Extensive Use of *Hilah* in Islamic Banking and Finance

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Abstract

The current products of Islamic banks closely resemble direct loans and mortgages offered by conventional banks. Such resemblance makes one wonder whether Islamic banks are simply disguising interest-bearing loans. Such disguises are known as *hilah* (legal stratagem) in Islamic law. This paper examines the use of *hilah* by Islamic banks in their products and discusses the validity of *hilah* under various schools of Islamic law.

Introduction

Owing to prohibition of *riba*, usually translated as interest,¹ Islamic banks cannot make any direct interest-bearing loan. Instead, most products of Islamic banks are technically either a sale or a lease contract. Being a sale or lease contract, any additional amount charged by Islamic banks amounts to either profit or rent as opposed to interest. Islamic banks are not, however, in the business of selling or leasing cars or property. As financial intermediaries, the main business of Islamic banks is to take deposits and make loans. The use of sale and lease agreements to disguise loans can be considered as *hilah* (legal stratagem or ruse, pl. *hiyal*).² This paper identifies various *hiyal* involved in the most popular products of Islamic banks and then discusses the validity of *hilah* according to various schools of Islamic law.

Meaning of *Hilah* and its use by Islamic banks

*Hilah* is either a legal (i.e., a technically valid) means used to avoid a prohibited or inconvenient action³ or an apparent illegal means to achieve a permissible end.⁴ In this paper the term is used in the first meaning unless

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expressly stated otherwise. For example, instead of getting an interest-bearing loan and then buying a car with the loan, a client (borrower) may get the car from an Islamic bank in a credit sale. The Islamic bank buys the car in its own name first and then sells it to the client at a specified amount of profit. Being a sale contract, any extra amount received by the Islamic bank and paid by the client in this example would amount to legitimate (ḥalāh) profit as opposed to forbidden (ḥarām) interest, i.e. ribā. The ḥilāh in this example lies in the sale contract; a permissible contract under Islamic law but used as a means to bypass the prohibition of ribā. It would be ribā if the Islamic bank in question were to give the price of the car as a loan directly to the client. Unlike an ordinary motor-trader, however, Islamic banks are not in the business of selling cars. They are financial institutions and, more specifically, financial intermediaries between depositors and borrowers. Their main business is to take deposits and to make loans.

To a reasonable individual with no background in Islamic law, the products of Islamic banks would appear indistinguishable from those of conventional banks. In Islamic banking and finance literature, however, these products are termed anything but loans. Most of the current products of Islamic banks are not originally intended as modes of finance. They are sale or lease transactions extensively modified and combined with many other concepts in order to be used as modes of finance. This is where the ḥiyāl lie in the products of Islamic banks.

**Murābaḥa**

*Murābaḥa* is a cost-plus sale agreement under which the owner of a commodity sells it to a buyer at a specified and disclosed margin. The client of an Islamic bank may need finance to buy a car. There could be no objection to a *murābaḥa* transaction if an Islamic bank were to have a motor-trade business selling the car directly to the client at a specific amount of profit but an Islamic bank does not have such a business. The bank has to buy the car of the customer’s choice from the market and then sell it to the client at an agreed-upon profit in order to make the transaction valid under Islamic law. The use and modification of a sale transaction for the purpose of a loan agreement is the first ḥilāh to overcome the prohibition of ribā. This may be a less objectionable ḥilāh if the bank itself (or through a subsidiary) buys the car and then sells it to the customer after
taking possession of the car. In practice, many Islamic banks make the customer their agent (kaffil) to purchase the car on behalf of the bank (the principal) and then sell it back to the customer. This is the second hila‘, the fictitious agency contract (wakālah). Unlike an ordinary agent, the agent in this example is buying something for his own ultimate use.

In a typical murābaḥa product of Islamic banks there are supposed to be three separate contracts and each should be independent of the others; first, the agency contract, second, the sale contract entered through the agent (the client) on behalf of the bank and third, the sale contract (murābaḥa) between the bank as seller and the customer as buyer. The third contract (murābaḥa) must be made after the bank takes actual or constructive possession of the car. As such, the first or the second contract cannot be conditional on the third. The customer is not bound to enter into the third contract. This, however, may put the bank in an uncertain position in case the customer refuses to buy. To overcome this inconvenience, a third hila‘ is devised; a unilateral promise by the client at the outset to buy the item.

The client does not have the cash to pay the price for this murābaḥa transaction. Otherwise he would not approach the bank in the first place. The current transaction has to be combined with another type of transaction, called deferred sale (bay‘ bil-thaman al-a‘jil). This is the fourth hila‘ in that the ultimate price in this transaction would be determined on the basis of the time needed by the client. Technically, there can be no objection to charging a higher price in a deferred sale than in a cash sale because a seller is free to charge any amount for his commodity.

At this stage, the technical difference between this murābaḥa transaction and pre-Islamic ribā (ribā al-jāhiliyya which the Qur’an prohibits) is that in the former the extra amount over the price is added at the beginning of the transaction, whilst the extra amount in the latter is added on the due date to pay the price of purchased goods or to repay the loan. In both cases the extra amount is based on time.

