

Research Article

The Classical Islamic Law of *Ḥiyal* (Legal Stratagems (LS)): A Concise Introduction

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ABSTRACT

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The application of *Ḥiyal*, which is *Hilah*, means legal stratagem (LS), is a highly discussed topic in Islamic jurisprudence. Moreover, *Ḥiyal* are being categorized into permissible and impermissible types by the majority of Islamic juristic. Recently, the Islamic financial industry has been commonly using the LS as a financial mechanism on an appeal of economic necessity (*Maslahah*). It adopts a doctrinal analysis of the primary and secondary data and documents including the Quranic ayahs, hadith and fiqh principles relevant to *Ḥiyal* and its application. The primary materials include scholarly texts on Quran, hadiths as well as fiqh books, compilation of article and relevant to the subject. This article briefly explains the application of LS and assesses its debate amongst Islamic juristic scholars about the permissibility of LS acceptance in structuring Islamic financial products. However, all legal stratagems are not permissible in Islamic law. Therefore, this study attempts to discuss both permissible and impermissible LS and gives a brief idea about the juridical and customary definitions of the LS and illustrates the broad-ranged classifications mentioned by the earlier scholars.

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1- Introduction

Following the failure of conventional financial economies, ethical financing has gained traction, and Islamic banking and finance (IBF) is gaining popularity even in non-Muslim countries. Nevertheless, certain products offered by IBF have sparked a vigorous discussion and controversy among scholars of Islamic finance. Several scholars have argued that the current practices of Islamic banking and finance (IBF) are not truly Islamic, as they heavily rely on legal stratagems (LS) known as *Ḥiyal*. Examples of these stratagems can be found in the practices of *Murābahah* and *Ijārah*, which are not considered genuine Islamic alternatives to conventional banking and finance, as stated in a report by (al-Ifta' 2008), which are not real Islamic alternatives to conventional banking and finance.¹

This paper attempts to determine the parameters for *Ḥiyal* (legal stratagems) and its position from the Shari'ah perspective. Moreover, the Ḥanafī earlier scholars particularly said that not all LS are prohibited from the viewpoint of Shari'ah, in fact, some are acceptable. Furthermore, those who apply the LS to save themselves from a critical situation and to avoid the prohibited (*Ḥarām*) transaction in a contract will get the reward from Allah.² This study gives a brief idea about the juridical, lexical, and customary definitions of the legal stratagems (LS) and illustrates the broad-ranged classifications mentioned by the earlier scholars.

2- Definition of Legal Stratagem (LS) (*Ḥiyal*)

The term "*Ḥiyal*" in Arabic is the plural form of "*Hilah*," which refers to legitimate means, sharpness, lawful ingenuity,

¹ Mansoori, M. T, "Is "Islamic Banking" Islamic? Analysis of Current Debate on Shari'ah Legitimacy of Islamic Banking and Finance." *Islamic Studies*, Volume 50, No. 3/4, (2011), 383-411.

² Uthmani, Muhammad Taqi. *Ghayr Suwdy Bankaary*. (Karachi: Quranic Studies Publishers), (2009).

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lawful traps, tricks, and lawful stratagems in simple English.³ According to the Arabic dialect, the term *Ḥilah* and its various synonyms, such as *Ḥiyal*, *Tahayyul*, and *Ihtiyal*, all refer to the concept of imagination, intellectual acuity, and proficiency in handling matters.⁴ The origin of *Ḥilah* is *Hāwla*, which signifies the process of transition (*Tahawwul*) from one state to another, possibly through a well-executed strategy that aids in concealing the truth; it could also be an interpretation of the fundamental term *Hāwla* which denotes capability (*Quwwah*). The term "Ḥilah" refers to a method of achieving certain objectives, typically in a hidden or covert manner. Even though the term is more frequently used to describe a method in which there is some negative perspective, it is also used to describe a technique that is prudent and useful⁵, he is referred form "*Al-Mausu'ah Al-Fiqhiyah*."⁶

Another such definition provided by the commentator of Ṣaḥīḥ al-Bukhari, Ibn Ḥajar al-ʿAsqalāniyy, is: "(Ḥiyal are stratagems) which lead one to one's objective through indirect means". Here, too, the definition does not attempt to scrutinize *Ḥiyal* based on any criteria except that it should be an indirect means, leading to the desired objective.

3- The Juridical Meaning of Legal Stratagem (LS)

The term "*Ḥiyal*," which is the plural form of "*Ḥilah*," refers to a legal concept within a specific school of jurisprudence. Further details about this concept will be provided in the following discussion. However, when considering it from a broad perspective, the following explanation may adequately fulfil the criteria for its definition: Ibn Ḥajar provided a concise explanation of *Ḥiyal*, which involves using hidden methods to achieve one's objective.⁷ In the same vein, Ibn Taimiyyah elucidated that *Ḥiyal* are designed to circumvent a duty or authorize a prohibition (*Ḥarām*) through actions that are not inherently implied or prescribed by the *Shari'ah*.⁸ The definition seems to be biased, as it only encompasses the concept of *Ḥiyal*, which is designed to circumvent legal rulings in order to legitimize the illegal or invalidate the permissible. The text does not consider the inclusion of frequently confirmed legal stratagems, known as *Ḥiyal*, in the *Shari'ah*. This may be because the author is referring to the general meaning of *Ḥiyal*, rather than its technical meaning, which will be discussed in future sections.

