

**EARLY JURISTIC APPROACHES  
TO THE APPLICATION OF *ḤIYAL*  
(LEGAL DEVICES) IN ISLAMIC LAW**

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**ABSTRACT**

*A precise demarcation separating ḥiyal from normal application of law has remained challenging. The majority of juristic trends are seen to categorise ḥiyal into permissible and impermissible types. Out of four categories of ḥiyal, juristic difference is found only with regard to one, where a permissible avenue is employed for attaining an unlawful end. This highlights that there is a large area of ḥiyal where there is near unanimity on acceptability. Despite the apparent laxity perceived of Ḥanafī jurists with regard to ḥiyal, they have limited the employment of ḥiyal to justifiable purposes only. The debate on ḥiyal could essentially be reduced to the juristic difference on the relevance and significance of intent in contracts, as upheld by Ibn Ḥajar al-ʿAsqalānī.*

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## INTRODUCTION

Without concerning itself solely with the external aspects of human conduct, the Islamic *sharī'ah* has probed into the significance of underlying intentions and objectives, regarding human interaction in a more complex and comprehensive light. This broad approach has necessitated the individual treatment of an area of law under the name of *ḥiyal* (legal devices) that has remained a subject of lively juristic discussion. After tracing the development of *ḥiyal* as reflected in the early literature, this article examines the positions adopted by various schools of Islamic law as well as individual scholars in identifying permissible varieties of *ḥiyal*. It explores the grounds that have dictated variance on the topic, and attempts to shed light on the underlying legal positions as upheld in various schools of Islamic law that have given rise to their individual position on the admissibility of *ḥiyal*.

## THE TERM *ḤIYAL* IN ISLAMIC LITERATURE

The Arabic term *ḥiyal* is the plural of *ḥīlah*, which is described as the Arabic equivalent for artifice, device, expedient, stratagem, the means of evading a thing, or effecting an object.<sup>1</sup> According to Arabic lexicographers, the original meaning of the term *ḥīlah* and various other terms such as *ḥayl*, *taḥayyul* and *ih̥tiyāl* all indicate the meaning of resourcefulness, sharpness of intellect and skill in management of affairs.<sup>2</sup> The root of *ḥīlah* is *ḥawl*, which means transformation (*taḥawwul*) from one state to another, possibly through some finely executed design that helps conceal the reality; it could also be a derivation of the root term *ḥawl* which means ability (*quwwah*). The term *ḥīlah* is used to denote the medium of attaining or acquiring some objective, usually in a covert manner. Although the term is used more often to describe a means in the employment of which there is some negative aspect, it is also used to indicate a means which is prudent and wise.<sup>3</sup>

<sup>1</sup> *The Encyclopaedia of Islam*, Leiden, E J Brill, vol. 3, 510.

<sup>2</sup> Ibn Manẓūr, *Lisān al-‘Arab*, Jordan, Markaz al-Turāth, 1999, vol. 11, 186.

<sup>3</sup> *Al-Mawsū‘ah al-Fiqhīyah*, Kuwait, Ministry of Awqāf, vol. 18, 328.

Throughout the lengthy history of the Islamic civilization, the term *hiyal* had become inseparably attached to and come to be used in connection with several different fields. The science of mechanics referred to as *hiyal* in Arabic, achieved great advancement during the period of third and seventh Islamic centuries. Operation of ingenious mechanical devices for a variety of purposes, using variations of the cog wheel as the basic component for converting linear and circular movements with automatic and precise motion for remote operation, was highly developed. Popular works authored during the period on the subject are *Hiyal Banī Mūsa* of the sons of Mūsa ibn Shākir who lived in the third Islamic century where detailed diagrams of complex devices with explanations are provided (translated into English by Donald Hill in 1979), and *Kitab al-Jāmi' bayn al-'ilm wa al-'Amal fī Ṣinā'ah al-Ḥiyal* of Badī' al-Zamān al-Razzāz al-Jazarī of the 6<sup>th</sup> century.<sup>4</sup> The author of *Kashf al-Zunūn* has enumerated a number of works dedicated to this science, in addition to compilations where a chapter or more has been assigned to this topic.<sup>5</sup> Another field that was known by the name of *hiyal* was the art of military tactics. Subterfuges and stratagems of war had evolved into a cultivated science, which were collectively referred to as *hiyal*. There have been a fair number of expert treatises and manuals on this science, under the name of *kutub al-ḥiyal*, of which a handful are still in existence. 'Alī ibn Abū Bakr al-Ḥarawī's (died 611/1215) *al-Tadhkirah al-Ḥarawīyyah fī al-Ḥiyal al-Ḥarbiyyah* is considered to have been a popular work on the subject.<sup>6</sup> Apart from these, tricks related to hypnotism (*al-ḥiyal al-rūḥāniyyah*) and the pre-Islamic arts of deception for achieving vocal and motive animation of

<sup>4</sup> *Al-Mawsū'ah al-Islāmiyyah*, Cairo, Wazārah al-Awqāf, under '*hiyal*.' See Dr Fātimah Mahjūb, *Al-Mawsū'ah al-Dhahabiyyah li al-'Ulūm al-Islāmiyyah*, Cairo, Dār al-Ghad al-'Arabī, vol. 15, 140-150 for a discussion with sample illustrations.

<sup>5</sup> Mustafā ibn 'Abd Allāh al-Rūmi, *Kashf al-Zunūn 'an Asāmī al-Kutub wa al-Funūn*, Beirut, Dār al-Kutub al-'Ilmiyyah, 1992, passim.

<sup>6</sup> J Schacht, *Encyclopaedia of Islam*, vol. 3, p. 511. The details of some of the major works on the field extant today that have been reviewed by orientalist could be found here, including *Kitāb al-Ḥiyal fī al-Ḥurūb wa Fath al-Madā'in wa Ḥifz al-Duruūb*, a work of the 6<sup>th</sup> century AH.

religious statues, as well as sleights of hand played by conjurers and forgers too have been known by the name of *hiyal*.<sup>7</sup>

## ***HIYAL SHAR'ITYAH OR LEGAL DEVICES***

Although the original meaning of the term *hiyal* covered any activity through which one moved from one position or situation to another, it came to denote covert or subtle techniques that enable one to attain his objective, in a way that could be comprehended only with acumen and sagacity. The meaning became even more specific with its gradual employment to signify gaining access to what is considered forbidden or out of bounds, whether such prohibition based on law, common practice or is dictated by reason.<sup>8</sup> Procedures of a subtle nature that were adopted for overcoming situations where one was faced with the predicament of violating the *sharī'ah* came to be known as *hiyal shar'īyyah*. These referred to the employment of legal procedures and transactions, sometimes involving the execution of several contracts one after the other, that facilitated achieving some objective. The procedures adopted thus varied from the simple to the complex, comprising of varying levels of legitimacy. While *hiyal* that consisted of forsaking clear *sharī'ah* precepts or negated justifiable objectives were unanimously held impermissible, jurists found grounds for difference in the case of certain *hiyal* where clear evidence could not be established linking them either to *hiyal* that could be regarded as legal or to the unlawful category.

