

A THEORETICAL ANALYSIS OF THE ESSENCE AND RATIONALE OF LEGAL DEVICES IN ISLAMIC LAW

Muhammad Abdurrahman Sadique

ABSTRACT

A study of the application of legal contrivances in Islamic law would reveal it to be a natural corollary to the development of law, the progress of which kept par with the expansion of different fields of law. Legal contrivances, being an academic field of expertise pertaining to law and not necessarily meant in every instance to be practicable, were discussed as an academic topic of interest in the works on the subject. Positions adopted by jurists on the issue of differentiating lawful contrivances from the unlawful could be summarised into a general principle that reflects areas of consensus among different approaches theoretically. Contrivances that Islamic law condemns and abolishes could be broadly identified as those that negate a legal principle or conflict with an interest recognised by law. If the particular contrivance does not negate any legal principle and is not in conflict with a recognised interest or legal objective, it is not included in the prohibition and is not considered void. The reason that a discussion of legal contrivances exists in Islamic law is due to the fact that Islamic law concerns itself with discussing the significance of intentions and objectives of the parties in addition to actions and verbal formulae of contracts, thus regarding human interaction in a more complex and comprehensive light.

Keywords: Contrivance, legal, Islamic, contract, objective

INTRODUCTION

The term *hilah* is used to denote the medium of attaining or acquiring some objective, usually in a covert manner. The term is used more often to describe a means in the employment of which there is some negative aspect; however, it is also used to indicate a means which is prudent and wise.¹ Linguistically, the original meaning of the term *hilah* and various other terms such as *hayl*, *tahayyul* and *ihitiyal* all indicate the meaning of resourcefulness, sharpness of intellect and skill in management of affairs.² The root of *hilah* is *hawl*, which means transformation (*tahawwul*) from one state to another through some finely executed design that helps conceal the reality; it could also be a derivation of the root term *hawl* which means ability.

The term came to denote covert or subtle techniques that enable one to attain his objective. The meaning becomes even more specific when the term is employed 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.³ Procedures of a subtle nature that were adopted for overcoming situations where one was faced with the predicament of violating the Shari'ah came to be known as *hiyal shar'iyah*. 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 legal precepts or negated the justifiable legal 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.

A study of the application of *hiyal* would reveal it to be a natural corollary to the development of Shar'iah, the progress of which kept par with the expansion of fiqh. *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 confrontation of the law could be justly regarded as part and parcel of any legal system, the negation of the existence of which could be regarded as a negation of the law itself, as the means adopted too belong to the law, and form an integral part of it as any other legal provision. The difference in this respect between the Islamic Shari'ah and man-made law is that while the former concerns itself with discussing the significance of intentions and objectives of the parties in addition to actions and verbal formulae of contracts, and thus regards human interaction in a more complex and comprehensive light, the latter tends to suffice itself with merely taking the external state of affairs into consideration and confine its judgement to this plane alone. Thus, the issue of *hiyal* is not likely to arise in man-made law, where all means of accomplishing something could be strictly legal 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 thoroughly discuss these under the individual classification named *hiyal*, while man-made law does not generally find justification in them for such particular attention. Hence, the sweeping claim made by Schacht (characteristic of orientalist) that *hiyal* represent a cleavage between the theory and practice of Islamic law⁴ appear thoroughly unjustifiable, which could have been

¹ *Al-Mawsu'ah al-Fiqhiyyah*, Ministry of Awqaf, Kuwait, vol. 18, p. 328.

² Ibn Manzur, *Lisan al-'Arab*, Jordan, Markaz al-Turath, 1999, vol. 11, p. 186.

³ *Al-Mawsu'ah al-Zahabiyyah*, vol. 15, p. 150.

⁴ See *Encyclopaedia of Islam*, vol. 3, p. 511.

the case only if all hiyal without exception had been illegal, and had overwhelmed other normal applications of law. The Hanafi jurist al-Sarakhsi has observed that deliberation on legal rules would reveal all transactions to be tantamount to hiyal in varying degrees, and that an aversion to hiyal in general in reality is only indicative of detest for legal rules.

