

# ANALYSIS OF ḤIYAL (LEGAL STRATAGEMS) CASES IN ISLAMIC FINANCIAL LAW

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## Abstract

*Ḥiyal (legal stratagems) means to meet a permissible end through a legal but unconventional way. It has a wide application in today's Islamic finance versatile cutting-edge issues. The research objective of this study is to explore and analyze the behavior and tendency of jurists in the application of Ḥiyal (legal stratagems) in Islamic financial law in the problem-solving procedure. The research applies the content analysis method to analyze thirteen cases of financial matters stratagems, purposively sampled from authentic Ḥiyal compilations of reputable jurists. The findings of the analysis are generally, in accordance with the principles set by the jurists for advising stratagems and way outs. They have practiced considerable Shari'ah engineering in dire and general hardship cases to relax the strict bindings on the follower. In some cases, the exactly intended contract by the parties is transformed by adding a contract retaining Maqсад-e-Shari'ah. These findings are crucial for Shari'ah advisors and scholars in identifying their conduct while relaxing a stern directive of Shari'ah.*

**Keywords:** *Ḥiyal, legal stratagems, Islamic finance, Shari'ah engineering, Maqasid-e-Shari'ah.*

## Table of Contents

1. Introduction
2. Research problem
3. Research Objective
4. Methodology
5. Significance of Nawāzil in Islamic law
6. Ḥiyal (legal stratagems)
7. Ḥiyal (legal stratagems) cases
8. Analysis of Ḥiyal (legal stratagem) cases
9. Findings
10. Conclusion
11. References

## 1. INTRODUCTION

It is the responsibility of a Shari'ah scholar, whenever he prohibits an action, to provide a permissible alternate and solve the problems of society <sup>1</sup>. It is because to stop people from a specific thing is not easy, rather give an alternate way to fulfill the permissible need is the real solution to the problem, like a river cannot be stopped from flowing, instead, a substitute path can be dug to stop the usage of the first path.

## 2. Research Problem

For the provision of these alternates, Muslim jurists have been applying Ḥiyal (legal stratagems) since the early times of Islamic law. But in the latter part of history, it has been a controversial topic among scholars of Islamic law. Many Shafi'i, Maliki, and Hanbali scholars condemn the application of Ḥiyal in issuing fatawa (Shari'ah verdicts). It is not an easy task to draw a distinguishing line between the

<sup>1</sup> Mufti Muhammad Taqi Usmani, *Riba Free Banking* (Karachi: Quranic Studies Publishers, 2009).

permissible solution and way-outs prescribed by jurists and the impermissible stratagems and tricks applied to evade the objectives of Shari'ah.

The current ever-changing world is in desperate need of dynamic Shari'ah solutions for emerging issues. Especially the development of Islamic finance against the conventional interest-based system is a huge challenge for Muslim scholars. The application of stratagems in this field has been criticized widely by scholars. The study will have a direct impact on Islamic finance (IF) *Ḥiyal* and stratagems and benefit the IF scholars in understanding the approach of elder jurists in solving financial Shari'ah challenges.

### 3. Research Objective

The research objective of this study is to explore and analyze the behavior and tendency of jurists in the application of *Ḥiyal* (legal stratagems) in problem-solving procedures from their *Ḥiyal* scriptures.

### 4. Methodology

The study employed purposive sampling from the compilations on *Ḥiyal* (legal stratagems) from jurists. The researcher applied the content analysis method to analyze the trend of jurists in the application of legal stratagems in financial issues.

Content analysis is a highly versatile research strategy that has been commonly used with diverse research aims and goals in Social sciences analyses<sup>2</sup>. Content Analysis helps researchers to systematically review vast amounts of data with minimal effort<sup>3</sup>. Content analysis is also useful for analyzing document patterns and trends<sup>4</sup>. Stemler and Bebell<sup>5</sup>, for instance, performed a content analysis of educational mission statements to include some conclusions about what schools consider to be their primary purpose of existence.