It is pertinent to note that the term *hīlah* as indicated in the context of *hiyal shar'īyyah* came to be related to some other terms that have a bearing on its meaning in one way or the other. Some of these terms are; (i) *tadbīr*, that means organizing or mending an affair so that its outcome becomes constructive; the terms *tadbīr* and *hīlah* both share in the sense of transference from one state to another; however, while *tadbīr* is specifically used where the designed outcome is positive, *hīlah* is used even where the outcome happens to be negative; (ii) *tawriyah* and *ta'rīd*, which indicates using a linguistic term in a sense other than

<sup>7</sup> *Al-Mawsū'ah al-Islāmiyyah*, Cairo, Wizārae al-Awqāf, under *hiyal*.

<sup>8</sup> *Al-Mawsū'ah al-Dhahabiyyah*, vol. 15, 150.

its overt and commonly understood meaning; and (iii) *dharī‘ah*, which denotes a medium or tool adopted to access a thing; closing of avenues which are in themselves permissible for fear of their being misused for attaining unlawful objectives is referred to as *sadd al-dharī‘ah*.<sup>9</sup>

## LEGAL DEVICES IN THE EARLY WORKS OF MUSLIM JURISTS

Although reference to what could be regarded as *hiyal shar‘īyyah* finds mention in narrations concerning the companions and the *mujtahids* of the early Islamic era, apparently none of them are known to have laid down treatises devoted to the subject, or made any collection of known *hiyal*. The later authors such as al-Khassāf have cited numerous reports related to prophetic companions and early *mujtahids* involving *hiyal*, and have recounted a number of occasions where they had had recourse to what could be categorised under *hiyal shar‘īyyah*. Compilation of treatises devoted to the subject of *hiyal* appear to have started towards the latter half of the 2<sup>nd</sup> Islamic century with the Ḥanafī jurists being the first to assemble the available *hiyal* in book form. The Ḥanafī jurist Muḥammad ibn Ḥasan (died in 189H) himself is considered to have authored a compilation of *hiyal*, the ascription of which to Muḥammad has been questioned by other Ḥanafī jurists like Abū Sulaymān al-Jawzjāni. The latter considers it improbable that Imām Muḥammad could have compiled anything with the title of *Kitāb al-Ḥiyal*, that could be misused by the ignorant. However, the leading Ḥanafī jurist al-Sarkhasī has upheld in *al-Mabsūṭ* the verdict of Abū Ḥafs, who had regarded the compilation to be the work of Muḥammad, in addition to reporting it from the latter.<sup>10</sup> According to Ibn Ḥajar al-‘Asqalānī, Imām Abū Yūsuf too is credited with a work on the subject.<sup>11</sup> The most famous treatise on *hiyal* could be the work of Abū Bakr Aḥmad ibn ‘Amr al-Khassāf, known as *Kitāb al-Khassāf fī al-*

<sup>9</sup> *Al-Mawsū‘ah al-Fiqhīyyah*, vol. 18, 329.

<sup>10</sup> Abū Bakr al-Sarkhasī, *al-Mabsūṭ*, Beirut, Dār al-Ma‘rifah, 1406H, vol. 30, 209.

<sup>11</sup> Aḥmad ibn ‘Alī ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, Beirut, Dār al-Ma‘rifah, 1379H, vol. 12, 326.

*Ḥiyal*,<sup>12</sup> that is said to incorporate parts of the now extinct work of Muḥammad ibn Ḥasan. Although criticised unsympathetically by opponents of *ḥiyal*, a perusal of the work reveals it to be a rich source of legal provisions, reflecting the erudition of its author. In addition, it portrays the level of development Islamic law had attained in his day, which was meticulously adhered to both in public and private. The book contains ingenious procedures for achieving a variety of justifiable objectives without committing a violation of the *sharī'ah*, that could be resorted to by parties who find themselves in circumstances unfavourable to them. Many of the procedures discussed in the book appear not to exceed known legal limitations, at least in Ḥanafī law. The numerous annotations and commentaries on *Kitāb al-Khassāf* indicate the level of popularity it enjoyed among scholars. The author of *Kashf al-Zunūn* has recorded the commentaries of *al-Khassāf* by leading Ḥanafī jurists such as Shams al-A'imma al-Ḥalwānī, and Shams al-Dīn al-Sarkhasī. Works bearing the title *Kitāb al-Ḥiyal* were produced, among others, by Muḥammad ibn 'Alī al-Nakha'ī, Abū Ḥātīm al-Qazwīnī and the Shāfi'ī jurist Abū Bakr al-Sayrafī, where *ḥiyal* for rebutting claims and other topics were discussed. A less famous work on the subject is *Jannat al-Aḥkām wa Junnat al-Ḥukkām* by Sa'īd ibn 'Alī al-Samarqandī, which contains *ḥiyal* not mentioned in the work of al-Khassāf.<sup>13</sup> The authoritative compendium of *fatāwa* of the Ḥanafī school, *al-Fatāwa al-Ālamgīriyyah*, contains a detailed chapter on *ḥiyal*, consisting of a wide collection of *ḥiyal* relating to a variety of topics, drawn from Ḥanafī legal works.

Of the early works compiled in denunciation of *ḥiyal*, *Ibtāl al-Ḥiyal* of Ibn Battah<sup>14</sup> (died 387H) stands prominent. Specifically devoted to establish the fallacy of a *ḥīlah* where *khul'* (divorce granted against compensation at wife's request) followed by remarriage was suggested by some for evading breach of an oath resulting in a triple divorce on the wife, it severely condemns all sorts of *ḥiyal* as fraud and hypocrisy. A

<sup>12</sup> Abū Bakr Aḥmad ibn 'Amr al-Khassāf, *Kitāb al-Khassāf fī al-Ḥiyal*, Cairo, (publisher unknown), 1314H.

<sup>13</sup> Mustafā ibn 'Abd Allah al-Rūmi, *Kashf al-Zunūn 'an Asāmī al-Kutub wa al-Funūn*, vol. 1, 606.

