka *ta marbūṭah* itu ditransliterasikan dengan *ha* (h). Contoh:

رَوْضَةُ الْأَطْفَالِ : *rauḍah al-atfāl*

الْمَدِينَةُ الْفَضِيلَةُ : *al-madīnah al-fāḍilah*

الْحِكْمَةُ : *al-ḥikmah*

E. SYADDAH (*TASYDĪD*)

Syaddah atau *tasydīd* yang dalam sistem tulisan Arab dilambangkan dengan sebuah tanda tasydīd (ّ), -dalam transliterasi ini dilambangkan dengan perulangan huruf (konsonan ganda) yang diberi tanda syaddah.

Contoh:

رَبَّنَا : *rabbnā*

نَجَّيْنَا : *najjainā*

الْحَقُّ : *al-ḥaqq*

الْحَجُّ : *al-ḥajj*

نُعِمُّ : *nu'ima*

عَدُوُّ : *'aduwwu*

Jika huruf ى ber- tasydīd di akhir sebuah kata dan didahului oleh huruf berharakat kasrah (.), -maka ia ditransliterasi seperti huruf maddah (ī).

Contoh:

عَلِيٍّ : *Alī* (bukan 'Aliyy atau 'Aly)

عَرَبِيٍّ : *Arabī* (bukan 'Arabiyy atau 'Araby)

F. KATA SANDANG

Kata sandang dalam sistem tulisan Arab dilambangkan dengan huruf (ّ) alif lam ma'arifah. Dalam pedoman transliterasi ini, kata sandang ditransliterasi seperti biasa, al-, baik ketika ia diikuti oleh huruf syamsiah maupun huruf qamariah. Kata sandang tidak mengikuti bunyi huruf

langsung yang mengikutinya. Kata sandang ditulis terpisah dari kata yang mengikutinya dan dihubungkan dengan garis mendatar (-). Contohnya

الشَّمْسُ : *al-syamsu* (bukan *asy-syamsu*)

الزَّلْزَلَةُ : *al-zalzalāh* (bukan *az-zalzalāh*)

الْفَلْسَفَةُ : *al-falsafah*

الْبِلَادُ : *al-bilādu*

G. HAMZAH

Aturan transliterasi huruf hamzah menjadi apostrof (') hanya berlaku bagi hamzah yang terletak di tengah dan akhir kata. Namun, bila hamzah terletak di awal kata, ia tidak dilambangkan, karena dalam tulisan Arab ia berupa alif. Contohnya:

تَأْمُرُونَ : *ta'murūna*

النَّوْءُ : *al-nau'*

شَيْءٌ : *syai'un*

أَمْرٌ : *amirtu*

H. PENULISAN KATA ARAB YANG LAZIM DIGUNAKAN DALAM BAHASA INDONESIA

Kata, istilah atau kalimat Arab yang ditransliterasi adalah kata, istilah atau kalimat yang belum dibakukan dalam bahasa Indonesia. Kata, istilah atau kalimat yang sudah lazim dan menjadi bagian dari pembendaharaan bahasa Indonesia, atau sudah sering ditulis dalam tulisan bahasa Indonesia, tidak lagi ditulis menurut cara transliterasi di atas.

Misalnya kata Alquran (dari al-Qur'ān), sunnah, hadis, khusus dan umum. Namun, bila kata-kata tersebut menjadi bagian dari satu rangkaian teks Arab, maka mereka harus ditransliterasi secara utuh. Contoh:

Fī zilāl al-Qur'ān

Al-Sunnah qabl al-tadwīn

Al-'Ibārāt Fī 'Umūm al-Lafz lā bi khuṣūṣ al-sabab

I. LAFZ AL-JALĀLAH (الله)

Kata “Allah” yang didahului partikel seperti huruf jarr dan huruf lainnya atau berkedudukan sebagai muḍāf ilaih (frasa nominal), ditransliterasi tanpa huruf hamzah. Contoh:

دِينُ اللهِ : *dīnullāh*

Adapun *ta marbūṭah* di akhir kata yang disandarkan kepada lafz *al-jalālah*, ditransliterasi dengan huruf [t]. Contoh:

هُمُ فِي رَحْمَةِ اللهِ : *hum fī raḥmatillāh*

J. HURUF KAPITAL

Walau sistem tulisan Arab tidak mengenal huruf kapital (*All Caps*), dalam transliterasinya huruf-huruf tersebut dikenai ketentuan tentang penggunaan huruf kapital berdasarkan pedoman ejaan Bahasa Indonesia yang berlaku (EYD). Huruf kapital, misalnya, digunakan untuk menuliskan huruf awal nama diri (orang, tempat, bulan) dan huruf pertama pada permulaan kalimat. Bila nama diri didahului oleh kata sandang (al-), maka yang ditulis dengan huruf kapital tetap huruf awal nama diri tersebut, bukan huruf awal kata sandangnya. Jika terletak pada awal kalimat, maka huruf A

dari kata sandang tersebut menggunakan huruf kapital (Al-). Ketentuan yang sama juga berlaku untuk huruf awal dari judul referensi yang didahului oleh kata sandang al-, baik ketika ia ditulis dalam teks maupun dalam catatan rujukan (CK, DP, CDK, dan DR). Contoh:

Wa mā Muḥammadun illā rasūl

Inna awwala baitin wuḍi‘a linnāsi lallaḏī bi Bakkata mubārakan

Syahru Ramaḏān al-laḏī unzila fīh al-Qur‘ān

Naṣīr al-Dīn al-Ṭūs

Abū Naṣr al-Farābī

Al-Gazālī

Al-Munqiz min al-Ḍalāl

TABLE OF CONTENT

INSIDE COVER.....	ii
STATEMENT OF AUTHENTICITY.....	iii
APROVAL SHEET.....	iv
PROOF OF CONSULTATION.....	v
LEGITIMATION SHEET.....	vi
MOTTO.....	vii
ACKNOWLEDGEMENTS.....	viii
PEDOMAN TRANSLITERASI.....	x
TABLE OF CONTENT.....	xvii
TABLES.....	xix
ABSTRACT.....	xx
CHAPTER I INTRODUCTION.....	1
A. Research Background.....	1
B. Statement of Problem.....	7
C. Objective of Research.....	7
D. Benefit of Research.....	8
E. Conceptual Definiton.....	8
F. Method of Research.....	10
1. Type of Research.....	10
2. Research Approach.....	10
3. Law Material.....	11

4. Law Material Collection.....	12
5. Analysis of Law.....	13
G. Previous Research.....	13
H. Systematic Discussion.....	25
CHAPTER II LITERATURE REVIEW.....	27
A. Legal <i>Istinbāt</i> Method.....	27
B. <i>Tawarruq</i>.....	37
C. Financing in Sharia Financial Institution.....	40
CHAPTER III RESULT AND DISCUSSION OF RESEARCH.....	48
A. The Regulation of <i>Tawarruq</i> Contract.....	48
B. Analisis of Legal <i>Istinbāt</i> Method of Using <i>Tawarruq</i> Contract on Financing in Sharia Financial Institution of Indonesia and Malaysia.....	74
CHAPTER IV CLOSING.....	85
A. Conclusion.....	85
B. Suggestion.....	86
BIBLYOGRAPHY.....	88
ATTACHMENT.....	92
CURRICULUM VITAE.....	93

TABLES

Table 2.1 Previous Research.....	21
Table 3.1 Comparison <i>Tawarruq Fatwa</i> of Indonesia and Malaysia.....	81

ABSTRAK

Rifqatus Salsabila, NIM 19220034. *Metode Istinbāt Hukum Penggunaan Akad Tawarruq dalam Pembiayaan di Lembaga Keuangan Syariah (Studi Perbandingan Indonesia dan Malaysia)*. Skripsi. Program Studi Hukum Ekonomi Syariah, Fakultas Syariah, Universitas Islam Negeri Maulana Malik Ibrahim Malang. Pembimbing: Ramadhita, M.HI.

Kata Kunci: Fatwa of DSN-MUI; *Policy Document*; Akad *Tawarruq*; Metode *Istinbāt* Hukum.

Kegiatan sehari-hari masyarakat tidak terlepas dari kegiatan *muamalah*. Oleh karena itu, masyarakat membutuhkan regulasi yang tepat terkait pengaturan *muamalah*. Pada penghujung tahun 2020, terdapat wacana terkait implementasi akad *tawarruq* pada lembaga perbankan syariah di Indonesia. Akad *tawarruq* di Indonesia sendiri dilarang di LKS (Lembaga Keuangan Syariah), sedangkan di Malaysia akad *tawarruq* sudah diterapkan dan dilaksanakan di IFI (Islamic Financial Institution) dan Bursa Komoditi (Bursa *Suq Al-Sila*). Tujuan penelitian ini untuk mengetahui dan menganalisis bagaimana metode *istinbāt* hukum mengatur akad *tawarruq* dalam pembiayaan pada Lembaga Keuangan Syariah di Indonesia dan Malaysia serta implikasinya.

Penelitian ini menggunakan jenis metode penelitian hukum normatif, dengan dua metode pendekatan yaitu *conceptual approach* dan *comparative approach*. Sumber bahan hukum yang digunakan dalam penelitian ini yaitu bahan hukum primer, sekunder, dan tersier. Penelitian ini menggunakan metode analisis yuridis kualitatif.

Hasil dari penelitian ini yaitu: 1) Metode *istinbath* hukum yang digunakan dalam menetapkan fatwa baik di Indonesia maupun Malaysia yaitu *qiyas*. Sumber hukum yang digunakan dalam menetapkan hukum akad *tawarruq* di Indonesia yaitu ayat-ayat Al-Qur'an, hadits, kaidah fiqh, serta pendapat para ulama. Sedangkan di Malaysia yaitu Al-Qur'an, kaidah fiqh, dan pendapat para ulama. 2) Implikasi hukumnya yaitu di Indonesia penggunaan akad *tawarruq* terbatas dalam keadaan tertentu saja dan hanya berlaku di Bursa Komoditi pada ketentuan yang diatur dalam Fatwa DSN-MUI No. 82 Tahun 2011. Sedangkan akad *tawarruq* di Malaysia sudah diimplementasikan pada IFI (Islamic Financial Institution), seperti yang sudah diimplementasikan di BNM (Bank Negara Malaysia), Koperasi Pegadaian pada lembaga pendidikan seperti yang terdapat pada UiTM, dan juga pada Murabahah Komoditi di Pasar Bursa Malaysia: *Bursa Suq Al-Sila*.

ABSTRACT

Rifqatus Salsabila, NIM 19220034. *Legal Istimbāt Method of Using Tawarruq Contract on Financing in Sharia Financial Institution (Comparative Study Of Indonesia And Malaysia)*. Thesis. Department Sharia Economic Law, Faculty of Sharia, Universitas Islam Negeri Maulana Malik Ibrahim Malang. Advisor: Ramadhita, M.HI.

Keyword: Fatwa DSN-MUI; *Policy Document*; *Tawarruq* Contract; Legal *Istinbath* Method.

People's daily activities are inseparable from *muamalah* activities. So the community needs appropriate regulations about *muamalah* as well. At the end of 2020, there was a discourse related to the implementation of the *tawarruq* contract in Islamic banking institutions in Indonesia. The *tawarruq* contract in Indonesia is prohibited in LKS (Sharia Financial Institution), whereas in Malaysia the *tawarruq* contract was implemented in IFI (Islamic Financial Institution). The purpose of this study is to find out and analyze how the legal *istinbath* method regulates *tawarruq* contracts in financing Islamic financial institutions in Indonesia and Malaysia and the implications.

This research uses a type of normative legal research method, with two approaches namely conceptual approach and comparative approach. The sources of legal materials used in this study are primary, secondary and tertiary legal materials. This study uses a qualitative juridical analysis method.

The results of this study are: 1) The legal *istinbath* method used in establishing fatwas in both Indonesia and Malaysia is *qiyas*. The sources of law used in determining the law on *Tawarruq* contracts in Indonesia are the verses of the Qur'an, hadith, *fiqh* rules, and the opinions of the scholars. While in Malaysia, namely the Qur'an, *fiqh* rules, and the opinions of the scholars. 2) The legal implication is that in Indonesia the use of the *tawarruq* contract is limited under certain circumstances and only applies to the Commodity Exchange according to the provisions stipulated in the Fatwa of DSN-MUI No. 82 of 2011. Whereas, the *tawarruq* contract in Malaysia has been implemented at the IFI (Islamic Financial Institution), as implemented in BNM or Bank Negara Malaysia, Pawnshop Cooperatives at educational institutions such as those found at UiTM, and also at Commodity Murabaha on the Exchange Market in Malaysia: *Bursa Suq Al-Sila*.

مستخلص البحث

رفقة سلسبيلا. ١٩٢٢٠٠٣٤. طريقة الاستنباط القانوني لاستخدام عقد التورق في التمويل في مؤسسة مالية شرعية (دراسة مقارنة بين إندونيسيا وماليزيا). أطروحة. قسم الشريعة والقانون الاقتصادي (المعاملة)، كلية الشريعة، جامعة مولانا مالك إبراهيم مالانج. المشرف: الأستاذ رماضيتا، الماجستير.

الكلمات الأساسية: فتوى DSN-MUI، *Policy Document of Tawarruq*، عقد التورق، طريقة الاستنباط القانوني.

لا يمكن فصل الأنشطة اليومية للمجتمع عن أنشطة المعامله. لذلك ، يحتاج المجتمع إلى لوائح مناسبة فيما يتعلق بترتيبات المعامله. في نهاية عام 2020 ، كان هناك حديث يتعلق بتنفيذ عقد التورق في المؤسسات المصرفية الإسلامية في إندونيسيا. عقد التورق في إندونيسيا ممنوع في *Lembaga Keuangan Syariah* ، بينما في ماليزيا تم تنفيذ عقد التورق وتنفيذه في IFI (مؤسسة مالية إسلامية) وبورصة السلع (*Bursa Suq Al-Sila*). الغرض من هذه الدراسة هو معرفة وتحليل كيفية تنظيم طريقة الاستنباط القانوني لعقود التورق في تمويل المؤسسات المالية الإسلامية في إندونيسيا وماليزيا وآثارها.

تستخدم هذه الدراسة نوعًا من أسلوب البحث القانوني المعياري ، مع نهجين ، وهما النهج المفاهيمي والنهج المقارن. مصادر المواد القانونية المستخدمة في هذه الدراسة هي المواد القانونية الأولية والثانوية والثالثية. تستخدم هذه الدراسة أسلوب التحليل القانوني النوعي.

وننتج هذه الدراسة هي: (1) طريقة الاستنباط القانونية المستخدمة في الفتوى في كل من إندونيسيا وماليزيا هي القياس. مصادر القانون المستخدمة في تحديد قانون عقود التورق في إندونيسيا هي آيات القرآن ، والحديث ، والأحكام الفقهية ، وآراء العلماء. بينما في ماليزيا: القرآن

، والأحكام الفقهية ، وآراء العلماء. (2) المعنى القانوني هو أن استخدام عقد التورق في إندونيسيا محدود في ظل ظروف معينة ولا ينطبق إلا على بورصة السلع وفقاً للأحكام المنصوص عليها في Fatwa No. 82 DSN-MUI لعام 2011. وفي الوقت نفسه ، تم تنفيذ عقد التورق في ماليزيا في IFI (مؤسسة مالية إسلامية)، كما هو مطبق في BNM (*Bank Negara Malaysia*) ، وتعاونيات *Pegadaian* في المؤسسات التعليمية مثل تلك الموجودة في UiTM ، وكذلك في مرابحة السلع في البورصة الماليزية: بورصة سوق السلع.

CHAPTER I

INTRODUCTION

A. Research Background

The development of technology in the economy demands progress in Islamic Law to be in harmony with each other.¹ In the fact, people's daily activities are inseparable from *muamalah* activities. In every *muamalah* transaction that occurs, of course, there are conflicting opinions from the *fuqaha* on a transaction, both from classical scholars and contemporary scholars. So the community needs appropriate regulations as well.

The relationship between technology, the economy, applicable Sharia law, and economic actors themselves has a very strong linkage, sharia law (*fiqih*) must always develop in order to provide limits on the law of an economic activity in society, so that it can distinguish between *halal* and *haram* things and there is no confusion in it. In addition, legal advances that go hand in hand with technology and an economy that continues to innovate, business people can find out how to obtain *halal* profits or allowed in sharia law in order to get His pleasure.²

At the end of 2020, there was a discourse related to the implementation of the *tawarruq* contract in Islamic banking institutions.

¹ Anton Widyanto, "Pengembangan Fiqih di Zaman Modern", *Jurnal Ilmiah Islam Futura* Vol. 10 No. 2 (2011), 92, <https://jurnal.ar-raniry.ac.id/index.php/islamfutura/article/view/46/41>

² Fitrianur Syarif, "Perkembangan Hukum Ekonomi Syariah di Indonesia", *Jurnal Pleno Jure*, Vol. 9 (2) (2019), 4, <https://doi.org/10.37541/plenojure.v8i2.38>.

This discourse was initiated by KNEKS in the website on September 18, 2020 by making a bargaining agreement as an innovative sharia banking product with the opinion that *tawarruq* can also be used to improve the future of financial products in Indonesia.³

Tawarruq contract in practice there are opinions that allow and there are opinions that prohibit. Opinions that allow the *tawarruq* contract are scholars from the Hanafi, Shafi'i and Hanbali schools who give the view that the *tawarruq* contract is a valid transaction, including Abdul Aziz bin Baz and Muhammad ibn Shaleh al-Uthaymin. The *fuqaha* who allow *tawarruq* contract use the basis of the verses of Al-Qur'an and the rules of *fiqhiyah*, namely: "All buying and selling transactions are *halal*, except for buying and selling transactions that have evidence for their prohibition by Al-Qur'an and Sunnah."⁴

Dewan Syariah Nasional, Majelis Ulama Indonesia and Bank Indonesia, in order to be able to create a healthy Islamic banking climate, avoid products that have shara' problems, allow some Islamic banking products and prohibit others. One of the prohibited sharia banking products is *tawarruq* contract, although in some countries this product is permitted.