### 5. Significance of Nawāzil in Islamic fiqh

'Nawāzil' are jurisprudential literature whose scientific material has been edited by judges, muftis, or consultants on the subject of real events that were submitted to them to decide on them or to clarify the legal ruling thereon. Islamic law has emphasized most of this precedent judicial method since its inception. *Fiqh-un-Nawāzil* is a *fiqh* (Islamic jurisprudence) branch that addresses contemporary issues (newly developing issues)<sup>6</sup>. Such problems involve *usul-based fiqh reasoning (ijtihād)* (standards and doctrines of Islamic law) due to the lack of textual proof on the subject. This *ijtihād* is done by *fuqahā* and jurists who will try to work out Shari'ah rulings by reviewing the key Shari'ah sources.

The Maliki madhhab has the most well-known Nawāzil literature for Muslims living in minority, perhaps due to the experience of the mainly Maliki population of the Muslim West in losing Andalus to the Christians. There were compilations like *Nawāzil ahl al-Qurtuba* (momentous events of the people of Cordova). Their scholars gave fatwa about what Muslims could legally do in such circumstances, like the verdicts of the Maliki scholar Ahmad al-Wanshiris named as "al-Miyar al-mughrib 'an fatawa ulama Ifriqiya wa al-Andalus wa al-Maghrib" (The standard, expressing the fatwas of the scholars of Tunisia, Andalus, and Morocco)<sup>7</sup>.

<sup>2</sup> Marilyn Domas White and Emily E Marsh, "Content Analysis: A Flexible Methodology," *Library Trends* 55, no. 1 (2006): 22-45.

<sup>3</sup> GAO, *Content Analysis: A Methodology for Structuring and Analyzing Written Material (Evaluation, United States. General Accounting Office. Program Division, Methodology: US General Accounting Office, 1996)*.

<sup>4</sup> Steve Stemler, "An Overview of Content Analysis," *Practical Assessment, Research, and Evaluation* 7, no. 1 (2000): 17.

<sup>5</sup> S Stemler and D Bebell, "Paper Presented at the Annual Meeting of the New England Educational Research Organization," *An Empirical Approach to Understanding and Analyzing the Mission Statements of Selected Educational Institutions, 1998*.

<sup>6</sup> Etty Terem, "Redefining Islamic Tradition: Legal Interpretation as a Medium for Innovation in the Making of Modern Morocco," *Islamic Law and Society* 20, no. 4 (2013): 425-75, <https://doi.org/10.1163/15685195-0204P0003>.

<sup>7</sup> Francisco Vidal-Castro, "Al-Mi'yār Al-Mu'rib Wa-l-Jāmi' Al-Mughrib 'an Fatāwā 'ulamā' Ifriqiya Wa-l-Andalus Wa-l-Maghrib," in *Christian-Muslim Relations 1500 - 1900, Christian-Muslim Relations (Brill, n.d.)*, [https://referenceworks.brillonline.com:443/entries/christian-muslim-relations-ii/al-miyar-al-murib-wa-l-jami-al-mughrib-an-fatawa-ulama-ifriqiya-wa-l-andalus-wa-l-maghrib-COM\\_24753](https://referenceworks.brillonline.com:443/entries/christian-muslim-relations-ii/al-miyar-al-murib-wa-l-jami-al-mughrib-an-fatawa-ulama-ifriqiya-wa-l-andalus-wa-l-maghrib-COM_24753). accessed on 23 November 2020.

We have similar types of Nawāzil compilations, in the Ḥanafī school, such as Ibn Abidin's commentary on al-Durr al-mukhtars<sup>8</sup>, or the al-Fatawa al-Hindiyya<sup>9</sup>, under the juristic classification of events that do not comply with the Shari'ah, but affect so many people that relaxations have to be made for them, for specific reasons. The Ḥanafī school is very rich in such legal applications out of need, because it controlled the majority of Muslims for a major part of history, including the Abbasid and Ottoman periods, and Ḥanafī jurists dispensed with many situations in many different regions of the world<sup>10</sup>.

In Islamic precedents usually, the opinions of older scholars are preferred. The attempt being to connect the statement of the decision with the opinions of earlier Imams or even companions of Sahaba<sup>11</sup>. These precedents have been used in both ways as an argument as well as justification. The difference in both is that the former is made before the decision and the latter is used after the decision<sup>12</sup>. In Islamic jurisprudence, the term "Nawāzil" is used for precedents. This means the compilations of the latter part of the jurists, not the earlier jurists. The jurisprudence of Nawāzil changes with the transformation in society and civilization, so the more society and civilization develops, this type of jurisprudence develops with it, and the more the civilization holds a stagnation it freezes this type of jurisprudence, so it develops with the development of life<sup>13</sup>.