In case the client defaults or is late in paying an instalment, conventional banks charge penalties in the form of additional interest. Islamic banks do the same, save that any such penalty (technically, a compulsory donation) cannot be added to the profits of an Islamic bank but must be given to charity. This may be considered the fifth hila‘ to avoid the prohibition of ribā because a penalty is disguised as a donation. The intended purpose of this donation is not to benefit the poor but to ensure timely payment of instalments.
Another popular product of Islamic banks for consumer finance is what Islamic law names it *ijarah wa iqtina'* (hire-purchase). It is a combination of at least two contracts as the term suggests - lease contract (*ijarah*) and sale contract (*iqtina’*). A third contract may also exist if the client is entrusted with the purchase of the commodity as an agent (wakil) for the bank. These agreements were not originally intended to be modes of finance. The former was meant to allow the use of a property for a specific period of time and the latter was to transfer ownership permanently. If used for their original intended purposes there can be no objection to any of these agreements but their use to disguise a monetary loan amounts to *hiliyah* and thus becomes objectionable. As is the case with *murabaха*, a client of an Islamic bank approaches the bank not because the bank has the car or the house the client wants to buy but simply because he needs the money from the bank.

Inasmuch as an Islamic bank cannot make a direct loan and then charge any extra amount over the loan according to the majority interpretation of *ribâ*, the bank becomes a co-owner of the purchased property based on the bank’s contribution to the price paid (e.g., 80%). The bank then leases its portion to the client (the other co-owner for the remaining 20%). This is very similar to conventional hire-purchase except Islamic banks retain full or part ownership in the underlying commodity until payment of the last instalment. As an owner, the profit earned by Islamic banks becomes rent as opposed to interest. The rent, however, closely reflects the market interest rate for conventional mortgages. The *hiliyah* here lies in the use of a lease agreement to camouflage an interest-bearing loan. Like the monthly mortgage payment to a conventional bank, the monthly payment to Islamic banks represents two components; rent (‘interest’ in conventional mortgage) for the lease and partial price for the property (part of principal amount in traditional mortgages) under the sale contract. Like the owner’s equity in a conventional mortgage, the percentage of the client’s ownership increases with each instalment and eventually leads to full ownership by the client.

**Tawarruq (monetisation)**

Although *murabaха* and *ijarah* are primarily used for consumer finance,
they can also be used by Islamic banks to meet the financial needs of businesses, especially when finance is required to buy a commodity (e.g., raw materials or machinery) but a business may simply need cash for day-to-day expenses. Instead of making a direct loan, Islamic banks can purchase some commodity such as iron or copper and sell the commodity to the customer at a higher price on a deferred-payment basis. The customer then resells the commodity back to the market to get the required cash. This transaction is known as tawarruq and is slightly different from controversial *bayʿ al-ʿina* (sale and repurchase of same item). The latter involves only two parties (lender and borrower), whilst the former involves three parties (lender, borrower and a third-party buyer). Technically, there can be no objection to buying something at a higher price in a deferred sale and then selling it at a lower price for immediate cash. The objection lies in making a loan and clothing it in a sale transaction. This is pure *hilah* and more direct than those mentioned earlier. The Maliki School considers tawarruq a reprehensible transaction under the school’s doctrine of *sadd adh-dhari’ah* because it can be used as means to evade the prohibition of *ribā*.

To save the customer from inconvenience and higher transaction costs, some Islamic banks become agents for their clients and resell the commodity back to its original owner on behalf of the customer. This form of tawarruq is more objectionable than the transaction mentioned in the above paragraph because it is a more direct form of *hilah* and resembles the controversial *bayʿ al-ʿina*. The sale and repurchase contracts are merely *shams* (*biyal*) in that neither Islamic banks nor their customers have any real interest in the sold item.

**Parallel salam**

*Salam* is a prepaid forward sale and is an exception to the general prohibition of selling something before its possession or even before its existence. Unlike *murābaḥa* and *ijārah*, *salam* was intended to be a mode of finance in classical Islamic jurisprudence. It is permitted to meet the financial needs of farmers before harvest. Farmers receive the price of crops before the harvest. In such transactions both parties benefit. Whilst farmers get needed cash before the harvest, buyers usually get the crops at a lower guaranteed price. If Islamic banks were to use *salam* transactions in this way, there could be no objection. Unlike the buyer of commodity in a *salam* transaction, however, Islamic banks have no interest in the sold...
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commodity; they simply have to get their money back with a return. Islamic banks thus usually enter into a second parallel salam to sell the same commodity at a higher price back to the initial vendor or to a third party.

Whilst the first salam meets the need of a farmer (the rationale behind the permissibility of this transaction), the second salam is used simply as a means (hilah) to help the bank get its money back with a return. This would be less objectionable if Islamic banks were to resell the commodity purchased under the first salam to a third party after taking possession of it. In such case, there would be no need for a second and parallel salam. Inasmuch as Islamic banks have no interest in the underlying commodity and are mainly interested in a loan, however, they do not want to do anything with the commodity and sell it before possessing it through a second salam transaction. The transaction becomes even more obviously hilah when the buyer in the second salam is the original seller under the first salam and the delivery date under the second salam coincides with the delivery date of the first, obviating the need to take possession of the commodity by any of the parties. Both salam transactions then become fictitious and the real transaction is a loan paid with interest after a specific period of time (i.e., the duration of first salam). They are very similar to the controversial transactions of bay’ al-‘ina (same item sale repurchase), discussed below.

