Special Issue: A Comparative Perspective on Asia

**Tawliya and Ishrāk in the Formative Period of Islamic Law**

YANAGIHASI Hiroyuki

I. Introduction
II. Trust sales (*buyūr al-amāna*)
III. *Tawliya*
IV. *Ishrāk*
V. Conclusion

イスラール法形成期におけるタウリヤとイシュラーカ

柳橋博之

後世のハナフィー派はタウリヤを、「信頼売買」の一つとして定義している。同派は、タウリヤにおいては、売主が目的物の取得に要した原価を表示し、それと同額で転売することから、これを商取引に類い賃主を保護することを目的とする売買と解したのである。しかしイスラーム法形成期の8世紀の少しくとも初頭においては、タウリヤが締結される場合、賃主が目的物を転売することによって得られる転売益について売主が一定の取り分を留保することが予定されており、従ってタウリヤは一種の組合契約であった。しかし、タウリヤは形式上は売買であって、所有権を移転する機能を有することから、その締結後、ないしは少なくとも目的物の引渡しが完了した後には、その滅失・毁損について売主は危
I. Introduction

In Islamic law, as in the modern laws, ownership implies the right to profit from and dispose of the object. In the first centuries of Islam, clauses that place restraint upon such a right were prohibited: for example, *bay' al-thunyā*, by which the seller reserves the right to repurchase the object at the price for which he has sold it to the buyer, was prohibited, because it is at variance with the concept of ownership. In the following I take up the example of *tawliya* to show the process by which the classical concept of ownership was formed.

At the same time, I will shed light on one of the origins of commercial partnership by analyzing the doctrinal development of *tawliya*. To date there are few detailed studies on the origins of commercial partnerships in Islamic law. In his *Partnership and Profit in Medieval Islam* Abraham L. Udovitch writes that in the *Muwatta*’ “[c]ommercial partnership is alluded to only in passing and not at all systematically” and that in the *Mudawwana* Mālik discusses the commercial partnership in great details. (1) Then Udovitch writes:

This omission is puzzling since other forms of commercial association, such as the *qirād* (*commenda*) and the *musāqāt* are systematically and thoroughly treated. The exclusion of so important an institution as partnership from its purview is perhaps to be explained by the fact that in the *Muwatta*, Mālik, while aiming to give a survey of law and justice according to *ijmā* (consensus) of Islam in Madina and to codify and systematize the customary law of Madina, did not at the same time intend the *Muwatta* to serve as a comprehensive and all-inclusive legal code. (2)

Indeed, in the *Aṣl al-Shaybānī* (132-189/749-805), a contemporary of Mālik, discusses the commercial partnership at length. But he refers to it only sporadically in his *Kitāb al-ḥujiya ʿalā ahl al-Madīna*, in which he attempts to demonstrate the superiority of Kufan legal doctrine, especially that of Abū Ḥanīfa, over that of the Medinan jurists. In addition, in the *Mudawwana* no opinion is ascribed to a Medinan jurist prior to Mālik on the subject of *mufāwada*, a kind of commercial partnership, and Ibn al-Qāsim states that he has not heard from Mālik about ‘*inān*, another kind of commercial partnership, nor has met in the
Hijaz anyone who knows anything about it. (3) We may therefore infer that the infrequency with which the commercial partnership is referred to in the Kitāb al-κuyja is a function of the fact that the Medinan jurists had not yet formed a system on this matter comparable to the Iraqi system, when al-Shaybānī was acquainted with the Medinan doctrine, i.e. probably when he studied with Mālik. (4)

However, the commercial partnership must have been a very important institution, as Udovitch notes. Why was there not an established system in Medina prior to the lifetime of Mālik or al-Shaybānī? One possible answer to this question is that the commercial partnership was introduced for the first time in the lifetime of these two jurists.

If so, we are tempted to ask if there was any precursor to the commercial partnership. To anticipate the conclusion, I shall argue that the tawliya, among others, served as a kind of commercial partnership before the commercial partnerships known as mufāwaḍa and ‘inān were introduced. With the introduction of the new forms of commercial partnership, the old ones lost their function and ceased to be of economic importance, perhaps except for the salam (a sale in which the buyer prepays the price to the seller for the object to be delivered at the end of a specified date). In the following pages I will try to substantiate my view.

II. Trust sales (buyū‘ al-amāna)

The Hanafi jurist al-Kāsānī classifies murābaḥa and tawliya as “trust sales (buyū‘ al-amāna),” and writes, “[this is] because the buyer places trust in the seller with regard to the amount of money the seller gives him as the original cost [in acquiring the object] without making him produce witnesses or making him swear.” (5) The Hanafi jurist al-Marghīnānī defines murābaḥa as “transfer of ownership of an object that one has acquired in the original contract at a surcharge on the original cost.” (6) The Ṣafī jurist al-Shīrāzī is more concrete.