LEGAL CONTRIVANCES IN ISLAMIC LITERATURE

For an objective study of the classical works on the topic of hiyal, it is vital to be conscious of their academic treatment of the subject. It should be noted that hiyal, being an academic field of expertise pertaining to law and not necessarily meant in every instance to be practicable, were discussed as an academic topic of interest in the works on the subject. As such, all possible varieties of devices in overcoming legal intricacies relating to given situations find mention in many of the works, regardless of the level of admissibility enjoyed by each hilah, i.e. whether the particular hilah in question in itself is permissible, offensive or prohibited.⁵ Such inclusion of even prohibited alternatives to problems in the books on hiyal, such as a possible contrivance for a woman who wishes to nullify her marriage being apostasy, has drawn heavy criticism from the opponents of hiyal, who have counted their inclusion equal to advocating such measures. While the books of fiqh would present identical information in a different manner, e.g., that apostasy results in severing the marriage bond, the particular approach adopted by the works on hiyal have made them especially receptive to censure and disapproval.

Of the early works compiled in denunciation of hiyal, *Ibtal al-Hiyal* of Ibn Battah⁶ (died 387H) stands prominent. Specifically devoted to establish the fallacy of a hilah 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 hiyal as fraud and hypocrisy. A book bearing the identical title is also ascribed to al-Qadi Abu Ya'la.⁷ 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 Imam Ahmad 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'lam al-Muwaqqi' in 'an Rabb al-'alamin*⁸ 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 has elaborated on evidence indicating the nullity of hiyal together with a painstaking refutation of the arguments in favour of hiyal. Despite of 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 towards the prohibited variety. This could mark a significant divergence from the

position adopted by his mentor Ibn Taymiyyah, whose work *Iqamah al-Dalil 'ala Ibtal al-Tahlil* is referred to a number of times by Ibn al-Qayyim, and also by Imam Ahmad that categorically negates the admissibility of hiyal in general.⁹ Ibn al-Qayyim could be said to have left a profound impression that has significantly influenced the later writers on hiyal. Al-'Asqalani, in his commentary on Kitab al-Hiyal in al-Bukhari has objectively analysed the observations of Ibn al-Qayyim.¹⁰

SCHOLARLY DISCOURSE ON LEGAL CONTRIVANCES

The proponents of hiyal have cited copious evidence from the Qur'an 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" (Q, 37: 44) relates how the prophet Ayyub (Sal.) was taught by Allah an exit (makhrāj) from the oath he had taken to inflict on his wife a hundred strikes. The verses appearing in Surah Yusuf, "After he (i.e. Yusuf) supplied them (i.e. his brothers) with provisions, he inserted the drinking vessel in his brother's luggage" and thereafter "Thus did we scheme for Yusuf" (Q, 12: 70 -76) indicate the strategy he was taught by Allah for retaining his brother with him in a plausible manner. The Holy Prophet (Sal.) was directed by Allah: "Never say about a matter 'I will surly do it in the future' without (making the exception) 'if Allah wills'" (Q, 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. (Q, 65: 2) Hiyal provide exits out of difficult situations.

Adoption of some hiyal stands challenged by evidence drawn from various Qur'anic verses and ahadith. Having recourse to hiyal for circumventing prohibitions finds severe condemnation in the Qur'anic narration appearing in Surah An'am concerning Sabbath violators from the nation of Musa (Sal.). (Q, 7: 163 – 166) Al-Bukhari has recorded the hadith reported by Abu Hurayrah (Rad.)

⁵ It is noted that this feature is not confined to books on hiyal; 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.

⁶ Ubaidullah ibn Muhammad, Ibn Battah al-'Akbari, *Ibtal al-Hiyal*, Beirut, al-Maktab al-Islami, 1403H.

⁷ Ahmad 'Abd al-Halim ibn Taymiyyah, *Kutub wa Rasa'l wa Fatawa ibn Taymiyyah*, Riyadh, Maktabah Ibn Taymiyyah, vol. 30, pp. 220, 241.

⁸ Abu 'Abd Allah Muhammad ibn Abi Bakr, Ibn al-Qayyim, *I'lam al-Muwaqqi' in 'an Rabb al-'alamin*, Beirut, Dar al-Jiyal, 1973.

⁹ Ahmad 'Abd al-Halim ibn Taymiyyah, *Kutub wa Rasa'l wa Fatawa ibn Taymiyyah*, Riyadh, Maktabah Ibn Taymiyyah, vol. 29, pp. 62, vol. 30, p. 241.