Other products of Islamic banking and finance

Similar observations can be made about most other products of Islamic banking and finance. For example, Islamic bonds (sukuk) can be designed in such a way as to reflect a variable market interest rate or to offer a fixed return. On the saving side, Islamic banks purportedly enter mudaraba (partnership) agreements with their depositors. Using various hiyal, Islamic banks offer their customers a fixed return, especially on fixed long-term deposits.

Validity of Hilah under various schools of law

It is generally believed that mainly the Hanafi School explicitly recognises the validity of some hiyal but many rulings from other schools of Islamic law also indicate the use and the validity of some hiyal, even though they do not use the word. Some schools are highly critical of hiyal, as will be
shown below. Criticism mainly revolves around some controversial ħiyyal that occurred in the early period of Islamic law. The products of Islamic banks are very similar to some of those controversial ħiyyal.

The ħilah of validation (taḥlīḥ) is one of the first controversial ħiyyal in the history of Islamic law, under which, when a husband divorces his wife three times, he cannot remarry her unless she has been divorced by a second husband after consummation of that marriage. In order to overcome uncertainty and inconvenience, the first (divorcing) husband may enter into an agreement with a third party, who would marry his ex-wife and then divorce her to facilitate remarriage. This ħilah was known during the time of the Prophet and his companions. They categorically rejected it. The Prophet cursed both the second husband (muḥallīl) and the first husband for whom the validation is done (muḥallāl lahu) involved in such an agreement. In general, it is also disapproved by major schools of Islamic law, including Hanafis.

Some jurists from the Hanafi School, however, make an exception to the above ruling when similar arrangements are made by the divorced wife because the Prophet did not say anything about the divorcee in the above hadith or in other related narrations. A divorced woman might pay a trustworthy person to buy a slave and then marry the slave to her. After consummation of the marriage, the relative would give the slave to her as a gift. This would abrogate the marriage because marriage with a person and ownership of the same person cannot coexist. On the basis of the same argument some later Hanafi jurists also allowed a stipulation by the wife in the second marriage contract to the effect that the marriage would automatically terminate with the first act of consummation. Also, if the second husband marries and divorces with the intention of taḥlīl (facilitation of remarriage), both marriages would be valid so long as the intention remains undisclosed and the second marriage and the subsequent divorce are not done at the request of either former spouse. This is because, according to the Hanafi and Shafi’i Schools, legal rulings are based on the fulfilment of apparent conditions of a transaction and not on the undisclosed intention of a party.

Avoidance of zakah

Another early ħilah was with regard to zakah. One of the conditions of zakah obligation is that there must be a specific amount (nābūb) of a
commodity or money in the possession of a person for a full year. Owning a commodity either less than the required amount or for the duration short of one full year does not make the payment of zakah obligatory. For example, if someone has the required amount of gold for zakah obligation and he sells some of the gold just one day before the completion of the year, both the conditions of a full-year possession and of the required amount would be absent. Technically, the owner of the gold in the example would not be obliged to pay zakah on it.

If someone sells some of the gold solely for the purpose of avoiding zakah, it would be a ḥilih to circumvent a religious obligation. If such intention were not made public, some Ḥanafi jurists opine that zakah would not be compulsory on such a person for the same reason mentioned earlier; i.e., legal rulings cannot be based on undisclosed intention. Most jurists from other schools hold that zakah would be obligatory on a person with such an intention despite the absence of the required condition. The basis of the Ḥanafi ruling is that legal decisions cannot be based on unknown intention even if the intention were sinful. Jurists from other schools made their rulings based on some ahadith about the importance of intention and on a specific hadith prohibiting such measures. The Prophet said, “Distinct assets should not be combined and joint assets should not be separated for the fear of paying zakah.”

Bay’ al-‘ina (sale and repurchase of the same item)

The third controversial hilih is the sale and repurchase of the same item (bay’ al-‘ina). In this hilih, a person who needs to borrow money would sell a particular commodity to a buyer (read, ‘lender’) for cash. The lender/buyer would then resell the property back to the original owner (read, ‘borrower’) at a deferred and higher price. The result of these two transactions is simply a loan repayable at a future date with interest. If the first sale is not conditional on the second, most Ḥanafi and Shafi’i jurists approve the transaction. The same result would follow if the lender sells something at a deferred price and then buys it back for a lower cash price.

Again, the basis of their approval is that the validity of a contract does not depend on the undisclosed intention of parties or on the suspicion of its use to circumvent ribā. Abu Ḥanifa and his disciple, Mohammed ash-Shaybani, opine that, if the parties enter into these transactions simply to circumvent the prohibition of ribā, the contract is reprehensible (makrūh).