In addition, Ibn Qaiyim asserted that *Ḥiyal* can be defined as a specific technique used by practitioners to manipulate a condition and transition it to another.⁹ According to this

definition, there must be a transition from one state to another. Put simply, the decision or condition should be manipulated by the strategic actions of the *Ḥiyal*. The researcher Tawfique focusses on the topic of *Ḥiyal* and their applications in contemporary Islamic financial contracts. In order to establish acceptable standards, he has presented the legal significance of *Ḥiyal* from a classical educational institution.:

Regarding al-Buti, the concept of permissible *Ḥiyal* is distinct in its nature compared to the definitions provided by other scholars. The author emphasized the importance of intention (or *qaṣd*) and means (*wāsiṭāh*) in defining the term. He states that intention refers to the willingness to redirect a ruling to another using means that are originally permissible in nature...., Similarly, the *ʿinah* contract, which leads to *Ribā* in disguise, should also be permissible according to this definition. The means (*wāsiṭāh*) in the *ʿinah* contracts are simple sale contracts (*ʿuqūd al-Bayʿ*) which are permissible in the *Shari'ah*. However, the end results lead to *Ribā* which is therefore considered impermissible. Despite being the means a permissible one, it may lead to afflicting harm or distort a *Shari'ah* ruling. *Ḥiyal*, in a broad sense, are secretive methods employed to attain particular objectives that would otherwise be unattainable without a degree of cleverness and foresight. The permissible *Ḥiyal* are strategies designed to redirect a permissible method, originally intended for a specific purpose, and apply it in different situations to assert a right, prevent an injustice, or facilitate a necessity. Furthermore, these forms of *Ḥiyal* do not undermine the legitimate benefits of the *Shari'ah* law.¹⁰

In simple terms, the definitions provided above offer an easily understood overview of the typical defining factors for the *Ḥiyal* and the criteria for its recognition. Based on the explanations provided above, we can conclude that a demonstration can be classified as *Ḥiyal*. Therefore, it can be utilized to address challenging issues, much like how Prophet Muhammad (PBUH) instructed his Ṣaḥābah in the situation involving the sale of dates (al-Tamr) following the battle of *Khayber*. This study of *Hadeeth* demonstrates the evidence supporting the implementation of LS (Legal Substitution) in Islamic transactions as a means of avoiding *Ribā* (usury) and *Ḥarām* (forbidden) practices.

4- The Islamic Juridical Schools and Their Views on Legal Stratagem (LS)

According to Islamic jurists, LS is not completely rejected from the perspective of *Shari'ah*. Moreover, certain LS do not contravene the *Shari'ah* perspective. It can also be employed in crucial circumstances to protect oneself and society from *Ribā* and *Ḥarām* transactions.

The *Qurʾān* and *Sunnah* mention the LS in two distinct scenarios: one where it is considered valid and acceptable, and another where it is deemed invalid and prohibited. Based on these classifications, *Prophet Muhammad stated that the Jews were cursed and deprived of blessings by Allah because they prohibited the consumption of grease (fat), yet they still produced*

³ Tawfique, Al-Mubarak, "The use of *Ḥiyal* as a Financial Engineering Tool." In *Islamic Transactions and Finance: Principles and Developments*, by Mohammad Hashim Kamali and Sheila Ainon, 1-21. KL: Malaysian Current Law Journal and IAIS, (2014).

⁴ Ibn Manzūr, Abū Bakr Muḥammad bin Abdullah, "*Lisān al-ʿArabi*." (Beirut: Dār al-ʿIhyāʾ al-Turāth al-Srabi, (1993).

⁵ Sadique, Muhammad Abdurrahman. 2008. "Early Juristic Approaches to The Application of *Ḥiyal* (Legal Devices) In Islamic Law." *IJUM Law Journal* Vol. 16 No. 2 (2008), 157-180.

⁶ Ministry of Awqāf, Kuwait, *al-Mausu'ah al-Fiqhiyyah*. Kuwait: Ministry of Awqāf wal-shu'nul al-Islami- Kuwait, (1983).

⁷ al-ʿAsqalāni, Ahmad Ibn Ḥajar. *Fathūl al-Bārī Sharhu Ṣaḥīḥ al-Bukhari*. Beirut: Dār al-Fikr (1993).

⁸ Ibn Taimiyyah, Abu al-ʿAbbās Taqī al-Dīn Aḥmad ibn ʿAbd al-Ḥalīm, *Kitāb al-Ikhtiyārāt alʿImyya*. In *al-Fatāwā al-Kubrā*. Beirut: Dar al-Kutub al-ʿImyyah, (1987).

⁹ Ibn Qaiyim al-Jawziyyah, Shams Al-Dīn Abū ʿAbdullah Muḥammad Ibn Abī Bakr, *Iʿlām al-Muwaqqiʿin ʿan Rabb al-ʿĀlāmīn*. Beirut: Dār al-Kutub al-ʿImiyyah, (1991).

¹⁰ Tawfique, Al-Mubarak. 2014. "The use of *Ḥiyal* as a Financial Engineering Tool." In *Islamic Transactions and Finance: Principles and Developments*, by Mohammad Hashim Kamali and Sheila Ainon, 1-21. KL: Malaysian Current Law Journal and IAIS

and sold it for profit.¹¹ This indicates the existence of a prohibition. on the Legal Stratagem (LS) in Islam.

In addition, Allah invoked a curse upon the community of "Al-Sabut" in the Holy *Qur'an*. Allah prohibited (*Ḥarām*) fishing on Saturdays due to the excessive fishing activity on that day compared to others. However, they disregarded this prohibition and consequently incurred punishment from Allah upon the entire community. According to historical records, certain scholars have argued that the punishment was inflicted upon them due to their deceitful actions.

Meanwhile, the following verse of the *Qur'an* explains the history of Prophet Yusuf:

"So, he began [the search] with their bags before the bag of his brother; then he extracted it from the bag of his brother. Thus, did We plan for Joseph. He could not have taken his brother within the religion of the king except that Allah willed. We raise in degrees whom We will, but over every possessor of knowledge is one [more] knowing" (al-Yusuf-76).¹²

This verse states that Prophet Yusuf employed the tactic of emotional manipulation to ensure his brother remained in his presence. According to this verse, Allah stated that He instructed Prophet Yusuf to implement the strategy devised by Him (Allah) in order to achieve their plan. Furthermore, Allah stated that in the historical account of Prophet Ayoub, he made a solemn oath and pledge to Allah regarding his wife:

"[We said], "And take in your hand a bunch [of grass] and strike with it and do not break your oath." Undoubtedly, we discovered him to be patient, an exceptional servant. Truly, he was one who consistently returned to Allah." (Sād - 44).