Murābaḥa means the selling [of an object] whereby the seller refers to the original cost (ra’s al-māl, literally “capital”) and the percentage of profit. For example, the seller says, “The original price of this object was 100 dirhams and I will sell it on the basis of 100 dirhams and one dirham profit per ten dirhams.” (7)

Here the surcharge is defined as a percentage of the original cost, but there is no harm in defining it as a fixed amount. (8) In the original cost are included expenses (nafaqā)
on services, e.g. for fulling or sewing, rent for transport, foodstuffs and clothes for a slave etc., in addition to the original price for which the seller purchased the object of a *murābaḥa*.\(^9\)

*Tawliya* is resale at the original cost, without any profit or loss for the seller.\(^{10}\) The rubric of "trust sales" may include *waḍī'a* or *muwāda'a* and *ishrāk*. *Waḍī'a* is resale at discount from the original cost.\(^{11}\) *Ishrāk* is sale of a *tawliya* for a share of the object.

What is the purpose of these sales? According to al-Marghīnānī *murābaḥa* and *tawliya* serve certain social needs, for one who is not accustomed to commercial transactions needs to rely on merchants to obtain goods at a reasonable price. This is why these sales are based on trust, i.e. they are intended to prevent a fraud.\(^{12}\) Al-Kāsānī writes that the buyer in a *murābaḥa* or a *tawliya* trusts the statement of the seller with regard to the original cost without making him produce witnesses or making him swear; thus, it is necessary to safeguard the interests of the buyer in case of fraud.\(^{13}\)

In an ordinary sale (sometimes called *musāwama* or *mukāyasa*) the seller does not designate either the original cost or the profit. The buyer agrees to the sale at his own risk, and he may not cancel the sale or require the seller to compensate him for any loss he suffers, if the seller sells the object at price higher than he he paid for it. But if the seller designates the original cost and the profit, on the basis of which the buyer agrees to the sale, the buyer can cancel the sale in the case of fraud by the seller in his statement. By definition *murābaḥa* and *tawliya* contain the seller's statement as to the original cost and the profit: the buyer can therefore cancel it in the case of fraud. It is assumed that the seller will not dare to make a false statement if he takes into consideration the possibility of cancellation. This is why the Hanafis regard *murābaḥa* and *tawliya* as a sale that seeks to protect a buyer who is not accustomed to commercial transactions.

Most contemporary scholars, such as al-Sanhūrī, al-Mahmūdī and Rayner, accept the explanation of the Hanafis.\(^{14}\) Dib, who has made a detailed analysis of trust sales, writes as follows: in general fraud by itself confers no right on the contracting parties, especially the buyer. Only when flagrant misrepresentation (*ghabn fāḥish, ghubn fāḥish*) reaches a certain amount in addition to fraud by the seller can the buyer rescind the sale. This is because only in such a case it is clear that the buyer made a mistake about the price or the object and that the contract was not formed in a normal way. Trust sales are an exception to this rule. Because the buyer is less vigilant than in an ordinary sale and the fraud of the seller is particularly unethical considering the trust the buyer puts in his statement, jurists give the deceived buyer the right to cancel the contract or to make the seller compensate him for the difference between the sum he paid on the basis of the stated original cost and the sum calculated on the basis of the true original cost, even if the difference

---

\(^{9}\) *Ali bin Abū Tālīfa*, *Tihār al-Dīn*, 3, 112.

\(^{10}\) *Ali bin Abū Tālīfa*, *Tihār al-Dīn*, 3, 111.

\(^{11}\) *Ali bin Abū Tālīfa*, *Tihār al-Dīn*, 3, 110.

\(^{12}\) *Ali bin Abū Tālīfa*, *Tihār al-Dīn*, 3, 110.

\(^{13}\) *Ali bin Abū Tālīfa*, *Tihār al-Dīn*, 3, 110.