³ Aldi, Adi, Andika, Anisa, "Dinamika Tawarruq sebagai Inovasi Produk Perbankan Syariah", *KNEKS*, September 18, 2020, accessed on October 4, 2022, <https://knks.go.id/berita/298/dinamika-tawarruq-sebagai-inovasi-produk-perbankan-syariah?category=1>

⁴ Asep Dadan Suganda, "Analisis Teori Bai' Tawarruq dalam Muamalah Maliyah", *Jurnal Islamiconomic*, Vol.6 No.1 (2015): 7, <https://journal.islamiconomic.or.id/index.php/ije/article/view/6>

The prohibition of *tawarruq* contract by Dewan Syariah Nasional and Majelis Ulama Indonesia is based on several reasons, that is⁵ the implementation of *tawarruq* contract is only limited to transactions on paper with the aim of obtaining cash, the conditions for carrying out *muamalah* activities are transparency and clarity in the transaction and there should be no elements of *gharar* or *syubhat* in it, and it is felt that *tawarruq* contract has a greater problems than the benefit.

From various opinions regarding the *tawarruq* contract, some scholars allow it and some prohibit it. *Jumhūr Ulamā'* allow *tawarruq* transactions in *muamalah* as long as there are no indications that lead to usury practices. Conditions that need to be continuously monitored in *tawarruq* transactions must be based on the scale of urgent needs (*ḍarurah*), it is not based solely on desire, so that the provision of regulations in terms of *tawarruq* is truly in accordance with Islamic law. When faced with the problem of someone's need to get cash (liquidity) by using the bargaining mechanism, it must really be based on that person's needs, not for the needs of other people. Thus, there are *ulama* who argue that *bai' tawarruq* is permissible if there is no other way to obtain cash.⁶

In the implementation, the *tawarruq* contract in Indonesia is prohibited in Islamic banking products, however, in the implementation, the

⁵ Fatimah Zahara, R. Deddy Harryanto, "Implementasi Akad Tawarruq dalam Perbankan Syariah di Indonesia", *Ijtihad: Jurnal Hukum Islam dan Pranata Sosial*, Vol. 35(2) (2019): 59, <https://journals.fasya.uinib.org/index.php/ijtihad/article/view/17>

⁶ Suganda, Analisis Teori Bai' Tawarruq, 10, <https://journal.islamiconomic.or.id/index.php/ije/article/view/6>

tawarruq contract is permitted in non-bank financial products, namely commodity exchanges. Even though it is allowed conditionally, or must comply with several provisions contained in the *fatwa*, namely Fatwa No. 82 of 2011 concerning Commodity Trading based on Sharia Principles on Commodity Exchanges. This permissibility is contained in Article 2 Rule of Law “Commodity Trading on the Exchange, both in the form of Physical Handover Trading and in the form of Follow-Up Trading, the law is permissible by fulfilling the provisions stipulated in this fatwa.”⁷

On the basis of the considerations in Fatwa No. 82 of 2011, there is one foundation, that is foundation Number 7 “*Tawarruq* is not an investment or financing scheme. *Tawarruq* is only permissible because of necessity (there is a need) with conditions that must be met. Therefore, Sharia Financial Institutions or Lembaga Keuangan Syariah (LKS) are not allowed to bargain in meeting their operational liquidity needs, to replace receiving funds through *mudharabah* products, *wakalah* for investment, mutual fund products, and so on. *Tawarruq* may only be used to cover liquidity shortages (difficulties), avoid (minimize) customer losses, and overcome LKS operational difficulties.”⁸

Tawarruq contracts in Islamic banking are not permitted by *ulama* in Indonesia, which is still being debated by some *ulama* because transactions using these contracts are the same as *bai' al-'inah* which is

⁷ Article 2: Rule of Law, Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange, p. 11.

⁸ Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange, p. 9.

nothing more than *hilah* from usury (*riba*). Wherease, the implementation of *tawarruq* contracts on the Commodity Exchange is permitted, although it is only conditionally permitted and it is not clearly explained that the *tawarruq* contract is permissible, giving rise to the assumption that Sharia Economic Law in Indonesia has legal dualism in the arrangement of *tawarruq* contracts.⁹

In this case, the country that has implemented the *tawarruq* contract is Malaysia. The use of *tawarruq* in Malaysia is permissible on the grounds that this contract is included in *darurah*. They think that the *tawarruq* contract can help Islamic banks in the world whose number and business are very limited. So, the use of *tawarruq* contracts can help increase the liquidity of Islamic Banking which is considered as an urgent emergency.¹⁰ The implementation of *tawarruq* contracts in Malaysia has been carried out at Malaysian Sharia Banking institutions, namely BNM or Bank Negara Malaysia, Pawnshop Cooperatives at educational institutions such as those found at UiTM, and also at Commodity *Murabaha* on the Exchange Market in Malaysia: *Bursa Suq Al-Sila*.¹¹ As for the opinion that prohibits saying that the *tawarruq* contract is included in the *bai' al-'inah* transaction which includes transactions that are not allowed or *haram*.¹² In Indonesia, it is

⁹ Baihaqi, "Pengaruh Fatwa DSN MUI terhadap Pelaksanaan Transaksi Tawarruq", (Magister Thesis, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2017), 216, <https://repository.uinjkt.ac.id/dspace/handle/123456789/41587>

¹⁰ Ali Samsuri, "Membincang Konsep Tawarruq dalam Dunia Perbankan Dewasa Ini", *Universum*, Vol. 9 No. 1 (2015): 34, <http://repository.iainkediri.ac.id/353/1/70-275-1-PB.pdf>

¹¹ Dr. Dziauddin, Ph.D., PPT Tawarruq dalam Ar-Rahnu, UiTM, 2022.

¹² Zahara, Harryanto, Implementasi Akad Tawarruq, 55.

forbidden to apply the *tawarruq* contract so that there is no implementation of the *tawarruq* contract in economic activities in Indonesia.

Tawarruq contract arrangements in Indonesia are based on DSN-MUI Fatwa No. 82/DSN-MUI/VIII/2011 concerning Commodity Trading based on Sharia Principles on Commodity Exchanges. The *tawarruq* contract implemented in Malaysia has been implemented and is included in the Sharia Banking product known as the Commodity *Murabaha* which has obtained a Shariah Advisory Council (SAC) permit.¹³ In Indonesia itself, there is an innovation plan regarding the implementation of *tawarruq* contracts in Sharia Financial Institutions (LKS). The existence of this discourse is based on the hope that the MUI will be able to review the fatwa that has been issued regarding the *tawarruq* contract.¹⁴ Because of the related parties opinion that having a *tawarruq* contract presents benefits, namely flexible acquisition, so that customers can immediately obtain liquidity and can also be used in multipurpose financing. Although basically there is no definite regulation that specifically discusses the law regarding *tawarruq* contracts in Indonesia.

With the differences of opinion in the regulation regarding the permissibility or prohibition of the *tawarruq* contract even though Indonesia and Malaysia use the same school (*mazhab*) of thought, that is *mazhab* of Shafi'i, moreover there is a legal issue that the banking sector wants to

¹³ Luqman Nurhisam, “*Bai’ Al-Tawarruq* Perspektif Dewan Syariah Nasional Indonesia dan Shariah Advisory Council Malaysia” (Magister thesis, Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2016), <https://digilib.uin-suka.ac.id/id/eprint/20726/>

¹⁴ Zahara, Harryanto, Implementasi Akad Tawarruq, 62.

innovate on *tawarruq* contract. So that the problem arises about the *istinbāt* method that used in the formulation of the arrangements that underlie the legal determination of the *tawarruq* contract, as well as the legal implications arising from the determination of the *tawarruq* contract arrangements. For this reason, the author is interested in studying more broadly in the form of an undergraduate thesis with the title “Legal *Istinbāt* Method of Using *Tawarruq* Contracts on Financing in Sharia Financial Institutions (Comparative Study of Indonesia and Malaysia)”.

B. Statement of Problem

1. How the legal *istinbat* method of *tawarruq* contracts in financing at Islamic Financial Institutions in Indonesia and Malaysia?
2. How the legal implication of *tawarruq* contracts in financing at Islamic Financial Institutions in Indonesia and Malaysia?

C. Objective of Research

1. To describe how legal *istinbāt* method against the arrangement of *tawarruq* contracts in financing at Islamic Financial Institutions in Indonesia and Malaysia.
2. To describe how legal implication against the arrangement of *tawarruq* contracts in financing at Islamic Financial Institutions in Indonesia and Malaysia.

D. Benefit of Research

1. Theoretical Aspect

For academics, expected the research to provide recommendations or references and encourage further progressive research about *tawarruq* contract.

2. Practical Aspect

- a. For Government, expected the research can provide intake to government of *tawarruq* contracts if judicial review will be carry out on the regulation that have been formed.
- b. For the public, expected the result of research can provide an overview or estimate on the implementation of the rules regarding *tawarruq* contracts in financing at Islamic Financial Institutions.

E. Conceptual Definition

a. Methods of Legal *Istinbāt*

The legal *istinbāt* method is a way to find sharia law through legal sources or legal digging methods, the legal sources in question are revelation and reality. Revelation is divided into two; namely the *matlu*, namely Al-Qur'an and *ghairu matlu* namely the Sunnah. While that is not a revelation if it is in the form of a consensus of the Muslim mujtahidin then called *ijma'* and if it is in the form of likeness '*illat* with revelation then it is called *qiyas*. Out of all of that then called the *istidlal* various forms. Four kinds The first is what the *Jumhūr Ulamā'* agreed to used as an argument.

In the discussion of the istinbath method sharia law according to Prof. Dr. Wahbah az-Zuhaili stated with two articles namely about *al-Dilālah* or how to Instigate the law from the shariah texts that divides it into two various ways namely *Ṭariqah Hanafiyyah* and *Ṭariqah Mutakallimin*. While the second article regarding the letters that have *ma'na* (*aṭaf, jar, zarf* and *syarṭ*).¹⁵

b. *Tawarruq*

Tawarruq is one kind of contract in *muamalah* (Islamic transaction) that involve 3 parties, which party 1 selling things to party 2 with credit payment, then in other transaction party 2 sell his things to other person that called party 3 to get paid in cash or contant.¹⁶

c. *Fatwa*

Fatwa is a *mufti's* opinion about something law in Islam which is the answer to questions asked by the *fatwa* requester (*mustafti*). *Fatwas* are not binding.¹⁷ In Indonesia the institution who has the authority to issue fatwas is Dewan Syariah Nasional Majelis Ulama Indonesia (DSN-MUI). Whereas in Malaysia the institution who has authority to issue *fatwa* is Sharia Advisory Council (SAC).

¹⁵ Ariyadi, "Metodologi Istinbath Hukum Prof. Dr. Wahbah az Zuhaili", *Jurnal Hadratul Madaniyah*, Volume 4 Issue I (2017): 32.

¹⁶ Aldi, Adi, Andika, Anisa, *Dinamika Tawarruq sebagai Inovasi*.

¹⁷ Nova Effenty Muhammad, "Fatwa dalam Pemikiran Hukum Islam", *Al-Mizan*, Vol. 12(1) (2016): 152, <https://media.neliti.com/media/publications/289950-fatwa-dalam-pemikiran-hukum-islam-cc4218de.pdf>

F. Methods of Research

1. Type of Research

The type of this research is normative legal research, because the research conducted by studying the norms in law. According the opinion by E. Saefullah Wiradipradja normative research (legal research) is research that studies positive legal norm as research object. In the normative legal research, the law is no longer regarded as something that is just a phantasy but law is the written norm as constitution, principle, and also legal institution that applies to the country. Normative research it's also known legal doctrinal research, because the research carried out only on written regulations or law materials.¹⁸

The legal norm that will be studied is Fatwa DSN-MUI No. 82 Tahun 2011 and Policy Document about *tawarruq* BNM/PD/RH/028-8 that is formed by Sharia Advisory Council (SAC) Malaysia, and also secondary legal materials in the form of library materials related to research.

2. Research Approach

The research approach used in this research are:

a. Conceptual Approach

The conceptual approach is an approach by understanding and studying legal materials.

¹⁸ Muhaimin, *Metode Penelitian Hukum*, (Mataram: Mataram University Press, 2020), 45.

b. Comparative Approach

The comparative approach is one way of comparing one legal rule with others. In Islamic research of method comparative approach be known *muqaranah* approach, with using specification approach in historically, sociology, anthropology, and others.¹⁹ In this research using comparative approach with specification in historical and sociology for the issuance of a *fatwa* on the law of *tawarruq* contracts in Indonesia and Malaysia.

3. Law Material

The primary legal materials is materials that have a legal status consisting of legislation, official records or treatises in the making of laws and regulations invitations and judges decisions.²⁰ The primary legal materials used are:

- a. Fatwa DSN-MUI No.82/DSN-MUI/VIII/2011 about Commodity Trades based on Sharia Principle on The Exchange Commodity.
- b. Policy Document of *Tawarruq* BNM/RH/PD 028-8.

The secondary legal materials in this research used are books, articles, journals and others²¹ which support the secondary data in this study.

¹⁹ Faisar Ananda Arfa, *Metode Penelitian Hukum Islam*, (Bandung: Citrapustaka Media Perintis, 2010), 61.

²⁰ Ishaq, *Metode Penelitian Hukum dan Penulisan Skripsi, Tesis, serta Disertasi*, (Bandung: Penerbit Alfabeta, 2017), 68.

²¹ Johnny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif*. (Malang: Bayumedia Publishing, 2006), 392.

The tertiary legal materials in this research used are materials from the internet in the official website.

4. Law Material Collection

The data collection methods in normative legal research known 3 (three) types, namely:²²

a. Literature Study (bibliography study);

Literature study is assessment written information regarding the law originating from various sources and widely published as well needed in normative legal research.

b. Document Study;

Document study is is assessment written information regarding the law that is not publicly published, but may not known by certain parties.

c. Archival Study (file or record study);

Archival study is an study information that written about the events that occurred at that time past (including legal events) that have historical value, stored and maintained in place specifically for reference. It can be letter,certain records, maps, sketches, or documents.

²² Muhaimin, *Metode Penelitian Hukum*, 66.

This research using the literature study (bibliography study) because the law material that used is widely published in the internet (official institutions website).

5. Analysis of Law

The analysis method that using in this normative research is qualitative analysis, in this method the data obtained is presented descriptively. The analysis methods on normative legal research there are include 3 steps:

- a. Identification of legal facts as a first step; could in the form of actions, events, or circumstances.
- b. Related legal examination or discovery with legal facts (concrete norms); carry out inspections or discoveries of laws and regulations invitation to discover legal concepts; indicators of behavior, or prohibited actions, permitted and ordered.
- c. Application of law; application of legal norms (the regulation) to legal facts.²³

G. Previous Research

The title of research taken by researcher is: “Legal *Istinbāt* Method of Using *Tawarruq* Contracts in Financing on Sharia Financial Institution (Comparative Study of Indonesia and Malaysia)”. Some of the previous research related to this research will be described below, including the following:

²³ Muhaimin, *Metode Penelitian Hukum*, 70.

1. Doctoral Thesis by Muhammad Maksum with the title: “*Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia dalam Merespon Produk-Produk Ekonomi Syariah Tahun 2000-2011 (Studi Perbandingan Dengan Fatwa Majelis Penasihat Syariah Bank Negara Malaysia)*”.²⁴ In this study, it is concluded that the main contracts that are used together in the DSN and MPS fatwa are *ijarah*, *muḍarabah*, *murabahah*, *musyarakah*, *qard*, *wakalah*, *bai’*, *istiṣna’*, *kafalah*, *hibah*, *wadi’ah*, *salam*, *rahn*, and *ṣarf*. Another contract used in the DSN fatwa namely *ju’alah*, *ḥawālah*, and *ḥawālah bi al-ujrah*. MPS does not use the two contracts, but use the contract of *tawarruq*, *bai’ al-’inah*, *bai’ al-dain*, and *wakaf*. On the other hand, DSN does not use the contract of *tawarruq* and *bai’ al-dain*, but using *bai’ al-’inah* contract due to *ḍarurah* (emergency condition).

The similarity of this study is that both make the DSN-MUI Fatwa which stipulates a permitted and prohibited sharia economic product as an object of research. However, the difference is the specification of the object. In research by Muhammad Maksum examines what sharia economic products are permitted and prohibited by DSN-MUI in comparison with the Fatwa of the Sharia Advisory Council of Bank Negara Malaysia, while in the research that will be discussed further by researchers is the *fatwa*

²⁴ Muhammad Maksum, “*Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia dalam Merespon Produk-Produk Ekonomi Syariah Tahun 2000-2011 (Studi Perbandingan Dengan Fatwa Majelis Penasihat Syariah Bank Negara Malaysia)*”, (Doctoral Thesis, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2013).

regarding *tawarruq* contracts in Indonesia with a comparison of the *fatwa* regarding the *tawarruq* contract in Malaysia that is used in Sharia Financial Institution.

2. Magister Thesis by Luqman Nurhisam with the title: “*Bai’ Al-Tawarruq Perspektif Dewan Syariah Nasional Indonesia dan Shariah Advisory Council Malaysia*”.²⁵ In this study, it is concluded that the main contracts that the mechanism of *al-tawarruq*, cannot be considered as an Islamic financial product, because there are many flaws in it. It is known that there are *hilah* which are not good, namely leading to usury, so this is the reason for the majority of scholars not ratifying the contract of *tawarruq* in Indonesia. While Malaysia believes that the sale and purchase of *al-tawarruq* is halal as a basic rule for the legitimacy of the contract, which has been applied in personal financing in Islamic banks, as well as a *murabahah* commodity (*murabahah commodity*) on the Malaysian Exchange called Bursa Suq Al-Sila.

The similarity with this research is that they both examine the comparison of *tawarruq* contracts between Indonesia and Malaysia. However, what is different is that previous studies examined the views of fiqh scholars on *al-tawarruq*, aspects of financial products, and Islamic legal framework. While the research that will be discussed by researchers is

²⁵ Nurhisam, *Bai’ Al-Tawarruq*.

the *istinbath* method and the legal implications of the ratification of the fatwa regarding the *tawarruq* contract both in Indonesia and Malaysia.

3. Thesis by Nurfajri Herman with the title: “*Konsep Akad Tawarruq Menurut Mazhab Syafi’i dan Mazhab Hanbali (Studi Komparatif)*”.²⁶ This research concludes that the similarities between the two schools of thought in defining *tawarruq* are that *tawarruq* is a sale and purchase contract involving three parties in the transaction. The difference is that the Shafi’i School of law (permissible), because all forms of buying and selling are lawful unless there are verses or hadiths that prohibit it, while the Hanbali School considers *tawarruq* to be *makruh* and permissible.