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On the other hand, jurists from the Maliki and Ḥanbali Schools\(^{51}\) consider this an interest-bearing loan and thus prohibited. They base their opinion on a hadith from Ayesha, wife of the Prophet. After hearing about a similar transaction entered by a companion (Zayd ibn Arqam), Ayesha said that the companion had to repent.\(^{52}\) Even if these two transactions are mere coincidence and not pre-planned to circumvent the prohibition of ribā, the Maliki School considers the transaction void under the school’s doctrine of sadd adh-dharī’ah.\(^{53}\) The school considers the transaction prohibited not because it is ribā but because it could be used as a means to an interest-bearing loan.\(^{54}\) Imam Shafi‘i considers this hadith weak (da‘īf). Even if it is not weak, it shows the genuine differences of opinion between two companions, i.e. Ayesha and Zaid ibn Arqam.\(^{55}\)

### Other controversial ḥiyāl

Another early controversial ḥilah is the case of a husband who divorces his wife on his deathbed in order to exclude her from inheritance. Omar, Othman, ‘Ali and many other companions ruled that such a divorced woman would inherit.\(^{56}\) According to Ḥanafi jurists, however, she would inherit only if he dies during her waiting period (‘iddah).\(^{57}\) Another controversial ḥilah involves shuṭa’ah, i.e. the pre-emptory right given to a co-owner of a property (also to neighbours according to Ḥanafis) to purchase the portions of other co-owners.\(^{58}\) A co-owner not wishing to sell his portion to his partner may demand a high price so as to discourage the other co-owner from exercising his right. The owner sells the property to a third party at the high price but donates the extra amount in the sale price to the third-party buyer.\(^{59}\) A more straightforward ḥilah in this regard is to give the property to the third party as a gift, after which the third party gives the owner of the property another gift equivalent to the price of the property because shuṭa’ah does not apply to gifts. In this exchange of gifts, the first gift cannot be conditional on the second one; otherwise they would amount to a pure sale contract.\(^{60}\)

There are many controversial ḥiyāl mentioned in the book Kitab al-Ḥiyāl and some other works attributed to later Ḥanafi scholars.\(^{61}\) Some of these ḥiyāl amount to mockery and playfulness with religious matters. For example, in one such ḥilah it is suggested that if a wife fails to obtain divorce from her husband, she can use the ḥilah of temporary renunciation from Islam.\(^{62}\) Renunciation from Islam (riddah) would automatically terminate her marriage with her Muslim husband.\(^{63}\)

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Although many such *hiyal* are generally attributed to the Ḥanafi School, other schools have occasionally suggested similar *hiyal*. For example, a case was referred to Imam Ahmed bin Ḥanbal in which a man made an oath that his wife would automatically be divorced if he did not have intercourse with her during the daytime in Ramadhan. This oath put him in a dilemma. Either he had to have intercourse with her during the daytime in Ramadhan and pay huge expiation (*kaффarah*) or he would not fulfill his oath and his wife would be divorced. Imam Ahmed bin Ḥanbal suggested a solution (*ḥillah*) to save the person from these two equally bad options. He suggested that the man should travel during Ramadhan. A traveller (*musāfir*) is not required to fast, so he could break his fast while travelling and have intercourse with his wife. This would both fulfill his oath and save his marital relationship.64

Use of *hiyal* by Ḥanafi jurists and the reasons for such use

Ḥanafi jurists are known to use many *hiyal* but most do not approve them to facilitate circumvention of religious prohibition or obligation. Many earlier jurists did not consider their legal rulings as *hiyal* inasmuch as the rulings were based on their legal doctrines. As mentioned above in the discussion of controversial *hiyal*, an important juristic principle under both the Ḥanafi and Shafi‘i Schools is that legal rulings (*qada*) should be based on proven facts and the fulfillment of the apparent conditions, rather than on undisclosed intention or suspicion.65 As a result, many transactions were upheld because they satisfied of apparent legal conditions. They foresaw, however, that some people might misuse these legal principles either to circumvent a prohibition or escape a religious obligation.66 Another reason they validated some *hiyal* was to prevent people from committing sins or to escape from oppression. That is why many Ḥanafi jurists would call these types of rulings *makhārij* (exits), i.e. ways to escape oppression or inconvenience, instead of the somewhat derogatory term *hiyal*.67 For example, the Ḥanafi jurist Abu Yusuf not only validated a form of *bay‘ al-‘ina* (where a credit sale is preceded by a cash sale) but also recommended it so that the poor might avoid *ribā* and get needed cash, especially when they could not get a *qard hasan* (interest-free loan) from the rich.68

In their support, the proponents of *hiyal* cite a hadith in which the Prophet prohibited a companion to exchange dates for dates unless the quantity was...
equal even though there were qualitative differences. As an alternative, the Prophet suggested that people who desire better quality dates in exchange of their lower quality ones should sell their dates in the market and then buy the better quality ones with the proceeds. 69 Although the result may appear to be the same in both transactions (i.e., getting smaller amounts of higher quality dates in exchange for larger amounts of lower quality ones), the technique avoids ribā al-fādil (unequal spot exchange of commodities that differ in quality only). 70 In these transactions the owners of the respective dates are not jointly making any fictitious arrangement to circumvent the prohibition of ribā. This technique is like any other normal market transaction, where an owner of a commodity sells his commodity to get the money needed and then uses the money to buy from the market whatever he wants, including the same commodity different quality.