\(^{14}\) *Ali bin Abū Tālīfa*, *Tihār al-Dīn*, 3, 110.
is small.\(^{(15)}\)

However, it is doubtful that trust sales originally were intended to safeguard the interests of the buyer, for three reasons. First, as far as I know, jurists other than the Hanafis do not explain their purpose. It is interesting to note, in this connection, that the Malikis and the Hanbalis refer to bay' al-istiṣāl or bay' al-isti'māna, a sale that obviously is intended to safeguard a buyer who is not accustomed to commercial transactions. According to the Maliki jurist Ibn Rushd al-Jadd, this is a sale in which the seller or the buyer acknowledges that he has no idea of the market value of the object and asks the other party (when he is the buyer) to pay the same amount of money as he would pay to others in return for it or (when he is the seller) to receive the same amount of money that he would receive from others in return for it.\(^{(16)}\) Indeed it is no wonder that there was more than one institution that served the same purpose. But how can we explain the fact that Ibn Rushd al-Jadd in his description of murābaha and tawliya does not assume, at least explicitly, that the buyer knows little about commercial transactions?\(^{(17)}\) Second, one engages in murābaha or tawliya only when the contracting parties agree to it, i.e., they are not formed automatically as, for example, when the buyer knows little about the market. However, it is sufficient for a buyer who fears that the seller may deceive him to ask the seller to designate the original cost so that he may subsequently rescind the sale on the ground of fraud. The question arises: why are murābaha and tawliya understood as a type of sale distinct from an ordinary sale, rather than as a variation of an ordinary sale which is characterized only by the seller's statement of the original cost and the profit? Are there any other features peculiar to murābaha and tawliya? Third, and the most important, they are a number of rules that cannot be explained if we assume that they are intended to safeguard the buyer. To answer these questions, I will analyze the rules governing the tawliya.

III. Tawliya

The Hanafi jurist al-Marghīnānī defined tawliya as resale of an object for the original cost for which the seller acquired it.\(^{(18)}\) To repeat, its rationale for the Hanafis is to safeguard a buyer who knows little about commercial transactions by obligating the seller to designate the original cost.

However, we find the following definition in Lisān al-‘arab: “making a third party take over the sale which someone has concluded at a certain price for the same price.” \(^{(19)}\) According to this definition, which is in accordance with the literal meaning of the term “tawliya”, i.e. “assigning,” “putting in charge,” or “appointing,” the tawliya consists in sub-
rogating of the original seller by a third person. What is the purpose of such a transaction? The idea that occurs to us is that a person who purchased an object on credit, but is unable to pay the price, is forced to transfer the object for the original price. In fact, the Maliki jurist Ibn 'Arafa (d.804/1401) defines tawliya as “the transfer of what one has bought to a person other than the seller for the original price [in exchange for the debt he owes to the transferee] (tasżyr mushtarin mā 'shtarā-hu li-ghayrī bāʾī-i-hi bi-thamani-hi).” (20) I have added the interpolation following another Maliki jurist al-Tasūli (d.1258/1842), who defines “tasżyr” as “a contract to give an immovable, a movable or anything else as a substitute for an existing debt (aqd 'alā da'f asl aw 'ard aw ghayri-hā fī dayn sābiq).” (21)

Such a case is alluded to in the Mustakhrajā of al-'Utbī. A has a credit of ten dirhams against B, who has purchased from C wheat for which he has not yet paid the price and whose delivery has not yet been effectuated. Then A demands that B sell him the wheat in a tawliya, with the price being set off by A’s credit against B. Mālik sees no harm in this. (22) We imagine that B, who was unable to pay his debt to A, was forced to transfer the wheat that he had purchased from a third person (C).

A more important form of tawliya or a similar transaction, from an economic point of view, is suggested in an anecdote cited in the Muwatā’ compiled by al-Shaybānī: a certain 'Alā’ b. 'Abd al-Rahmān b. Ya ’qūb transmits the following narration of his grandfather Ya’qūb.

When I was selling cloth during the reign of 'Umar b. al-Khaṭṭāb, 'Umar said to me, “The Persians cannot sell in our suq, for they hold a different belief from ours and are dishonest in weighing and measuring.” I went to see 'Uthmān b. 'Affān and asked him, “What do you think of an easy prey?” He said, “What is that?” I said, “I know a place where someone sells cloth at such a low price that he can hardly make a profit. What do you think if I buy and then resell it to you?” He said, “OK.” I went and bought cloth and returned to the house of 'Uthmān, where I left them behind. When he came home and saw the folded cloth, he said, “What is this?” They said, “Ya'qūb brought this cloth.” He said, “Summon him to me.” When I came, he asked, “What is this?” I said, “This is what I talked to you about.” He said, “Have you examined them?” I said, “I am convinced that it will satisfy you, but I am afraid of the retainer of 'Umar.” He said, “Sure.” So I went, accompanied by 'Uthmañ, to 'Umar's retainer. 'Uthmān said, “Ya'qūb sells my cloth, so don't hinder him.” They said, “Yes.” Then I brought the cloth to sell it in the suq [of the Arabs] and it did not take long before I put the proceeds [of the sales] in a bag and brought them back to 'Uthmān, accompanied by the original seller of the cloth. I said to 'Uthmān, “Please count what belongs to you.” He counted and much money belonged to him. I said to 'Uthmān, “I
did not harm anyone in this transaction.” He said, “May God reward you,” and he was satisfied. I said, “I know another place similar to or more profitable than this.” He said, “Could you do it again?” I said, “If you want.” He said, “Yes, please.” I said, “All right, as I want to make a profit, conclude an ishrāk with me (fa-ashrik-nī).” He said, “All right, between you and me.” (23)