The similarity with this research is that they both make the *tawarruq* contract the object of research. However, the difference between the research conducted by Nurfajri Herman and the research that will be discussed by researchers is the material that will be used as a comparison. In Nurfajri Herman’s research, the *Mazhab* point of view is the object of comparison, while the researcher makes *fatwas* or regulations that have been ratified by Indonesia and Malaysia as comparative object of research.

4. Magister Thesis by Baihaqi with the title: “*Pengaruh Fatwa DSN MUI terhadap Pelaksanaan Transaksi Tawarruq*”.²⁷ This

²⁶ Nurfajri Herman, “Konsep Akad Tawarruq Menurut Mazhab Syafi’i dan Mazhab Hanbali (Studi Komparatif)”, (Undergraduate Thesis, Institut Agama Islam Negeri Parepare, 2022).

²⁷ Baihaqi, Pengaruh Fatwa DSN MUI.

study concludes that *tawarruq* transactions are not considered as Islamic financial products because there are many deficiencies in them and there are *hilah* that lead to usury.

The similarity of this research with previous research is the research object, namely the *tawarruq* contract in Indonesia. The difference lies in the research focus, in previous research specifically on the implementation or implementation of the *tawarruq* contract. Meanwhile, the researcher examines the comparison of the *istinbāṭ* method and the legal implications of using *tawarruq* contracts in Indonesia and Malaysia.

5. Thesis by Nurasmaa Hawa Binti Omar with the title: “*Pelaksanaan Sistem Pembiayaan Bai’ Al-Tawarruq pada Bank Islam Malaysia Berhad (BIMB) Cabang Selangor dalam Perspektif Hukum Islam*”.²⁸ This research concludes that in Malaysia, *tawarruq* transactions are permitted to be applied to financing both in Islamic banks and as *murābahah* commodities on the Malaysia Exchange. Although there are still some doubtful aspects in the implementation of the *tawarruq* contract at BIMB, such as the initial agreement (*tawatu’*) which is prohibited by the *fuqahā* scholars.

²⁸ Nurasmaa Hawa Binti Omar, “*Pelaksanaan Sistem Pembiayaan Bai’ Al-Tawarruq pada Bank Islam Malaysia Berhad (BIMB) Cabang Selangor dalam Perspektif Hukum Islam*”, (Undergraduate Thesis, Universitas Islam Negeri Ar-Raniry Banda Aceh, 2018), <https://repository.ar-raniry.ac.id/id/eprint/6221/2/Nurasmaa%20Hawa%20Binti%20Omar.pdf>

The similarity with previous research is that the research object is about the *tawarruq* contract in Malaysia which is the same as one of the research objects that the researcher will study. The difference is that previous research only examined the practice of *tawarruq* contracts in Malaysia, while the researchers studied comparisons of *tawarruq* contracts from Indonesia and Malaysia with specifics on the *istinbāṭ* method and the legal implications of using *tawarruq*.

6. Thesis by Widiya Siti Rahmah with the title: “*Perbandingan Pemikiran Ibnu Taimiyah dan Imam Ali Al-Mardawi terhadap Transaksi Tawarruq dan Implementasinya dalam Tinjauan Fatwa DSN-MUI No.82/DSN-MUI/VIII/2011*”.²⁹ From this research, it can be concluded that the *tawarruq* transaction was not legalized by the DSN-MUI due to various deeper considerations, there is no community readiness to implement it, and it has more mafsada than benefits, but it can turn into a legitimate *tawarruq* if the *mafsada* is removed.

The similarity with previous research is to make the *tawarruq* contract in Indonesia one of the research objects using comparative research methods. However, the difference is that previous studies used Ibn

²⁹ Widiya Siti Rahmah, “*Perbandingan Pemikiran Ibnu Taimiyah dan Imam Ali Al-Mardawi terhadap Transaksi Tawarruq dan Implementasinya dalam Tinjauan Fatwa DSN-MUI No.82/DSN-MUI/VIII/2011*”, (Undergraduate Thesis, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2021)

Taimiyah's opinion as a comparison material for the implementation of *tawarruq* contracts in Indonesia.

7. Journal by Asep Dadan Suganda, *Jurnal Islamiconomic* "Analisis Teori Bai' Tawarruq dalam Muamalah Maliyah".³⁰

From this research it can be concluded that in bai' *at-tawarruq* there are scholars who allow the transaction and some others prohibit its implementation. Among the scholars who allow *bai' tawarruq* are the classical scholars from the Hanafi, Shafi'i and Hanbali schools such as Abdul Aziz bin Baz and Muhammad ibn Shaleh al-Uṭaymin. While the scholars who banned it were Ibn Taimiyah and Abu Hanifah. Some of the Maliki School also considers *tawarruq* to resemble an *al-'inah* transaction. Likewise, Umar bin Abdul 'Aziz, Muhammad bin al-Hasan, Ibnul Qayim, and Ibn Taimiyah from the Hanbali School also rejected the *tawarruq* transaction.

The similarities with this research are the similarities with this research is the *tawarruq* contract as the object of research. The difference with this research is the focus of the research which in previous studies examined the opinions of *ulama mazhab* regarding the *tawarruq* contract, while comparative researchers of *tawarruq* contracts in Indonesia and Malaysia in Sharia Financial Institution (LKS).

³⁰ Suganda, Analisis Teori Bai' Tawarruq.

8. Journal by Ali Samsuri, Jurnal IAIN Kediri, Jurnal Universum, with the title “*Membincang Konsep Tawarruq dalam Dunia Perbankan Dewasa ini*”.³¹ From this research it can be concluded that the *tawarruq* contract was allowed by the previous scholars because the jurists at that time had different circumstances and the macroeconomic analysis tools needed to find the *mafsadah* of the *tawarruq* effect did not exist at that time and also because the *mafsadah* effect of *tawarruq* on the economy as a whole at that time now is not the same as then.

The similarity with previous research is that researchers examine the *tawarruq* contract. The difference is that in previous studies the researchers studied the details of the *tawarruq* concept and the opinions of the scholars about it. In contrast to researchers who study the legal comparisons of the *tawarruq* contract between Indonesia and Malaysia.

9. Journal by Fatimah Zahara and R. Deddy Harryanto, Jurnal Ijtihad: Jurnal Hukum Islam dan Pranata Sosial, with the title of research “*Implementasi Akad Tawarruq dalam Perbankan Syari’ah Indonesia*”.³² From this study it was concluded that in principle, the *tawarruq* contract is not completely *makruh* and unlawful. The *tawarruq* concept is used as the basis for Middle Eastern countries in carrying out the *tawarruq* contract,

³¹ Samsuri, *Membincang Konsep Tawarruq*.

³² Zahara, Harryanto, *Implementasi Akad Tawarruq*.

especially when there is an urgent need for customers and Islamic banking with a deficit.

The similarity with previous research is the *tawarruq* contract in Indonesia as a research object. The difference is that previous studies studied the implementation of *tawarruq* contracts in Islamic banking in Indonesia, while researchers studied the comparison or comparison of the *istinbāṭ* method and the legal implications of *tawarruq* contracts in Indonesia and Malaysia.

Table 2.1 Previous Research

No.	Name	Title of Research	Similarity	Difference
1	Muhammad Maksum, Doctoral Thesis, Jakarta 2013	<i>Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia dalam Merespon Produk-Produk Ekonomi Syariah Tahun 2000-2011 (Studi Perbandingan Dengan Fatwa Majelis Penasihat Syariah Bank Negara Malaysia)</i>	The similarities of this study are that both make the Fatwa of DSN-MUI which stipulates a permitted and prohibited sharia economic product as an object in the study.	In the previous study examined what sharia economic products were permitted and prohibited by the DSN-MUI and on the Fatwa of the Sharia Advisory Council of Bank Negara Malaysia, while the researcher examined the <i>fatwa</i> regarding <i>tawarruq</i> contracts in Indonesia and in Malaysia.

2	Luqman Nurhisam, Magister Thesis, Yogyakarta 2016	<i>Bai' Al-Tawarruq Perspektif Dewan Syariah Nasional Indonesia dan Shariah Advisory Council Malaysia</i>	The similarity with this research is that they both examine the comparison of <i>tawarruq</i> contracts between Indonesia and Malaysia.	In the previous study, it examined the views of fiqh scholars towards <i>al-tawarruq</i> . While the research is about the <i>istinbāt</i> method and the legal implications of the legalization of <i>fatwas</i> regarding <i>tawarruq</i> contracts in Indonesia in Malaysia.
3	Nurfajri Herman, Undergraduate Thesis, Pare 2022	<i>Konsep Akad Tawarruq Menurut Mazhab Syafi'i dan Mazhab Hanbali (Studi Komparatif)</i>	In the previous study, it examined the views of fiqh scholars towards <i>al-tawarruq</i> . While the research that will be researched is about the <i>istinbāt</i> method and the legal implications of the legalization of <i>fatwas</i> regarding <i>tawarruq</i> contracts in Indonesia and Malaysia.	The difference is that previous research examined the comparison of <i>tawarruq</i> contracts between the Shafi'i and Hanbali schools.

4	Baihaqi, Magister Thesis, Jakarta 2017	<i>Pengaruh Fatwa DSN MUI terhadap Pelaksanaan Transaksi Tawarruq</i>	The similarity of this research with previous research is the research object, namely the <i>tawarruq</i> contract in Indonesia.	In previous research specifically on the implementation of the <i>tawarruq</i> contract. Meanwhile, the researcher examines the comparison of the <i>istinbāt</i> method and the legal implications of using <i>tawarruq</i> contracts in Indonesia and Malaysia.
5	Nurasmaa Hawa Binti Omar, Undergraduate Thesis, Banda Aceh 2018	<i>Pelaksanaan Sistem Pembiayaan Bai' Al-Tawarruq pada Bank Islam Malaysia Berhad (BIMB) Cabang Selangor dalam Perspektif Hukum Islam (Analisis Akad Baiti Home Financing)</i>	The similarity with previous research is the similarity of the object of research with one of the objects studied by researchers, namely the <i>tawarruq</i> contract in Malaysia.	In the previous research, it only examined the practice of <i>tawarruq</i> contracts in Malaysia, while the researchers studied comparisons of <i>tawarruq</i> contracts from Indonesia and Malaysia with specifics on the <i>istinbāt</i> method and the legal implications of <i>tawarruq</i> contracts.
6	Widiya Siti Rahmah, Undergraduate	<i>Perbandingan Pemikiran Ibnu Taimiyah dan Imam Ali Al-</i>	The similarity with this research is the <i>tawarruq</i>	The difference is that previous research used Ibn Taimiyah's

	Thesis, Jakarta 2021	<i>Mardawi terhadap Transaksi Tawarruq dan Implementasinya dalam Tinjauan Fatwa DSN-MUI No.82/DSN-MUI/VIII/2011</i>	contract in Indonesia as a comparative research object.	opinion as a comparison material for the <i>tawarruq</i> contract in Indonesia.
7	Asep Dadan Suganda, Journal, Banten, 2015	<i>Analisis Teori Bai' Tawarruq dalam Muamalah Maliyah</i>	The similarity with this research is the <i>tawarruq</i> contract as the object of research.	The difference lies in the focus of the research, which in previous studies examined the opinions of scholars regarding the <i>tawarruq</i> contract. While the researchers examined the comparison of <i>tawarruq</i> contracts in Indonesia and Malaysia.
8	Ali Samsuri, Journal, Kediri 2015	<i>Membincang Konsep Tawarruq dalam Dunia Perbankan Dewasa Ini</i>	The similarity with previous research is that researchers examine the <i>tawarruq</i> contract.	In previous research, it examined the details of the <i>tawarruq</i> concept and the opinions of scholars about it. Whereas, the researcher examines the legal comparison of the <i>tawarruq</i> contract between

				Indonesia and Malaysia.
9	Fatimah Zahara and R. Deddy Harryanto, Journal, North Sumatera 2019	<i>Implementasi Akad Tawarruq dalam Perbankan Syari'ah Indonesia</i>	The similarity with previous research is the <i>tawarruq</i> contract in Indonesia as a research object.	In the previous research studied the implementation of <i>tawarruq</i> contracts in Indonesia, while the researchers examined the comparison of the <i>istinbāt</i> method and the legal implications of <i>tawarruq</i> contracts in Indonesia and Malaysia.

H. Systematic Discussion

In this systematic discussion of research will explain the description of research that started from first chapter until the last chapter according to The Guidance of Writing for The Faculty of Syariah UIN Maulana Malik Ibrahim Malang, that the normative research contains 4 chapter and written in paragraph form which forms a systematic sequence of discussions. The systematics writing in this study namely:

CHAPTER I Introduction. In this chapter contains an introduction consisting of the background of the problem, the formulation of the problem, objectives, benefits, research methods, previous research, and writing systematics.

CHAPTER II Literature Review. In this chapter contains juridical concepts as a theoretical basis for study and analysis of problems and contains the development of data, sourced from books, journals, legislation and other sources.

CHAPTER III Discussion of Research Finding. In this chapter contains a discussion regarding the review of the legal *istinbāṭ* method of using *tawarruq* contracts and its legal implications in Islamic Financial Institutions in Indonesia and Malaysia which answer the formulation of the problem that has been set.

CHAPTER IV Closing. In this chapter contains conclusions and suggestions which is the last chapter.

CHAPTER II

LITERATURE REVIEW

A. Legal *Istinbāt* Method

The word of *istinbāt* it's from Arabic word *النبط* (نبط-ينبط-نبطا) which means the water that coming out from the ground.³³ Based on terminology *istinbāt* attempt to interpret *naṣ* (Al-Qur'an and Al-Sunnah) which need further exploration in their meaning by optimizing the ability of thinking.³⁴ So, it is can be concluded that *istinbāt* is methods or ways to find Islamic law sourced from the Al-Qur'an and Al-Sunnah by using consideration and the ability to think.

According to Prof. Dr. Wahbah Zuhaili legal *istinbāt* method is procedur to finding (legal digging method) the Sharia Law of some object or product according Islamic law sources that has been agreed upon by the *Fuqahā'*.³⁵ The sources of law which is used as the basis for carrying out legal *istinbāt* according to Imam Shafi'I there is:³⁶

³³ Mahmud Yunus, *Kamus Arab Indonesia*, (Jakarta: PT. Hidakarya Agung, 1989), 438.

³⁴ Muhammad Syukri Albani Nasution, *Filsafat Hukum Islam* (Jakarta: PT. Raja Grafindo Persada, 2012), 155.

³⁵ Ariyadi, *Metodologi Istinbath Hukum*, 32.

³⁶ Nur Kholifah, Miftakhul Rohman, "Metodologi Istinbath Hukum Imam Asy-Syafi'i", *JURNAL SINDA* Vol. 2(2) (2022): 47, <https://doi.org/10.28926/sinda.v2i2.469>

- a. Al-Qur'an and Sunnah
- b. If the law not confirmed in Al-Qur'an and Sunnah, then *ijma'* can be used as the source to find the legal.
- c. Fatwa *Ṣahabī* (not *ikhtilāf*).
- d. The opinion that be debated around the shahabiy (*ikhtilāf*).
- e. *Qiyas* can be used if the law can't be found in Al-Qur'an and also Sunnah.

The sources of Islamic Law according *Jumhur Ulama'* has differences of opinion there are divided into agreed and disputed methods. The agreed sources (*dalil*) is Al-Qur'an, sunnah, *ijma'*, and *qiyas*.³⁷ Whereas disputed (*ikhtilāf*) sources among *jumhur ulama* is *istiḥsān*, *istishab*, *'urf*, *maṣlahah mursalah*, *syar'u man qablana*, *sad al-dhari'ah* dan *Mazhab Ṣahabī*. The explanation agreed sources there are:

- a. Al-Qur'an
- b. Sunnah
- c. *Ijma'*

Ijma' according to language means agreed. According to terminology means agreement of the people of Rasulullah saw. in the period after he died to find the law of a matter. *Ijma'* is considered legally valid by the words and deeds of the scholars, even though it is only carried out by some of the scholars, as well as *ijma' sukuti* or

³⁷ Moh. Bahrudin, *Ilmu Ushul Fiqih*, (Lampung: CV. Anugrah Pratama Raharja, 2019),23.

approval of the silence of the existing scholars. An example is the scholars consensus about the cause of ablution being canceled is because something that normally comes out of two holes; *bawl* (urine) and feces.

Imam Shafi'i looked for arguments to determine *qiyas* by using the argument of hadith where some of his friends had done it, and the scholars who were there at that time did not deny it, so that was what was called *ijma'*.

d. *Qiyas*

Qiyas is a legal argument that is used to return the law to the original law with the '*illat* contained in both of them in determining a legal provision.³⁸

The conditions of *qiyas*, there are:³⁹

1) *Aşl* (Subject)

Aşl conditions according to Imam al-Ghazali and Saifuddin al-Amidi are as follows:

- a) Law of *aşl* cannot be written or canceled, because it is permanent law,
- b) Law of *aşl* is determined by shara',
- c) *Aşl* not a *far'u* from other *aşl*,

³⁸ Abdul Hamid Hakim, *مبادئ أولية في أصول الفقه و القواعد الفقهية*, Trans. Sukanan and Khairudin, (KSI Al-Khoirot, 2023) 26.

³⁹ Nasrun Haroen, *Ushul Fiqh I*, (Jakarta: Logos Wacana Ilmu, 1997), 73.

- d) *Dalil* that establish the '*illat* in *aşl* it is especially *dalil*, not general,
- e) *Aşl* will not change after *qiyas* done.

2) *Hukm al-Aşl*

According *Ulama'* of *Uşul Fiqh* said that the conditions *hukm al-aşl* is:

- a) Not a speciality, which means can not be developed to *far'u*.
- b) *Hukm al-aşl* does not come out of the provisions of *qiyas*, which means if the legal of something differently determined by *qiyas* rules, then other laws may not be imposed on that law.
- c) Nothing *naş* which explain legal of *far'u* which will be determined by law.
- d) *Hukm al-aşl* was first established by *far'u*.

3) *Far'u* (Object)

Ulama of *Uşul Fiqh* said that the conditions of *far'u* there are four conditions, that is:

- a) The '*illat* is the same as the '*illat* that exists in *aşl*, both in its substance and in it's type
- b) The original law does not change after *qiyas* is carried out
- c) The law of *far'u* does not precede *aşl* law
- d) There is no text or *ijma'* which explains the *far'u* law.

4) *Illat* (Causality)

The definition of *'illat* is identifying characteristics or causes for the existence of law (which causes the emergence of law). For example, in buying and selling, the element of pleasure is the main element. However, because the element of *riḍa* is an inner problem and difficult to express, Islamic law determines *ijab* and *qabul* to measure this element of pleasure.