¹⁰ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, p. 326.

that Jews were accursed due to their benefiting from the sale of molten animal fat when animal fat was prohibited on them.¹¹ The hadith narrated by 'Ali (Rad.) that the Holy Prophet (Sal.) cursed the legaliser (of something prohibited) and the one for whom it is legalised, is cited in denunciation of the *hilah* for legalising an irrevocably divorced woman for her former husband.¹² The hadith recorded by al-Bukhari and Muslim, narrated by Umar (Rad.) that 'actions are according to intentions' has been interpreted to support the condemnation of *hiyal*.¹³ Al-'Asqalani has recorded the statement of Ibn al-Munir that this hadith is of the strongest evidences in support of blocking of means and nullifying adoption of *hiyal*.¹⁴ It is interesting to note that the hadith has been cited in support by both those who consider *hiyal* to be acceptable as well as those who hold them void, as both factions refer to the intended meaning of the perpetrator. In a hadith bearing direct reference to *hiyal*, the Holy Prophet (Sal.) has warned against committing what the Jews had committed, by seeking to permit the prohibitions of Allah through the simplest of strategies (*adna al-hiyal*).¹⁵

Based on the above, 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 theoretically. *Hiyal* that Shari'ah condemns and abolishes could be broadly identified as those that negate a legal principle or conflict with an interest recognised by Shari'ah. If the *hilah* does not negate any legal principle and is not in conflict with a recognised interest, it is not included in the prohibition and is not considered void.¹⁶

Division of *hiyal* into lawful and unlawful could lead to a better appreciation of what constitutes lawful *hiyal* according to the majority of scholars. It is observed that *hiyal* 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, abandoning a prohibition etc. where the objective of the lawgiver is fulfilled through employing a legally acceptable means. Thus, permissible *hiyal* could be defined as an inconspicuous means permitted in Shari'ah that facilitate the attainment of a benefit or repelling a harm, without forgoing the objectives of Shari'ah.¹⁷ Conceived in this perspective, *hiyal* 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 Shari'ah, that does not involve forgoing rights of Allah or rights of men; third, the purpose intended to be realised through the employment of *hiyal* being lawful.

In his discussion of *hiyal*, al-Shatibi 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 *hilah* that was employed, while one is aware that the means adopted was not supposed to be utilised for this purpose. Al-Shatibi 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 Shari'ah are made mediums leading to such transformation.¹⁸

Al-Shatibi argues that when it is established that laws 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 finds expression in them then. 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 *maslahah* 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, which are the interests for achieving which they had been sanctioned. Thus, when an action does not lead to securing these objectives, it could not be regarded as legal.¹⁹

Analysing the controversial type of *hiyal*, Al-'Asqalani 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.²⁰ It should be noted that the categorisation of the juristic trends in this respect to the above three is only approximate, and that these three approaches are not found with regard to every *hilah* 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 Maliki and Hanbali jurists, who are renowned for their universal condemnation of

¹¹ Muhammad ibn Isma'il al-Bukhari, Hadith No. 2111, *al-Sahih*, Beirut, Dar ibn Kathir, 1987, vol. 2, p. 775.

¹² Abu Bakr al-Bayhaqi, Hadith No. 13961, *al-Sunan al-Kubra*, vol. 7, p. 207.

¹³ Muhammad ibn Isma'il al-Bukhari, Hadith No. 1, *al-Sahih*, vol. 1, p. 3.

¹⁴ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, p. 327.

¹⁵ 'Ubaid Allah ibn Muhammad, Ibn Battah al-'Akbari, *Ibtal al-Hiyal*, Beirut, al-Maktab al-Islami, 1403H, vol. 1, p. 47. Ibn al-Qayyim narrates this hadith from the author and observes that an *isnad* of this nature is considered *sahih* by al-Tirmidhi. Ibn al-Qayyim, *Hashiyah ibn al-Qayyim*, Beirut, Dar al-Kutub al-'Ilmiyyah, 1995, vol. 9, p. 244.

¹⁶ *Fatawa Dar al-Ifta*, Cairo, al-Majlis al-'Ala li al-Shu'un al-Islamiyyah, Fatwa No. 1324.

¹⁷ *Fatawa Dar al-Ifta*, Cairo, al-Majlis al-'Ala li al-Shu'un al-Islamiyyah, Fatwa No. 1324.

¹⁸ Al-Shatibi, *al-Muwafaqat fi Usul al-Shari'ah*, Cairo, al-Maktabah al-Tijariyyah, vol. 2, p. 378 -385.

¹⁹ Al-Shatibi, *al-Muwafaqat fi Usul al-Shari'ah*, vol. 2, p. 378 -385.