## 6. Ḥiyal (legal stratagems)

### a) Definition

Fares Djafrī defined Ḥiyal as legal loopholes or artifices; and Ḍarae' means or instruments<sup>14</sup>. Cesar and Greg explained Ḥiyal as "legal stratagems designed to reach impermissible ends by formal lawful means"<sup>15</sup>. The scholars have defined the Ḥiyal in two ways<sup>16</sup>: One is a broader meaning, that is: any clandestine means of getting rid of a problem or an exit. The Arabic word *Makhrağ* portrays the same. The definers are Imām Qurtubi, Al-Ḥamawī, Al-Sha'bi, and others<sup>17</sup>. Al-'asqalani is defined with the words: "Hila is something through which you reach your goal in a hidden way"<sup>18</sup>.

The second and the narrowed meaning for this word indicates a backdoor solution of the issue which results in transforming an impermissible to permissible. The scholars preferring this, are namely Ibn Taimiyyah, his student Ibn Qaiyyim, and Al-Shaṭṭī<sup>19</sup>.

Mansoori<sup>20</sup> gave a detailed and comprehensive definition, he said "the use of legal means for extra-legal ends that could not, whether themselves are legal or illegal, be achieved directly with the means provided by the Sharī'ah. It enables persons who would otherwise have had no choice but to act against the provisions of sacred law, to arrive at the desired result while conforming to the letter of the law."

<sup>8</sup> Ibn Abidin, *Radd Al-Mukhtar Ala Al-Durr Al-Mukhtar*, 1st ed. (Beirut: Dar Ihya al-Turath al-Arabi, 1998).

<sup>9</sup> Scholars committee of King Alamgir, *Al-Fatawa Alamgiri* (Quetta: Maktabah Majdiyyah, 1983).

<sup>10</sup> Muhammad. Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan," *Islamic Studies* 47, no. 4 (2008): 467, <https://doi.org/10.2307/20839140>.

<sup>11</sup> Imran A. K. Nyazee, *Introduction to Al-Hidayah* (Bristol: Amal Press, 2006).

<sup>12</sup> F. Schauer, "Precedent," *Stanford Law Review* 39, no. 3 (1987): 571, <https://doi.org/10.2307/1228760>.

<sup>13</sup> Ahmed Alsaidy, "The Contribution of Fiqh in Human Sciences: History as an Example," *Journal of Human Sciences* 2016, no. 1 (2016): 85-115, <https://doi.org/10.12785/jhs/20160103>.

<sup>14</sup> Fares Djafrī, "Applying Ḥiyal & Makharīj and Other Islamic Principles," in *LSE - HBKU Workshop (Doha: Center for Islamic Economics and Finance (CIEF), 2018)*, 9.

<sup>15</sup> Cesar Arjona and Greg Jehle, "Islamic Law and the Limits of Amoralism: Re-Conceptualizing the Legal Ethics of Transnational Islamic Finance," *TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS* 27, no. Summer (2018): 275.

<sup>16</sup> Muhammad Tahir Mansoori, "Use of Ḥiyal in Islamic Finance and Its Shariah Legitimacy," *Journal of Islamic Business and Management* 1, no. 1 (2011): 69-92.

<sup>17</sup> Ibnul Arabi, *Ahkamul Qur'an*, Darul Kutub Al-Alamiyyah, Beirut, Tt (Cairo: Darul Kutub Tauqifiyyah, 1967); Ahmad bin Muhammad Al-Ḥamawī, *Al-Ashbah Wa Nazaer* (Beirut: Darul Kutub Ilmiyyah, 1999).

<sup>18</sup> Ibn Hajar Al-'Asqalani, *Fath Al-Bārī Fī Sharḥ Ṣaḥīḥ Al-Bukhārī* (Cairo: Mustafa al-Babi al-Halabi, 1959).