The explanation about *ikhtilāf* sources there are:

a. *Istiḥsān*

Istiḥsān according to language means to consider something that good, while according to the term *isitiḥsan* is turning away a *mujtahid* from using *qiyas* that is real to *khafī* (vague) *qiyas* or from general law to the law of *istithna'i* (exception) because there is an argument according to logic justify it. According to other *ulama*, *istiḥsān* is an argument that came out of the thought of a *mujtahid* who set the preference of *qiyas khafī* from *qiyas jalī*, or prioritizing specific legal provisions (*juz'i*) over provisions general (*kulli*).

The forms of *istiḥsan* based on the arguments that to support it, can be divided into six, namely *istiḥsan* with texts, with consensus, with *ḍarurah*, with *qiyas khafī*, with *'urf* or with *maṣlahah*.

1) *Istiḥsan bi al-qiyas al-khafī*; is the origination of law through deep contemplation and research, on a case or events that have two

arguments, namely in the form of *qiyas jalī* and *qiyas khafī*, and each of these propositions has own legal consequences.

- 2) *Istihsān bi al-naṣ*; is the permissibility of the above laws that have been universally established and become general rules, because specifically there are texts from Al-Qur'an or Sunnah which allows it.
- 3) *Istihsān bi al-ijma'*; is the fatwa of the *mujtahids* about something law in contemporary problems that violate universal rules that have become general rules because of a habit.
- 4) *Istihsān bi al-darurah*; is an exception to the law has been established, because of the difficulties that will occur if the law or those provisions are used.
- 5) *Istihsān bi al-maṣlahah*; is a conflicting law with general rules that have been set due to common interests and security
- 6) *Istihsān bi al-'urf*; is the transfer of a law or rule that has been established because of the existence of tradition apply.

b. *Istishab*

Istishab is the determination (applicability) of law against something future cases on the basis that the law has been happened before, because there was no such thing require changes to the law. Or establish a previous law, so the new law change it.

If a *mufti* is asked about a problem, then he must seek its law in Al-Qur'an, then sunnah, then consensus, then *qiyas*. If he does not find

(the law there), then he can set the law by interesting application of past laws in the present (*istishab al-hal*). If he doubts that the law will not apply, then the principle of origin is that the law remains in effect.

Istishab is the end of the sharia proposition which is the place of one's return *mujtahid* to know the law of something that is confronted to him. Therefore, the experts in the science of *uṣul fiqh* argues that actually *istishab* is the way the last fatwa reference. It is the application of law to something with the law that has existed before, as long as there is no argument who changed it.⁴⁰

c. *Al-'urf*

'*Urf* or it is can known with *adah*, the meaning is habit, something that is usually done by the related community, it can be word, deed, or omission. '*Urf* generally divided into 2 types, that is *al-'urf ṣaḥiḥ* and *al-'urf fasid*. *Al-'urf ṣaḥiḥ* that is, what is known to each other, does not violate the sharia proposition, does not justify what is unlawful and does not cancel what is obligatory. Whereas for *al-'urf fasid*, that is what people know each other, but are different from sharia, or justify what is unlawful, or cancel what is obligatory.

d. *Maṣlaḥah Mursalah*

According *ulama*, *maṣlaḥah mursalah* is an argument sharia, on which the sharia law is built. There are two arguments put forward by

⁴⁰ Bahrudin, *Ilmu Ushul Fiqih*, 66.

people in this problem. First, renewing the welfare of society and not have prohibitions. Second, the rulings of *tasyri'* companions and *tabi'in*, as well as the *imams mujtahid*. In fact, they legislated the law to set the law the absolute welfare of society. Conditions to be used as an argument:

- 1) *Maşlahah* the truth, not a matter of *wahamiah* (fantasy).
- 2) Public interest, not individual interest.
- 3) The *tasyri'* must not conflict with the benefits of this law or the principle of principles established by *naş* or *ijma'*.

Some scholars say that it is *maşlahah mursalah* which does not use shar'i with explanations and not canceling it then here shar'i is not built on him. There are two arguments put forward by people. First, shar'i maintains everyone's welfare based on texts and what was stated by *qiyas*. Second, *tasyri'* is built on absolute *maşlahah*.

e. *Syar'u Man Qablana*

Al-Qur'an and sunnah have told about one of sharia law, which Allah gave to people who were earlier than us. There are things and texts that were conveyed to the Prophet saw. also by Allah *Ta'ala* has been conveyed to the people long ago. There are things that are no different according to what is prescribed to us in the form of regulations we must follow. According to the *Mazhab* Hanafi, there are also some people

from the *Mazhab* Maliki and Shafi'i said that we must follow the sharia that we have practice as told to us.

According to some scholars, in fact there is no sharia that we have, because our sharia revokes the previous sharia. Except when there is in our sharia what it stipulates. Because our sharia is justified the former sharia, whatever is different from it.⁴¹

f. *Sadd Al-Dhari'ah*

An activity that is carried out which is basically permissible because it contains benefits, but the goals to be achieved end up being harm (*mafsadat*).

The simple analogy, someone buys a car for two hundred million on credit, this is legal because the seller gives waivers to the buyer to pay it off in installments. However, if the car is resold to the seller (creditor) for a cash price of one hundred and ninety million, then this goal will lead to a disaster, because it is as if the multiplication of debts is without cause. Therefore such actions are prohibited.

Wahbah Zuhaili and Ibn Qayyim al-Jauziyah classified the definition of *al-dhari'ah* into two kinds. That is *sadd al-dhari'ah* and *fath al-dhari'ah*. According opinion of Ibn Qayyim al-Jauziyah:⁴²

⁴¹ Abdul Wahab Khalaf, *Ilmu Ushul Fiqih*, (Kairo: Maktabah Dakwatul Islam, 1956), 84-93.

⁴² Haroen, *Ushul Fiqh I*, 160.

1) *Sadd Al-Dhari'ah* is something that leads to something bad.

2) *Fath Al-Dhari'ah* is the way to something good (*maṣlahah*).

Sadd al-Dhari'ah method is more of a method that discusses the impact or consequences of an application of an activity. If the course of an act is permissible in sharia or has benefits then it is recommended, but if the impact is on something that is forbidden, for example causing harm or damage, then the law is not permissible (*haram*).⁴³

Imam ash-Syatibi stated that there are three conditions so that an action is prohibited, namely:⁴⁴

- 1) The actions taken lead to *mafsadat*,
- 2) Benefit is stronger than work benefit, and
- 3) In carrying out permissible actions, the elements of harm are more than the *maṣlahah*.

g. *Mazhab Ṣaḥabī*

After the death of Rasulullah, the people who gave fatwas to the people (*ummat*) on that time was the *ṣaḥabah*. They all know *fiqh*, science and everything that is usually conveyed by Rasulullah, understanding Al-Qur'an and the laws. This is the source of the *fatwas* in various problems that occur. Several narrators from the *tabi'in*

⁴³ Abd. Rahman Dahlan, *Ushul Fiqh*, cet-2 (Jakarta: Amzah, 2011), 236.

⁴⁴ Haroen, *Ushul Fiqh I*, 162.

narrated and recorded hadith, so that some of them wrote *riwayah*, in addition to the sunnah of Rasulullah SAW.⁴⁵

B. *Tawarruq*

Tawarruq it is comes from Arabic word “*wariq*” which means symbol or character tar of silver. The word *tawarruq* is used to interpret, search for silver, the same as the word *ta'allum*, which means seek knowledge, namely study or school. The word of *tawarruq* can be interpreted more broadly its to finding for cash with a variety ways, that can be by looking for silver, gold or other coins. However the meaning of literature is the various ways in which to get cash or liquidity.⁴⁶

The legal of *tawarruq* contract it's based on Q.S. Al-Baqarah verse 275

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا

“Whereas Allah permitteth trading and forbiddeth usury”⁴⁷

(Q.S Al-Baqarah: 275)

And also in Hadith

حَدَّثَنَا إِسْمَاعِيلُ قَالَ حَدَّثَنِي مَالِكٌ عَنْ عَبْدِ الْمَجِيدِ بْنِ سُهَيْلٍ عَنْ سَعِيدِ بْنِ الْمُسَيَّبِ عَنْ

أَبِي سَعِيدِ الْخُدْرِيِّ وَأَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُمَا أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ

⁴⁵ Khalaf, *Ilmu Ushul Fiqih*, 94.

⁴⁶ Samsuri, *Membincang Konsep Tawarruq*, 29.

⁴⁷ Al-Qur'an Kemenag in Word.

اسْتَعْمَلَ رَجُلًا عَلَى خَيْبَرَ فَجَاءَهُ بِتَمْرٍ جَنِيْبٍ فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَكُلُهُ
 تَمْرٍ خَيْبَرَ هَكَذَا فَقَالَ لَا وَاللَّهِ يَا رَسُولَ اللَّهِ إِنَّا لَنَأْخُذُ الصَّاعَ مِنْ هَذَا بِالصَّاعَيْنِ بِالثَّلَاثَةِ
 فَقَالَ لَا تَفْعَلْ بَعْ الْجَمْعِ بِالذَّرَاهِمِ ثُمَّ ابْتَعْ بِالذَّرَاهِمِ جَنِيْبًا

“Narrated Abu Sa‘id Al-Khudri and Abu Hurairah (radhiyallahu ‘anhuma) Allah’s Messenger, appointed a man as the ruler of Khaibar who later brought some Janib (i.e., dates of good quality) to the Prophet . On that, Allah’s Messenger said (to him), “Are all the dates of Khaibar like this?” He said, “No, by Allah, O Allah’s Messenger! But we take one sha’ of these (dates of good quality) for two or three sha’ of other dates (of inferior quality) .” On that, Allah’s Messenger a said, “Do not do so as it is a kind of usury (Riba Fadl) but first sell the inferior quality dates for money and then with money, buy Janib .”

(Hadith of Shahih Al-Bukhari No. 4244,4245 – كتاب المغازي : Chapter The appointment of a ruler for Khaibar by the Prophet)⁴⁸

In general, the opinion that allows *al-tawarruq* because it is part of buying and selling activities. The hadith indicates to try to find a financing instrument that is in accordance with sharia and can meet economic needs. On this basis, the concept of *al-tawarruq* is a financing instrument that prioritizes human desires.⁴⁹

According to Prof. Dr. Wahbah Zuhaili *tawarruq* contract is buying a commodity on deferred payment basis and then selling it on cash basis to a person other than the buyer, at a lower price. In *tawarruq* contract there is 3 parties involved in this contract, they are seller (*muwarriq*) or creditor, buyer (*mustawriq* or *mutawarriq*), and also the one buyer who is looking

⁴⁸ Al-Bukhari, صحيح البخاري Vol. 5, Trans. by Muhammad Muhsin Khan, (Riyadh: دار السلام للنشر و التوزيع, 1997), 335.

⁴⁹ Omar, Pelaksanaan Sistem Pembiayaan Bai’, 23.

for liquidity. In this contract, of course, you must have an object as part of the transaction its called subject matter: commodity.⁵⁰

The classical *fuqahā'* define the *tawarruq* contract based on the system operational not by definition by concept. It can be seen like what was explained by Ibn Taimiyyah that if someone need money with cash, then at the same time buy a commodity (price) for example, Rp.1.000.000 at a higher price to sell (divide obtain cash), then this is called *al-tawarruq*. However Contemporary *Fuqahā'* define the *tawarruq* contract generally that *al-tawarruq* functions to get cash in addition to the form of party involvement third (who is not the original seller) in the *al-tawarruq* transaction which aspect this is what differentiate it from *bai' al-inah*.⁵¹

The simple example for *tawarruq* contract is Mr. A needs money to pay for his son's hospital fees. Then he went to Mr. B's shop, with the intention that Mr. A would buy a computer for Rp. 7.000.000 on credit with payment period of 12 months. Mr. B allowed and agreed, then gave the computer according to Mr. A's order. After Mr. A got the computer he ordered, he sold the computer to another party who needed a computer for Rp. 6.500.000 in cash.

⁵⁰ Wahbah Zuhaili, "Tawarruq, Its Essence and Its Types: Mainstream Tawarruq and Organized Tawarruq", 2, <https://www.iefpedia.com/english/wp-content/uploads/2009/09/>

⁵¹ Omar, Pelaksanaan Sistem Pembiayaan Bai', 18.

C. Financing in Sharia Finance Institution

Financing is one of the products that exist in Sharia Financial Institutions, which in Conventional Financial Institutions is known as credit.⁵² According to Law No. 10 of 1998 Article 1 verse 11 about banking concern, the definition of credit is “Credit is the provision of money or equivalent claim to money based on a loan agreement between a bank and another party, obligating the borrowing party to repay his debt after a certain period with interest.”⁵³

Financing is funding carried out by the person or institution given to the party others to support the planned business.⁵⁴ In other words, financing is a form of loan given to the borrower to carry out or increase capital in the business carried out by the borrower. According to Law No. 10 of 1998 Article 1 Number 12 the define of Sharia Financing “Financing based on Syariah Principles is the provision of money or equivalent claim to money based on a Financing agreement between Bank and another party obligating the party receiving the fund to repay the Financing after a certain period with fees or profit share.”⁵⁵

The concept of financing essentially means “trust”, which means that one party and the other party must trust and be pleased (*rida*) with each

⁵² Nurhadi, “Pembiayaan dan Kredit di Lembaga Keuangan”, *Jurnal Tabarru’ : Islamic Banking and Finance*, Vol. 1 No. 2 (2018): 23, <https://journal.uir.ac.id/index.php/tabarru/article/download/2804/1552>

⁵³ Law No. 10 of 1998 about Amandement of Law No. 7 of 1992 Concerning Banking.

⁵⁴ Rahmat Ilyas, “Konsep Pembiayaan dalam Perbankan Syari’ah”, *Jurnal Penelitian* Vol. 9 No. 1 (2015): 186, <https://journal.iainkudus.ac.id/index.php/jurnalPenelitian/article/view/859/805>

⁵⁵ Law No. 10 of 1998 about Amandement of Law No. 7 of 1992 Concerning Banking.

other. Financing institution as *ṣaḥibul māl* put trust in parties who need financing to run financing funds in accordance with the agreements and conditions that apply between parties honestly.⁵⁶

The Islamic financing have some types, the types of financing products in Islamic banking are:

a. Sharia Working Capital Financing

Namely the financing provided by the company for finance their business based on working capital needs sharia principles in one business cycle.

b. Sharia Investment Financing

Namely the investment of funds with the intention of obtaining benefits or profits in the future or can be called medium term or long term financing for purchase of capital goods needed in the business.

c. Sharia Consumptive Financing

Namely financing provided for purposes other than business and generally personal.

d. Syndicated Financing

Namely financing given to more than one bank financial institution for one financing object certain. This financing is usually required by the customer cooperatives because the transaction value is very large.

⁵⁶ Mariya Ulpah, "Konsep Pembiayaan dalam Perbankan Syariah", *Madani Syari'ah* Vol. 3 No.2 (2020): 150, <https://stai-binamadani.e-journal.id/MadaniSyariah/article/download/208/174>

e. Take Over Financing

Namely financing arising from the take over of non-sharia transactions that have been carried out by sharia bank at the request of the customer.

f. Letter of Credit Financing

Namely financing provided in order to facilitate import and export of consumers transactions.⁵⁷

Finance companies based on sharia principles have different characteristics from finance companies conventional. Financing and sourcing business activities sharia financing company funding must be appropriate with Islamic teachings (in compliance with sharia) which are free from the elements of usury, *haram*, and *gharar*. Therefore, Islamic finance companies must be regulated in clear regulations.⁵⁸ The transactions of financing in Sharia Finance Institution that using Sharia Principles divided to 3 types, there are:⁵⁹

a. Profit Sharing Principle

1) *Muḍarabah*

Muḍarabah financing is transaction between the owner of the property (capital) hand over capital to entrepreneurs to trade with capital and profits are divided between the two based on terms agreed. Thus,

⁵⁷ Ulpah, Konsep Pembiayaan dalam Perbankan, 152.

⁵⁸ Asnaini, Herlina Astaty, *Lembaga Keuangan Syari'ah Teori dan Praktiknya di Indonesia*, (Yogyakarta: Pustaka Belajar, 2017), 78.

⁵⁹ Ilyas, Konsep Pembiayaan dalam Perbankan, 190.

mudharabah is an agreement between two parties (people) bear each other, one party surrenders his assets to other parties to be traded with his share has been determined from the profit, such as half or one third with conditions that have been determined.⁶⁰

2) *Musyarakah*

Musyarakah is a general form of profit-sharing business which is defined as a contract of cooperation between two parties or more to a particular undertaking in which each party contributing funds (or charity) by agreement that the benefits and risks will be shared accordingly by agreement.⁶¹

3) *Muzara'ah*

Muzara'ah is a form of muamalah activity in agriculture with profit sharing system, this contract occurs between the land owner and the farmers who work the land. Farmers work the land at their own expense. The harvest obtained from the land will later be divided as profit-sharing wages.⁶²

⁶⁰ Sri Sudiarti, *Fiqh Muamalah Kontemporer*, (Medan: FEBI UIN-SU Press, 2018), 158.

⁶¹ Sudiarti, *Fiqh Muamalah Kontemporer*, 145.

⁶² Ahmad Farroh Hasan, *Fiqh Muamalah dari Klasik Hingga Kontemporer*, (Malang: UIN-Maliki Press, 2018), 89.

b. Buying and Selling Principle (*bai*')

1) *Bai' al-Murabahah*

Murabahah is buying and selling of goods at the original price agreed additional benefits. In technical banking terms sharia, *murabahah* is interpreted as an agreed agreement between Islamic Banks and customers, where the Bank provides financing for the purchase of raw materials or other working capital required by the customer, which will be repaid by the customer in the amount of selling price of the bank (buying price of the bank plus profit margin) at that time agreed upon between the parties concerned in the contract.⁶³

2) *Bai' al-Muqayyadah*

Mudarah muqayyadah or also called by the term restricted *mudarah* is the opposite of *mudarah mutlaqah*. The *muḍārib* is limited by the type of business, time or place of business. There are often these restrictions reflects the general tendency of the *sāhibul māl* in enter the business world.

This type of *mudarah* is a special deposit where the owner of the fund can set certain conditions that must be complied with by the bank. Characteristics of this type of deposit:

- a. The owner of the fund must set certain conditions that must be met followed by banks.