Another argument in favour of the validity of hiyal is the way the Prophet Ayyub (Job) fulfilled his oath to strike his wife with hundred lashes. In order to facilitate Ayyub's fulfilment of his oath and at the same time be gentle to his wife, Allah instructed him to use a bundle of one hundred branches tied together gently to strike his wife once. 71 Allah mentioned this in the Qur'an. 72 Based on this verse, it is reported that the Prophet Muhammad on several occasions did similar things with regard to hadd (fixed corporal punishment) for fornication when he felt the convicted was not physically fit to bear a hundred lashes. 73 In these examples, in order to lessen the hardship of the intended oath or punishments, both the words of the oath and the letter of the law were upheld and the intended consequences of the oath and hadd ignored. Such practices are exceptions made directly by lawgivers, Allah and His Messenger, and their application should not be generalised.

Use of hiyal by non-Ḥanafi jurists and the arguments against hiyal

As mentioned earlier, other schools also have rulings that are very similar to hiyal or makārīj of the Ḥanafi School, although the use of the words hiyal or makārīj is rare in the works of other schools. 74 Like Ḥanafis, jurists from other schools made their rulings based on their own juristic principles. They never intended their rulings to facilitate the circumvention of legal prohibition or the avoidance of legal obligation. It has already been seen that Imam Shafi'i, like the Ḥanafi jurists, does not take into account undisclosed intention or suspicion to determine the validity of a transaction. 75 On the other hand, the Maliki and Hanbali Schools do not
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completely disregard such intention and give importance to undisclosed intention in their rulings.

Among non-Hanafi jurists, some completely reject any ḥilāl in their legal rulings whilst others take a middle path. The latter group accepts some ḥiyāl and rejects others. For example, Ibn Taimiyya of the Hanbali School divided ḥiyāl into good and bad categories. Most of the above-mentioned controversial ḥiyāl fall into the bad category. Another Hanbali jurist and the disciple of Ibn Taimiyya, Ibn al-Qayyim, in his book I’lam al-Muwaqi’in mentioned one hundred and sixteen ḥiyāl he considered valid. As for Maliki School, its doctrine of sadd adh-dhari’ah is the opposite concept of ḥilāl but some Maliki jurists mentioned many valid and void ḥiyāl in their writings (e.g., ash-Shatibi in his al-Muwafaqān).

The strongest opponents of ḥiyāl are traditionalists (ahl al-hadīth), but their opposition should be understood in the context of the above-mentioned controversial early ḥiyāl as well as some of the controversial books on the subject. For example, Imam Ahmed ibn Ḥanbal was so opposed to the above mentioned Kitāb al-Ḥiyāl that he considered any owner and user of that book an infidel (kafīr). He said, “Whoever has Kitāb al-Ḥiyāl in his house and uses its rulings is a disbeliever in what was revealed to Mohammed.”

The arguments against ḥiyāl are many. First of all, the Qur’an tells us the story of those Jews who were prohibited from fishing on Saturdays (Sabbath) when fish used to be plentiful. In order not to violate the divine command, they abstained from catching fish directly on Saturdays but left their nets or dug tranches on Fridays and removed the fish there from on Sundays. They apparently followed the command of God and circumvented the prohibition through their ḥilāl. God did not approve this ḥilāl, as indicated in the Qur’an.

Another argument against the use of ḥilāl is the importance of intention (niyyah) in religious activities. The Prophet said, “Verily (the acceptability of) deeds depend on the intention of (the doer).” Regardless of technical validity, most products of Islamic banks seem intended to overcome the prohibition of ribā. The importance of intention is so great in Islam that it is a pre-condition in most religious rituals such as prayer, fasting and pilgrimage to Makkah. Identical actions but with different intentions would

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lead to different results. For example, an additional amount paid at the time of loan repayment may be considered either ribā or gift based on the intention of the parties. It would be gift and thus permissible when the additional amount was not stipulated in the contract and given voluntarily. The Prophet on various occasions returned a better animal than what he had borrowed.83

Most literature on Islamic banking and finance detail the various products offered by Islamic banks without discussing the validity or otherwise of the technical means (hiyal) involved in these products. They hardly discuss the importance of intention (niyyah) in Islamic transactions. Although Hanafi jurists consider a form of bay‘ al-’inah to be technically valid because of undisclosed intention of the parties to the transaction, they consider this reprehensible. In particular, Imam Mohammed ash-Shaybani said, “This transaction feels heavy like mountains on my heart. The devourers of ribā invented it.”84 The jurists and schools that approved some of the hīyal did not do so because of any inherent goodness but only because the transactions met the apparent (technical) conditions of a lawful transaction.

Validity of hīyal in Islamic banks’ products

From the technical point of view, the products of Islamic banks would be legally permissible contracts under shari‘ah. They are mainly mark-up sale (murābahah), lease (ijarah) and pre-paid forward contracts (salam). Each of these contracts has its separate set of conditions. Once the conditions are satisfied, the letter of the law is observed and the contracts are apparently valid.85 These contracts are, however, often extensively modified and combined with many other concepts in order to use them as modes of finance. Such techniques are no different from bay‘ al-’inah and other controversial hīyal mentioned earlier. Whilst bay‘ al-’inah a in its original form may be a more obvious form of hīlah, the different products of Islamic banks are more complex. They all lead to the same result; a loan repayable with an additional amount. Like the lender in the bay‘ al-’inah, Islamic banks have no interest in the underlying commodity.