<sup>19</sup> Ibn Taamiyyah, *Iqamatu Daleel Ala Ibtal Al-Tahleel* (Beirut: Darul Kutub Ilmiyyah, 1991); Shams al-Dīn Abū'Abdillāh Al-Jauziyyah Ibn Qaiyyim, *E'lam-Ul-Muwaqqi'een* (Beirut: Darul Kutub Ilmiyyah, 1991); Ibraheem bin Musa Al-Shatbi, *Al-Muafaqat* (Cairo: Maktabah Tauqifiyyah, 1964).

<sup>20</sup> Mansoori, "Use of Ḥiyal in Islamic Finance and Its Shariah Legitimacy."

### b) Difference between *Ḥilah* and *Makhrāj*

*Ḥilah* can be defined as a trick or stratagem<sup>21</sup>, while *makhrāj* may be defined as a licit exit or relief<sup>22</sup>. Smolo and co-writers differentiated in *makhrāj* and *ḥilah* and said prior one is a legal exit, and the latter is a trick. They utilized intent to demonstrate the contrast between the two jargons: *makhrāj* tries to comply with the *Shari'ah* excluded requirement<sup>23</sup>. While, in the case of *ḥilah*, the intention usually is to commit the prohibited act.

### c) Shari'ah rule regarding the application of *Ḥilah*

To summarize the conflict on the issue, instead of canceling all *Ḥiyal* (legal artifices), most of the scholars opted to classify them. The categorization of *Ḥiyal* into permitted and forbidden is advocated by various classical Muslim jurists, such as Al-Khassaf of the Hanafī School, Al-Shātībī from the Mālikī School, Al-Qazwīnī, a Shāfi'ī jurist and Ibn al-Qayyim of the Hanbalī School.

As far as the Hanafi jurists are concerned, they are considered as the master of this science. Among the founders of Hanafi madhab, Abu Yusuf is the most lenient in allowing the use of *Ḥiyal*, and his student, Muhammad bin Hasan Shaybani is quite moderate in allowing certain *Ḥiyal* and prohibiting others. Their unique theory to draw a line between two types of stratagems is the prejudice and defensive nature of *Ḥiyal*. Hanafi scholars were heavily criticized for their behavior in proposing *Ḥiyal* by Imām Bukhari (by writing a complete chapter against them in his *Saḥiḥ*) and others like Ibne Baṭṭa<sup>24</sup> etc.

## 7. *Ḥiyal* (legal stratagem) cases prescribed by jurists

The above deliberations show a holistic view of the origin of the *Ḥiyal* concept and the tendency of several scholars and schools of thought in applying stratagems in solving a Shari'ah problem. The discussion will be extended to some specific *Ḥiyal* cases and the treatment of jurists in these scenarios to obtain an idea of their approaches. The study of several cases in legal research allows scholars the opportunity to identify and evaluate new legal phenomena, enhance and redefine legal ideas, and challenge prevailing assumptions and beliefs<sup>25</sup>. Case studies are forms of research whose practitioners are chiefly case-oriented rather than variable oriented<sup>26</sup>.

Cautious considerations of case selection are a key part of convincing and influential case studies<sup>27</sup>. The cases should be closely related to the research questions<sup>28</sup>. Therefore, cases will be sorted from different classical scriptures of prominent scholars. Only Mu'amalat and more specifically investment and trading cases will be sought, as it will lead to the main research objective of this study that is to analyze the tendency of scholars in applying stratagems in commercial law.

**Table 1: *Ḥiyal* (legal stratagem) cases**

<b>Case:1: If the rental agreement is for (say) a year on monthly basis<sup>29</sup>.</b>
Actual doctrine: The party has the right to dissolve the tenancy agreement after the payment period (especially in Hanafi doctrine) because the rental agreement is not binding on either party to continue after one unit <sup>30</sup> .

<sup>21</sup> S. Abu Jib, *Al-Qamus Al-Fighi* (Damascus: Darul-Fikr, 1988); J Milton Cowan, "Hans Wehr: A Dictionary of Modern Written Arabic (Arabic-English)," 1980.

<sup>22</sup> Abu Jib, *Al-Qamus Al-Fighi*.

<sup>23</sup> Abubakar Muhammad Musa and Edib Smolo, "Al-Hilah (Legal Trick) and Al-Makhrāj (Legal Exit): The Difference between the Two and Their Application in Islamic Finance," in *International Seminar on "Muamalat, Islamic Economics and Finance (SMEKI 09)," October 20-21, 2009, Faculty of Islamic Studies, University Kebangsaan Malaysia, Malaysia. (Kulliyah of Economics and Management Sciences, International Islamic ..., 2009).*

<sup>24</sup> Ibnu Batta, *Ibtal Al-Hiyal*.