<sup>14</sup> 'Ubaid Allah ibn Muḥammad, Ibn Battah al-Akbarī, *Ibtāl al-Ḥiyal*, Beirut, al-Maktab al-Islāmī, 1403H.

book bearing an identical title is also ascribed to al-Qāḍī Abū Ya‘la.<sup>15</sup> After citing a number of narrations from the companions and others that indicate that *khul‘* could only be initiated by the wife when incompatibility develops between the couple and could not be originated by the husband, Ibn Battah goes on to uphold the verdict of Imām Aḥmad that even if this procedure is adhered to, the oath will again become applicable when the second marriage takes place. Of the later scholars, Ibn al-Qayyim is known as the most vociferous critic of *hiyal*, who has dedicated a significant portion of his four volume *I‘lām al-Muwaqqi‘īn ‘an Rabb al-‘Ālamīn*<sup>16</sup> to an enthusiastic condemnation of them. Continuing his discussion of intention and blocking of avenues to an in-depth exposition of *hiyal*, he has provided a detailed elucidation of *hiyal* and its various forms citing over a hundred examples, and elaborated on evidence indicating the nullity of *hiyal* together with a painstaking refutation of the arguments in favour of *hiyal*. Despite his vehement criticism of *hiyal*, he has acknowledged the existence of acceptable *hiyal* and has mentioned a number of examples illustrating this permissible category, which makes it clear that the preceding assault was directed only at the prohibited variety. This could mark a significant divergence from the position adopted by his mentor Ibn Taymiyyah, whose work *Iqāmat al-Dalīl ‘alā Ibtāl al-Tahlīl* is referred to a number of times by Ibn al-Qayyim, and also by Imām Aḥmad, that categorically negates the admissibility of *hiyal* in general.<sup>17</sup> Ibn al-Qayyim could be said to have left a profound impression that has significantly influenced the later writers on *hiyal*. Ibn Ḥajar, in his commentary on *Kitāb al-Ḥiyal* in al-Bukhārī has objectively analysed the observations of Ibn al-Qayyim.<sup>18</sup>

It should be noted that in the treatment of the subject of *hiyal* in early works, a strictly academic approach has evidently been adopted. Being a scholastic field of expertise pertaining to law and not necessarily meant in every instance to be practised, *hiyal* were discussed as an

<sup>15</sup> Aḥmad ‘Abd al-Ḥalīm ibn Taymiyyah, *Kutub wa Rasā’il wa Fatāwā ibn Taymiyyah*, Riyāḍ, Maktabah Ibn Taymiyyah, vol. 30, 220, 241.

<sup>16</sup> Abū ‘Abdillāh Muḥammad ibn Abū Bakr, Ibn al-Qayyim, *I‘lām al-Muwaqqi‘īn ‘an Rabb al-‘Ālamīn*, Beirut, Dār al-Jīl, 1973.

<sup>17</sup> Ibn Taymiyyah, *Kutub wa Rasā’il wa Fatāwā ibn Taymiyyah*, vol. 29, 62, vol. 30, 241.

<sup>18</sup> Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, vol. 12, 326.

academic topic of interest. As such, all possible varieties of devices in overcoming legal intricacies relating to given situations could find mention in some works, regardless of the level of admissibility enjoyed by each such *ḥīlah*, i.e. whether the particular *ḥīlah* in question is in itself permissible, offensive or prohibited.<sup>19</sup> Reference even to alternatives that are obviously prohibited, such as a possible *ḥīlah* for a woman who wishes to nullify her marriage irrevocably being reneging from Islam, has drawn heavy criticism from opponents.<sup>20</sup> The latter have counted allusion to such illegal options equal to advocating such measures. While the books of *fiqh* would present essentially identical information in a different manner, e.g. that apostasy results in severing the marriage bond, the particular approach adopted by the works on *ḥiyal* appears to have made them especially vulnerable to censure and disapproval.

## THE CASE FOR LEGAL DEVICES: SUPPORTIVE TEXTS

The proponents of *ḥiyal* have cited copious evidence from the Qur’ān and the Sunnah, supported by the practice of the companions. Of the more relevant references, the verse “Take in your hand a bundle of twigs and strike (your wife) with it, and do not break your oath” (Qur’ān, 37:44) relates how the prophet Ayyūb (*pbuh*) was taught by Allah an exit (*makhraj*) from the oath he had taken to inflict on his wife a hundred strikes. The verses appearing in Sūrah Yūsuf, “After he (i.e. Yūsuf) supplied them (i.e. his brothers) with provisions, he inserted the drinking vessel in his brother’s luggage” and taught by Allah for retaining his brother with him in a plausible manner. The Holy Prophet (*pbuh.*) was directed by Allah: “Never say about a matter ‘I will surely do it in

<sup>19</sup> It is noted that this feature is not confined to books on *ḥiyal*; it is commonly observed in works on *fiqh* that some issues that are obviously prohibited are analysed at length, especially when an issue is taken up incidentally for clarifying another, without any indication of their being impermissible.

<sup>20</sup> ‘Alā al-Dīn al-Ḥaṣkafī, *al-Durr al-Mukhtār*, Beirut, Dār al-Fikr, 1386H, vol. 6, 147; the text explicitly states that this is a foul device (*ḥīlah bāṭilah*) and that one who advocates such *ḥiyal* should be prevented from doing so.



the future' without (making the exception) 'if Allah wills'" (Qur'ān, 18:23, 24), which helps one avoid violation of an oath. The god-fearing are promised by Allah that he will facilitate exits for them. (Qur'ān, 65:2) Proponents argue that *hiyal* provide exits out of difficult situations.

Evidence is sought in a number of *aḥādīth* for supporting *hiyal*. In a *ḥadīth* recorded by Abū Dāwūd from Abū Umāmah (*Rad.*) the Holy Prophet (*pbuh.*) is reported to have commanded in the case of a bedridden invalid who committed fornication that he be beaten once with a palm frond made of a hundred strands.<sup>21</sup> Al-Shāfi'ī and Ḥanafī jurists have understood from this *ḥadīth* and the Qur'anic verse in connection with Ayyūb (*pbuh.*) that one could avoid breaking a similar oath in certain instances by following this procedure, while Imām Mālik considers it necessary that beating should involve pain.<sup>22</sup> The famous *ḥadīth* narrated by Abū Hurayrah and Abū Sa'īd al-Khudrī (*Rad.*) where the Holy Prophet (*pbuh.*) had disapproved the exchange of different types of dates in unequal quantities and directed that one type of dates be sold against *dirhams* and then other dates be purchased against *dirhams* too is cited in support.<sup>23</sup> It is noted here that the two transactions prescribed are in themselves not the objective of the contractors, but have only been required for the purpose of avoiding *ribā*.