It may be argued in Islamic banks’ defence that, unlike a borrower under the bay‘ al-’inah, clients of Islamic banks (at least in murābahah and ijarah transactions) do intend to obtain the underlying commodity as opposed to pure cash but the borrower in the bay‘ al-’inah would ultimately use the money to buy his desired commodity. In substance, the products of Islamic
bank are indistinguishable from the controversial *bay' al-'īnah*. Like *bay' al-'īnah*, the products of Islamic banks are used to circumvent the prohibition of *riba*. Classical jurists who approved *bay' al-'īnah* or its variants did so with the understanding that this type of sale is only technically valid and the transaction would be reprehensible if the parties intended by these contracts to get around the prohibition of *riba*.\(^{36}\)

The only situation where such a transaction would not be reprehensible is when it is not premeditated to overcome the prohibition of *riba*. For example, immediately after selling something at a cash price the seller may feel that it was not a good decision and want to get the item back. If the seller approaches the buyer, the buyer may want to sell it back only if he receives a higher price and the original seller may not have enough cash at hand, so the price or part of it in the second contract is deferred and the price of the commodity is now higher.\(^{37}\) In this example, the parties never intended these contracts involving the sale and repurchase of the same item to borrow money at interest. Because of the possibility that permissibility of this type of contract may lead to circumventing the prohibition of *riba*, the Maliki School does not approve it. They use their doctrine of sadd adh-dhari'ah.\(^{38}\) *Sadd adh-dhari'ah* is the complete opposite doctrine of *hilah*. Whilst the former would disallow even a valid means because of its illegal end, the latter would permit such a transaction owing to its apparent validity.

**Conclusion**

If most of the products of Islamic banks involve *hilah* and are thus questionable from a religious point of view, what can Islamic banks and financial institutions do to make these products truly shari'ah-compliant? Two alternatives can be suggested. One can adopt the view of the minority of Islamic scholars about the meaning of *riba*.\(^{39}\) This would obviate Islamic banks because the interest charged by conventional banks would not amount to *riba*. Alternatively, if one continues to use the meaning of *riba* as interpreted by the majority, there would be the need for Islamic banks. To make the products of Islamic banking and finance free from *riba*, however, they must use proper modes of Islamic finance such as *muḍarabah* and *musharakah*. This could cause some inconvenience and might result in lower profits or slower growth for Islamic banks. On the other hand, if Islamic banks continue to offer theses current products of *murābaḥah*,

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ijārah, tawarruq and parallel salam, it would be difficult for educated Muslims and non-Muslims to see any real difference between Islamic banks and their conventional counterparts.
Notes

1 The translation of ‘ribā’ into either ‘interest’ or ‘usury’ does not reflect its true meaning as there may be implicit interest without ribā (as the case with most products of Islamic banks where additional amounts received by the banks are either in the form of profit in sale or rent in lease transactions) and there can ribā without interest (e.g., any excess in a spot transaction of similar goods). See Mahmoud A. El-Gamal, Islamic Finance: Law, Economics and Practice 51-52 (2006).

2 As the word ḥīlah has a negative connotation, some practitioners of use the word makhraj (plural makhārīj) (‘exit’) instead in their legal strategies. For example, the earliest book on such strategies is known as al-makhārīj fi al-ḥiyāl by Muhammad b. al-Hasan ash-Shaybani (d. 189/805). See Satoe Horii, Reconsideration of Legal Devices in Islamic Jurisprudence: the Hanafis and their “Exits” (Makhārīj), 9 Islamic Law and Society 312, 312 (2002).

3 The first meaning is the most commonly used meaning of the word and thus most authors mention only this meaning. See Id. at 312-13; Mohammed bin Ibrahim, Al-Hiyl al-Fiqhiyya fi l-Mu‘āmalāt-Māliyyah 17-21 (2009).

4 It may appear that in the first situation the means would justify the end, whereas in the second the end justifies the means. However, the proponents of hiyal do not base their justifications on such reasoning. They look at hiyal from the point of their jurisprudential principles which are ultimately based on the Qur’an and Sunnah of the Prophet.

5 An example of the second type from the Qur’an is the putting of the king’s drinking cup by Joseph in his brother’s bag and then accusing him of theft in order to reunite the whole family (12:70-83 (Joseph)). A second example from the Qur’an is the permissibility of apparent renunciation of Islam under compulsion (16:96 (The Bee)).

6 Ros Cranston, Principals of banking Law 8-9 (2d ed. 2002).

7 A group of Pakistani traditional Islamic scholars declared the most popular products of Islamic banks, murābaha and ijārah, as pure forms of ḥīlah. See Muhammad Imran Ismail, Legal Stratagems (hiyal) and Usury in Islamic Commercial Law 3 (2010) (unpublished PhD thesis, The University of Birmingham) (on file with author).
In classical Islamic jurisprudence, it was intended to facilitate the purchase of a commodity by a merchant at the request of a buyer located usually at a remote area. Walid S. Hegazy, *Contemporary Islamic Finance: From Socioeconomic Idealism to Pure Legalism*, 7 CHIC. J. INT’L L. 581, 598 (2007). If the profit is not disclosed, it becomes a musawamah transaction. See Mufti Muhammad Taqi Usmani, *Introduction to Islamic Finance* 96 (2010).