⁶³ Sudiarti, *Fiqh Muamalah Kontemporer*, 100.

- b. The bank is obliged to notify the owner of the funds regarding ratios and procedures for notification of profits
- c. As proof of deposits, banks issue proofs bank special savings are required to separate funds from another account.

3) *Bai' al-Muṭlaqah*

Muḍarabah muṭlaqah or *muṭlaqah* financing is a contract in the form of cooperation between *sāhibul māl* and *muḍarib* whose scope is very broad and is not limited by the specifications of the type of business, time and area business. The application of *muḍarabah muṭlaqah* can be in the form of savings. Based on this principle there are no restrictions for internal banks using the funds raised.

The characteristics of *bai' al-muṭlaqah* there are:

- a. The bank is obliged to notify the owner of the funds regarding ratios and procedures for notification of profits and profit sharing according to the risk that can be arising from the deposit of funds, which are listed in *aqad* (contract).
- b. For *muḍarabah* savings, banks can provide passbook as proof of deposit, as well as a card ATMs and/or other withdrawal tools to savers.
- c. *Muḍarabah* savings can be taken at any time by savers with agreed agreements, but not allowed to have a negative balance.⁶⁴

⁶⁴ Zaenal Arifin, *Akad Mudharabah*, (Indramayu: CV. Adanu Abimata, 2011), 44.

4) *Bai' al-Salam*

Salam contract is a future transaction of goods (subjects) with a reward at the beginning of the contract, by selling something that is described its nature. That is, capital is given at the beginning and delays the goods until a certain deadline. In short, a *salam* contract is a contract with an order to the seller for an item by specifying the properties of the goods ordered with payment at the beginning of the transaction and delivery of the goods in accordance with the agreed contract.⁶⁵

5) *Bai' al- Istiṣnā'*

This contract have a similiarity with *salam* contract (buying goods at a dependent cash), because this contract is a sale and purchase items that do not exist (*ma'dūm*) at the time of the contract. In the contract it is stipulated that the goods ordered are in the responsibility of the maker (seller). However, the *istiṣnā'* contract differs from the *salam* contract in terms of payment or delivery of compensation, which can be submitted at the start of the contract, or when the order is processed, or when the goods are received. Nor is it required that the ordered item is one of the items that can be found in the market.⁶⁶

⁶⁵ Wahbah Zuhaili, *Fiqih Islam Wa Adillatuhu, Jilid 5 Trans.*, (Jakarta: Gema Insani, 2011), 240.

⁶⁶ Zuhaili, *Fiqih Islam Wa Adillatuhu*, 268.

c. Lease Principle (*ijarah*)

1) *Ijarah*

The word *ijarah* comes from the word *ajr* which means reward. This word has similarities in the meaning of reward in Arabic, which is called *ajr*. In Sharia, The meaning of *ijarah* is a contract to get benefits in return for financing an item by renting. If the lease has been made, then the utilization of something that is rented out is on the *musta'jir* (tenant) and for those who rent it out, he has the right have something given from the tenant, because this contract is included in the contract exchange.⁶⁷ *Ijarah* is a form of sharia contract in the form of leasing to take advantage of an item received from another person by paying according to the agreement agreed between the parties.⁶⁸

⁶⁷ Sayyid Sabiq, *Fiqh Sunnah, Jilid 5*, (Jakarta: Cakrawala, 2018), 258.

⁶⁸ Hasan, *Fiqh Muamalah dari Klasik*, 49.

CHAPTER III

DISCUSSION AND RESULT OF RESEARCH

A. The Regulation of *Tawarruq* Contract

The regulation of *tawarruq* contract in Indonesia and Malaysia have different legal arrangement, which in Indonesia the regulation that arrange is Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange. While in Malaysia the regulation that arrange is Policy Document BNM/RH/PD 028-8. The differences about the regulation of Indonesia and Malaysia will be classificated with the following classification:

1. Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange
 - a. Dalil Al-qur'an which is used to found the law
 - 1) Q.S al-Maidah: 1

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ أُحِلَّتْ لَكُمْ بَهِيمَةُ الْأَنْعَامِ إِلَّا مَا يُتْلَى عَلَيْكُمْ غَيْرَ

مُجَلَّى الصَّيْدِ وَأَنْتُمْ حُرْمٌ إِنَّ اللَّهَ يَحْكُمُ مَا يُرِيدُ

O you who have believed, fulfill (all) contracts. Lawful for you are the animals of grazing livestock except for that which is recited to

you (in this Qur'an) - hunting not being permitted while you are in the state of ihram. Indeed, Allah ordains what He intends.⁶⁹

2) Q.S al-Isra':34

وَلَا تَقْرَبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ حَتَّىٰ يَبْلُغَ أَشُدَّهُ وَأَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ

كَانَ مَسْئُولًا

And do not approach the property of an orphan, except in the way that is best, until he reaches maturity. And fulfill (every) commitment. Indeed, the commitment is ever (that about which one will be) questioned.⁷⁰

3) Q.S al-Baqarah: 275

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقُومُونَ إِلَّا كَمَا يَقُومُ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ

ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ

مِّن رَّبِّهِ فَانْتَهَىٰ فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَٰئِكَ أَصْحَابُ النَّارِ ۖ

هُمْ فِيهَا خَالِدُونَ

⁶⁹ Al-Qur'an Kemenag in Word

⁷⁰ Al-Qur'an Kemenag in Word

Those who consume interest cannot stand (on the Day of Resurrection) except as one stands who is being beaten by Satan into insanity. That is because they say, "Trade is (just) like interest." But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to (dealing in interest or usury) - those are the companions of the Fire; they will abide eternally therein.⁷¹

4) Q.S al-Baqarah: 278

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنتُمْ مُؤْمِنِينَ

O you who have believed, fear Allah and give up what remains (due to you) of interest, if you should be believers.⁷²

5) Q.S an-Nisa': 29

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا أَمْوَالِكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَ تِجَارَةً عَنْ تَرَاضٍ

مِنْكُمْ وَلَا تَقْتُلُوا أَنْفُسَكُمْ إِنَّ اللَّهَ كَانَ بِكُمْ رَحِيمًا

O you who have believed, do not consume one another's wealth unjustly but only (in lawful) business by mutual consent. And do not kill yourselves (or one another). Indeed, Allah is to you ever Merciful.⁷³

⁷¹ Al-Qur'an Kemenag in Word

⁷² Al-Qur'an Kemenag in Word

⁷³ Al-Qur'an Kemenag in Word

6) Q.S al-Baqarah: 283

﴿ وَإِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهْنَ مَقْبُوضَةً ۚ فَإِنْ أَمِنَ بَعْضُكُم

بَعْضًا فَلْيُؤَدِّ الَّذِي أُؤْتِمِنَ أَمَانَتَهُ وَلْيَتَّقِ اللَّهَ رَبَّهُ ۚ وَلَا تَكْتُمُوا الشَّهَادَةَ ۗ وَمَنْ

يَكْتُمهَا فَإِنَّهُ آتَمَّ قَلْبُهُ ۗ وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ ۙ

And if you are on a journey and cannot find a scribe, then a security deposit (should be) taken. And if one of you entrusts another, then let him who is entrusted discharge his trust (faithfully) and let him fear Allah, his Lord. And do not conceal testimony, for whoever conceals it - his heart is indeed sinful, and Allah is Knowing of what you do.⁷⁴

7) Q.S an-Nisa': 58

﴿ إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا

بِالْعَدْلِ ۗ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ ۗ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا

Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing.⁷⁵

⁷⁴ Al-Qur'an Kemenag in Word

⁷⁵ Al-Qur'an Kemenag in Word

b. Hadith which is used to found the law

- 1) The Hadith of The Prophet Narrated by Ibnu Majah from Ubadah bin Şamit, narrated by Ahmad from Ibnu Abbas, and narrated by Imam Malik from Yahya:

أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَضَى أَنْ لَا ضَرَرَ وَلَا ضِرَارَ (أَخْرَجَهُ ابْنُ

مَاجَهَ عَنِ عِبَادَةَ بْنِ الصَّامِتِ فِي سُنَنِهِ / الْكِتَابُ: الْأَحْكَامُ، الْبَابُ: مَنْ

بَنَى فِي حَقِّهِ مَا يَضُرُّ بِجَارِهِ، رَقْمُ الْحَدِيثِ: ٢٣٣١، وَرَوَاهُ أَحْمَدُ عَنِ ابْنِ

عَبَّاسٍ، وَ مَالِكٌ عَنِ يَحْيَى) ⁷⁶

“Rasulullah s.a.w. stipulates: May not harm/harm other people and may not (also) repay harm (losses caused by other people) with harm (actions that harm them).” (Narrated by Ibnu Majah)

- 2) The Hadith of The Prophet Narrated by Muslim from Abu Hurairah:

عَنْ أَبِي هُرَيْرَةَ قَالَ: نَهَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ عَنْ بَيْعِ الْحَصَاةِ

وَعَنْ بَيْعِ الْعَرْرِ. ⁷⁷ (أَخْرَجَهُ مُسْلِمٌ فِي صَحِيحِهِ الْكِتَابُ: الْبُوعُ، بَابُ بُطْلَانِ

بَيْعِ لِحَصَاةٍ وَ الْبَيْعِ الَّذِي فِيهِ عَرْرٌ، رَقْمُ الْحَدِيثِ: ٣٧٨٣)

ابن ماجه، سنن ابن ماجه، الجوز ١، (بيروت: دار الفكر، ١٩٩٤م)، ٧٣٦. ⁷⁶

إمام مسلم، صحيح مسلم، الجوز ٣، (بيروت: عالم الكتب، ١٩٩٨م)، ٧. ⁷⁷

It was narrated from Abi Hurairah ra, he said, "Rasulullah s.a.w forbade buying and selling hashah and buying and selling that contain gharar." (Narrated by Muslim)

3) The Hadith of The Prophet Narrated by Imam al-Bukhari:

عَنْ ابْنِ عُمَرَ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ نَهَى عَنِ النَّجْشِ. (أخرجه

البخاري في صحيحه / الكتاب : الخيل، الباب : ما يكره من التناجش، رقم

الحديث : ٦٤٤٨) ⁷⁸

"It was narrated from Ibn Umar r.a that Rasulallah s.a.w. forbid (to) do najsy (fake offers)." (Narrated by Bukhari).

4) The Hadith of The Prophet Narrated by Ibnu Abbas:

عَنْ ابْنِ عَبَّاسٍ رَضِيَ اللَّهُ عَنْهُمَا قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ لَا تَلْقُوا الرُّكْبَانَ وَلَا يَبِعْ حَاضِرٌ لِبَادٍ. قَالَ فُؤَلْتُ لِابْنِ عَبَّاسٍ: مَا قَوْلُهُ لَا يَبِيعُ

حَاضِرٌ لِبَادٍ؟ قَالَ : لَا يَكُونُ لَهُ سِمْسَارًا، (أخرجه البخاري في صحيحه

الكتاب البيوع، الباب: هل يبيع حاضر لباد بغير أجر وهل يعينه، رقم

الحديث : ٢٠١٣) ⁷⁹

Narrated from Ibn Abbas r.a. said: The Messenger of Allah said: "Don't block the drivers (carriers of merchandise, pen.) and don't do bai' hadhir li-bad (city people sell to village people)." He (the narrator) said: I asked Ibn Abbas: What does: "Don't do bai' hadhir li-bad?" He replied: City people cannot be intermediaries (brokers) for village people. (Narrated by Bukhari).

البخاري، صحيح البخاري - ط الشعب، المجلد التاسع، (القاهرة: دار الشعب، ١٩٨٧م)، ٣١ ⁷⁸

البخاري، صحيح البخاري، (الرياض: دار السلام للنشر والتوزيع، ٢٠١٢م)، ٢١٥٨. ⁷⁹

5) The Hadith of The Prophet Narrated by Tirmidzi from Hakim bin Hizam:

عَنْ حَكِيمِ بْنِ حِزَامٍ قَالَ أَتَيْتُ رَسُولَ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- فَقُلْتُ

يَأْتِينِي الرَّجُلُ يَسْأَلُنِي مِنَ الْبَيْعِ مَا لَيْسَ عِنْدِي أَبْتَاغُ لَهُ مِنْ فِي السُّوقِ ثُمَّ

أَبِيعُهُ، قَالَ « لَا تَبِعْ مَا لَيْسَ عِنْدَكَ ». (أخرجه الترمذي في سننه، الكتاب :

البيوع، الباب : ماجاء في كرهية بيع ماليس عندك، رقم الحديث: ١١٥٣)

80

It was narrated from Hakim bin Hizam, he said: I met Rasulullah s.a.w., then said: A man came to me asking me to sell an item that I did not have, I would buy it for him in the market, then I sold it to that person. Rasulullah saw. replied: "Do not sell something that you do not have." (Narrated by Tirmidzi).

6) The Hadith of The Prophet Narrated by Hakim bin Hizam:

رُوي أَنَّ حَكِيمَ بْنَ حِزَامٍ قَالَ: قُلْتُ: يَا رَسُولَ اللَّهِ إِنِّي أَشْتَرِي بُيُوعًا فَمَا

يَجِلُّ لِي مِنْهَا وَمَا يُحَرِّمُ عَلَيَّ؟ قَالَ: فَإِذَا اشْتَرَيْتَ بَيْعًا فَلَا تَبِعْهُ حَتَّى

تَقْبِضَهُ. (أخرجه أحمد في مسنده، الكتاب : مسند المكين الباب : مسند

الترمذي، سنن الترمذي، المجلد الثاني، (الرياض: مكتبة المعارف للنشر و التوزيع، ٢٠٠٢)، ١٧. 80

حكيم ابن حزام عن النبي صلى الله عليه وسلم، رقم الحديث : (١٤٧٧٧)

81

It was narrated that Hakim bin Hizam said: I said: "O Messenger of Allah I bought several items: what is lawful and what is unlawful for me to do?" The Messenger of Allah said: "If you buy something, don't sell it unless you have received it (taqabud)." (Narrated by Ahmad)

7) The Hadith of The Prophet Narrated by Ibnu Majah dari Ibnu Umar:

عَنْ عَبْدِ اللَّهِ بْنِ عُمَرَ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أُعْطُوا

الْأَجِيرَ أَجْرَهُ قَبْلَ أَنْ يَجِفَ عَرْفُهُ.⁸² (أخرجه ابن ماجه في سننه / الكتاب:

الأحكام، الباب: أجر الأجراء، رقم الحديث : ٢٤٣٤)

It was narrated from Ibn Umar ra, he said, Rasulullah said: "Give workers wages before their sweat dries." (Narrated by Ibnu Majah)

8) The Hadith of The Prophet Narrated by 'Abd al-Razaq from Sa'id:

أحمد بن حنبل، مسند الإمام أحمد بن حنبل ٢٤، (بيروت: الرسالة العالمية، ٢٠٠٨)، ٣٢. 81

ابن ماجه، سنن ابن ماجه، ج ٢، (الرياض: مكتبة المعارف للنشر و التوزيع، ١٩٩٦ م)، ٤١٧. 82

وَعَنْ سَعِيدِ رَضِيَ اللَّهُ عَنْهُ أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: مَنْ اسْتَأْجَرَ

أَجِيرًا فَلْيُسِّمْ أَجْرَتَهُ. (رواه عبد الرزاق، سبل السلام، لمحمد بن اسماعيل

الكحلاني، باب المساقاة و الاجارة؛ ٢٨/٣، رقم الحديث: ٩).⁸³

“From Abu Sa‘id radhiyallah ‘anhu, in fact the Messenger of Allah said: ‘Whoever employs workers, let them know their wages.’ (Narrated by ‘Abd al-Razaq).

9) Hadith The Hadith of The Prophet Narrated by Abi Sa‘id al-Khudri and Abi Hurairah

عَنْ أَبِي سَعِيدِ الْخُدْرِيِّ وَأَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُمَا أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ اسْتَعْمَلَ رَجُلًا عَلَى حَيْبَرَ فَجَاءَهُ بِتَمْرٍ جَنِيْبٍ، فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَكُلُّ تَمْرٍ حَيْبَرَ هَكَذَا؟ فَقَالَ لَا، وَاللَّهِ يَا رَسُولَ اللَّهِ، إِنَّا لَنَأْخُذُ الصَّاعَ مِنْ هَذَا بِالصَّاعَيْنِ، بِالثَّلَاثَةِ فَقَالَ لَا تَفْعَلْ، بَعْ الْجَمْعَ بِالدَّرَاهِمِ، ثُمَّ ابْتَعْ بِالدَّرَاهِمِ جَنِيْبًا.⁸⁴ (أخرجه البخاري في صحيحه، الكتاب: البيوع، الباب: إذا أراد بيع تمر بتمر خير منه ث، رقم الحديث: ٢٠٥٠).

“From Abu Sa‘id Al Khudri and Abu Hurairah r.a., Rasulallah saw. once hired someone to manage the land of Khaibar. Then the Companion came to Rasulallah saw bring good dates. Rasulallah saw asked: Are all Khaibar dates like this? That best friend replied: No, O Rasulallah saw. We exchange one sha’ of these good dates with two sha’ dates (ordinary, pen.), and exchanged two sha’ of these good dates with three sha’ dates (ordinary, pen.). So Rasulallah saw. said: Do not do that, but sell dates with dirhams; then with the dirham, you buy good dates.” (Narrated by Bukhari).

إمام محمد بن إسماعيل العنصاني، سبل السلام، الجزء ٣، (الرياض: مكتبة المعارف للنشر و التوزيع، ٢٠٠٦ م)، ٢٢٣. 83

البخاري، صحيح البخاري، ٢٢٠٢. 84

10) The Hadith of The Prophet Narrated ‘Amr bin ‘Auf al-Muzani:

عن عَمْرِو بْنِ عَوْفِ الْمُزَنِيِّ عَنِ أَبِيهِ عَنْ جَدِّهِ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِينَ إِلَّا صُلْحًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا، وَالْمُسْلِمُونَ عَلَى شُرُوطِهِمْ إِلَّا شَرْطًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا. قَالَ أَبُو عِيسَى: هَذَا حَدِيثٌ حَسَنٌ صَحِيحٌ. (أخرجه الترمذي في سننه / الكتاب: الأحكام، الباب: ما ذكر عن رسول الله في الصلح، رقم الحديث : ١٢٧٢) ⁸⁵

Narrated from Amr bin 'Auf al-Muzani, from his father, from his grandfather, Rasulullah s.a.w. said: "Peace may be made between Muslims except for peace that forbids what is lawful justifies what is unlawful; and the Muslims are bound by their terms except for conditions that forbid what is lawful or allow what is unlawful." (Narrated by Tirmidzi)

c. The *Qowaid al-Fiqh*

أ- الأَصْلُ فِي الْأَشْيَاءِ الْإِبَاحَةُ حَتَّى يَدُلَّ دَلِيلٌ عَلَى التَّحْرِيمِ. ⁸⁶ (الأشباه والنظائر

للسيوطي : ٦٠)

“Basically, everything in muamalah can be done until there is an argument that forbids it.”