This part of the verse "take in your hand thousands of grasses and strike and beat for your wife", teaches us the consequences of breaking our oath. This demonstrates that Allah commanded Prophet Ayoub to perform the LS (*Hiyah*) as a means of fulfilling his oath, which he subsequently violated in relation to his wife. The juristic scholars have provided various perspectives on the implementation of LS in this case, as described below.

Hence, we can understand from the history of Prophet Ayoub that the application of legal stratagem is permissible but there has a different situation, and its explanations are as follows.

4.1- The Ḥanafi School on Legal Stratagem (LS)

In his book *al-Mabsūt*, Al-Sarkhasi asserted that the LS, which pertains to the revocation of rulings and the issuance of new judgements and resolutions in critical situations, is widely accepted as valid by the majority of scholars. Moreover, he cited the remedy found in the Holy *Qur'an*, where Allah recounted the story of Prophet Ayoub:

"[We said], "take in your hand thousands of grass and strike and beat your wife" (Sād-44). He also discussed the story of Prophet Yusuf "So he began [the search] with their bags before the bag of his brother; then he extracted it from the bag of his brother" (al-Yusuf-76).

Conversely, he stated that individuals who question the legitimacy of the LS do so due to their lack of contemplation, rationality, magnanimity, and emancipation.¹³

In addition, the author of *Kanzul al-Daqa'iq* introduced the idea of Al-Jassāf, who believes that LS (legal substitutes) are valid instruments for contracts in Islamic commercial law. To illustrate this, Al-Jassāf used the example of the issue of capital in a *Muḍārabah* contract. If a person wants to enter into a *Muḍārabah* partnership but only has food and no money, Al-Jassāf suggests that the person should first sell the food for cash to the *Mudārib* (the other party), and then use the cash to enter into the *Muḍārabah* agreement. According to al-Jassās, this example demonstrates that using food as a substitute for money in a *Muḍārabah* contract is considered lawful substitution (LS). Therefore, this type of LS is not prohibited from the *Shari'ah* perspective.¹⁴

Supplementary, al-Burhānuddīn discussed the topic of oath and sworn statement in relation to sexual intercourse. Specifically, he explored the scenario where a resident makes a solemn promise to his wife during the month of *Ramadhān* that he will engage in sexual intercourse with her during daylight hours.¹⁵ In this scenario, the application of LS (Legal Stratagem) is that if a husband and wife go on a three-day journey together and engage in sexual intercourse, it will not nullify any oaths or vows they have made when they return home. Therefore, it is evident that in the event of an unintentional mistake or error, we can resolve such a problem by employing the LS method, which is deemed permissible according to the *Shari'ah* perspective.

In brief, Ḥanafi scholars have demonstrated that they widely accept the use of the LS as a business tool in modern Islamic institutions. Nevertheless, a recent publication stated that the proposed arrangement by certain Hanafi scholars flagrantly contravenes the purpose of the law and is a deceptive tactic to justify the rejection of LS (Legal Stratagem).¹⁶ However, the truth is different from this because the LS is currently employed in Islamic banking and finance as a substitute for conventional interest-bearing products, out of financial necessity.

4.2- The Shāfi School on Legal Stratagem (LS)

Similar to the Hanafi jurists, many Shāfi jurists support the implementation of LS. According to the Shāfi scholar al-Sharbini,¹⁷ the justification for using the LS (Legal Standard) is based on a well-known *Ḥadīth* that occurred during the battle of *Khaybar*. In this incident, a *Ṣaḥābah* sold goods for one *Saa'* to two *Saa'*. Although Prophet Muhammad (PBUH) stated that he did not engage in such transactions, he did propose a different approach. He advised first selling all the goods and then use the money obtained to purchase only the necessary amount of goods. According to al-Sharwānī, the *Ḥadīth* mentions that the Prophet taught the *Ṣaḥābah* a technique using the LS to avoid and protect themselves from usury.¹⁸ According to al-Subuqī, the use of the LS is not considered *Makrūh* (disliked) but rather approved.

¹¹ al-'Asqalānī, Ahmad Ibn Ḥajar. *Fathūl al-Bāri Sharhu Sahihū al-Bukhari*. Beirut: Dār al-Fikr (1993).

¹² Translate by Quran.Com (Also Known as The Noble Quran, Al Quran, Holy Quran, Koran) Is A Pro Bono Project. © 2016 Quran.Com. All Rights Reserved.

¹³ al-Sarkhasi, Muhammed Ibn Ahmed, *al-Mabsūt*. Beirut: Dār al-Kutub al-'Imyiah, (1993).

¹⁴ al-Nusfi, Abdullah Ibn Ahmed, *Kanzul al-Daqa'iq*. Beirut: Dār al-Kutub al-'Imyiah (2004).

¹⁵ al-Burhānuddīn, *al-Muhyit al-Burhānī*. Beirut: Dār al-Kutub al-'Imyiah (2004).

¹⁶ Mansoori, M. T, "Is "Islamic Banking" Islamic? Analysis of Current Debate on *Shari'ah* Legitimacy of Islamic Banking and Finance." *Islamic Studies*, Volume 50, No. 3/4, (2011), 383-411.

¹⁷ al-Sharbini, *al-Minhāaj*. Beirut: Dār al-Fikri (1995).

¹⁸ Ibid.