<sup>25</sup> Lisa L Miller, "The Use of Case Studies in Law and Social Science Research," *Annual Review of Law and Social Science* 14, no. 1 (2018): 393, <https://doi.org/10.1146/annurev-lawsocsci-120814-121513>.

<sup>26</sup> Gary Goertz and James Mahoney, *A Tale of Two Cultures: Qualitative and Quantitative Research in the Social Sciences* (Princeton University Press, 2012).

<sup>27</sup> Miller, "The Use of Case Studies in Law and Social Science Research," 392.

<sup>28</sup> Jennifer Rowley, "Using Case Studies in Research," *Management Research News*, 2002, 19.

<sup>29</sup> Ahmad bin amr Al-Khassaf, *Kitabul Khassaf Fil Hiyal* (Qahira, 1994), 41; Muhammad bin Ahmad Al-Sarakhsi, *AL-Mabsoot* (Beirut: Dar-ul-Mariafa, 1993), 216; Shaybani, *Al-Makaharij Fil -Hiyal*, 13.

<sup>30</sup> Wahbah Al-Zuhayli, *Usul Al-Fiqh Al-Islami* (Damascus: Dar Al-Fikr, 1986).



Inconvenience: The tenant worries if the landlord dissolves the agreement just after a month, which will cause him to find another house.
Ḥilah: Assign RM1000 for each month, and RM10,000 for the twelfth month, to keep the other party intact till the end of the period.
Impact: Purpose fulfilled without changing the essence of the contract.
<b>Case 2: Time limit in repayment of the loan<sup>31</sup></b>
Actual doctrine: A loan is a gracious contract thus is not a time-binding, even if the time is mentioned in a contract. Therefore, the creditor can ask whenever he wants.
Inconvenience: The debtor cannot pay before the period.
Ḥilah: The debtor should turn creditor to a person(muhtal) who has to pay to the debtor with a time limit (subject to the approval of creditor), then the creditor or even his inheritors cannot ask for the debt before maturity time.
Impact: Purpose fulfilled through the addition of a third-party transaction.
<b>Case:3: How to allow the investor in a mudarabah contract to participate in the management of the business?</b>
Actual doctrine: The investor in a mudarabah contract is not allowed to participate in the management of the business, only mudarib can work.
Inconvenience: The investor needs to secure his investment by the right to intermingle whenever he wants.
Ḥilah: Make that mudarib an investing partner by a loan of RM10 from the investor. Mudarabah turns into Musharakah.
Impact: Purpose fulfilled by turning Mudarabah into Muasharakah.
<b>Case 4: Using of Rahn by the mortgagee.</b>
Actual doctrine: Not allowed as it leads to Riba, due to the profit generated by the loan.
Inconvenience: The mortgagee wants to use mortgage land to get the benefits of an asset kept idle.
Ḥilah: Hand over the mortgage (land/thing) to the mortgagee and then ask mortgager to use based on ‘Ariya.
Impact: Purpose fulfilled by adding a contract.
<b>Case 5: Investment in kind<sup>32</sup></b>
Actual doctrine: Not allowed. Encashment is required to initiate a joint venture.
Inconvenience: Encashment will cause a devaluation of assets.
Ḥanafī Ḥilah: Sell half of these goods to the partner or give him as a gift, the Shirkah will develop itself. Or sell the goods to a trusted person who then sells it to Mudarib, then Mudarib uses these goods in the business.
Maliki Ḥilah: The investor should deliver goods to his partner, who sells them and uses the money of the sale to invest in a qirad <sup>33</sup> .
Impact: Purpose fulfilled in both stratagems by merging qirad with Musharakah or pre-agreed sale. But in the Maliki stratagem, the asset cannot be utilized directly in the business.
<b>Case 6: Selling Agent buying the goods for himself<sup>34</sup></b>
Actual doctrine: Not permissible because one person cannot act as both parties of a contract.
Inconvenience: Selling Agent needs to buy the item for himself.
Ḥilah: The agent should ask the principal to sanction him to do whatever he seems appropriate and then set another agent and ask him to sell this to the first agent. If the principal is not ready to do so, then sell this to a trusted person and revert the sale afterward to get the item and pay the amount to the principal.
Impact: Purpose fulfilled in both stratagems by adding an agency agreement. Second Hila is a pure synthetic arrangement.
<b>Case 7: Tenant bearing maintenance charges for a leased car or feeding charges for an animal. <sup>35</sup></b>
Actual doctrine: The owner has to bear these charges due to the ownership.