'Umar (*Rad.*) is reported to have remarked that oblique speech saves one from uttering falsehood.<sup>24</sup> While falsehood is prohibited and is not condoned, one may resort to indirect speech, thereby saving himself from uttering what is not true. This could be through making the proposition imprecise by qualifying it with 'perhaps' etc., or intending a possible meaning other than what is readily understood by the addressee. Falsehood has been permitted for making peace between people through uttering what is good.<sup>25</sup> This has been interpreted to mean oblique speech,

<sup>21</sup> Abū Dāwūd al-Sijistānī, *Ḥadīth* No. 4472, *al-Sunan*, Beirut, Dār al-Fikr, vol. 4, 161.

<sup>22</sup> Abū 'Abd Allah al-Qurṭubī, *Tafsīr al-Qurṭubī*, Cairo, Dār al-Sha'b, 1372H, vol. 15, 214.

<sup>23</sup> Abū Bakr al-Bayhaqī, *al-Sunan al-Kubrā*, Makkah, Maktabah Dār al-Bāz, 1994, vol. 5, 291, *Ḥadīth* No. 10323.

<sup>24</sup> Abū Bakr al-Sarkhasī, *al-Mabsūt*, vol. 30, 211.

<sup>25</sup> Muslim ibn Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*, Beirut, Dār Ihyā' al-Turāth al-'Arabī, vol. 4, 2011, *Ḥadīth* No. 2605.

avoiding outright falsehood that is impermissible. Oblique speech making indirect reference is recognised in the *sharī'ah* on the basis of the Qur'anic verse that allows such reference to a widowed woman in her *'iddah*, indicating one's interest in her. (Q, 2: 235) After citing the verses and traditions that lend support to the legality of *ḥiyal*, Al-Sarkhasī observes that various types of *ḥiyal* have been instructed in these and other narrations, which are numerous.<sup>26</sup>

## DENUNCIATION OF LEGAL DEVICES

Adoption of some *ḥiyal* stands challenged by evidence drawn from various Qur'anic verses and *aḥādīth*. Having recourse to *ḥiyal* for circumventing prohibitions finds severe condemnation in the Qur'anic narration appearing in Sūrah al-An'ām concerning Sabbath violators from the nation of Mūsā (*pbuh*). (Q, 7: 163-166) Al-Bukhārī has recorded the *ḥadīth* reported by Abū Hurayrah (*Rad.*) that Jews were accursed due to their benefiting from the sale of molten animal fat when animal fat was prohibited on them.<sup>27</sup> The *ḥadīth* narrated by 'Alī (*Rad.*) that the Holy Prophet (*pbuh*) cursed the legaliser (of something prohibited) and the one for whom it is legalised, is cited in denunciation of the *ḥīlah* for legalising an irrevocably divorced woman for her former husband.<sup>28</sup> The *ḥadīth* recorded by al-Bukhārī and Muslim, narrated by 'Umar (*Rad.*) that 'actions are according to intentions' has been interpreted to support the condemnation of *ḥiyal*.<sup>29</sup> Ibn Ḥajar has recorded the statement of Ibn al-Munīr that this *ḥadīth* is one of the strongest evidences in support of blocking of means and nullifying adoption of *ḥiyal*.<sup>30</sup> It is interesting to note that the *ḥadīth* has been cited in support by both those who consider *ḥiyal* to be acceptable as well as those who hold them void. In a *ḥadīth* bearing direct reference to *ḥiyal*, the Holy Prophet (*pbuh*) has

<sup>26</sup> Abū Bakr al-Sarkhasī, *al-Mabsūṭ*, vol. 30, 210.

<sup>27</sup> Muḥammad ibn Ismā'īl al-Bukhārī, *Ḥadīth* No. 2111, *al-Ṣaḥīḥ*, Beirut, Dār ibn Kathīr, 1987, vol. 2, 775.

<sup>28</sup> Abū Bakr al-Bayhaqī, *Ḥadīth* No. 13961, *al-Sunan al-Kubrā*, vol. 7, 207.

<sup>29</sup> Muḥammad ibn Ismā'īl al-Bukhārī, *Ḥadīth* No. 1, *al-Ṣaḥīḥ*, vol. 1, 3.

<sup>30</sup> Ibn Ḥajar al-'Asqalānī, *Fath al-Bārī*, vol. 12, 327.

warned against committing what the Jews had committed, by seeking to permit the prohibitions of Allah through the simplest of strategies (*adnā al-hiyal*).<sup>31</sup>

## ATTEMPTS TO DIFFERENTIATE LAWFUL LEGAL DEVICES FROM THE UNLAWFUL

Imām Mālik and some early jurists are considered to have held all *hiyal* impermissible, which approach has also been adopted by Imām Aḥmad and his followers, especially of the initial centuries. However, the majority of jurists have refrained from condemning all applications falling under *hiyal* in general as unlawful, possibly also due to the fact that attempting a precise demarcation separating *hiyal* from normal application of law could prove challenging. Thus, the majority of juristic trends are inclined to categorise *hiyal* into permissible and impermissible types. In spite of his forceful objection to *hiyal*, the approach adopted by Al-Bukhārī in the chapter he devotes for denouncing *hiyal* in his *Ṣaḥīḥ* implies that he does not advocate renunciation of all *hiyal*.<sup>32</sup> Al-Sarkhasī considers that permissibility of *hiyal* is established, based on the rulings derived (*mukharraj*) from the original verdicts of the Imām. He states that the overwhelming majority of scholars concur on this, except for some whom he refers to as lacking insight in the Qurʾān and the Sunnah.<sup>33</sup>

In dividing *hiyal* into permissible and impermissible varieties, many of the jurists have fundamentally taken their outcome into consideration. The theoretical principle in this regard, stated briefly, is that if the device in question repels some injustice or wrong, it is approved,

<sup>31</sup> ‘Ubaidullah ibn Muḥammad, Ibn Battah al-Akbarī, *Ibtāl al-Ḥiyal*, Beirut, al-Maktab al-Islāmī, 1403H, vol. 1, 47. Ibn al-Qayyim narrates this *hadīth* from the author and observes that an *isnād* of this nature is considered *ṣaḥīḥ* by al-Tirmidhī. Ibn al-Qayyim, *Ḥāshiyah ibn al-Qayyim*, Beirut, Dār al-Kutub al-‘Ilmiyyah, 1995, vol. 9, 244. *Adnā al-hiyal* means easiest of *hiyal* or those closest to reach; Ibn al-Qayyim, *I‘lām al-Muwaqqi‘in*, vol. 3, 165.

<sup>32</sup> Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, vol. 12, 327.