From a legal point of view, Ya‘qūb first purchased cloth on credit. Then he sold them to ‘Uthmān in a tawliya, as indicated by the last statement of Ya‘qūb, and subsequently sold them acting as ‘Uthmān’s agent. After he sold them all, he used the proceeds to pay the price of the original sale. ‘Uthmān, who could make a good profit from this transaction, promised to conclude an ishrāk for Ya‘qūb in future. In this transaction, Ya‘qūb gained nothing, but al-Shaybānī’s comment on this anecdote suggests an economic function of a tawliya.

We adopt this position. There is no harm in two persons jointly purchasing an object on credit if neither of them has capital, on the condition that the profit will be distributed among them and they suffer from a loss in the same proportion. But if only one of them buys the object and sells the object, and his share is not greater than that of his partner [viz. the seller of the tawliya], this is not permitted, for one of them profits from an object the risk of which is attributed to his partner. This is the view of Abū Ḥanīfa and all of our colleagues. (24)

The third sentence indicates that it is permitted to distribute the profit earned by reselling the object between the contracting parties of the tawliya, if the share of the seller is smaller than that of the buyer. It may appear to be strange that the seller, who retains no share in the object when he sells it in a tawliya, has a share in the profit. In the following example, Shurayḥ prohibits the seller from retaining a share.

Two persons brought a case to Shurayḥ. One of them sold a sheep to the other for 20 dirhams, remaining a co-owner in it (wa-huwa sharik fi-hā). Subsequently the buyer resold it [to a third person] for 21 dirhams, and retained the amount of money for which he bought it [viz. 20 dirhams] and one dirham. Then they brought this case to Shurayḥ. He said to the seller, “You wanted a ribā, but it did not increase to your benefit (inna-ka aratta al-ribā fa-lam yarbū la-ka).” He was a co-owner (sharīk) only as regards one dirham. (25)
The last sentence, "He was a co-owner only as regards one dirham" means that the seller has retained no share in the object, despite the seller’s intention. "[R]ibā", i.e. unlawful gain, means the profit the seller demanded as accruing from the share he pretended to retain in the sheep, as indicated in the second sentence.

What is the point of the disagreement between the seller and Shurayḥ? It is reported that Ibn Sīrīn disapproved that “you sell an object retaining one-fourth of it, so long as it is in its original state (tabī‘a sil‘ata-ka mā kānat wa-tashtariku fī-hā bi‘l-rub‘).” (26) The meaning of this statement, in particular “mā kānat” which I translate as “so long as it is in its original state,” is not clear. In my view it means that the seller who spent money to increase its value by improving it (e.g. by conversion) or transporting it from one place to another where it sells for a good price can demand a reward for his efforts.

Then we can assume as follows: (1) according to the understanding that the expenses incurred by the seller are connected with the partnership, both the expenses and that part of the profit which derives from them are shared by the seller and the buyer; (2) if, to the contrary, we assume that the seller alone contributed to adding value to the object, the seller may claim an extra share of the profit. Let us try to calculate what is expected to belong to the seller according to the two understandings. Let us assume that the seller and the buyer agreed to distribute the profit between them in the ratio of $x : 1-x$.

According to the former understanding, in the case in which the seller paid $b$ dirhams for a variety of expenses (other than the original price) and the expected price of the object is $p$ dirhams, the amount of money the seller expects to receive is

$$s = \{p-(a+b)\}x$$

According to the second understanding, the seller who is forced to sell the object for $a$ dirhams will reserve a certain share of the object to demand a share of the profit corresponding to the expenses he has paid. In this case, the percentage of the share in relation to the share of the original price will be equal to $\frac{b}{a}$, i.e. the ratio of the expenses that the seller paid to the original price of the object. Thus, the expected profit of the seller is

$$s = \{p-(a+b)\}\frac{x+b}{a} = \{p-(a+b)\}\frac{ax+b}{a+b}$$

The following diagram shows the ratio of the expected profit that belongs to the buyer (\frac{ax}{a+b}), that of the seller which corresponds to the original price of the object (\frac{a(1-x)}{a+b})

| \frac{ax}{a+b} | \frac{a(1-x)}{a+b} | \frac{b}{a+b} |
and that of the seller which corresponds to its added value \( \frac{b}{a+b} \). The entire profit is equal to 1.