ب- الضَّرَرُ يُدْفَعُ بِقَدْرِ الْإِمْكَانِ. ⁸⁷ (درر الحكام شرح مجلة الأحكام،

⁸⁵ الترمذي، سنن الترمذي، ٧٧.

⁸⁶ عبد الرحمن بن أبي بكر، جلال الدين السيوطي، الأشباه والنظائر للسيوطي، (بيروت: دار الكتب العلمية، ١٩٩٠ م)، ٦٠.

⁸⁷ محمد عميم الإحسان المجددي البركتي، قواعد الفقه، (كراتشي: الصدق ببلشرز، ١٩٨٦)، ٨٨.

لمتلاخسرو، بيروت: دار إحياء الكتب العربية، المادة ٣١ / ١ (٤٢)

“All of madharat (harm, loss) should be avoided as far as possible.”

ت- الضَّرَرُ يُزَالُ.⁸⁸ (الأشباه والنظائر للسيوطي، القاهرة: دار السلام ٢٠٠٤،

ط ٢ تحقيق وتعليق محمد محمد تامر وحافظ عاشور حافظ، ج ١، ص ٢١٠

(

“All of madharat (harm, loss) must be removed.”

ث- تَصَرُّفُ الْإِمَامِ عَلَى الرَّعِيَّةِ مَنْوُطٌ بِالْمَصْلَحَةِ.⁸⁹ (السيوطي، الأشباه والنظائر،

القاهرة: دار السلام، ٢٠٠٤ ط ٢، تحقيق وتعليق: محمد تامر و حافظ عاشور

حافظ، ج ١، ص ٢٧٦)

“The action or policy of the Imam (holder of authority) towards the people must be mashlahat oriented.”

⁸⁸ البركتي، قواعد الفقه، ٨٨.

⁸⁹ السيوطي، الأشباه والنظائر للسيوطي، ١٢١.

ج- دَرءُ الْمَفَاسِدِ أَوْلَى مِنْ جَلْبِ الْمَصَالِحِ.⁹⁰ (السيوطي، الأشباه والنظائر،

القاهرة دار السلام، ٢٠٠٤ ط ٢، تحقيق وتعليق: محمد تامرو حافظ

عاشور حافظ، ج ١، ص ٢٧٦)

“Preventing mafsadah (damage) takes precedence over taking benefit.”

ح- مَا أَدَّى إِلَى الْحَرَامِ فَهُوَ حَرَامٌ.⁹¹ (قواعد الأحكام في مصالح الأنام لعز الدين

بن عبد السلام، بيروت: دار الكتب العلمية، ٢/٢١٩)

“Anything that acts as an intermediary (media) for unlawful acts is also unlawful.”

d. The opinion of Ulama

1) The opinion of Ibnu Qudamah:

⁹⁰ السيوطي، الأشباه والنظائر للسيوطي، ٨٧.

⁹¹ عز الدين عبد العزيز بن عبد السلام، قواعد الأحكام في مصالح الأنام، (لبنان: دار المعارف بيروت، ١٩٩١ م)، ١٨٤.

وَأَجْمَعَتِ الْأُمَّةُ عَلَى حَوَازِ الْوَكَالَةِ فِي الْجُمْلَةِ، وَلِأَنَّ الْحَاجَةَ دَاعِيَةً إِلَى ذَلِكَ، فَإِنَّهُ

لَا يُمَكِّنُ كُلَّ وَاحِدٍ فِعْلَ مَا يَحْتَاجُ إِلَيْهِ، فَدَعَتْ الْحَاجَةُ إِلَيْهَا،⁹² (المعني لابن

قدامة، القاهرة: دار الحديث، ٢٠٠٤، ٥١/٥)

Ulama have agreed that in general “The people (ulama) have agreed that wakalah is legally permissible; and because of the intention (need) people are encouraged to do wakalah. Not everyone can do what he needs directly. Thus, there is a need for the wakalah.”

2) The opinion of Ibnu Qudamah:

وَيَجُوزُ التَّوَكُّلُ بِجُعْلِ وَعَيْرِ جُعْلٍ، فَإِنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَآلِهِ وَسَلَّمَ وَكَلَّ أَنْيَسًا

فِي إِقَامَةِ الْحَدِّ، وَعُرْوَةَ فِي شَرَاءِ شَاةٍ، وَأَبَا رَافِعٍ فِي قَبُولِ النِّكَاحِ بِعَيْرِ جُعْلٍ، وَكَانَ

يَبْعَثُ عُمَّالَهُ لِقَبْضِ الصَّدَقَاتِ وَيَجْعَلُ لَهُمْ عُمُولَةً.⁹³ (المعني لابن قدامة :

[القاهرة: دار الحديث ٢٠٠٤] ، ج. ٦ ، ص ٤٦٨)

“Taukil (wakalah) contracts may be made, either with or without compensation. This was because the Prophet -peace and prayer of

ابن قدامة، المعني ت، ج ٧، (الرياض: عالم الكتب، ١٩٩٧ م)، ١٩٧. 92.

ابن قدامة، المعني ط، ج ٥، (مكتبة القاهرة، ١٩٦٨ م)، ٦٨. 93.

Allah be upon him- had delegated to Unais to carry out the punishment, to Urwah to buy a goat, and to Abu Rafi' to perform the marriage qabul, (all) without giving anything in return. The Prophet once also sent his officials to collect alms (zakat) and he gave them rewards."

3) The Opinion of Imam Shaukani:

وَفِيهِ أَيْضًا دَلِيلٌ عَلَى أَنَّ مَنْ نَوَى التَّبَرُّعَ يَجُوزُ لَهُ أَخْذُ الْأُجْرَةِ بَعْدَ ذَلِكَ.⁹⁴

(نيل الأوطار للشوكاني، القاهرة: دار الحديث، ٢٠٠٠، ٥٢٧/٤)

"The Hadith of Busr bin Sa'id also shows that people who do something with the intention of tabarru' may receive rewards."

4) The opinion of The Kuwait Islamic Fiqh Encyclopedia

Compilation Team:

أَلْوَكَالَةُ بِأَجْرٍ (بِجُعَلٍ) حُكْمُهَا حُكْمُ الْإِجَارَاتِ، فَيَسْتَحِقُّ الْوَكِيلُ الْجُعَلَ بِتَسْلِيمِ

مَا وَكَّلَ فِيهِ إِلَى الْمُوَكَّلِ - إِنْ كَانَ مِمَّا يُمَكِّنُ تَسْلِيمَهُ فَلَهُ الْأَجْرُ.⁹⁵ (الموسوعة

الفقهية الجماعة من العلماء، الكويت: وزارة الأوقاف الكويتية، ٣٢٤/١١)

Wakalah with wages (reward) the law is the same as the law of ijarah. The representative has the right to receive wages by handing

⁹⁴ الشوكاني، نيل الأوطار، ج ٤، (مصرى: دار الحديث، ١٩٩٣ م)، ١٩٥.

⁹⁵ الموسوعة الفقهية الجماعة من العلماء، (الكويت: وزارة الأوقاف الكويتية ١٩٨٣-٢٠٠٦ م)، ٣٢٤.

over the object represented to the representative. If the object can be handed over, then he is entitled to receive wages.

5) The Opinion of al-Mirdawi:

ويقول المرداوي : لَوِ اخْتِاجَ إِلَى نَقْدٍ، فَاشْتَرَى مَا يُسَاوِي مِائَةً بِمِائَةٍ وَحَمْسِينَ

فَلَا بَأْسَ. نَصَّ عَلَيْهِ. وَهُوَ الْمَذْهَبُ. وَعَلَيْهِ الْأَصْحَابُ. وَهِيَ مَسْأَلَةُ التُّورِقِ.⁹⁶

(الإنصاف في معرفة الراجح من الخلاف للمرداوي، الجزء الرابع، صفحة:

(٣٣٨

Imam al-Mirdawi said: if someone needs money. then he buys goods that cost 100 at a price of 150, then the law is permissible. This is the opinion of the Mazhab (Hanbali): and this matter is called tawarruq.

6) The Opinion of Ibnu al-Humam:

ويقول ابن الهمام : كَأَنَّ يَحْتَاجَ الْمَدْيُونُ فَيَأْتِي الْمَسْئُولُ أَنْ يُفْرَضَ بَلٌّ أَنْ يَبِيعَ مَا

يُسَاوِي عَشْرَةَ بِخَمْسَةِ عَشَرَ إِلَى أَجَلٍ، فَيَشْتَرِيهِ الْمَدْيُونُ السُّوقِ بِعَشْرَةِ حَالَةً، وَلَا

بَأْسَ فِي هَذَا فَإِنَّ الْأَجَلَ قَابِلَهُ قَسَطٌ مِنَ التَّمَنِ، وَالْقَرْضُ غَيْرٌ وَاجِبٌ عَلَيْهِ دَائِمًا،

المرداوي، الإنصاف في معرفة، ج ٤، (دار الإحياء التراث العربي، ١٩٥٦ م)، ٣٣٨. ⁹⁶

بَلْ هُوَ مَنْدُوبٌ.⁹⁷ (فتح القدير شرح الهداية، لابن الهمام، الجزء السابع،

صفحة: ٢١٣)

Ibn al-Humam said: It's like a person who wants to owe money, but the party asked to give the debt is reluctant to provide a loan (debt), he instead sells the person the item that costs 10 at a price of 15 in a respectful manner. Then that person also bought the item and sold it in the market at a price of 10 in cash. It is permissible to buy and sell like that, because tough (payment period) has a price. While providing loans (debt, qard) is not obligatory, but sunnah.

7) Al-Ma'ayir Al-Syar'iyah (2010, h.413)

التَّوَرُّقُ لَيْسَ صَيِّعَةً مِنْ صَيِّغِ الْإِسْتِمَارِ أَوْ التَّمْوِيلِ، وَإِنَّمَا أُجِيزَ لِلْحَاجَةِ بِشُرُوطِهَا، وَلِذَا عَلَى الْمَوْسَّسَاتِ أَنْ لَا تُقَدِّمَ عَلَى التَّوَرُّقِ لِتَوْفِيرِ السُّيُؤَلَةِ لِعَمَلِيَّتِهَا بَدَلًا مِنْ بَذْلِ الْجُهْدِ لِتَلْقَى الْأَمْوَالَ عَنْ طَرِيقِ الْمَضَارَبَةِ أَوْ الْوَكَالَةِ بِالْإِسْتِمَارِ أَوْ الصَّنَادِيقِ الْإِسْتِمَارِيَّةِ وَعَيْرِهَا وَيَنْبَغِي حَصْرُ اسْتِخْدَامَاتِهَا لَهُ لِتَفَادِي الْعَجْزِ أَوْ النَّقْصِ فِي السُّيُؤَلَةِ لِتَلْبِيَةِ الْحَاجَةِ وَتَجَنُّبِ خَسَارَةِ عُمَّالِهَا وَتَعَثُّرِ عَمَلِيَّتِهَا.⁹⁸
(المعايير الشرعية، ٢٠١٠: ٤١٣)

Tawarruq is not an investment or financing scheme. Tawaruq is only permissible because of necessity (there is a need) with conditions that must be met. Therefore, Islamic financial institutions (LKS) are not allowed to bargain in meeting their operational liquidity needs, to replace receiving funds through mudharabah products, wakalah for investment, mutual fund products, and so on. Tawaruq may only be used to cover liquidity shortages (difficulties), avoid (minimize) customer losses, and overcome LKS operational difficulties.

e. The previous regulations which is used as determining the fatwa

⁹⁷. ابن الهمام، فتح القدير، ج ٧، (دمشق: دار الكتب العلمية، ١٩٩٣)، ٢١٣.

⁹⁸. المجلس الشرعي بالهيئة، المعايير الشرعية، (الكويت: الإمتياز لإستثمار، ٢٠١٠)، ٤١٣.

- 1) Substance of Fatwa DSN-MUI No.4/DSN-MUI/IV/2000 about Murabahah
- 2) Decision of DSN about Commodity Murabahah of 2007.
- 3) Letter from Deputy Governor of Bank Indonesia No. 13/33/DpG/DPbS on April 11, 2011 that containing recommendation of Working Group.
- 4) Letter from Director of PT Bursa Berjangka Jakarta (BBJ) No. L/BBJ/DIR/02-11/100 on February 25, 2011.
- 5) Workshop Result of DSN-MUI with BBJ; on May 9, 2011.
- 6) The Opinion and Suggestion Participant of Rapat Pleno DSN-MUI on Friday, August 5, 2011 AD./Ramadhan 5, 1432 H.

f. Result of fatwa

Based on Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange that explains about *tawarruq* contract in Indonesia, the legal result of the *fatwa* is that the implementation of *tawarruq* contracts is permitted in Indonesia, but on condition that it fulfills the provisions contained in this *fatwa* and is only implemented on commodity exchanges, where this element of permissibility is included in The Second Article (Legal Provisions) in Fatwa DSN-MUI No. 82 of 2011 that is “Trading of Commodities on the

Exchange, both in the form of Trading Physical Handover or in the form of Follow-up Trading, legally permissible by fulfilling the provisions stipulated in the fatwa.”⁹⁹

g. The terms

Provisions regarding the permissibility of the implementation of the *tawarruq* contract are regulated starting from The Third Article to The Eighth Article. in The Third Article it is explained about the trading conditions, in The Fourth Article it is explained about the exchange provisions, in The Fifth Article it is explained about the physical handover trading mechanism, in The Sixth Article it is explained about the provisions for the follow-up trading mechanism, in The Seventh Article it is explained about agents and trading mechanisms that can carry out the *tawarruq* contract, and in The Eighth Article it is explained regarding the closing provisions.

In the closing provisions of Article Eight Number 1, it is explained about the dispute resolution mechanism if the related parties are involved in a dispute, the settlement is carried out by deliberation to reach a consensus. If no agreement is reached, then the dispute can be resolved through a sharia arbitration body or

⁹⁹ Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange, p. 11.

based on regulations or laws that are in accordance with sharia principles.¹⁰⁰

The article in the *fatwa* that explains the terms of *tawarruq* contract is in the fifth and sixth article, which is as follows¹⁰¹:

Fifth: Provisions regarding the Handover Trading Mechanism

Physique

1. Commodity Consumers as buyers place orders to Participants Commercial and promise (*wa 'd*) to make a purchase commodity;
2. Commercial Participants buy commodities from a number of Participants Commodity traders with cash payments (*bai'*);
3. Commercial Participant receives ownership documents which in the form of an Surat Penguasaan Atas Komoditi Tersebut (SPAKT) issued by the Exchange through the system, as evidence above purchase of commodities from Commodity Trade Participants;
4. Commercial Participants sell commodities to consumers Commodities with *murabahah* contracts; and followed by submission of ownership documents;
5. Commodity Consumers pay Commercial Participants deferred or in installments according to the agreement in the contract *murabahah*;

¹⁰⁰ Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange, p. 14.

¹⁰¹ Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange, p.12.

6. Commodity consumers receive the physical commodity from Commercial Participants.

Sixth: Provisions regarding the Mechanism of Trade with Follow-Up Sales

1. Commodity consumers as buyers place orders to participants Commercial and promise (*wa 'd*) to make a purchase commodity;
2. Commercial Participants buy commodities from a number of Participants Commodity traders with cash payments (*bai'*);
3. Commercial Participant receives ownership documents which in the form of an Surat Penguasaan Atas Komoditi Tersetujui (SPAKT) issued by the Exchange through the system, as evidence above purchase of commodities from Commodity Trade Participants;
4. Commercial Participants sell commodities to consumers Commodities with *murabahah* contracts; and followed by submission of ownership documents;
5. Commodity Consumers pay Commercial Participants deferred or in installments according to the agreement in the contract *murabahah*;
6. Commodity consumers are guaranteed to receive commodity in the form of SPAKT from Commercial Participants; so that thus, *qabdh hukmi* has occurred;

7. Commodity Trading Participants represent to the Exchange for buying commodities in cash with a *wakalah* agreement;
8. Commodity Consumers may sell commodities to Participants Commodity traders in cash with a *bai'* through contract. Exchange as buyer's representative (Commodity Traders Participant);
9. Commodity consumers submit commodities, with transfer the guarantee of physical handover (SPKAT) received from the Commercial Participant as referred to in item 6;
10. Commodity Consumers receive cash payments from Participants Commodity Traders;
11. Commodity Settlement between Participants Commodity traders are conducted with a *muqayadhah* contract;

If referring to the definition of *tawarruq* contract which is a combination of two or more contracts (hybrid contract) which the first contract is a *murabahah* contract and in the second contract the goods as object in *aqad* are resold to other parties (third parties) with different price from the first contract, because *tawarruq* itself means selling goods at a lower price than the previous price (without making a profit)¹⁰², the explanation of the provisions and mechanisms for continued trading in this *fatwa* cannot be fully called a *tawarruq* contract. Although it has similarities with using

¹⁰² Zuhaili, *Tawarruq, Its Essence*, 2.

the first contract is a *murabahah* contract with a deferred payment system, but the provisions contained in Fatwa No. 82 of 2011 in the second contract uses a *wakalah* contract which has no provisions about selling price to third parties.

h. The implementation

The implementation of *tawarruq* contracts in Indonesia is only permitted on Commodity Exchanges.

2. Policy Document BNM/RH/PD 028-8 about *Tawarruq*

a. Dalil Al-Qur'an which is used to found the law

1) Q.S al-Baqarah: 275

وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا

“...But Allah has permitted trade and has forbidden interest...”

b. Hadith which is used to found the law

Based on Policy Document Malaysia about *tawarruq* there is no directly of sunnah that explain about *tawarruq* contract. Their opinion that legitimacy of *tawarruq* contract is same with the general permissibility of sales in Islamic law.¹⁰³

c. The *Qowaid al-Fiqh*¹⁰⁴

الأصل في الأشياء الإباحة حتى يدُلَّ دليلٌ على التحريم

¹⁰³ Policy Document *Tawarruq* (BNM/RH/PD 028-8), Appendices, p. 26.