<sup>33</sup> Abū Bakr al-Sarkhasī, *al-Mabsūṭ*, vol. 30, 209.

while if it results in the lapse of a right, it is disapproved.<sup>34</sup> The verdict of the Ḥanafī jurists, the chief proponents of *ḥiyal*, is summarised by al-Sarkhasī as follows: *ḥiyal* through which prohibitions are avoided or what is lawful is attained are desirable. What is reprehensible is adoption of means to abolish a person's right, to disguise a wrongdoing (*bāṭil*), or to create doubts in a right.<sup>35</sup> The same ruling is reiterated in *al-Fatāwa al-Ālamgīriyyah*.

Thus, *ḥiyal* that are recognised as legal in general by many of the jurists are those that serve the purpose of establishing a right, repelling a wrong, fulfilling an obligation, avoiding a prohibition etc. where the objective of the lawgiver is fulfilled through employing a legally acceptable means. Thus, permissible *ḥiyal* could be defined as an inconspicuous means permitted in *sharī'ah* that facilitates the attainment of a benefit or repelling a harm, without forgoing the objectives of *sharī'ah*.<sup>36</sup> Conceived in this perspective, *ḥiyal* that are generally held legal are noted to comprise three factors: First, the means being of a concealed nature, either due to its exterior being different from the interior, or due to it being naturally obscure, not usually commanding attention; second, the means being lawful in *sharī'ah*, that does not involve forgoing rights of Allah or rights of men; third, the purpose intended to be realised through the employment of *ḥiyal* being lawful.<sup>37</sup>

It appears that *ḥiyal* included in the permissible category could be further divided into two types, based on their relationship with the natural objective as laid down by the lawgiver.<sup>38</sup> In the first of the two, the means adopted leads to its legally intended objective, nevertheless, in a way that is not immediately perceivable. It is noted that if the means serve the purpose of achieving the legally intended objective as laid by the lawgiver in an obvious manner, it is not linguistically referred to as *ḥiyal*. Examples of such means are spelled-out contracts such as sale, guarantee, lease, *salam* and various types of *khiyār* (options), that realise

<sup>34</sup> Ibn Ḥajar al-ʿAsqalāni, *Fath al-Bārī*, vol. 12, 328.

<sup>35</sup> Al-Shaykh Niẓām (et al.), *al-Fatāwa al-Ālamgīriyyah*, Kuetta, Maktabah Mājidīyyah, vol. 6, 390, Abū Bakr al-Sarkhasī, *al-Mabsūṭ*, vol. 30, 210.

<sup>36</sup> *Fatāwā Dār al-Iftā*, Cairo, al-Majlis al-Aʿlā li al-Shuʿūn al-Islāmiyyah, *Fatwa* No. 1324.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

their legally intended objective in an unconcealed manner, and are not generally included in *hiyal*. Second of the two types of permissible *hiyal* is where the means employed for achieving a certain objective is legally intended to realise a different objective, nevertheless, the two objectives do not happen to be contradictory. Due to the congruity existing between the two objectives, this type of *hīlah* too could be considered permissible, as it could not be regarded to result in defeating either objective. An example for this type is oblique speech. If the objectives are contradictory, the means in this instance would be termed an unlawful *hīlah*.

Analysing the above, the varying positions adopted by jurists on the issue of differentiating lawful *hiyal* from the unlawful could be summarised into a general principle that reflects areas of consensus among different approaches, at least in theory. *Hiyal* that the *sharī'ah* condemns and abolishes could be broadly identified as those that negate a *sharī'ah* principle or conflict with an interest recognised by *sharī'ah*. If the *hīlah* does not negate any *sharī'ah* principle and is not in conflict with a recognised interest, it is not included in the prohibition and is not considered void.<sup>39</sup>

## CLASSIFICATION OF LEGAL DEVICES ACCORDING TO AL-SHĀṬIBĪ

In his discussion of *hiyal*, al-Shāṭibī is inclined to categorise *hiyal* that are adopted in a permissible way as legal. He regards *hiyal* illegal in general when they are adopted in an impermissible manner that leads to waiving a ruling or transforming it into another, which could not have happened except for the *hīlah* that was employed, while one is aware that the means adopted was not supposed to be utilised for this purpose. Al-Shāṭibī has identified two factors in this type of *hiyal*; first, it results in apparent transformation of the ruling pertaining to the action from one to another, and second, actions recognised in the *sharī'ah* are made mediums leading to such transformation.<sup>40</sup>

<sup>39</sup> *Fatāwā Dār al-Iftā*, Cairo, al-Majlis al-A'lā li al-Shu'ūn al-Islāmiyyah, Fatwa No. 1324.

<sup>40</sup> Al-Shāṭibī, *al-Muwāfaqāt fī Usūl al-Sharī'ah*, Cairo, al-Maktabah al-Tijāriyyah, vol. 2, 378-385.

The principal arguments of al-Shāṭibī against such *ḥiyal* could be summed up as follows:

First, al-Shāṭibī maintains that adopting *ḥiyal* is in conflict with the objective of the lawgiver. One who resorts to employing *ḥiyal* has aimed at achieving what defeats the objective of the lawgiver, which results in his action becoming void. It is required that the objective of a *mukallaf*, i.e. one addressed by the law, be in conformity with the objective of the lawgiver. If the *mukallaf* aims at achieving what is at variance with the lawgiver's objective, his action is considered inconsistent with the *sharī'ah*. An action inconsistent with the *sharī'ah* is void. Al-Shāṭibī has elaborated on the assertion that an action becomes void when it is not in consonance with the objective of the lawgiver, as the realisation of these objectives is intended.<sup>41</sup>

Second, following a line of argument close to the first, he also contends that adopting *ḥiyal* also contradicts the *sharī'ah* principles of taking the end result into consideration and that of cause and effect. Al-Shāṭibī explains that having recourse to an act that is apparently in conformity with the *sharī'ah* for abolishing a *sharī'ah* ruling or transforming it ostensibly into another, when the end result is taken into consideration, is in reality injurious to *sharī'ah* principles. A factor that is recognised as a cause in *sharī'ah*, when it is known, legally dictates that its specified effect be realised and none other; when an effect that is other than the one laid down by the law giver and happens to be at variance with the objective of the lawgiver, is intended to be achieved, it becomes void.<sup>42</sup> Third, al-Shāṭibī claims that adoption of *ḥiyal* necessitates absence of intention in the contract employed as the *ḥīlah*. Willingness (*riḍā*) which is the foundation of the contract being hidden and unverifiable, the lawgiver has equated the text of the contract to it and has considered the text to be representative of consent. According to al-Shāṭibī, when the contractor intends other than the meaning of the contract, he could no longer be considered to intend the realisation of the contract legally, as the effect of contracts depends on authorisation of the lawgiver, and not on the intention of the contractor.<sup>43</sup>

<sup>41</sup> Al-Shāṭibī, *al-Muwāfaqāt*, vol. 2, 231.