This shows that the seller, who has added value to the object by paying expenses, can demand an extra share of the object. I will show that this amounts to giving the seller a share of that part of the resale price which exceeds the profit. For this purpose, let us reformulate \( s \) as

\[
s = (p-(a+b)) \left[ 1 + \frac{b(1-x)}{(a+b)x} \right] x \geq (p-(a+b))x
\]

As \( p-(a+b) \) is the profit generated by the resale, this amounts to saying that the seller has a share of whatever exceeds the profit (i.e. \( \frac{100b(p-(a+b))(1-x)}{(a+b)x} \% \)). The last sentence in the above-cited text, “He was a co-owner (\( \text{\texttt{sharik}} \)) only as regards one dirham” seeks to prevent the seller from obtaining such an extra share of the object.

It should be noted, however, that the opinions attributed to Shurayh and Ibn Sirīn are both based on the idea that the seller who has sold an object in a \( \text{\texttt{tawliya}} \) can claim a certain share in the difference between the price of the \( \text{\texttt{tawliya}} \) and the price for which the buyer resells it. The economic function of the \( \text{\texttt{tawliya}} \) may be as follows: suppose, for example, that a local merchant purchased an item (e.g. foodstuffs) in a suq. If he resells it in the same suq or one nearby, he can make only a small profit. But if he has a long-distance trader as a partner, he may possibly make a greater profit. A \( \text{\texttt{tawliya}} \) contract appears to facilitate such an objective, among others: the local merchant sells an object in \( \text{\texttt{tawliya}} \) to the long-distance trader, who, at his own risk, resells it in a distant place for a higher price. The difference between the resale price and the price of the \( \text{\texttt{tawliya}} \) is the profit, which is divided between the local merchant and the long-distance trader. The local merchant serves as an agent for the long-distance merchant, and his share of the profit is a remuneration for his agency.

Recall, however, that Ya'qūb, who once sold cloth in a \( \text{\texttt{tawliya}} \) to `Uthmān, said, “All right, as I want to make a profit, conclude an \( \text{\texttt{ishrāk}} \) with me (\( \text{\texttt{fa-\texttt{ashrik}-\texttt{ni}}}) \).” This is to say, the seller in a \( \text{\texttt{tawliya}} \) cannot claim a share of the profit: in other words, the resale is completely separated from the \( \text{\texttt{tawliya}} \). This is suggested in the statement: “a \( \text{\texttt{tawliya}} \) is a sale (\( \text{\texttt{al-tawliya bay}} \)),” attributed to the Kufan jurists Ibn ‘Amr al-Salmānī al-Murādī al-Kūfī (d.72 or 73 or 74/691 or 692 or 693) and al-Sha’bī (born between 16 and 21/637 and 641; died between 103 and 110/721 and 728).\(^{27}\) Al-Ḥasan al-BAṣrī (21-110/642-728) is reported to have regarded a \( \text{\texttt{tawliya}} \) as a sale.\(^{28}\)

The same understanding is suggested in the statement that al-Taymī is reported to
have transmitted from his father, “I disapprove of someone saying, ‘I sell you [an object], but I reserve a half of it.’ No, he should say, ‘I sell you a half of it.” (29) Al-Taymī’s father disapproved of a person who sold an object (rather than a share of it) in a tawliya, but reserves a share of the profit generated by the resale: he insisted that in order to claim a share of the profit the seller must reserve a share in the object itself. In contrast, Ibrāhīm al-Nakha‘ī is reported to have said: “There is no harm if you say about your goods, ‘I sell it to you, but I reserve a half of it,’ or ‘I sell it to you, but I reserve a quarter of it.’” (30) It is reported that “Ibn Sīrīn did not disapprove of it [viz. tawliya]. Subsequently he disapproved of it.” (31) This suggests that he changed his mind to support the view of al-Taymī’s father.

It is not clear why Iraqi jurists disapproved of a tawliya as a form of partnership. I suspect that this is because of the principle that one cannot profit from an object for which one does not bear the risk. According to this principle, a person who has sold an object in a tawliya presumably does not assume the risk of loss, and he therefore cannot claim a share in the profit generated by the resale.