<sup>31</sup> Al-Khassaf, *Kitabul Khassaf Fil Hiyal*, 40.

<sup>32</sup> Satoe Horii, “Reconsideration of Legal Devices (Hiyal) in Islamic Jurisprudence: The Hanafīs and Their ‘Exits’ (Makhārij),” *Islamic Law and Society* 9, no. 3 (2002): 312-57, <https://doi.org/10.1163/156851902320901189>; Al-Sarakhsi, *AL-Mabsoot; Ehsanullah Agha Syed and Mustafa Omar*, “Hiyal in Islamic Finance: A Recognition of Genuine Economic Need or Circumvention of Riba?,” *Qualitative Research in Financial Markets* 9, no. 4 (2017): 382-90, <https://doi.org/10.1108/QRFM-05-2017-0041>.

<sup>33</sup> Abraham L. Udovitch, “Theory and Practice of Islamic Law: Some Evidence from the Geniza,” *Studia Islamica*, no. 32 (1970): 183, <https://doi.org/10.2307/1595226>.

<sup>34</sup> Al-Khassaf, *Kitabul Khassaf Fil Hiyal*, 55.

<sup>35</sup> Al-Khassaf, 32.

Inconvenience: The owner does not want to pay the charges because he is not using it.
Hilah: Embed all these charges into the rental payments.
Impact: Purpose fulfilled without adding any synthetic arrangement.
<b>Case 8: Buying back the sold goods at a less price: The creditor sells a good to the debtor at a higher price after purchasing it at a lower price<sup>36</sup>.</b>
Actual doctrine: Not permissible, as it will become a loan generating profit.
Inconvenience: The buyer needs financing and not to lose his owned goods as well and the investor wants a profit in the transaction.
Hilah: Add a piece of cloth with the goods/house and sell it to the investor and buy back the same without that cloth at a less price.
Impact: Wish accomplished with an apparent/fake arrangement.
<b>Case 9: Rental/selling of trees<sup>37</sup>.</b>
Actual doctrine: Cannot sell the fruits which have not appeared yet, nor the rental of the trees is allowed as it involves consumption of fruits.
Inconvenience: The owner wants to give all the fruits of a year but not the trees.
Hilah: Both the parties give their lands on rental to each other; the tenant will consume the fruits and return the land after a year, or the seller of fruits may rent the land for a year.
Impact: Purpose accomplished by changing the subject matter of rental contract.
<b>Case: 10: Mudarabah risk<sup>38</sup></b>
Actual Doctrine: The investor has to bear the risk of his investment.
Inconvenience: The investor is not ready to bear the risk of investment.
Hilah: The investor shall give his investment as a loan except some money say RM100 and form a Musharakah from the investor's loan and the RM 100. They can agree on any Profit and loss ratio, but the ratio of working partners should not be less than the capital ratio.
Impact: Purpose fulfilled with injecting a loan agreement.
<b>Case: 11: Elapse of Rahn/mortgage in the hand of the creditor<sup>39</sup></b>
Actual doctrine: The death/expiry of Rahn/mortgage will nullify the creditor's right in the debt.
Inconvenience: He did not want to lose his debt by an unexpected incident to the mortgage.
Hilah: The creditor should buy the mortgage and give testimony that he did not take over the mortgage, now if the debtor returned the money, he should revert the sale. And the mortgage elapsed, then he can get his money due to the non-occupation.
Impact: Purpose fulfilled by adding a Sale agreement and an Iqrar (declaration).
<b>Case 12: Shuf'a, the neighborhood right to buy the neighbor's house<sup>40</sup></b>
Actual doctrine: The neighbor can claim his right to buy the house, especially in Hanafi doctrine <sup>41</sup> .
Inconvenience: The parties do not want to let the neighbor enter the deal.
Hilah: The seller should gift some part of his house to the buyer and then sell the remaining part at an agreed price. Then the neighborhood right cannot be claimed.
Impact: Purpose fulfilled through the addition of a gift arrangement.
<b>Case 13 : Buying agent for a specific thing, against the pertinent currency, say RM. <sup>42</sup></b>
Actual doctrine: He cannot buy that for himself because he will disobey the principal's order if he does so.
Inconvenience: He needs to buy that particular thing for himself.
Hilah: He can buy the same thing with another currency for himself, because he was not ordered by the principal to buy with Rupee, for example.
Impact: Change in form of contract to get the desired result.