<sup>42</sup> Al-Shāṭibī, *al-Muwāfaqāt*, vol. 2, 201, 278.

<sup>43</sup> Al-Shāṭibī, *al-Muwāfaqāt*, vol. 1, 216, 330.

Based on the above, Al-Shāṭibī argues that when it is established that laws of *sharīʿah* have been enacted for securing the well being of men, human actions would necessarily be assessed on the basis of their being in harmony with this ideal, as the objective of the lawgiver then finds expression in them. If an issue is in consonance with the law both in externality and in intent, it does not pose any problem. If the issue in question is such that it is overtly in accordance with the law, while the dictate of *maṣlahah* is to the contrary, the action in this instance is in reality illegal. This is so because legally recognised actions are not objectives in themselves; on the contrary, the objective happens to be their end results, i.e. the interests for attaining which actions had been sanctioned. Thus, when an action does not lead to securing these objectives, it could not be regarded as legal.<sup>44</sup>

### **CAN LEGAL DEVICES BE VALID BUT PROHIBITED: JURISTIC DILEMMA**

In differentiating between the lawful and unlawful *hiyal* as generally agreed based on the characteristics delineated above, there remain certain varieties of *hiyal* where jurists have differed with regard to their inclusion in the permissible category, and whether an executer of such *hiyal* could be committing a sin even if the contract is legally held to be valid and effective. This group of *hiyal* principally concern those legal mechanisms where lawful means are employed for achieving primarily unlawful ends. The validity of such *hiyal*, which mostly consist of multiple contracts executed one after the other based on a prior understanding or otherwise, has been a centre of a lively debate among Islamic jurists from the early periods. In *Fatḥ al-Bārī*, the Shāfiʿī jurist and eminent traditionist Ibn Ḥajar al-ʿAsqalānī has highlighted this category, after summing up four varieties of *hiyal* that comprise employing permissible means for different ends. He has not discussed impermissible means, possibly indicating that there is no substantial difference on the unlawfulness of employing them. In his classification, in the first category, a permissible avenue is employed for violating a right or perpetrating a wrong. Ibn Ḥajar pronounces this category of *hiyal* to be prohibited,

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Al-Shāṭibī, *al-Muwāfaqāt*, vol. 2, 378-385.

evidently expressing his judgment on the issue, although he has later taken up this type and has outlined the difference of scholars on it. The second category pertains to employing a permissible means for securing a right or repelling a wrong, which he pronounces as either compulsory or recommended. The last two categories involve using a permissible means for evading what is detestable (*makrūh*), which could be either recommended or permissible, or for avoiding what is desirable, which is reprehensible.

Out of these four types, all of which, as evident, pertain to employment of avenues lawful in themselves, jurists are at variance about the first, where a permissible avenue is employed for attaining an unlawful end such as negation of a right or securing a wrong. It appears that the term *hiyal* has been generally taken to mean specifically this type by most of those who condemn them or are critical of their application. However, as shown earlier, it should be noted that there happens to be a large area where there is near unanimity about their acceptability, despite of the term *hiyal* being applicable to them.

### THREE APPROACHES TO *HIYAL*

Analysing the controversial type of *hiyal*, Ibn Ḥajar notes three trends among jurists in this regard. Some have considered the transaction in question entirely valid, both externally and in reality, i.e. *de jure* as well as *de facto*, while others hold it totally void. A third group holds it valid, although the perpetrator is admitted to become sinful in the process.<sup>45</sup> It can be said that the categorisation of the juristic trends to the above three is only approximate, as these three approaches are not found with regard to every *hīlah* where a lawful means is employed for attaining an apparently unlawful end.

Of the three approaches to the employment of lawful means for what could be considered as extra-legal ends as delineated above, the second approach obviously is of the early Mālikī and Ḥanbalī jurists, who are renowned for their universal condemnation of *hiyal*. However, critics have cited instances where these schools have upheld the use of some *hiyal* as valid. The later followers of these schools, such as Ibn al-

<sup>45</sup>

Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī*, vol. 12, 326.



Qayyim, display a marked divergence from the stance of their predecessors, in that they have given concession to permissible *hiyal*, directing the disapproval only to the unlawful variety. With regard to the remaining two approaches, the first is ascribed to the Ḥanafī jurists, while the last belongs to Imām al-Shāfi‘ī. As these two approaches have had the strongest impact on *hiyal* and have decided the extent and nature of the involvement of *hiyal* in Islamic law, we shall discuss them at some length.

## LEGAL DEVICES AND ḤANAFĪ JURISTS

The first approach above, where the process is held valid and acceptable in its entirety, both externally and internally, is ascribed to the jurists of the Ḥanafī school. Jurists of the Ḥanafī school are widely recognised for the accommodative stance they had adopted towards *hiyal* in general, possibly due to a work on the subject ascribed to Imām Abū Yūsuf. Indeed, the Ḥanafī jurist al-Sarakhsī has observed that deliberation on *shar‘ī* rules would reveal all transactions to be tantamount to *hiyal* in varying degrees, and that detest of *hiyal* in reality is only indicative of detest for *shar‘ī* rules. Ḥanafī jurists have put forward tenable arguments justifying their position in some instances, and in some others, retraction of Ḥanafī jurists from their earlier verdicts recognising *hiyal* of this type is on record. Retraction of Imām Abū Yūsuf from some *hiyal* aimed at evading *zakāt* could be cited in example.

The apparent laxity perceived of Ḥanafī jurists with regard to *hiyal* seems to have drawn strong criticism, as reflected in the comments of al-Bukhārī in the section on *hiyal* in *Kitāb al-Ikrāh* of his *Ṣaḥīḥ*. However, closer inspection does not uphold this allegation in every instance Ḥanafī jurists have come under attack in the context of *hiyal*. There appears to be a great deal of misconception regarding the reality and extent of the Ḥanafī schools’ concessionary attitude towards *hiyal*. Ibn Ḥajar contends that it is known of Imām Abū Yūsuf and other jurists of the school that they had confined the employment of *hiyal* to justifiable purposes only.<sup>46</sup> The Ḥanafī jurist al-Nasafī has narrated in *al-Kāfi* the saying of Muḥammad ibn Ḥasan that to evade the laws of Allah through

<sup>46</sup>

Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, vol. 12, 326.