The following example indicates that al-Shaybānī in fact regards a tawliya as separate from the original sale. A sold his house worth 3000 dinars to B, who, it was subsequently determined, was not an heir of A, for 3000 dinars and B took possession of the house. Then C, who later proved to be one of A’s heirs, purchased the house from B in a tawliya and then A, who “had become sick (marida),” reduced the price of the sale between himself and B to 2000 dinars. According to al-Shaybānī, the price of the tawliya should be reduced by 1000 dirhams. (32)

The rule underlying this solutions is that dispositions made by a person who “has become sick,” or technically, who suffers from “death-sickness (marad al-mawt)” are valid only insofar as they do not diminish the value of his property if they are made in favor of one of his heirs. (33) The term “death-sickness” in its technical sense signifies a true sickness and certain circumstances which “cause a fear of death (mukhawwil)” and which in fact leads directly to death, sometimes expressed by the sentence “the sickness from which one died (al-marat alladhī māta fi-hī)” . For example, a prisoner who has been sentenced to death, a soldier on the battlefield, and a voyager on a ship struck by a storm are all considered to suffer from a death-sickness, on the condition that they actually die in these circumstances. (34) Taking this rule into consideration, we conclude that C is a third person to the original sale, i.e. the house once belonged to B and then belonged to C in a separate sale, so that the rule regulating dispositions by a person suffering from a death-sickness in favor of an heir (C) does not apply.

Conversely, the Medinan jurists continued to regard tawliya as a partnership, and
they generally admit that a transfer of the ownership of foodstuffs is lawful if made by a
transfer of share (*shirk*), a *tawliya* or a cancellation by mutual agreement (*iqāla*).\(^{(35)}\)
According to the Medinan principle, a person is prohibited from selling foodstuffs that he
purchased before he takes possession of them. This rule is a residue of the ancient under-
standing according to which *tawliya* was a partnership. I will return to this point in my dis-
ussion of the *ishrāk*.

Let us say a word about a false statement by the seller of the original cost. Abū Ḥanīfa and Abū Yusuf hold that the buyer in a *tawliya* who is aware of the fraud cannot
rescind the *tawliya*, but that he can demand that the seller reduce the price to the original
cost.\(^{(36)}\) How can we explain their position? Dib has given an answer to this question.

*C'est qu'il s'agit d'une vente subrogative, dans laquelle, par définition même, il ne
saurait être question de gain. On ne peut donc plus mettre l'acquéreur devant le dilemme:
tout prendre ou tout laisser, car, s'il optait pour la première solution, s'il acceptait de verser
au vendeur le surplus de prix réclamé, la vente cesserait par le fait même d'être subrogative;
pour confirmer un acte, il faut d'abord qu'il existe et ici les éléments constitutifs même
feraient défaut.\(^{(37)}\)

That is to say, the *tawliya* consists in subrogating the seller by the buyer in relation
to the original seller. Thus, in the case of affirmation, if the buyer in the *tawliya* owes a
price greater than the original price, the constitutive element of *tawliya*, i.e. the subroga-
tion, disappears. This is the reason why the price in the *tawliya* is reduced to the original
price. This explanation is not necessarily persuasive, for we can thus say about a fraud in a
*murābahā* as follows: the *murābahā* consists in reselling an object at the original cost with
a predetermined margin; therefore the price must be reduced. But Abū Ḥanīfa gives a
deceived buyer the choice between affirming the contract and rescinding it.

In my view, the solution adopted by Abū Ḥanīfa and Abū Yusuf can be justified by
assuming that the seller in a *tawliya* does not have sufficient means, as was probably true
of Ya'qūb. Suppose that a penniless merchant buys goods on credit and resells them in a
*tawliya*, giving a false statement about the original price. If, in this case, the buyer were to
rescind the contract, the original seller might not receive the payment, for the seller (the
original buyer) is penniless. This may have been the substantive reason why Abū Ḥanīfa
and Abū Yusuf do not permit the buyer to rescind the *tawliya*.

Finally, let us consider another case involving a *tawliya*. Mālik permits a person
who purchased foodstuffs or other items in a *salam* to resell them in a *tawliya* before the
payment becomes due.\(^{(38)}\) The object in a *salam* in which the price is paid at the moment

---

**Tawliya and Ishrāk in the Formative Period of Islamic Law (Yanagihashi)**

---

37
of the contract is usually sold at a price lower than its expected price on the date on which performance falls due. For example, the Hanafi jurist al-Sarakhsî states, “The price stipulated in a salam is usually smaller than the market price of the object.” (39) If the buyer in a salam who is in need of cash before the date of payment transfers the object in a tawliya, the buyer of the tawliya can obtain an object that will fetch a price higher than its original price. This seems to have been another economic function of the tawliya.