In addition, several legal scholars from the Shāfi school, namely al-Ansāri,¹⁹ al-Ramālī, and al-Haitamī,²⁰ have highlighted that the use of elements of LS in transactions is allowed and does not violate the principles of *Shari'ah*. Furthermore, they cited the *Ḥadīth of Khaibar* from the *Ḥadīth of al-Bukhari*:

"Narrated Abu Sa'id al-Khudri and Abu Hurairah: Allah's Apostle appointed somebody as a governor of Khaibar. That governor brought to him an excellent kind of dates (from Khaibar). The Prophet asked, "Are all the dates of Khaibar like this?" He replied, "By Allah, no, O Allah's Apostle! But we barter one Sa of this (type of dates) for two Sas of dates of ours and two Sas of it for three of ours." Allah's Apostle said, "Do not do so (as that is a kind of usury) but sell the mixed dates (of inferior quality) for money, and then buy good dates with that money"^{21,22}

In a nutshell, this *Ḥadīth* makes it clear that Prophet Muhammad gave the *Ṣaḥābah* guidance on how to use the LS element in order to save themselves from *Ribā*, and they obeyed. Consequently, the LS element can be utilized in transactions and is permissible in Islam.

In addition, Abdurrahman stated in his book "*Tahrithu al-Tathrib*" that he observed the viewpoint of the followers of the Shāfi school who categorized that the implementation of LS is not in contradiction with the *Shari'ah* and does not constitute a reversal of the *Shari'ah*. Instead, it is recounted by a primary authority of Islamic law where Allah stated in the holy *Qur'an*: "*Take in your hand a bundle of grass and strike and beat your wife*" (Sād-44). Clearly, this verse indicates that there is substantial evidence to support the use of the LS (Legal System), and both traditional and modern scholars concur on its application in transactions as a means to prevent involvement in practices associated with *Ribā*.

In short, a great number of Shāfi classical and contemporary scholars agreed that the application of LS is permissible in *Shari'ah*, and They had high expectations that the LS would not violate any *Shari'ah* rule. Simultaneously, the Shāfi scholars assert that the LS (Legal System) should be employed to attain a significant advantage that aligns with the principles of *Shari'ah* (Islamic law) and its underlying interests (*Maslahāh*), thereby preventing any prohibited actions. The following aims to authenticate the validity of the LS element for acceptability.

4.3- The Mālik School on Legal Stratagem (LS)

The jurists of the Mālik school strongly opposed the use of Legal Stratagem (LS) when the school introduced the standards of "*Sadd al-Dharā'ī*". However, the majority of the Mālik researchers can be classified into two broad categories. The initial group dismissed the utilization of the LS al-Qurtubi,²³ al-Khurāshī,²⁴ al-Mālikī & al-Dardīri,²⁵ arguing that the implementation of the LS is not applicable in religious rituals like prayers, as well as in commercial dealings. They held the

belief that the trade contract utilizing the LS elements is null and void according to the *Shari'ah*, and it is not permissible and constitutes an illicit agreement.

Conversely, the second group maintains that the utilization of the LS is permissible and can be modified for implementation in Islamic financial practices. In addition, al-Shāṭibī and Ibn 'Āshūr extensively discussed the utilization of the LS and thoroughly examined the matters from multiple perspectives. The jurists provided an explanation,

"It has been built up that the LS which had been disproved, censured, and prohibited, are each one of those which demolish a *Shari'ah* rule or negate a *Shari'ah* intrigue. What is more, in the event that we accept that the LS does not pulverize a *Shari'ah* standard, nor repudiate a *Shari'ah* intrigue, the Law esteems it right. It is, at that point, avoided from the preclusion, nor is it rejected".²⁶

Our investigation has revealed that the application of LS is deemed invalid according to the Mālikī school of thought. However, certain Mālikī scholars, such as al-Shāṭibī and Ibn 'Āshūr, have put forward certain conditions and practices for the use of LS.

Based on this condition, al-Shāṭibī said that if the Legal Stratagem (LS) will try to change the law of *al-Shari'ah* then it is prohibited such as *Nikāḥul al-Muḥilil* which is after three divorces he tries to marry her second time, on the other hand, if that does not reduce of the *Al-Maslahāh Al-Shariyyah* then it is valid such as *Bay' al-'Ājil* which is the sale for a period of more than the sale price in cash.²⁷ Furthermore, a significant proportion of them refused to recognize it to the same extent as the Hanafi or the Shāfi schools of thought. Furthermore, al-Shāṭibī put forward several prerequisites for the LS to align with the standards of *Shari'ah* and the interests (*Masālih*) identified by the legislator. Similarly, Ibn 'Āshūr has divided the Legal Stratagem (LS) into five categories and it will come below.

4.4- The Ḥanbalī School on Legal Stratagem (LS)

The Ḥanbalī scholars often hold divergent opinions compared to the Imām Shāfi's and Imām Ḥanafi's schools regarding the use of the LS. In addition, certain jurists from the Ḥanbalī school, including al-Ḥanbalī,²⁸ al-Zarkashī,²⁹ and Dawyān,³⁰ expressed strong disapproval and contempt for the use of LS. They argued that any elements of LS applied in contracts render them invalid and even *Ḥarām* according to *Shari'ah*, with no reward from Allah for engaging in such activities.

In addition, Imām Ahmad Ibn Ḥanbal firmly expressed his opposition to the widespread use of the LS by citing a *Ḥadīth* in which the Prophet Muhammad (PBUH) prohibited Muslims from imitating the practices of the Jews., that is "*the Prophet Muhammed said that (peace and blessings of Allah be upon him): Do not commit what the Jews committed, and they will resort to God's prohibitions with the lowest tricks*". He cited another *Ḥadīth*, specifically the one found in Abū Dāwūd's narration, which states: "*Whoever introduces a horse between two horses*

¹⁹ al-Ansāri, *Asnā' al-Matālib Sharahu Rawdu al-Tālib*. Beirut: Dār al-Kutub al-'Imiyyah, (2001).