These cases are selected from the most authentic sources, and presented in an easily understandable way, as the most cumbersome part of understanding the law is the situation in which it is applied. Furthermore, the alternative prescribed by the scholars becomes even more difficult, when

<sup>36</sup> *Al-Khassaf*, 12.

<sup>37</sup> *Shaybani, Al-Makaharij Fil -Hiyal*, 61.

<sup>38</sup> *Shaybani*, 80.

<sup>39</sup> *Shaybani*, 81.

<sup>40</sup> *Shaybani*, 84; *Mahmood bin Ahmad ibn Maza Al-Hanafi, Al-Muheet Al-Alburhani (Beirut: Darul Kutub Ilmiyyah, 2004)*, 319.

<sup>41</sup> *Ali bin Bakr Al-Murghinani, "Kitab-Ul-Buyu", in Al-Hidayah (Istanbul, 1985)*.

<sup>42</sup> *Shaybani, Al-Makaharij Fil -Hiyal*.

comparing both the scenarios, prohibited and permissible. However, the above arrangement not only clarifies the concept, rather provides a base for further evaluation.

8. Table 2: Analysis of selected cases

Case	Inconvenience occurrence/ Intensity <sup>43</sup>	Substantial Shari'ah Engineering <sup>44</sup>	Essence of the contract changed <sup>45</sup>	Added contract	Maqsad-e-Shari'ah maintained
The rental agreement is for a year on monthly basis.	High	No	No	No addition (Adjustment in rental payment)	Yes
Time limit in loan	High	Yes	No	Hawalah	Yes
To allow the investor in a mudarabah contract to participate in the management of the business.	Medium	Yes	No	Musharakah	Yes
Using of Rahn by the mortgagee.	Medium	No	No	'Ariya	May be
Investment in kind in the joint venture (Maliki stratagem)	High	No	No	Agency to sell goods	Yes
Investment in kind in the joint venture (Hanafi stratagem)	High	Yes	No	Shirka tul Aqd	Yes
Selling agent buying the good for himself	Low	Yes	Yes	Agency agreement or sale and agreed return (Iqalah)	May be
Maintenance charges for a leased car or feeding charges for an animal etc. on a rental basis	High	No	No	No addition (Adjustment in rental payment)	Yes
Buying back the sold goods at a less price.	Medium	Yes	Yes	Loan disguised in sale arrangement	Yes
Rental/selling of fruit of trees	High	Yes	Yes	The subject matter of the rental contract changed from trees to land.	Yes
Mudarabah risk	Medium	Yes	Yes	Loan contract	Yes
Elapse of Rahn/mortgage in the hand of the creditor.	Medium	Yes	Yes	Sale contract added in pledge contract	Yes
Shuf'a the neighborhood right to buy the neighbor's house.	Medium	Yes	No	Gift arrangement	Yes

<sup>43</sup> Inconvenience occurrence or Intensity means whether this difficulty is faced by majority or it is a special non-occurring case.

<sup>44</sup> Substantial Shariah Engineering means the degree of transformation applied in the case to find the way out, with respect to Shariah laws.

<sup>45</sup> Essence of contract signifies that after application of *hilah*, the crux of contract is same or changed.