IV. Ishrâk

The Hanafi jurist al-Samarqandî defines ishrâk as “sale of a tawliya for a share of the object, say half, a third etc. (ba‘y al-tawliya fî ba‘d al-mabî‘, min al-nifs wa-l-thulth wa-ghayr dhâlika).” (40) For example, if a person purchased an object and sells it for 10 dinars, it is a tawliya. If he sells half of the object for 5 dinars, it is an ishrâk. I have mentioned the possible reason why in Iraq the ishrâk was introduced to substitute for the tawliya. But the ishrâk is not explained in detail in the Hanafi works, certainly because it was entirely replaced by several forms of partnership (sharika, shirka), both in theory and practice. For the Hanafis, ishrâk is simply a sale of a share, which is distinct from an ordinary sale only by the fact that the buyer demands no surcharge. Such an understanding of the ishrâk is reflected in the following example: regarding the case of the seller of an ishrâk, who stipulates, in the presence of the original seller, at the moment of the original sale and before they depart from the contractual session, that the original seller is responsible for any defect or eviction in the object, Abû Ḥanîfa holds that the declaration is void, because “the sharika is a sale (al-sharika ba‘y).” (41) The term “sharika” here refers to an ishrâk. He states also as follows: B purchased an object from A and took possession of it. Then B sold a share in the object to C, and B and C paid the price of the original sale directly to A. Subsequently the object became the subject of an eviction. In such a case, C can demand that B pay back the amount of money that C paid to A, while B in his turn can demand that A pay back the entire price of the original sale. (42) This shows that Abû Ḥanîfa regards an ishrâk as separated from the original sale.

In Medina, where the theory of partnership was less developed than in Iraq, some rules show that an ishrâk can create a partnership, in which the seller acts as an agent for the buyer. First, Mâlik states, regarding the case in which a seller who has purchased foodstuffs sells a share of them in an ishrâk without delivering them to the buyer: (1) if the buyer pays that part of the original price which corresponds to the share transferred before the foodstuffs are measured, the ishrâk is valid only when the payment is deferred
to the same date as the date of payment in the original sale; (2) if the foodstuffs have been measured, the *ishrāk* is valid whether it is stipulated that the buyer pays the price on the spot or on credit, for this sale is independent (*bay' musta'naf*) of the original sale.\(^{(43)}\) The rule with regard to the sale of an unascertained object is that ownership transfers to the buyer when the object is specified. Therefore in case (2) the seller resells a share of the object that he owns. As for case (1), the solution adopted suggests that for the *ishrāk* to be valid, both the seller and the buyer must be regarded as the buyers with regard to the original sale; in other words, the seller acquired the object on his own behalf and at the same time for the buyer.

Second, according to Mālik, if the price in the original sale is reduced after an *ishrāk* has been concluded, the price of the *ishrāk* is automatically reduced proportionally.\(^{(44)}\) This solution is easily understood if we assume the existence of an agency or a partnership between the seller and the buyer.

Third, according to the Medinan jurists, if the seller declares, in presence of the original seller, at the moment of the original sale and before they leave the contractual session, that the original seller is responsible for any defect or eviction in the object, the declaration is valid.\(^{(45)}\) In general, if the buyer has disposed of the object by resale, donation or manumission of a slave, the seller is no longer responsible for a defect or eviction.\(^{(46)}\) Therefore, in this case, the share transfers directly from the original seller to the buyer.

At last, let us examine the process by which the Malikis transformed the *ishrāk* into the *‘inān* partnership (for its definition, see below). Ibn Abī Zayd al-Qayrawānī (310-86/922-96) cites the statement of Muḥammad b. al-Mawwāz (180-269 or 281/796-882 or 894) and Ibn Ḥabīb (174-238/790-853): if a person stands by another person who is buying merchandise, without intervening in the sale and, after the sale, he demands that the buyer transfer a share, Mālik holds that the buyer is required to transfer a share (*yushriku*) to him, if he intended to resell the object.\(^{(47)}\) Ibn Abī Zayd adds that Ibn Ḥabīb writes that Mālik gives a merchant the right to demand of another merchant dealing with the same goods as he does to transfer a share of them; and that Ibn ‘Umar is reported to have rendered judgements to that effect.\(^{(48)}\) Ibn al-Mawwāz and Ibn Ḥabīb justify the rule that merchants have such a right as follows: “I admit this because I fear that if it were not for the rule, people would injure one another, so that the rule contributes to public welfare.” \(^{(49)}\) The reason why this rule “contributes to public welfare” is that were it not for this rule, merchants would concur with suq merchants, which would cause a rise in the market price. Rather than prohibiting merchants from intervening in the transactions of other merchants, the Maliki jurists give them the right to demand that the latter accept their offer of an *ishrāk*. 