El-Gamal, *supra* note 1, at 65.

See Usmani, *supra* note 8 at 106.


See Usmani, *supra* note 8 at 120-126. Some Hanafi jurists even upheld the validity of a unilateral promise to give extra amount of money in a loan transaction as long as such promise is not a stipulation in the loan contract itself. Some other Hanafi jurists, however, consider the extra amount under such promise as ribâ. Some of them consider it permissible but reprehensible. See Ismail, *supra* note 7 at 70-71.

The reason is that a hilah is needed to justify the additional amount charged by Islamic banks primarily on the basis of time needed to pay the deferred price.


Based on this distinction (*ex-post* interest *v.* *ex-ante* interest), Professor Fadel argued that current bank interest (*ex-ante* interest) is not ribâ. See Mohammad H Fadel, *Ribâ, Efficiency, and Prudential Regulations: Preliminary Thoughts*, 25 WIS. INT’L L. J. 655, 658 (2007), 655-702.

Another difference is that the interest rate under pre-Islamic ribâ was exorbitant, usually double the original loan or price in a year.

See Usmani, *supra* note 8 at 131-140.
20 See id. at 104, 159.

21 The major schools of Islamic law define ribā as any addition and/or deferment in the exchange of two things which share the same genus (jins). According to this definition, loans offered by conventional banks are ribā because they involve exchange of two things with the same genus (i.e., money for money) with an increase and deferment. If there is no deferment but only an increase in one of the exchanged items, it is ribā al-faḍl. On the other hand, when the delivery of an exchanged item is deferred, it is ribā al-nasī’ah regardless of increase in one of the exchanged items or the quality of the item. See Saleh, supra note 16 at 13.

22 See Saleh, supra note 16 at 97-99.

23 See El-Gamal, supra note 1, at 98.

24 See Usmani, supra note 8 at 174-176.

25 See El-Gamal, supra note 1, at 69-70.

26 Az-Zuhayli, supra note 12 at 117.

27 i.e., the same seller and buyer in the first transaction become the buyer and seller respectively in the second transaction. See infra the discussion on the controversial hiyal.

28 Based on this apparent validity and disregarding the undisclosed intention to circumvent ribā, Shafi’i and Hanafi Schools consider this transaction as permissible. There are contradictory opinions by the Hanbali School on the issue. See Ismail, supra note 7 at 211-213; Az-Zuhayli, supra note 12 at 117.

29 See El-Gamal, supra note 1, at 69-70.

30 Adh-Dhareer, supra note 9 at 238.

31 See Usmani, supra note 8 at 186-187.

32 See El-Gamal, supra note 1, at 83-84. In a personal interview with a friend, the author learnt about a similar mode of financing in Bangladesh before the existence of Islamic banks. Money lenders used to give money in return for specific amounts of crops (e.g., paddy or wheat) to be delivered at a future date. For example, when someone needed to borrow money, he would receive cash (say, £100) from the money-lender. After a specific period of time, the borrower would give the money
lender, say, 100 kilo wheat or paddy, the price of such wheat or paddy being more than £100 (e.g., £120). Of course, the money-lender was mainly interested in the profit (20 percent in the example) which he made by selling the wheat or paddy.

33 In salam a commodity can be sold before its possession by the seller.

34 Some Islamic scholars consider a parallel salam with the original seller not permissible. See Usmani, supra note 8 at 195.

35 See El-Gamal, supra note 1, at 83-84.

36 See Geoffrey Fuller, The Law and Practice of International Capital Markets Ch. 1 (2007). See also El-Gamal, supra note 1, at 73-74

37 See generally, Horii, supra note 2 at 317.

38 This is based on the following verse of the Qur’an: “So if a husband divorces his wife (irrevocably), he cannot after that re-marry her until after she has married another husband and he has divorced her.” (2:230) (Abdullah Yusuf ‘Ali trans.).

39 The Second Caliph Omar considered such a marriage as adultery and the parties to the marriage were subject to the punishment for adultery or fornication. See Ibrahim, supra note 3 at 23.

40 See Ismail, supra note 7 at 182; Horii, supra note 2 at 345.

41 See Ismail, supra note 7 at 182.

42 See Horii, supra note 2 at 345; see also Ismail, supra note 7 at 180; Wahbah Az-Zuhayli, Al-Fiqh Al-Islami wa Adillatuhu 187-188 (2012) (v.1). Same ruling would apply to a person who sells grapes to someone who would make alcohol from them. This would also be the case when a person sells arms to robbers or enemies of Muslims. On the other hand, Maliki, Hanbali and Shiite Schools consider all these transactions invalid for various reasons including the unlawful intention/goal behind the transactions even though such intention is not expressly mentioned in the contracts. Id. at 187-189.

43 See Az-Zuhayli, supra note 12 at 652-658 (v.2).

44 See Ismail, supra note 7 at 171-176; Horii, supra note 2 at 340-342.

45 Ismail, supra note 7 at 173.
Like most products of Islamic banks, in bay’ al-‘inah the price in the credit sale is higher than the product’s cash price. The price differential represents Islamic banks’ ‘profit’, which is not very different from conventional banks’ interest rates.