²⁰ al-Haitamī, *Tuhfatu al-Muhtāj Fi Sharahu al-Minhāj*. Beirut: Dār al-Kutub al-'Imiyya. al-Ḥanbalī, I. M. 1985. *al-Furūū'*. Dār al-'Ālim al-Kutub, (2011).

²¹ Translated by M. Muhsin Khan.

²² al-Bukhari, Muhammad bin Ismail bin Ibrahim bin, *Sahih al-Bukhari*. Mika'il al-Almany. (2009).

²³ al-Qurtubi, *Manḥu al-Jaliyy*. Beirut: Dār al-Fikri, (1996).

²⁴ al-Khurāshī, M. n.d. *Sharah Mukhtasar Khalil lil-Khurāshī*.

²⁵ al-Dardīri, *al-Sharah al-Saghir 'lāa Aqrabil al-Masāalik*. Egypt: Dār al-Ma'arif Misiri, (1992).

²⁶ Tawfique al-Mubarak, *Hiyal and Their Applications in Contemporary Islamic Financial Contracts: Towards Setting Acceptable Norms*. Qatar: Qatar Faculty of Islamic Studies, Hamad Bin Khalifa University, (2012).

²⁷ al-Shāṭibī, Ibrāhīm Ibn Mūsā (Abū Ishāq), *al-Muwāffaqāt Fi Usūl al-Shari'ah*. Beirut: Dār al-Fikri. (1997).

²⁸ al-Ḥanbalī, *al-Furūū'*. Dār al-'Ālim al-Kutub, (1985).

²⁹ al-Zarkashī, *Sharahu al-Zarkashī*. Maktabah al-'Ābikān, (1993).

³⁰ Ibn Dawyān, *Manāaru al-Sabil*. Beirut: al-Maktabah al-Islamiyyah, (1989).

indicates uncertainty about whether it will surpass the others".³¹ These two *Ḥadīths* mutually support each other regarding the unethical use of the LS. As a result, Imām Ahmad refused to accept LS in a general manner.

Simply put, our analysis has determined that the utilization of the LS is illegitimate according to the Hanbali school's viewpoint. Nevertheless, certain Hanbali scholars, such as Ibn Baṭṭāh and Ibn Taimiyyah, put forth several prerequisites for implementing the LS. Furthermore, certain Hanbali scholars have expressed support for specific Legal Schools (LS). Several instances of such cases were observed in the characterization area mentioned earlier.³² On the topic of the LS, Ibn Qaiyim took a well-balanced stance, which was one of many contributions made by scholars in his book *I'lām al-Muwaqqi'iyin*. he presented the opinions and evidence from both parties, the antagonists as well as the protagonists of LS. He considered LS invalid from the perspective of "*Saddu al-Dhari'ah*", as these are both antipathetic to each other, and they cannot come together.³³

The stance of the Ḥanābila scholars, as observed, demonstrates their modified standpoint, which differs from the aforementioned schools. It is important to note that they were among the first individuals to write in a confusing and critical manner, expressing disapproval of the LS.

4.5- Other Scholars on Legal Stratagem (LS)

Ibn Hajar posited that the LS is designed to achieve its goal through a concealed method, and there exist various categories of deliberate actions and intentions (*Niyyah*). Moreover, a valid method is acquired to invalidate a contract, and if this method is proven to be valid, then it is considered *Ḥarām*. However, if it is acquired in accordance with a set of rules and regulations, and a system is in place to determine whether it is obtained through a permissible (*Wājib*) or recommended (*Mustaḥab*) means, or if it is obtained through a prohibited (*Ḥarām*) means. Moreover, if the acquisition of LS is done legally and in order to ensure the safety and preservation of human life, then its application can be considered desirable (*Mustaḥab*) and permissible (*Mubāh*), but it does not yet become a mandatory obligation (*Wājib*).³⁴

Al-Mullāh Ali Qārī cited the following *Ḥadīth* to support the legitimacy of using the LS.³⁵ Prophet Muhammad (PBUH) instructed the *Ṣaḥābah* to abstain from *Ribā* by utilizing the LS that he had prescribed to them. Below is the *Ḥadīth* brought by al-Bukhari:

"Abu Said Al-Khudri and Abu Huraira reported that the Prophet of Allah designated an individual to serve as the governor of Khaibar. The governor presented him with a superior variety of dates sourced from Khaibar. The Prophet enquired, "Do all the dates from Khaibar possess this same

quality?" He responded, "I swear by Allah, no, O Apostle of Allah!" "However, we exchange one Sa of this particular type of dates for two SAs of our dates, and two SAs of it for three of our dates." The Prophet Muhammad stated, "Do not do so (as that is a kind of usury) but sell the mixed dates (of inferior quality) for money, and then buy good dates with that money"³⁶.

By referring this *Ḥadīth*, he said that Imām Shāfi, Ḥanafī, and others saw the permissibility of applying the LS and they referred to this part of the *Ḥadīth*, "Do not do so (as that is a kind of usury) but sell the mixed dates (of inferior quality) for money, and then buy good dates with that money".

Therefore, Prophet Muhammad instructed the *Saḥābah* to avoid engaging in *usury* and to adhere to his command by utilizing LS or other methods for their transactions in order to protect themselves from engaging in *Ḥarām* contracts.