employing legal devices leading to abolishment of rights is not of the ethical conduct of believers.<sup>47</sup> Abū Ḥafṣ al-Kabīr, who interestingly is the narrator of Muḥammad ibn Ḥasan's book on *ḥiyal*, reports from Muḥammad ibn Ḥasan himself: "A strategy a Muslim employs for the sake of avoiding something forbidden or for achieving what is lawful is condonable. However, devices employed for annulling a right or justifying a wrong, or for creating doubts in one's right, are offensive (*makrūh*)."<sup>48</sup> Ibn Ḥajar observes that *makrūh* in the view of Muḥammad ibn Ḥasan is closer to prohibition.<sup>48</sup>

Ḥanafī jurists appear to have taken varying approaches to *ḥiyal*, depending on the time of operating the *ḥīlah* vis-à-vis the right it is supposed to avoid or alter. They are said to have considered it offensive to adopt *ḥiyal* for evading an obligation or right that has already become established. Thus, adopting a measure that abolishes the right of a neighbour to pre-emption to which he has already become entitled through a stratagem such as obtaining his consent to relinquish his right against monetary compensation is disapproved. In this instance, the neighbour loses his right to pre-emption as well as any right to claim the agreed compensation in Ḥanafī law. With regard to having recourse to *ḥiyal* before the onset of the right, al-Kāsānī records that Abū Yūsuf and Muḥammad ibn Ḥasan have differed on this issue.<sup>49</sup> *Ḥiyal* could be employed in this situation for a purpose such as avoiding an obligation, before the relevant ruling becomes applicable. Abū Yūsuf generally considers *ḥiyal* admissible when they are applied before the obligation, while Muhammad holds them offensive due to the *ḥīlah* preventing the establishment of a right, thereby resulting in its annulment. Abū Yūsuf contends that the *ḥīlah* prevents the right through creating a legally acceptable reason that results in the non-applicability of the right, e.g. sale, gift or donation as in a case of pre-emption, which is lawful. It could not be said that a right is abolished or violated here, as the right had not yet become established. The *ḥīlah* had prevented the establishment of the right through a legally valid means. Al-Kāsānī concludes that

<sup>47</sup> Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī*, vol. 12, 328, 329.

<sup>48</sup> Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī*, vol. 12, 331.

<sup>49</sup> ʿAlā al-Dīn al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, Beirut, Dār al-Kutub al-ʿArabī, 1982, vol. 5, 35.

while the position adopted by Muḥammad reflects a precautionary approach (*ih̥tiyāt*), the ruling in the issue is the verdict of Abū Yūsuf.

## THE UNIQUE STAND OF SHĀFI‘Ī JURISTS ON LEGAL DEVICES

The third and unique approach where the validity of the action has been divorced from its acceptability belongs to Imām al-Shāfi‘ī. He holds that while a contract could be objectionable and result in its perpetrator becoming liable to sin and punishment in the hereafter, this does not necessitate its invalidity as far as its external ruling is concerned. The Shāfi‘ī jurists regard contracts to be legitimate on the basis of their externality, while conceding that one who employs *hiyal* with deceit and fraud becomes liable to sin as far as the internal aspect is concerned. In this regard, al-Shāfi‘ī has categorically ruled the employment of *hiyal* offensive where they lead to violation of a right. Some of his followers have held this to mean offensiveness of a minor nature (*tanzīh*). However, a large number of leading jurists of the Shāfi‘ī school like al-Ghazālī have stated this to indicate offensiveness at the level of prohibition (*tahrīm*), and that adopting such *hiyal* involves sin.<sup>50</sup> According to the Shāfi‘ī commentator of *Ṣaḥīḥ al-Bukhārī*, Ibn Ḥajar al-‘Asqalānī, this inference is borne out by the prophetic tradition ‘every man is entitled only to what he had intended’. Thus, one whose intention is to earn *ribā* through employing a contract of sale, has fallen in *ribā*, and his adopting the semblance of a sale would not exonerate him from its sin. One who intends through a contract of marriage merely to legalise (*taḥlīl*) the woman to her former husband, has become a *muḥallil* (legaliser), and is liable to the curse directed at the perpetrator of the act. He may not expect to avoid the sin involved through having adopted the semblance of a marriage contract. Every act intended to prohibit what Allah had permitted or licence what Allah had prohibited is a sin. Thus, adopting a device leading to committing a prohibition constitutes a sin; in this regard, there is no difference between the employed means being one that is

<sup>50</sup>

Ibn Ḥajar al-‘Asqalānī, *Fath̥ al-Bārī*, vol. 12, 328.

specific to the prohibition and it being one that is used only as an access (*dharī'ah*) while not specifically leading to it.<sup>51</sup>

Ibn al-Qayyim, in his vehement denunciation of *ḥiyal* in *I'lām al-Muwaqqi'īn*, commenting on Imām al-Shāfi'ī's position, has attempted to dispel the misconception arising from the latter's holding *ḥiyal* legally valid externally that he had approved of them. He observes that while later jurists had invented some *ḥiyal* to which none of the earlier *Imāms* are known to have subscribed to, Imām al-Shāfi'ī could never have permitted trickery and fraud. Ibn al-Qayyim asserts that one who is aware of the life of al-Shāfi'ī and his status would readily know that, although al-Shāfi'ī had treated contracts on the basis of their exterior and did not regard the intent of the contractor when it differed from his words, he did not advocate the practice of *ḥiyal* that are founded on deception. The distinction between treating contracts on their externality without regard to the intent, and legalizing a contract known to be based on deceit where its essence differs from the exterior, is obvious. Ibn al-Qayyim draws a parallel between what was permitted by al-Shāfi'ī and the case of a judge who delivers judgment relying on the apparent uprightness of witnesses. Although in reality the latter could be bearing false witness, it could never be said that by relying on their external uprightness, the judge had approved of their misdeed. Commenting on al-Shāfi'ī's position on the sale of *'īnah*, Ibn al-Qayyim explains that what he permitted was the sale of merchandise to one from whom it was purchased, relying on the fact that contracts of Muslims are evidently free from deceit and fraud. Al-Shāfi'ī had never permitted the contractors to pre-agree on exchanging 1000 for 1100 and then to produce a merchandise legalising *ribā*, especially when the vendor had never intended its sale, nor the buyer its purchase. Ibn al-Qayyim avers that had Imām al-Shāfi'ī known about this being considered legal, he would have hastened to denounce it.<sup>52</sup>

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<sup>51</sup> *Ibid.*

<sup>52</sup> Muḥammad ibn Abī Bakr Ibn Qayyim al-Jawziyyah, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, Beirut, Dār al-Jīl, 1973, vol. 3, 281.