---

*Tawliya and Ishrāk* in the Formative Period of Islamic Law (Yanagihashi)
Note that so far the name of the partnership created by an ishrāk is not mentioned. But Ibn Rushd al-Jadd writes as follows about the ‘inān partnership (sharikat ‘inān):

It is in general permitted among people when they agree on it. It is binding on the suq merchants (ahl al-aswāq) regarding whatever they purchased for trade (tijāra) without auction (‘alā ghayr al-muzāyada), if the object is foodstuffs found in the suq of foodstuffs destined for traders (ahl al-tijāra) dealing with this kind of item. There is no dispute over this point... As for that which he [viz. a suq merchant] purchased for his house or shop, it is not included in the partnership (sharika), even if someone [viz. his partner] is present at the purchase. There is no dispute over this point.\(^{(50)}\)

It is obvious that the partnership created by an ishrāk Ibn Rushd calls here ‘inān partnership. Ibn al-Qāsim states, “I did not hear of it [viz. ‘inān partnership] from Mālik, and I am not aware of any of the scholars of the Hijaz who knew of it.” \(^{(51)}\) As far as I know, Ibn Abī Zamanayn (d.399/1008) was the first Maliki jurist to define the ‘inān partnership.\(^{(52)}\)

V. Conclusion

Tawliya was originally a sale in which the seller transfers ownership, while reserving only a predetermined share of the profit earned through resale of the object by the buyer. It was therefore a form of commercial partnership. However, it seems that the introduction of the principle that one cannot profit from an object for which one does not bear the risk of loss made the jurists question the validity of the tawliya, for the seller in a tawliya still retain a share in the profit earned from an object that perishes at the buyer’s risk. Several Iraqi jurists prior to Abū Ḥanīfa are reported to have regarded it as a sale, and the rules about the tawliya as conceived by Abū Ḥanīfa are in accordance with such an understanding. But in Medina the tawliya retained its ancient characteristic. The prohibition of the original tawliya may have been one of the origins of the classical concept of ownership in Islamic law, in the sense that it prohibited the seller, who has transferred the ownership of the object, has no right on the profit drawn from it.

Ishrāk can be regarded as a revised form of tawliya. Unlike the seller in a tawliya, the seller in an ishrāk reserves a certain share of the object, with the logical result that he earns the same share of the profit generated by resale of the object by the buyer.
Notes

(4) Al-Shaybānī is said to have visited Medina to study with Mālikī for two or three years, although the date of his visit is unknown. E. Chaumont, "Shaybānī," EI, new edition 9:392b.


Mālik-Yahyā, *Muwaṭṭaʾ*, 3:297, no. 1386; idem, *Muwaṭṭaʾ of Imam Malik ibn Anas*, tr. Aisha Abdurrahman Bewley (London, New York: Kegan Paul International, 1989), 264a. It is noteworthy that the Prophet himself is reported to exclude a transfer of share, a *tawliya* and a cancellation by mutual agreement from the general prohibition of the sale of foodstuff before it is
taken possession of. Saḥnūn, Mudawwana, 4:81; Ṣanʿānī, Muṣannaf, 8:49, no. 14257.


Dib, Essai, 141.

Saḥnūn, Mudawwana, 4:83.


Samarqandi, Tuhfa, 2:133.

Shaybānī, Ḥujja, 2:711.

Shaybānī, Ḥujja, 2:710.

Saḥnūn, Mudawwana, 4:80.

Saḥnūn, Mudawwana, 4:236.


Ibn Abī Zayd, Nawādir, 7:335.

Ibn Abī Zayd, Nawādir, 7:335.

Ibn Rushd al-Jadd, Muqaddamāt, 3:37. For the Maliki ‘inān partnership in a different way, see Udovitch, Partnership, 145-46. For the Ḥanafi ‘inān partnership, see ibid., 119-41.

Saḥnūn, Mudawwana, 5:68, cited in Udovitch, Partnership, 146.

He describes it as, “two persons have a share in an object, the share of one of them not being superior to that of the other partners.” Ibn ‘Abd al-Raḥfīn, Abū Isḥāq Ibrāhīm b. Ḥasan, Muʾīn al-hukkām ‘alā al-qadāyā wa-l-aḥkām, ed. Muḥammad b. Qāsim b. ʿIyād., 2 vols. (Dār al-Gharb al-İslāmî, 1989), 2:530.

東京大学人文社會系研究科助教授
Associate Professor, Graduate School of Humanities and Sociology, The University of Tokyo