In addition, al-Kashmiri advocated for the implementation of LS in Islamic finance, citing the same *Ḥadīth* as a basis for his argument. According to him, there is a categorization of cases, and certain ones may be considered legitimate according to *Shari'ah* law.³⁸ This review examines the application of Legal Stratagems (LS) in terms of legitimate governance, drawing from the Holy *Qur'ān*, *Ḥadīth*, and the thoughts of classical jurists. It summarizes and categorizes these stratagems into five classifications based on previous classical literature. These classifications include Forbidden LS (*al-Ḥiyal al-Muḥarramah*), Recommended LS (*al-Ḥiyal al-Mandūb*) which is neither encouraged nor discouraged, Permissible LS (*al-Ḥiyal al-Mubāah*), Reprehensible LS (*al-Ḥiyal al-Makrūh*), and Obligatory LS (*al-Ḥiyal al-Wājibah* or *al-Ḥiyal al-Halāl*) (Ibrāhīm,³⁹ Ibn Qaiyim al-Jawziyyah,⁴⁰ & Ibn 'Āshūr.⁴¹

- 1- Forbidden LS, the use of *al-Ḥiyal al-Muḥarramah* is invalid, and individuals who employ this tactic will face punishment rather than receiving a reward from Allah. For instance, any forbidden (*Ḥarām*) commodity, like *Ribā* money, that undergoes a transformation through the application of the LS element, will only undergo a superficial change in its outward appearance (*Zāhiri*), rather than a substantial change in its true nature (*Ḥaqīqi*). Regarding the rationale, Prophet Muhammad stated that

"Allah cursed and unblessed on the Jews because they had deprived and been forbidden of grease (fat), but they make by the beauty and sold it".⁴²

According to this *Ḥadīth*, it is believed that the Jews had unlawfully altered the rule of the *Shari'ah*, using the element of LS, which is prohibited (*Ḥarām*) in Islam. Additionally, Al-Bukhari cited this *Ḥadīth* as evidence of the inappropriate utilisation of the LS, namely:

³¹ Ibn Qudāmah al-Maqdisī, Muwaffaq Al-Dīn Abū 'Abdullah ibn Aḥmad. *al-Mughnī 'alā Mukhtasar al-Khuraī*. Dār al-'Ālam al-Kutub, (1997).

³² Tawfiq, Al-Mubarak, "The use of *Hiyal* as a Financial Engineering Tool." In *Islamic Transactions and Finance: Principles and Developments*, by Mohammad Hashim Kamali and Sheila Aion, 1-21. KL: Malaysian Current Law Journal and IAS, (2014).

³³ Ibn Qaiyim al-Jawziyyah, Shams Al-Dīn Abū 'Abdullah Muḥammad Ibn Abi Bakr, *I'lām al-Muwaqqi'in 'an Rabb al-'Ālamin*. Beirut: Dār al-Kutub al-'Imiyyah, (1991).

³⁴ al-'Asqalāniyy, Ahmad Ibn Hajar, *Fathul al-Bāri Sharhu Sahihū al-Bukhari*. Beirut: Dār al-Fikr, (1993).

³⁵ Ali Qārī, Al-Makki al-Harwī, *Mirqātu al-Mafātih*. Beirut: Dār al-Fikr, (1994).

³⁶ Translated by M. Muhsin Khan.

³⁷ al-Bukhari, Muhammad bin Ismail bin Ibrahim bin, *Sahih al-Bukhari*. Mika'il al-Almany, (2009).

³⁸ al-Kashmiri, *Faidhul al-Bāri Sharaḥ Ṣaḥiyyh al-Bukhari*. Beirut: Dār al-Kutub al-'Imiyyah, (2005).

³⁹ Ibrāhīm, *al-Hiyal al-Fiḥiyyah Fi al-Mu'āmalah al-Ma'āliyah*. al-Dār al-Arabiyyah lil-Kutub, (1985).

⁴⁰ Ibid.

⁴¹ Ibn 'Āshūr, Al-Shaikh Muhammad Tahir, *Maqāsīd al-Shari'ah al-Islamiyyah*. Jordan: Dār al-Nafis, (2001).

⁴² Ibid.

"Narrated Anas: Abu Bakr wrote to me what was made compulsory by Allah's Apostle and that was (regarding the payments of Zakāt): Neither the property of different people may be taken together, nor the joint property may be split for fear of (paying more or receiving less) Zakāt"^{43, 44}

According to this Ḥadīth, Imām Shāfi and Imām Hanafi have stated that there are individuals who are concerned about the outstanding *Zakāt* and therefore they employ the Legal Strategy (LS) with the intention (*Niyyah*), or they attempt to decrease the *Zakāt* amount. According to legal experts, these individuals are attempting to evade or reduce their responsibilities under Islamic law by choosing to utilize this type of LS, which is not recognized as valid under Islamic law. Their lack of critical thinking and failure to apply Islamic principles is deemed unacceptable within the framework of Islam, rendering them liable to be held accountable under the *Shari'ah* law. Nevertheless, Imām Hanafi asserted that the utilization of the LS does not diminish the quantity of *Zakāt*. In this case, the applicant is deemed culpable and is obligated to pay the entire amount of *Zakāt*.⁴⁵

- 2- Reprehensible (*Makrūh*) LS refers to situations where the applicant of the LS may be morally at fault based on their intention (*Niyyah*), but the actual action of the LS is deemed as an invalid contract in Islam. For example, if a person is required to pay the mandatory (*Wājib*) *Zakāt*, they can fulfil this obligation by either giving the money to their wife or purchasing a non-mandatory (*Wājib*) item such as a house or a vehicle for personal use before the end of the year. In this case, they are not obligated to pay *Zakāt* for that money. However, he is culpable for deliberately selecting the LS option to evade *Zakāt* payment. Additionally, there is no mandatory requirement (*Wājib*) for his wife to pay *Zakāt* on the money she has received from her spouse.⁴⁶
- 3- Obligatory (*Wājibah*) The legitimate (*Shar'yī*) and obligatory (*Wājib*) means of obtaining necessities such as food, drink, and clothing are considered positive and obligatory (*Wājib*) according to the perspective of *Shari'ah*. Furthermore, the purpose of LS is to meet a requirement and it is imperative (*Wājib*) to utilize LS from a *Shari'ah* standpoint. Moreover, the essentials are essential for sustaining the body in order to fulfil the obligations to Allah that have been entrusted to us in this existence, such as acts of worship and transactions, such as a purchase and sale agreement. When there is a requirement to fulfil the religious and contractual obligations of *ʿĪbādah* and *Mu'āmlāt*, it is necessary to incorporate the concept of Legal Substitution (LS). The *Shari'ah* dictates that by utilising the principle of LS as a permissible concession (*Rūkhsah*) within the framework of *Shari'ah*, all *Shari'ah* obligations can be fulfilled.⁴⁷