## THE APPRAISAL OF IBN ḤAJAR

In his exposition of some *aḥādīth* related by al-Bukhārī where the latter had adversely commented on the practice of some early *mujtahid* (whom al-Bukhārī had desisted from naming, however, is popularly considered to be a reference to Imām Abū Ḥanīfah) in allowing certain legal options that could be construed as *hiyal*, Ibn Ḥajar al-‘Asqalānī has provided a succinct introduction that sums up the varying stands taken by different factions of the orthodox juristic body in this regard. It is pertinent to note that being a successor both to Ibn al-Qayyim and his mentor Ibn Taymiyyah and possessing encyclopaedic *ḥadīth* knowledge, Ibn Ḥajar al-‘Asqalānī (d. 852H) could critically appreciate their contributions to the topic. Ibn Ḥajar appears to have elaborated only on those *hiyal* where a legally acceptable avenue is employed; *hiyal* that are illegal in themselves have not been discussed by him, although others have included these too in the subject of *hiyal*, when they happen to be exploited for attaining a lawful end. After summarising the lengthy discussion of Ibn al-Qayyim alluded to above, Ibn Ḥajar concludes that a contract being sinful does not necessitate its invalidity as far its external ruling is concerned. The Shāfi‘ī jurists regard contracts to be legitimate on the basis of their externality, while conceding that one who employs *hiyal* with deceit and fraud becomes liable to sin as far as the internal aspect is concerned. Through this approach the contention of Ibn al-Qayyim is avoided.<sup>53</sup>

This could be regarded as a highly penetrating appreciation of the issue that has evidently succeeded in avoiding both support of the misuse of law as well as weakening the foundations of law. Thus the application of the law externally leading to legally valid ends is not held in every instance to mean that such practice is acceptable and admissible, but rather, depends on the intent of the perpetrators, who are best aware of their intentions. Imām al-Shāfi‘ī has been able to advance a unique approach that highlights the superior outlook of a revealed law, which is neither confined to externalities totally disregarding intents, nor is overly spiritual thus resulting in eroding the authority of law. Rather, a sophisticated blend that could only be in the command of a divine law is advanced, where the legal effects and admissibility are judged individually.

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Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, vol. 12, 337.

Although some later followers of the Shāfi'ī school appear to have attempted to equate the approach of Imām al-Shāfi'ī in some of the relevant issues with that of the Ḥanafī school, there is evidently no justification to this perception in the texts of the Imām.

## RELEVANCE OF MOTIVE TO LEGAL DEVICES

From the preceding discussion, it is observed that the source of difference on the validity or otherwise of *ḥiyal*, especially in the domain of transactions, lies elsewhere. Roots of the scholastic disagreement on the issue could be traced to the fundamental difference on the basis of validity of contracts, i.e. whether it is based on the wording of a contract or its meaning and intent. A segment of jurists have treated the textual wording or formula of a contract to be the basis on which a judgement on its validity should primarily depend, while others have considered the meaning intended thereby to be the critical factor. It would be immediately apparent that the former position would dictate the legality of *ḥiyal* in general, as the primary purpose of *ḥiyal* is overt conformity to law. This is reiterated by Ibn Ḥajar, who observes that jurists who give precedence to the text of contracts over the intent are on the whole noted to treat *ḥiyal* too as permissible.<sup>54</sup> Of those who consider the validity to be based on the text of the contract, some regard a contract where the text differs from the intent to be valid externally and factually in all situations, while some others restrict its applicability to certain situations only. Others who consider such contracts operative only externally while they are in reality invalid, treat them as void contracts; Thus, according to the latter, only contracts whose textual formula corresponds with the true intent of the contract as indicated by circumstantial factors are allowed. This fundamental difference appears to bear a direct relationship to the issue of *ḥiyal*.

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Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī*, vol. 12, 326.

## CONCLUSION

It is evident that the usage of the term *hiyal* to denote legal structures of a particular nature that had some aspect of intricacy or conveyed a sense of dexterity and skill in avoiding violation of the law was not unfamiliar during the early era. In view of the numerous examples cited by the likes of al-Sarakhsī and al-Khassāf it is difficult to deny the fact that the companions and the early *mujtahids* had resorted to various *hiyal* in their personal conduct for avoiding violation of *sharīʿ* precepts, a part of which could be regarded to belong to the category of *taʿrīd*, a relatively ‘harmless’ variety of *hiyal*. Apart from those *hiyal* that were accepted as lawful by the general body of jurists, there were *hiyal* that were of a complex nature involving multiple transactions where jurists differed regarding their permissibility. Although some jurists such as Imām Aḥmad and Imām Mālik appear to have maintained that all *hiyal* are unlawful, a perusal of their schools reveal applications that could be included under *hiyal* which were generally regarded as permissible. Based on the principles upheld by different juristic allegiances concerning the main issues affecting *hiyal* such as the debates over text and intent and closing of avenues, the approach of jurists to the complex varieties of *hiyal* have varied; while some have regarded them as permissible, others have relegated them to the sphere of unlawful means. The socio-political environment prevalent in the later centuries appears to have resulted in the invention of certain *hiyal* that could result in a negation of the objectives of *sharīʿah*, which have been roundly criticised by jurists and condemned as impermissible.

A study of the use of *hiyal* would reveal it to be a natural corollary to the wide application of *sharīʿah*. *Hiyal* that were recognised as permissible were deployed as a way for overcoming legal predicaments that could be surmounted through employment of means equally legal without violation of the law. In fact, solutions that provide ways out of a direct violation of the law could be justly regarded as part of any legal system. Negation of the existence of these could imply negation of the law itself, as the means adopted too belong to the law, and form an integral part of it as do any other legal provision. A difference could be noticed between the Islamic *sharīʿah* and man-made law in this respect. The latter, although taking motives and objectives of parties into consideration, does so in a limited manner that lays emphasis on the external state of affairs, and tends to confine its judgement to the practical

outcome on the mundane plane alone. The Islamic *sharī'ah*, in addition to considering actions and verbal formulae of contracts, assesses the significance of intentions and objectives of the parties vis-à-vis the objectives of the lawgiver through human conduct, thus regarding human interaction in a more complex and comprehensive light. Thus, the issue of *hiyal* is not likely to arise in man-made law, where all means of accomplishing something could be legal in general regardless of their intricacy as long as any external violation of law is not committed. Islamic law distinguishes itself with the cautious approach it has taken with regard to legal mechanisms where there is room for questioning the intents and objectives of the parties as to whether they fall in line with the goals intended by the lawgiver, and has taken pains to discuss these thoroughly under the individual classification of *hiyal*. The vigorous discussion on *hiyal* provides an indication of the stress placed by *sharī'ah* on facilitating human relations in ways that could secure their wellbeing in every sphere.