²⁰ Ahmad ibn 'Ali ibn Hajar al-'Asqalani, *Fath al-Bari*, Beirut, Dar al-Ma'rifah, 1379H, vol. 12, p. 326.

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-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 Hanafi jurists, while the last belongs to Imam al-Shafi'i. These two appear to have had the strongest impact on hiyal and have decided the extent and nature of the involvement of hiyal in Islamic law.

LEGAL CONTRIVANCES AND THE HANAFI SCHOOL

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 Hanafi school. Jurists of the Hanafi 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 Imam Abu Yusuf. This is the aspect that has induced the strong criticism of al-Bukhari in the section on hiyal in *Kitab al-Ikrah* in his *Sahih*. However, closer inspection does not uphold this allegation in every instance Hanafi 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 Hanafi schools' concessionary attitude towards Hiyal. Al-'Asqalani contends that it is known of Imam Abu Yusuf and other jurists of the school that they had confined the employment of hiyal to justifiable purposes only.²¹ The Hanafi jurist al-Nasafi has narrated in *al-Kafi* the saying of Muhammad ibn al-Hasan that to evade the laws of Allah through employing legal devices leading to abolishment of rights is not of the ethical conduct of believers.²² Abu Hafs al-Kabir, who interestingly is the narrator of Muhammad ibn al-Hasan's book on Hiyal, reports from Muhammad ibn al-Hasan himself: "A strategy a Muslim employs for the sake of gaining release from 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 (makruh)". Al-'Asqalani observes that makruh in the view of Muhammad ibn al-Hasan is closer to prohibition.²³ Hanafi jurists have put forward tenable arguments justifying their position in some instances, and in some others, retraction of Hanafi jurists from their earlier verdicts recognising hiyal of this type is on record.

LEGAL CONTRIVANCES AND TRADITIONISTS

In his exposition of some ahadith related by al-Bukhari where the latter had adversely commented on the practice of some early mujtahid, whom al-Bukhari had desisted from naming, however, is popularly considered to be a reference to Imam Abu Hanifah, in allowing certain legal options that could be construed as hiyal, Ibn Hajar al-'Asqalani 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 hadith knowledge, al-'Asqalani (d. 852H) could critically appreciate the contributions of the two to the topic. Al-'Asqalani 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 as above, al-'Asqalani says that the conclusion on the issue is that a contract being sinful does not necessitate its invalidity as far its external ruling is concerned. The Shafi'i 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.²⁴

This could be regarded as a highly penetrating appreciation of the subject that evidently has 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. Imam al-Shafi'i 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. Although some later followers of the Shafi'i school appear to have attempted to equate the approach of Imam al-Shafi'i in some of the relevant issues with that of the Hanafi school, there is evidently no justification to this perception in the texts of the Imam.

TEXT OF CONTRACT AND AND INTENT

Although the hadith in question is generally understood by experts to be in the context of worships ('ibadat), al-Bukhari has generalised its meaning to include both worships and transactions (mu'amalat). In fact, he has gone to the extent of including all injunctions of the Shari'ah within the ambit of this hadith. The reason for this generalisation evidently is the implicit clause in the hadith that could be construed as consideration (i'tibar). Consequently, the purport of the action, in the case of transactions, would hinge on the intent. In this respect, he appears to have followed Imam Malik in justifying the blocking of means (sadd al-dhara'i') and taking objectives (maqasid) into consideration.²⁵ Thus, in a situation where the text of the contract is inadmissible while the intent happens to be valid, the intent is implemented and the text discarded.

²¹ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, p. 326.

²² Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, pp. 328, 329.

²³ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, p. 331.

²⁴ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, p. 337.

²⁵ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, p. 327.