¹⁰⁴ Bank Negara Malaysia, *Resolusi Syariah dalam Kewangan Islam*, (Malaysia: Bank Negara Malaysia, 2010), 95.

“Basically, everything in muamalah can be done until there is an argument that forbids it.”

d. The opinion of *Ulama*¹⁰⁵

The view of current scholars has required the use of *tawarruq* based on the views of the Hanafi, Hanbali and Shafi'i schools of thought which requires the use of *tawarruq*.

e. The previous regulations which is used as determining the *fatwa*

The requirements in the policy document about *tawarruq* are specified pursuant to:¹⁰⁶

- 1) sections 29, 57(1), 135(1) and 155 of the Islamic Financial Services Act 2013 (IFSA); and
- 2) section 41(1) and constitutes a direction pursuant to section 129(3) of the Development Financial Institutions Act 2002 (DFIA).

The guidance in the policy document is issued pursuant to section 277 of the IFSA and section 126 of the DFIA.

f. Result of regulation

Contained in Part B Shariah Requirements and Optional Practices, in item 12. *Ijab* (offer) and *qabul* (acceptance) and 23. Completion of *tawarruq*:

12. *Ijab* (offer) and *qabul* (acceptance)¹⁰⁷

¹⁰⁵ BNM, *Resolusi Syariah dalam Kewangan*, 95.

¹⁰⁶ Policy Document *Tawarruq* (BNM/RH/PD 028-8), Legal Provision, p. 2.

¹⁰⁷ Policy Document *Tawarruq* (BNM/RH/PD 028-8), Legal Provision, p. 6.

12.1 Each sale and purchase contract in a *tawarruq* shall be entered into through an offer and acceptance between the contracting parties.

12.2 The offer and acceptance may be expressed orally, in writing or by any other methods recognised by Shariah.

12.3 The offer and acceptance referred to in paragraph 12.1 must be executed in the following sequence:

(a) the seller sells an asset to the purchaser by entering into a sale and purchase contract; and

(b) subsequently, the purchaser from the first sale and purchase contract enters into another sale and purchase contract to sell the same asset to a third party.

23. Completion of *tawarruq*¹⁰⁸

23.1 The sale and purchase contract in the *tawarruq* is completed upon fulfilment of the obligations of the contracting parties which include the following:

(a) full settlement of the selling price;

(b) transfer of the obligation to pay the selling price to a third party through *hiwalah al-dain*;

(c) waiving of the right to receive the remaining or outstanding selling price through a rebate by the seller; or

¹⁰⁸ Policy Document *Tawarruq* (BNM/RH/PD 028-8), Legal Provision, p. 13.

(d) full *muqassah* (set-off) of debt obligations between the contracting parties.

23.2 Upon completion of the *tawarruq* the contracting parties are free from any contractual obligations.

Tawarruq contracts in Malaysia have been implemented in the economic life of the community, namely at IFIs and asset traders or asset exchanges. Policy Documents of *Tawarruq* explain the requirements and pursuants regarding the implementation of the *tawarruq* contract in Malaysia. The argument used as the basis for the permissibility of the *tawarruq* contract is Q.S al-Baqarah verse 275.

Tawarruq contracts are permitted in Malaysia as long as they do not contrary with sharia principles, the provisions of which are also regulated in this regulation, namely in point 15.5 Part B Shariah Requirements and Optional Practice, that is “The sale and purchase contract in the *tawarruq* shall not contain any terms and conditions that restrict the purchaser from taking delivery of the asset or create an obligation for the purchaser to sell the underlying asset.”¹⁰⁹

g. The contracts that can be use in hybrid contract with *tawarruq*

¹⁰⁹ Policy Document *Tawarruq* (BNM/RH/PD 028-8), Requirements of the *tawarruq*, p. 8-9.

According to the Policy Document, dual-agency may be implemented in a *tawarruq* also may be arranged together with some contracts, which the contract is:

- 1) *Wakalah*
- 2) *Wa'd*
- 3) *Assurance*
- 4) *Ibra'*

h. The terms

There are four sections described in this arrangement, that is:

1) Part A Overview

In this section includes an explanation of the introduction, applicability, legal provision, effective date, interpretation, related shariah rulings and policy documents, and also policy document superseded.

2) Part B Sharia Requirements and Optional Practices

In this section includes an explanation of the definition, contracting parties, *ijab* and *qabul*, asset, price, requirements of the *tawarruq*, arrangement of *wakalah* in *tawarruq*, implementastion of dual-agency in *tawarruq*, arrangement of *wa'd* (promise) in *tawarruq*, arrangement of assurance in *tawarruq*, arrangement of *ibra'* (rebate) in *tawarruq*, arrangement of *tawarruq* with *ta'widh* (compensation) and/or

gharamah (penalty) in *tawarruq*, dissolution of sale and purchase contract *tawarruq*, and also completion of *tawarruq*.

3) Part C Operational Requirements

In this section includes an explanation of the Governace and oversight, structuring, risk management, business and market conduct, and financial disclosure.

4) Appendices

In this section includes an explanation of the legitimacy of *tawarruq*, glossary, and product structures.

i. The implementation

Based on Policy Document of *Tawarruq* (BNM/RH/PD 028-

8) Institutions that can implement a *tawarruq* contract in Malaysia are called IFI (Islamic Financial Institutions) and asset trader or asset exchange, explained in the regulation in Part A Oveview Point 5.3, which are included in IFI is:¹¹⁰

- 1) A licensed Islamic bank;
 - 2) A licensed *takaful* operator;
 - 3) A licensed bank and licensed investment bank approved under section 15(1)(a) of the FSA to carry on Islamic banking business;
- and

¹¹⁰ Policy Document of *Tawarruq* (BNM/RH/PD 028-8), Interpretation, p. 3.

- 4) A prescribed institution under the DFIA approved under section 33B(1) of the DFIA to carry on Islamic banking business or Islamic financial business.

B. Analysis of Legal Istimbath Method of Using Tawarruq Contract on Financing in Sharia Financial Institution of Indonesia and Malaysia

1. The Differences of Using Legal *Istinbāṭ* Method in Formulating Arrangements about *Tawarruq* Contract in Indonesia and Malaysia

In Indonesia the institution that have authority to determine and issue the fatwa is DSN-MUI (Dewan Syariah Nasional Majelis Ulama Indonesia) which is to digging the *fatwa* they must to do legal istimbath method, that is:¹¹¹

- a. Before the determination of the *fatwa*, a preliminary review of the opinion of the *imams* of the sect on the issue to be *fatwa* is conducted, accurately including the arguments.
- b. Issues that have clear laws (*al-ahkam al-qaṭ'iyah*) will be conveyed as they are.
- c. In the case of differences of opinion (*khilafiyah*) among the schools of thought, the determination of a fatwa is based on the results of efforts to find common ground between the *mazhab* opinions using the *al-jam'u wa al-taufiq* method; and if efforts to find common ground are not successful, the determination of a *fatwa* is based on the results of *tarjih*

¹¹¹ M. Zaidi Abdad, "Signifikansi Fatwa DSN MUI Terhadap Perkembangan Ekonomi Syariah Di Indonesia", *Jurnal Hukum dan Ekonomi Islam* Vol. 18(2) 2019, 439, <http://www.istinbath.or.id/index.php/ijhi/article/view/177>

through the *muqaranah al-mazahib* method using the principles of *uṣul fiqh muqaran*.

- d. In matters where no legal opinion is found among the *mazhab* of thought, the determination of a *fatwa* is based on the results of the *jama' i* (collective) *ijtihad* through the methods *bayani ta'lili* (*qiyas, istishani, ilhaqi*), *istiṣlahi*, and *sadd al-dhari'ah*.
- e. Determination of *fatwas* always pays attention to the public benefit (*maṣalih 'ammah*) and *maqāṣid sharia*.

In Indonesian legal provisions, *fatwas* are not rules that must be followed and enforced (non-binding). *Fatwa* itself is included in Islamic law, and can be taken into consideration in legislation and judges decisions in court. If referring to the type and hierarchy in Law Number 12 of 2011, the position of MUI Fatwa is not a type of legislation that has binding legal force.¹¹²

In Malaysia the institution that have authority to determine and issue the *fatwa* is MPS atau MPS-BNM (Majlis Penasihat Syariah Bank Negara Malaysia) which is to digging the *fatwa* they must to do legal *istinbāt* method, based on the reference manual of financial institutions to MPS, the methods or approaches used by MPS-BNM in determining *fatwas* or the resolution is to refer to primary sources and sources second.

¹¹² Ahmad Badrut Tamam, "Kedudukan Fatwa Majelis Ulama Indonesia (MUI) dan Fatwa Dewan Syariah Nasional (DSN) dalam Sistem Hukum Indonesia", *Al-Musthofa: Journal Of Sharia Economics*, Vol. 4 No. 2 (2021), 177, <https://ejournal.iaitabah.ac.id/index.php/musthofa/article/download/739/532>

Based on the designation of the Bank Negara Malaysia Act 701 of 2009, in Part VII Chapter I Shariah Advisory Council;¹¹³

56. (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall—

(a) take into consideration any published rulings of the Shariah Advisory Council; or

(b) refer such question to the Shariah Advisory Council for its ruling.

(2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.

According the Bank Negara Malaysia Act 701 of 2009 MPS decisions are binding in business and Islamic financial, the decisions it's applies not only to Islamic financial institutions, but also to courts and arbitration bodies which need to refer to MPS decisions for any proceedings relating to Islamic business and finance.¹¹⁴

The main sources are from Al-Qur'an and Sunnah. Secondary source is *ijtihad* which consists of *ijma'*, *qiyas*, *maṣlaḥah*, *istiḥsan*, *istishab*, *sadd dhari'ah*, *'urf*, *siyasah al-syar'iyah*, *ta'wil*, *istiqra'* and *talfiq*. In its

¹¹³ Central Bank of Malaysia Act 2009, 53.

¹¹⁴ Gulbudin Hekmatyar Bin Lukman, "FATWA DSN-MUI DAN MPS BNM TENTANG MUSYARAKAH (Analisis atas Dalil dan Metode Istinbāt al-Hukmi)", (Undergraduate Thesis, Universitas Islam Negeri Ar-Raniry Banda Aceh, 2018), 57, <https://repository.ar-raniry.ac.id/id/eprint/3364/1/Gulbuddin%20Hekmatyar%20bin%20Lukman%20.pdf>

implementation, MPS-BNM also supports the *maqasid sharia* approach and maintains its purity. This approach is applied in every decision issued by MPS. These decisions need to go through a process of deliberation an in-depth, rigorous and systematic consultation process according to the provisions in the standard procedure of management of Sharia in Malaysia.¹¹⁵

The law on the permissibility of *tawarruq* contract has differing opinions from among the scholars. There are scholars who allow it and there are also those who forbid it. The classical scholars who allow the implementation of *tawarruq* contracts in economic life are Imam Hanafi, Shafi'i and Imam Hanbali. In general, the source of law used for the permissibility of *tawarruq* contract is the verse of Al-Qur'an Q.S al-Baqarah verse 275 about pemissibility of *bai'* which *tawarruq* contract includes buying and selling agreement.

The sources of law that used by DSN-MUI in establishing Fatwa No. 82 of 2011 is al-Qur'an, hadith, *qowaid al-fiqh*, and the opinions of the *ulama'* about *tawarruq* contract. In the DSN-MUI Fatwa there are provisions on the permissibility of trading commodities on commodity exchanges by fulfilling the requirements that have been set, which in the provisions of these articles there is no indication that explains specifically

¹¹⁵ Qumi Andziri, "Akad Pengalihan Utang Berdasarkan Fatwa Dewan Syariah Nasional (Dsn) Mui dan Resolusi Majelis Penasihat Syariah (MPS) Malaysia", (Magister Theses, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2018), 59, <https://repository.uinjkt.ac.id/dspace/bitstream/123456789/44008/1/QUMI%20ANDZIRI-FSH.pdf>

about the permissibility of *tawarruq* contract, but explain hybrid contracts that using *wakalah* and *murabahah* contract in the similarity payment method with *tawarruq* contract (first contract with credit and second contract with cash). And also there's no provision that arrange about price, while in the *tawarruq* contract must contains selling the object with lower price than the previous contract (withouth margin) to the third party.

The sources of law that used by BNM-MPS in establishing Policy Document of *Tawarruq* is al-Qur'an, *qowaid al-fiqh*, and the opinions of the ulama' about *tawarruq*. In the Policy Document of *Tawarruq* explained the definition of *tawarruq* contract and all of the requirements about *tawarruq* contract in Malaysia. Malaysia is one of the countries that legalizes the *tawarruq* contract and has implemented it in sharia economic transactions. The terms in Policy Document Policy Document *Tawarruq* (BNM/RH/PD 028-8) that explain about the price as indicator of *tawarruq* is in the explanation of Resolusi Syariah dalam Kewangan Islam of Bank Negara Malaysia that is "*Islamic financial institutions will bear liability (commodity cost amount plus profit margin) to be paid to customer at maturity. The price of commodities purchased from traders metal A and the price sold to metal dealer B are the same.*"¹¹⁶ From the explanation the price in second contract of *tawarruq* contract must be same with first contract before adding margin in the first contract.

¹¹⁶ BNM, *Resolusi Syariah dalam Kewangan*, p. 94.

In short, *tawarruq* contracts in Indonesia are not yet permitted and in Malaysia it's permitted and there are already regulations that specifically regulate *tawarruq* contracts. *Tawarruq* contracts is not permitted in Indonesia is based on the DSN-MUI Fatwa which uses al-Ma'ayir al-Syar'iyah as a consideration for the formulation of the DSN-MUI 82/DSN MUI/VIII/2011 about Trading of Commodities Based on Sharia Principles in The Commodity Exchange. The legal *istinbāt* method used by DSN-MUI in the fatwa is *qiyas*. The forbidden *tawarruq* contract its because The similarity that connects *tawarruq* and *bai' al-'inah* (as *hukm al-aşl*) lies in the main motive or what is actually expected is get a debt/loan of money which is also an '*illat* of the prohibition by using the *qiyas* as legal *istinbāt* method.¹¹⁷

Legal *istinbāt* method in formulating the fatwa from BNM-MPS about *tawarruq* is using dalil from Al-Qur'an Surah al-Baqarah Verse 275 about buying and selling is lawful (*halal*) and usury is forbidden. So, Malaysia used *qiyas* as the legal *istinbāt* method to *tawarruq* contract with *qiyas*, to determine the law of *tawarruq* contract by *qiyas* the *tawarruq* contract into a sale and purchase (*bai'*) agreement, with the aim of obtaining cash¹¹⁸ as the '*illat*.

2. The differences of legal implication

¹¹⁷ Parman Komarudin and Muhammad Syarif Hidayatullah, "Analysis of *Qiyās Tawarruq* Transactions with *Bai' Al- 'Īnah*", *Nukhbatul 'Ulum : Jurnal Bidang Kajian Islam*, Vol. 7, No. 1 2021, 66, <https://doi.org/10.36701/nukhbah.v7i1.317>

¹¹⁸ BNM, *Resolusi Syariah dalam Kewangan*, p. 95.

In Indonesia *tawarruq* contract only allowed to implementation in the stock exchange, its regulated in the DSN-MUI Fatwa No. 82 of 2011 has set quite strict rules regarding trade Commodities Based on Sharia Principles, this fatwa regulates trade and mechanism of physical delivery trade with the principle of *tawarruq*. However, in reality the contract mechanism applied in the fatwa is not a *tawarruq* contract, but a *murabaha* and *wakalah* (hybrid contract) and there are no rules governing the price provisions in the contract where the selling price of the object should be lower than the previous price or without additional profit. As a result, there is confusion and uncertainty, whether in fact, *tawarruq* is prohibited in Indonesia or only allowed on commodity exchanges. Because the basis used in legal *istinbāt* is *tawarruq*, but in the results of the *fatwa* there is no explanation regarding the *tawarruq* contract.

The one of countries that have implemented *tawarruq* contract is Malaysia. *Tawarruq* contracts in Malaysia are carried out in Islamic banking, cooperatives, and on the Malaysian Stock Exchange (*Bursa Suq Al-Sila*). The regulation of *tawarruq* contract in Malaysia based on Policy Document of *Tawarruq* (BNM/RH/PD 028-8) which is the decision of the Sharia Advisory Council (SAC) issued by bank (BNM).