According to this, we know from these examples that this category includes the LS in the oaths which do not affect others' rights, like if someone swears not to enter the house, or not to

wear a specific dress. By breaking the oath, he will be liable for the expiation (*Kaffārah*) of it, as the *Shari'ah* demands. The objective of such a demand is, in fact, to venerate the name of Allah Who was made witness to the oath. If one finds it difficult to keep the sanctity of oath but finds an exit from it that resembles exerting it, then the objective of venerating Allah is fulfilled. He illustrated his stance with an example from Qāḍi Ibn 'Arabī's book, where he witnessed Abī Bakr Al-Shāshī, while at his court, was consulted by a man who swore not to wear this dress. The Imam, then, cut a portion the size of a digit from his dress and told him that he is not guilty of breaking his oath now. Similarly, some Hanafi jurists, when consulted about one's oath not to enter the house, would advise them to enter from the windows or the skylight.⁴⁸

Therefore, renowned classical scholars such as Shāfi, Hanafi, Ibn 'Aashūr, Ibn Qaium, and others have elucidated that the LS (legal solution) can be employed to navigate challenging circumstances and to achieve significant benefits (*Maslahāh*). It is not merely a resolution, but also an action that will be rewarded by Almighty Allah.

5- Views of Contemporary Scholars on Usage of the Legal Stratagem (LS)

This study employs a modern approach and classifies previous writings into two categories: firstly, writings that criticized the use of LS, and secondly, writings that provided the basis for using LS in agreements. This section concludes by providing a critical analysis of the two aforementioned types.

5.1- The Rejection of Using the LS in Transaction

Several modern scholars have pointed out that Islamic finance is essentially indistinguishable from conventional banking and finance, with the exception of its outward appearance. Moreover, the LS are utilised to produce products that merely mimic the products offered by traditional banks. These authors advocated for the implementation of equity-based benefit and loss financing, such as profit-loss sharing products, that align with the principles of Islam.

El-Gamal raised the concern that Islamic banks engage in practices that are rooted in *Ribā*. When all interests are prohibited, the transaction must exclusively involve the sharing of benefits and losses based on equity.⁴⁹ Nevertheless, Islamic finance currently offers interest-based products by reconstructing them with the LS and imposing interest through leases or price markups. The author completely dismissed the use of the LS due to the oversight of the *Shari'ah* perspective on the issue of interest, despite its practical foundation.

Using the LS to develop new products, like *Murābahah* (*Tawarruq*), has had a detrimental impact on Islamic banking and finance because these products do not align with the fundamental principles of Islamic contracts.⁵⁰ Furthermore, Mansoori suggested that when forming contracts, the objective of *Shari'ah* should be considered equally important as compliance, especially when creating new modes.⁵¹ There is a consensus that the current practices of Islamic banking and finance are not entirely satisfactory. Islamic finance is competing with traditional banking to establish a presence in the overall industry, while adhering to the principles of *Shari'ah* and complying with both global and local regulatory frameworks. It

⁴³ Translated by M. Muhsin Khan.

⁴⁴ Ibid.

⁴⁵ Uthmani.

⁴⁶ Ibraahim, & Usmani.

⁴⁷ Ibrāhīm, M.I. 1985. *al-Hiyal al-Fiqhiyyah Fī al-Mu'āmalah al-Ma'āliyah*. al-Dār al-Arabiyyah lil-Kutub, (1985).

⁴⁸ Ibn 'Aashūr.

⁴⁹ El-Gamal. M., *Financial Times*. May 23. (2007), Accessed <https://www.ft.com/. www.ft.com>

⁵⁰ M. T. Mansoori.

⁵¹ Mansoori, M. T., "Use of Hiyal in Islamic Finance and its Shari'ah Legitimacy." *Journal of Islamic Business and Management* (2011) 69-92.

is important to recognize the potential of applying LS on Islamic banking and finance products through a thorough examination.

5.2- The Greater Benefit of Using the LS in Transaction

Islamic banks should prioritize the promotion of profit-loss sharing (PLS) items rather than profit markup items. Islamic banks have indeed restructured their products by employing the Legal Structure (LS) in Islamic transactions to mimic conventional interest-bearing products as a financial engineering tool during times of economic uncertainty. greater benefit (*Maslahāh*).

The LS are often applied in order to bring in a benefit, hence these are closely related to engaging a *Maslahāh*. In every LS there are certainly some *Maslahāh*, which may render the LS valid and acceptable. For example, the floating rate in the *Murābahah-Sukuk* is often considered unacceptable, as the originator can only claim a fixed rate based on the agreed-upon rate. But the fixed rate *Sukuk* are prone to many market risks, especially when the *Sukuk* are for longer terms, for instance, 20 years or so, and the market rate changes with time marking a great difference between the fixed rate profit and the market rate. To follow the *Shari'ah* requirements of fixed-rate return and at the same time attempting to mitigate the market risks with a floating rate return, the *Murābahah-Sukuk* is based on a master *Murābahah* agreement with several subordinate *Murābahah* agreements therein. In the subordinate *Murābahah* agreements, which are of shorter-term than the master *Murābahah* agreement, the profit was set based on the market rate of that specific time frame. Hence, the market risk was mitigated, while the *Shari'ah* compliance is also maintained, it is a pleasant LS that opened the gateway to greater *Maslahāh*.⁵²