Al-'Asqalani has recorded the relationship between the wording and the intent. When it is clearly evident that one had intended what the wording means or when there is no indication of an intent contrary to the wording, the external meaning of the wording is understood necessarily. However, if it is evident that the intent is different from the wording, would the wording be adhered to and the intent disregarded, or the apparent intent be taken into consideration? It is argued for the former proposition that if a sale were to be held invalid on the assumption that the text of the contract could be an avenue (dhariah) to interest and the intention of the parties is likely to be foul, then, sales that comprise what is obviously prohibited should be held invalid a fortiori. Thus, when a person purchases a sword with the intention of killing a Muslim unjustly, the contract is held valid unquestionably even though the intention is foul. The prohibition of homicide does not necessitate invalidity of the contract. Therefore, when the contract is not invalid even in this instance, it could not be held invalid due to mere assumption and doubt. It is argued for the second proposition that the intention produces its effect on the act, which sometimes becomes prohibited or permitted based on the intention. A sacrificial animal is permissible if it was sacrificed for consumption, while it is unlawful if the sacrifice was for a false deity. In both, there is no difference as far as the external form is concerned. Similarly, contracts too become valid or invalid based on the intention. While a slave girl purchased for his principal is not lawful for a person, one purchased for himself is not so. In both, the contract externally is the same. Similar is the case of extending a loan for a term and sale of money against an equal amount deferred to a term. The former is a valid devotion (qurbah) while the latter is invalid and sinful. Thus, it is evident that the external validity of the contract does not necessarily absolve one who employed a false stratagem of sin internally.²⁶

LEGAL CONTRIVANCES AND IMAM AL-SHAFI'I

The third and unique approach where the validity of the action has been divorced from its acceptability, belongs to Imam al-Shafi'i. He has arrived at the exceptional conclusion that 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 Shafii 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-Shafi'i 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 (tanzih). However, a large number of leading jurists of the Shafi'i school like al-Ghazali have stated this to indicate offensiveness at the level of prohibition (tahrīm), and that adopting such hiyal involves sin.²⁷ According to the Shafi'i commentator of Sahih al-Bukhari, Ibn Hajar al-Asqalani, this inference borne out by the prophetic tradition 'every man is entitled only to what he had intended'. Thus, one whose intention is to gain interest through employing a contract of sale, has fallen in interest, 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 (tahlil) the woman to her former husband, has become a muhallil (legaliser), and is liable to the curse directed to the perpetrator of the act. He may not expect to escape 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 specific to the prohibition and it being one that is used only as an access (dhari'ah) while not being specifically leading to it.²⁸

Ibn al-Qayyim, in his vehement denunciation of hiyal in *I'lam al-Muwaqqi'in*, commenting on Imam al-Shafi'i's relationship to hiyal, has attempted to dispel the misconception arising from the latter's holding hiyal legally valid externally that he had approved of them. He observes that while later jurists had invented some hiyal to which none of the earlier a'immah are known to have subscribed to, Imam al-Shafi'i could never have permitted trickery and fraud for people. Ibn al-Qayyim asserts that one who is aware of the life of al-Shafi'i and his status would readily know that, although al-Shafi'i 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 hiyal that are founded on deception. The distinction between treating contracts on their externality without regarding the intent and the legalizing of a contract known to be based on deceit while being aware that its essence differs from its exterior, is obvious. Ibn al-Qayyim draws a parallel between what was permitted by al-Shafi'i 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-Shafi'i's position on the sale of 'inah, Ibn al-Qayyim explains that what he permitted was the sale of merchandise to one who purchases it, relying on the fact that contracts of Muslims are evidently free from deceit and fraud. Al-Shafi'i had never permitted the contractors to pre-agree on exchanging 1000 for 1100 and then to produce a merchandise legalising interest, especially when the vendor had never intended its sale, nor the buyer its purchase. Ibn al-Qayyim avers that had Imam al-Shafii known about this being considered legal, he would have hastened to denounce it.²⁹

CONCLUSION

Procedures of a subtle nature that were adopted for overcoming situations where one was faced with the predicament of violating the law came to be known as legal contrivances (hiyal shar'iyah). 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. Hiyal that were recognised as permissible were deployed as a way for overcoming legal predicaments that could be surmounted

²⁶ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, pp. 328, 329.

²⁷ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, p. 328.

²⁸ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, p. 328.

²⁹ Ibn Hajar al-'Asqalani, *Fath al-Bari*, vol. 12, p. 337.

through employment of means equally legal without violation of the law. 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 thoroughly discuss these under the individual classification named *hiyal*, while man-made law does not generally find justification in them for such particular attention. It is observed that *hiyal* 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, abandoning a prohibition etc. where the objective of the lawgiver is fulfilled through employing a legally acceptable means. Thus, permissible *hiyal* have been defined as an inconspicuous means permitted in Shari'ah that facilitate the attainment of a benefit or repelling a harm, without forgoing the objectives of Shari'ah.

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Muhammad Abdurrahman Sadique
Kulliyah of Laws
International Islamic University Malaysia
Email: sadique@iiu.edu.my