Table 3.1 Comparison *Tawarruq* Fatwa of Indonesia and Malaysia

No.	Review	Fatwa DSN-MUI No. 82 of 2011	Policy Document about BNM/RH/PD 028-8
------------	---------------	-------------------------------------	--

1.	<i>Istinbāṭ</i> Method	<i>Qiyas</i> with <i>hukm al-aṣl</i> by <i>bai' al-'inah</i> , considered have the same motive as the <i>'illat</i> .	<i>Qiyas</i> with <i>hukm al-aṣl</i> by the buying and selling (<i>bai'</i>) contract.
2.	Source of Law	<p>1. Al-Qur'an</p> <ul style="list-style-type: none"> -Q.S al-Maidah: 1 -Q.S al-Isra': 34 -Q.S al-Baqarah: 275 -Q.S al-Baqarah: 278 -Q.S an-Nisa: 29 -Q.S al-Baqarah: 283 -Q.S an-Nisa: 58 <p>2. Hadith</p> <ul style="list-style-type: none"> -Ibnu Majah Hadith No. 2331 -Imam Muslim Hadith No. 3783 -Imam Bukhari Hadith No. 6448 -Imam Bukhari Hadith No. 2013 -Imam Tirmidzi Hadith No. 1153 -Imam Ahmad Hadith No. 14777 -Ibnu Majah Hadith No. 2434 	<p>1. Al-Qur'an</p> <p>Q.S al-Baqarah: 275</p> <p>2. Hadith</p> <p>Malaysia's opinion think that is no direct sunnah of the Prophet (peace be upon him) that explain about <i>tawarruq</i>.</p> <p>3. The <i>Qowaid al-Fiqh</i></p> <p>4. The Opinions of <i>Ulama'</i></p> <p>5. The Previous Regulations</p>

		<p>-‘Abd al-Razaq Hadith No. 9 -Abi Sa’id al-Khudri Hadith No. 2050 -‘Amr bin Auf Hadith No. 1272 3. The <i>Qowaid al-Fiqh</i> 4. The opinions of <i>Ulama</i>’ 5. The Previous Regulations</p>	
3.	Result	<p><i>Tawarruq</i> contract in Indonesia in general it’s not permitted as arranged in Fatwa DSN-MUI No. 82 of 2011. In the <i>fatwa</i> it can be allowed, if the hybrid contract is used <i>murabahah</i> and <i>wakalah</i>.</p>	<p><i>Tawarruq</i> contract in Malaysia it’s permitted and was implemented in Islamic Financial Institution (IFI) Malaysia, which is the terms and requirement contract is regulated in Policy Document BNM/RH/PD 028-8.</p>

4.	Legal Implication	<p>It was implemented only in Commodity Exchange, but not as <i>tawarruq</i> contract. And it is may not be implemented in Sharia Financial Institution (LKS), except in <i>darurah</i> condition. Therefore, it creates legal ambiguity.</p>	<p>It was implemented in IFI (Islamic Financial Institution), as implemented in BNM or Bank Negara Malaysia, Pawnshop Cooperatives at educational institutions such as those found at UiTM, and also at Commodity Murabaha on the Exchange Market in Malaysia: <i>Bursa Suq Al-Sila</i>.</p>
----	-------------------	---	--

Indonesia and Malaysia use the Shafi'i school of thought and the same legal *istinbat* method in determining the law of *tawarruq* contracts, namely *qiyas*. The sources of law that used as the basis for legal *istinbat* in Fatwa of DSN-MUI is al-Qur'an, hadith, *qowaid al-fiqh*, and the opinions of the scholars. While, the legal sources used in Malaysia are the al-Qur'an, *qowaid al-fiqh*, and the opinions of *ulama mazhab*. The differences is that DSN-MUI uses 7 verses of Al-Qur'an, 10 hadiths, 6 *qowaid al-fiqh* as the basis for *istinbat* in the law of *tawarruq* contracts. Whereas, the BNM-MPS only uses 1 verse of al-Qur'an and 1 rule of *fiqh* as the basis for the permissibility of a *tawarruq* contract in Malaysia, it's same one of the verses used by the DSN-MUI in determining the law on *tawarruq* contracts.

Indonesia and Malaysia use the same *istinbāt* method, but produce different regulatory decisions, because Malaysia believes that *tawarruq* contracts are part of buying and selling activities based on Q.S. Al-Baqarah verse 275 and one of *fiqh* rules. Whereas, Indonesia prohibits using of *tawarruq* contracts by having a transaction motive to obtain funds instead of getting the benefits of using goods which is also the ‘*illat* of *qiyas* in determining the law (*fatwa*). Malaysia has also implemented the *tawarruq* contract in IFI (Islamic Financial Institution), the implementation in Malaysian Sharia Banking institutions, namely BNM or Bank Negara Malaysia, Pawnshop Cooperatives at educational institutions such as those found at UiTM, and also at Commodity Murabahah on the Exchange Market in Malaysia: *Bursa Suq Al-Sila* as the examples.¹¹⁹

CHAPTER IV

CLOSING

A. Conclusion

The conclusions from the results of the analysis and comparison of two Indonesian and Malaysian regulations regarding the Tawarruq contract, namely the DSN-MUI Fatwa NO: 82/VIII/DSN-MUI/2011

¹¹⁹ Dr. Dziauddin, Ph.D., PPT Tawarruq dalam Ar-Rahnu, UiTM, 2022.

and the Policy Document of *Tawarruq* (BNM/RH/PD 028-8) are as follows:

1. The *istinbath* method used in determining the law on the *tawarruq* contract used in Indonesia by the DSN-MUI is to use *naş qat'i* and *qiyas* to *bai' al-'inah*. And it is not permissible to practice it on LKS in Indonesia, because *'illat* is the same as *bai' al-'inah*, namely to obtain financing by getting around prices. The *fatwa* decision described in the DSN-MUI Fatwa is not a *tawarruq* contract mechanism, but a trading mechanism in the commodity exchange using *murabahah* and *wakalah* contracts. The *istinbāt* method used by BNM-MPS is to use the verse of Al-Qur'an in determining the permissibility of *tawarruq* by legal *istinbāt* method *qiyas* with generally *bai'* contract.
2. The implication that can be concluded is Malaysia more flexible than Indonesia in determine the *fatwa* of *muamalah*.

B. Suggestion

The suggestions that researchers give are based on previous research carried out, the researcher would like to provide some suggestions for the formulation of a fatwa, parties of academics, as well as for further research are as follows:

1. The need for regulations that specifically clearly explains the decision on the contract law of *tawarruq* contract, both in

terms of definition, legal *istinbāt*, and mechanism of contract in *fatwa*. And it is also necessary to review the DSN-MUI Fatwa No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange. So, that there is no ambiguity in the application of the law on a sharia product and people know the legality of a product, whether the product is allowed or prohibited.

2. For the academics, this study is something that need to be carried out further research in other related matters, especially in the regulation of *tawarruq* contracts in Indonesia, such as the relevance of the fatwa on implementation in LKS or non-LKS.
3. For future researchers to be able to study more deeply especially in the regulation of *tawarruq* contracts, so the researchers can find something that is new to do research.

BIBLIOGRAPHY

BOOKS

- Abdussalam, 'Izzuddin 'Abdul 'Aziz bin. *قواعد الأحكام في مصالح الأنام*. Beirut: Dar al-Ma'arif, 1991.
- Al-'Anshani, Muhammad bin Ismail. *سبل السلام، الجوز ٣*. Riyadh: Maktabah al-Ma'arif Publishing and Distribution, 2006.
- Al-Barkati, Muhammad al-Amim al-Ihsan al-Mujaddi. *قواعد الفقه*. Karachi: الصدق ببلشرز, 1986.
- Al-Bukhari. *صحيح البخاري - ط الشعب، المجلد التاسع*. Kairo: Dar al-Sya'ab, 1987.
- Al-Bukhari. *صحيح البخاري* Vol. 5, Trans. by Muhammad Muhsin Khan. Riyadh: Dar al-Salam Publishing and Distribution, 2012.
- Al-Mardawi. *الإنصاف في معرفة، ج ٤*. Beirut: Dar al-Ihya' al-Turath al-Arabi, 1956.
- Al-Suyuti. *الأشباه والنظائر*. Beirut: Dar al-Kutub al-'Ilmiyah, 1990.
- Al-Syaukani. *نيل الأوطار، ج ٤*. Mesir: Dar al-Hadith, 1993.
- Arfa, Faisar Ananda. *Metode Penelitian Hukum Islam*. Bandung: Citrapustaka Media Perintis, 2010.
- Arifin, Zaenal. *Akad Mudharabah*. Indramayu: CV. Adanu Abimata, 2011.
- Asnaini, and Herlina Yustati. *Lembaga Keuangan Syari'ah Teori dan Praktiknya di Indonesia*. Yogyakarta: Pustaka Belajar, 2017.
- Bahrudin, Moh. *Ilmu Ushul Fiqih*. Lampung: CV. Anugrah Pratama Raharja, 2019.
- Bank Negara Malaysia. *Resolusi Syariah dalam Kewangan Islam*. Malaysia: Bank Negara Malaysia, 2010.
- Hanbal, Ahmad bin. *مسند الإمام أحمد بن حنبل ٢٤*. Beirut: Ar-Risalah al-'Alamiyah, 2008.
- Hakim, Abdul Hamid. *مبادي أولية في اصول الفقه و القواعد الفقهيّة*, Trans. Sukanan and Khairudin. KSI Al-Khoirot.com, 2023.
- Haroen, Nasrun. *Ushul Fiqh I*. Jakarta: Logos Wacana Ilmu, 1997.
- Hasan, Ahmad Farroh. *Fiqh Muamalah dari Klasik Hingga Kontemporer*. Malang: UIN-Maliki Press, 2018.
- Humam, Ibnu. *فتح القدير، ج ٧*. Beirut: Dar al-Kutub al-'Ilmiyah, 1993.
- Ibrahim, Johnny. *Teori & Metodologi Penelitian Hukum Normatif*. Malang: Bayumedia Publishing, 2006.

- Ishaq. *Metode Penelitian Hukum dan Penulisan Skripsi, Tesis, serta Disertasi*. Bandung: Penerbit Alfabeta, 2017.
- Majah, Ibnu. سنن ابن ماجه، الجوز ١. Beirut: Darul Fikr, 1994.
- Majah, Ibnu. سنن ابن ماجه، ج ٢. Riyadh: Maktabah al-Ma'arif Publishing and Distribution, 1996.
- Muhaimin. *Metode Penelitian Hukum*. Mataram: Mataram University Press, 2020.
- Muslim. صحيح مسلم، الجوز ٣. Beirut: 'Alim al-Kutub, 1998.
- Nasution, Muhammad Syukri Albani. *Filsafat Hukum Islam*. Jakarta: PT. Raja Grafindo Persada, 2012.
- Qudamah, Ibnu. المغني ت، ج ٧. Riyadh: 'Alim al-Kutub, 1997.
- Qudamah, Ibnu. المغني ط، ج ٥. Kairo: مكتبة القاهرة، 1968.
- Dahlan, Abd Rahman. *Ushul Fiqh*. Cet-2. Jakarta: Amzah, 2011.
- Sabiq, Sayyid. *Fiqh Sunnah*, Jilid 5 Trans. Jakarta: Cakrawala, 2018.
- Sudiarti, Sri. *Fiqh Muamalah Kontemporer*. Medan: FEBI UIN-SU Press, 2018.
- The Sharia Board of the Authority. المعايير الشرعية. Kuwait: الإمتياز لإستثمار، 2010.
- The Team for The Preparation of The Kuwait Islamic Fiqh Encyclopedia. *Encyclopedia of Fiqh*. Kuwait: وزارة الأوقاف الكويتية، 1983-2006.
- Tirmidzi. سنن الترمذي، المجلد الثاني. Riyadh: Dar al-Salam Publishing and Distribution, 2002.
- Khalaf, Abdul Wahab. *Ilmu Ushul Fiqih*. Kairo: Maktabah Da'watul Islam, 1956.
- Zuhaili, Wahbah. *Fiqh Islam Wa Adillatuhu*, Jilid 5 Trans. Jakarta: Gema Insani, 2011.
- دار السلام للنشر و التوزيع، 1997.

JOURNALS

- Abdad, M. Zaidi. "Signifikansi Fatwa DSN MUI Terhadap Perkembangan Ekonomi Syariah Di Indonesia", *Jurnal Hukum dan Ekonomi Islam* Vol. 18(2) (2019), <http://www.istinbath.or.id/index.php/ijhi/article/view/177>
- Ariyadi. "Metodologi Istinbath Hukum Prof. Dr. Wahbah az Zuhaili", *Jurnal Hadratul Madaniyah*, Volume 4 Issue I (2017).
- Suganda, Asep Dadan. "Analisis Teori Bai' Tawarruq dalam Muamalah Maliyah", *Jurnal Islamiconomic*, Vol.6 No.1 (2015), <https://journal.islamiconomic.or.id/index.php/ijei/article/view/6>
- Ilyas, Rahmat. "Konsep Pembiayaan dalam Perbankan Syari'ah", *Jurnal Penelitian* Vol. 9 No. 1 (2015), <https://journal.iainkudus.ac.id/index.php/jurnalPenelitian/article/view/859/805>

- Kholifah, Nur and Miftakhul Rohman. "Metodologi Istinbath Hukum Imam Asy-Syafi'i", *Jurnal Sinda* Vol. 2(2) (2022), <https://doi.org/10.28926/sinda.v2i2.469>
- Komarudin, Parman and Muhammad Syarif Hidayatullah. "Analysis of Qiyās Tawarruq Transactions with Bai' Al-'Īnah", *Nukhbatul 'Ulum: Jurnal Bidang Kajian Islam*, Vol. 7, No. 1 (2021), <https://doi.org/10.36701/nukhbah.v7i1.317>
- Muhammad, Nova Effenty. "Fatwa dalam Pemikiran Hukum Islam", *Al-Mizan*, Vol. 12(1) (2016), <https://media.neliti.com/media/publications/289950-fatwa-dalam-pemikiran-hukum-islam-cc4218de.pdf>
- Nurhadi. "Pembiayaan dan Kredit di Lembaga Keuangan", *Jurnal Tabarru': Islamic Banking and Finance*, Vol. 1 No. 2 (2018), <https://journal.uir.ac.id/index.php/tabarru/article/download/2804/15>
- Samsuri, Ali. "Membincang Konsep Tawarruq dalam Dunia Perbankan Dewasa Ini", *Universum*, Vol. 9 No. 1 (2015), <http://repository.iainkediri.ac.id/353/1/70-275-1-PB.pdf>
- Syarif, Fitrihanur. "Perkembangan Hukum Ekonomi Syariah di Indonesia", *Jurnal Pleno Jure*, Vol. 9 (2) (2019), <https://doi.org/10.37541/plenojure.v8i2.38>
- Tamam, Ahmad Badrut. "Kedudukan Fatwa Majelis Ulama Indonesia (MUI) dan Fatwa Dewan Syariah Nasional (DSN) dalam Sistem Hukum Indonesia", *Al-Musthofa*, Vol. 4 (2) (2021), <https://ejournal.iaitabaha.ac.id/index.php/musthofa/article/download/739/532>
- Ulpah, Mariya. "Konsep Pembiayaan dalam Perbankan Syariah", *Madani Syari'ah*, Vol. 3 No.2 (2020), <https://stai-binamadani.ejournal.id/MadaniSyariah/article/download/208/174>
- Widyanto, Anton. "Pengembangan Fiqih di Zaman Modern", *Jurnal Ilmiah Islam Futura* Vol. 10 No. 2 (2011), <https://jurnal.ar-raniry.ac.id/index.php/islamfutura/article/view/46/41>
- Zahara, Fatimah and R. Deddy Harryanto. "Implementasi Akad Tawarruq dalam Perbankan Syariah di Indonesia", *Ijtihad: Jurnal Hukum Islam dan Pranata Sosial*, Vol. 35(2) (2019), <https://journals.fasya.uinib.org/index.php/ijtihad/article/view/17>
- Zuhaili, Wahbah. "Tawarruq, Its Essence and Its Types: Mainstream Tawarruq and Organized Tawarruq", (2009), <https://www.iefpedia.com/english/wp-content/uploads/2009/09/>

DICTIONARY

Yunus, Mahmud. *Kamus Arab Indonesia*. Jakarta: PT. Hidakarya Agung, 1989.

STATUTORY

Central Bank of Malaysia Act 2009.

Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia

Law No. 10 of 1998 about Amandement of Law No. 7 of 1992 Concerning Banking.

Policy Document Tawarruq (BNM/RH/PD 028-8).

Principle in The Commodity Exchange.

WEBSITE/INTERNET

- Aldi, Adi, Andika, and Anisa. "Dinamika Tawarruq sebagai Inovasi Produk Perbankan Syariah", KNEKS, September 18, 2020, accessed on October 4, 2022, <https://knks.go.id/berita/298/dinamika-tawarruq-sebagai-inovasi-produk-perbankan-syariah?category=1>
- Andziri, Qumi. "Akad Pengalihan Utang Berdasarkan Fatwa Dewan Syariah Nasional (DSN) MUI dan Resolusi Majelis Penasihat Syariah (MPS) Malaysia", (Magister Theses, Universitas Islam Negeri Syarif Hidayatullah Jakarta, Jakarta, 2018), <https://repository.uinjkt.ac.id/dspace/bitstream/123456789/44008/1/QUMI%20ANDZIRI-FSH.pdf>
- Baihaqi. "Pengaruh Fatwa DSN MUI terhadap Pelaksanaan Transaksi Tawarruq", (Magister Thesis, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2017), 216, <https://repository.uinjkt.ac.id/dspace/handle/123456789/41587>
- Herman, Nurfajri. "Konsep Akad Tawarruq Menurut Mazhab Syafi'i dan Mazhab Hanbali (Studi Komparatif)", (Undergraduate Thesis, Institut Agama Islam Negeri Parepare, 2022).
- Lukman, Gulbudin Hekmatyar bin. "Fatwa DSN-MUI dan MPS BNM Tentang Musyarakah (Analisis atas Dalil dan Metode *Istinbāt al-Hukmi*)", (Undergraduate Thesis, Universitas Islam Negeri Ar-Raniry Banda Aceh, 2018), <https://repository.ar-raniry.ac.id/id/eprint/3364/1/Gulbuddin%20Hekmatyar%20bin%20Lukman%20.pdf>
- Maksum, Muhammad. "Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia dalam Merespon Produk-Produk Ekonomi Syariah Tahun 2000-2011 (Studi Perbandingan Dengan Fatwa Majelis Penasihat Syariah Bank Negara Malaysia)", (Doctoral Thesis, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2013).
- Nurhisam, Luqman. "Bai' Al-Tawarruq Perspektif Dewan Syariah Nasional Indonesia dan Shariah Advisory Council Malaysia" (Magister thesis, Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2016), <https://digilib.uin-suka.ac.id/id/eprint/20726/>
- Omar, Nurasmaa Hawa binti. "Pelaksanaan Sistem Pembiayaan Bai' Al Tawarruq pada Bank Islam Malaysia Berhad (BIMB) Cabang Selangor dalam Perspektif Hukum Islam", (Undergraduate Thesis, Universitas Islam Negeri Ar-Raniry Banda Aceh, 2018), <https://repository.ar-raniry.ac.id/id/eprint/6221/2/Nurasmaa%20Hawa%20Binti%20Omar.pdf>
- Rahmah, Widiya Siti. "Perbandingan Pemikiran Ibnu Taimiyah dan Imam Ali Al-Mardawi terhadap Transaksi Tawarruq dan Implementasinya dalam Tinjauan Fatwa DSN-MUI No.82/DSN-MUI/VIII/2011", (Undergraduate Thesis, Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2021)

ATTACHMENT

The appendix contains the Regulation of *tawarruq* Indonesia and Malaysia that is Fatwa DSN-MUI No. 82 of 2011 about Commodity Trading based on Sharia Principle in The Commodity Exchange and Policy Document *Tawarruq* (BNM/RH/PD 028-8) as attached on the next sheet.

CURRICULUM VITAE

Name : Rifqatus Salsabila
Place of Birth : Muara Enim
Date of Birth : April, 14th 2001
Address : Kec. Lawang Kidul, Kab. Muara Enim, Sumatera Selatan
Gender : Female
Email : rifqatuss@gmail.com
Formal Education : UIN Maulana Malik Ibrahim Malang (S-1)