However, Hanafi School as well as Hanbali scholar Ibn Qudama differentiate this transaction from the former and consider this to be ribā owing to the specific prohibition about it in a hadith of Ayesah, mentioned below. Additionally, the Hanifi School argues that at the time of the second sale there was a debt pending for the same commodity. As the commodity is returned to its original owner, the second and the cash transaction are considered as a new debt against the old higher debt. One debt cancels the other debt and the additional amount is ribā. See Ismail, supra note 7 at 206-209; Az-Zuhayli, supra note 12 at 187 (v.1).

Ash-Shaybani is quoted to have said, “This sale is [heavy] like mountains in my heart; it is contrived by the consumers of ribā.” Abu Yusuf, on the other hand, recommended this transaction as way for the poor to escape from ribā. See Ismail, supra note 7 at 209-210.

Aliya bint Ayfah said, “I performed the pilgrimage with Umm Muhibba and when we entered upon Ayesha – may Allah be pleased with her – Umm Muhibba said to her: O Mother of the believers, I used to own a slave girl and I sold her to Zayd ibn Arqam for 800 dirhams due. He then intended to sell her, so I purchased her from him for 600 dirhams cash. She said: What an evil sale and purchase; let Zayd ibn Arqam know that he has nullified his Jihad with the Messenger of Allah unless he repents.” al-Ṣanʿānī, al-Musannaf, vol. 8, 184-85 (hadith no. 14812, 14813); cited in Ismail, supra note 7 at 199-200.
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57 See Horii, supra note 2 at 324. 'Iddah is the fixed period after divorce during which a woman is prohibited from remarriage.

58 This right is proven by many hadith. See Az-Zuhayli, supra note 12 at 657-658 (v.5). See also Ismail, supra note 7 at 176; Horii, supra note 2 at 338.

59 This hilah was approved by Imam Abu Yusuf of the Hanafi School but was considered as reprehensible by Imam Muhammad ash-Shaybani of the school. Horii, supra note 2 at 324-25. See also Az-Zuhayli, supra note 12 at 687-688 (v.5).

60 See Ismail, supra note 7 at 177.

61 The book is also known as Al-Makhārij fī al-Hiyāl and its authorship is ascribed to Muhammad b. al-Hasan ash-Shaybani (d. 189 H. /805 A.D.). For a list of other works of Hanafi and Shafi’i scholars on the subject, see Horii, supra note 2 at 313-314.

62 See Ibrahim, supra note 3 at 24-25; Horii, supra note 2 at 331. This is one of the hīyal considered prohibited by most scholars. See Ibrahim, supra note 3 at 44.

63 For the effect of riddah on marriage, see Az-Zuhayli, supra note 12 at 587-588 (v.7).

64 See Ismail, supra note 7 at 168-169.

65 See id. at 107.

66 See id. at 71, 77, 125, 130, 173-74, 178, 209-213.

67 See Horii, supra note 2 at 313.

68 See Ismail, supra note 7 at 210.

69 See Saleh, supra note 16 at 19. This hadith has different versions and is cited as a proof on the validity of hiyal or makhārij by Ahmad b. 'Amr al-Khassaf, a famous Hanafi jurist and the author of a book on the subject, Kitab al-Hiyālwa al-Mmakhārij.

70 See Horii, supra note 2 at 318.

71 See Ismail, supra note 7 at 123-124.

72 Qur’an 38:44.
Muhammad Masum Billah

73 See Ismail, supra note 7 at 123.

74 See generally Horii, supra note 2 at 317.

75 See Ismail, supra note 7 at 107; Ibrahim, supra note 3 at 29.

76 Schacht, supra note 49 at 81.

77 Ibrahim, supra note 3 at 33.

78 Id. at 30.

79 Schacht, supra note 49 at 81.


81 Qur’an 7:163. See Ismail, supra note 7 at 97; Ibrahim, supra note 3 at 36.

82 Bukhari, Sahih, v. I at 3, v. VI at 2551.

83 Muslim, Sahih, v. II at 682-84 (hadith no. 4185, 4192, 4194, 4195, 4196); cited in Ismail, supra note 7 at 50.

84 See Ismail, supra note 7 at 209.

85 For the conditions of these contracts, see generally Usmani, supra note 8 at 103-109 (murābahah), 157-163 (ijārah), 187-195 (salam).

86 See Ismail, supra note 7 at 71, 77, 125, 130, 173-74, 178, 209-213.

87 As the cash sale precedes the credit sale, Hanafi jurists consider this transaction valid. The Maliki School, on the other hand, consider this transaction prohibited despite the fact that the transaction is not pre-planned. See id. At 200-202, 206-209.

88 See id. at 200-202.

89 Some scholars argue that the Qur’an prohibits only ribā al-jāhiliyyah (pre-Islamic ribā) where the borrowed amount or the price of goods in a credit sale would be doubled or multiplied. Some of them do not consider the current bank interest as ribā owing to low interest rates and government regulation of excessive.

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interest (usury). For the minority view, see Saleh, supra note 16 at 27-30. See also Abdulla Saeed, Islamic Banking and Interest: A Study of the Prohibition of Ribā and Its Contemporary Interpretation 655-702 (1999); Fadel, supra note 17 at 655-702.