Furthermore, the costs associated with PLS products are exorbitant, and the procedures involved are intricate. Although the PLS products offer several macroeconomic benefits, individual banks are not adopting them due to their high costs and complex procedures. In order to enhance profitability and reduce expenses, Islamic banks prefer to replicate conventional products. Therefore, regulators must provide effective incentives to Islamic banks to develop Profit and Loss Sharing (PLS) products until the products become less complex and costs are reduced. This would serve as an opportunity to develop products based on *Shari'ah* principles. In order for Islamic banking and finance to continue and thrive, it is crucial to employ LS at the outset. The endorsement from regulators, along with increased knowledge about Islamic banking, would facilitate the industry's transition away from products developed through the LS.⁵³

Some previous scholars permitted the utilization of LS (Leveraged *Sukuk*) in Islamic transactions as a means of financial engineering, provided that there is a significant economic advantage (*Maslahāh*). Therefore, in times of need, LS can be employed to overcome challenging circumstances. It not only serves as a solution but also earns the individual a reward from Allah for their actions. Therefore, if we were to disregard all LS on the basis that it does not embody the essence of Islam, Muslims and others would be deprived of an alternative method of financing.

Furthermore, completely distancing oneself from the LS is exceedingly challenging, despite its undesirability. We necessitate a perpetual alteration, and as demonstrated, the LS should be employed frugally as needed. Controllers should play a significant role in transitioning the business from merely imitating traditional banks to promoting innovative products

and ensuring the long-term viability of the Islamic banking and finance industry.

6- The Difference Between a General Contract and Legal Stratagem (LS)

This section of the study aims to examine several distinctions between a general contractor and LS (Legal Substantiation) in relation to the utilisation of LS by modern Islamic banks in financial transactions.

According to the *Shari'ah* perspective, Allah has established obligations (*al-Ahkām*) that must be fulfilled in order to receive rewards from Him. These obligations include prayer, fasting, *Hajj*, and others. Additionally, Allah has prohibited certain actions (*al-Manhiwū*) such as prostitution, murder, and *Ribā*. In addition, if an individual (referred to as *Mukallaf*) neglects a duty or allows something that is considered forbidden (*Ḥarām*) by adhering to a certain Legal Strategy (LS) that aims to alter the obligation from being mandatory to non-mandatory or change the prohibition from being forbidden to non-*Ḥarām*.

Therefore, the transition from mandatory and prohibited rules to alternative rules distinguishes a general contract from an LS contract. The author of *I'lāmū al-Muwaqqinīn* al-Zar'i analysed the variations in multiple chapters of his book.⁵⁴ For example, in situations where a person wishes to purchase a product from a store and the store owner is a powerful and unfamiliar individual, or if the product has visible damage or defects, or alternatively, if the seller anticipates encountering similar issues with the customer, it becomes necessary to engage an intermediary to facilitate the transaction between both parties. *Bay' al-'Ināh*, in the same vein, adheres to the principles of *Shari'ah*, encompassing the transaction, subsequent repurchase, and exchange of advantages between a merchant. A dealer sells a commodity to a purchaser for immediate payment, and later receives the money back in instalments with a deferred payment arrangement, where the sales price of the commodity is higher than the purchase price.

The commodity *Murābahah* (CM) is a specific type of exchange for commodity deals. It operates on a deferred payment basis and includes an agreed-upon profit margin. The seller is obligated to disclose all costs included in the price of the goods to the buyer. Based on the three illustrations by al-Zar'i, it is evident that the disparities between a general contract and legal stratagem lie in the alternative approach used by an agent to carry out agreements, such as buying and selling, in order to avoid *Ribā* and mitigate risks, respectively.

7- Conclusion

Based on the evidence presented and discussed, it can be inferred that the use of LS has sparked numerous debates among both classical scholars and contemporary jurists. Furthermore, he stated that the utilization of LS is permissible, except in *'Ibā'dah*, where it must be consistent. The act of *'Ibadah* is immutable unless there is a divine revelation from Allah, and it must be performed precisely as commanded by Allah. Therefore, exerting control over the element of LS in the act of *'Ibā'dah* is tantamount to redirecting Allah's requests and charges, defying His commands, and performing *'Ibā'dah* in a manner that does not diminish its significance.

Nevertheless, Legal Substitutes (LS) can be employed in *Muāmalāt* situations when there is a significant advantage (*Maslahāh*) and a desire for luxury (*Hājah*). When a necessity arises, LS can be employed to extricate oneself from a challenging situation. While it may not always be the most ethical approach, one will receive divine recompense from Allah

⁵² Tawfique.

⁵³ al-Jarhi, Mabid Ali M. M, "An Economic Theory of Islamic Finance Regulation." *Islamic Economic Studies* Vol. 24, No.2, (2016).

⁵⁴ al-Zar'i, Abu Abdullah Muhammed Ibn Abi Bakkar, *I'lāmū al-Muwaqqinīn*. Beirut: Dār al-Fikri, (1997).

for their actions. Furthermore, the legal standards of jurisprudence hold significant validity and accuracy in the assessment of *Shari'ah* law, and the individual seeking these legal standards is not deemed guilty from a *Shari'ah* perspective. According to the principles of *Shari'ah*, the following actions are permissible: if the LS (legal system) brings about positive benefits and prevents harm, and if it is based on the principle of greater benefit (*Maslahāh*) and necessity (*Hājah*).

Therefore, the use of LS is contingent upon infringing upon the rights of others and is forbidden in Islam. However, most scholars permit the implementation of LS in *Muāmalāt* to prevent *Ribā* and establish *Halāl* contracts, citing the *Ḥadīth Khaibar*. Based on this finding, we can conclude that the use of the LS is permissible in Islamic banking and finance, the Islamic capital market, and Islamic investment. Additionally, the utilization of LS in the Islamic trade banking goods can be examined to broaden and elaborate on the existing literature on LS.

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