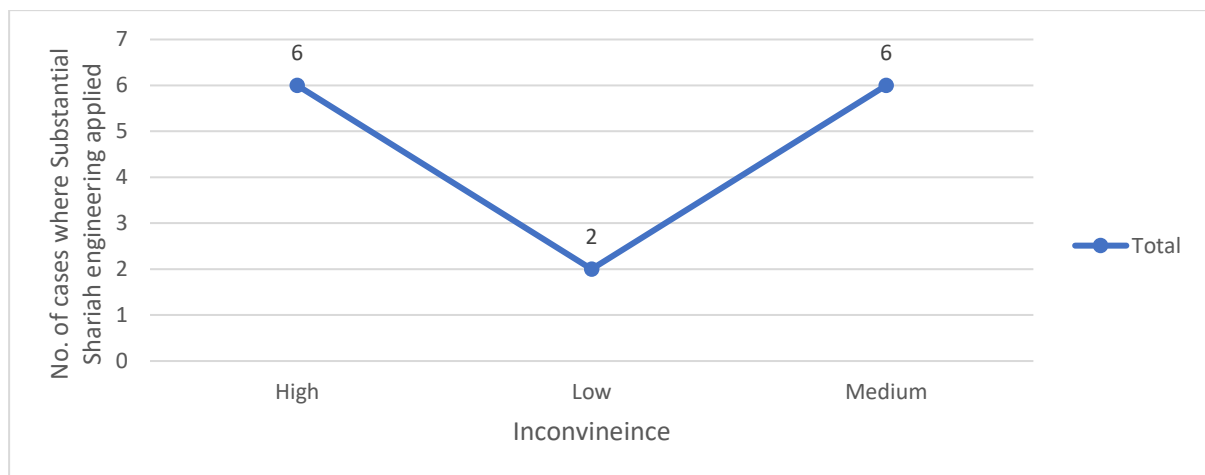


Buying agent for a specific thing, against the pertinent currency, say RM.	Low	No	No	No addition (Change of currency)	May be
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### 9. Findings

- In case of dire and general need, Shari’ah tends to give relaxations through legal stratagems and ijthihad can be exercised in these scenarios (See figure: 1).
- In most of the cases, Maqasad-e-Shari’ah is maintained by the jurists in their advised stratagems. Apart from these cases, there are some scenarios (21% of the sampled cases) where a debate can be initiated about the intactness of Maqasad-e-Shari’ah. It was observed that, even if the crux of the contract is changed, the Maqasad-e-Shari’ah can be retained. Transformation in the contract does not essentially mean evading the objective of Shari’ah. (See figure:2).
- As the inconvenience increases, it requires more intensive Shari’ah engineering in advising Hiyal (stratagems) (See figure: 3).
- Scholars have applied stratagems that alter the contract upside down only in rare cases. Many intensive cases can be dealt with, and solutions can be found without changing the real contract intended by the parties. (See figure: 4).

**Figure 1:** Substantial Shari’ah engineering applied to variant inconvenience degrees in Hiyal Cases



**Figure 2:** Maqasid-e-Shari’ah maintained while changing the essence of the contract

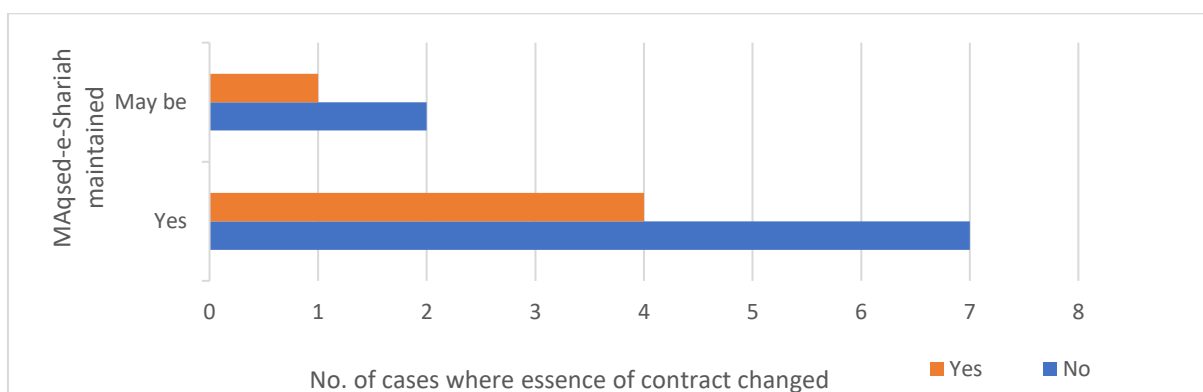




Figure 3: Inconvenience degree with Substantial Shari’ah engineering

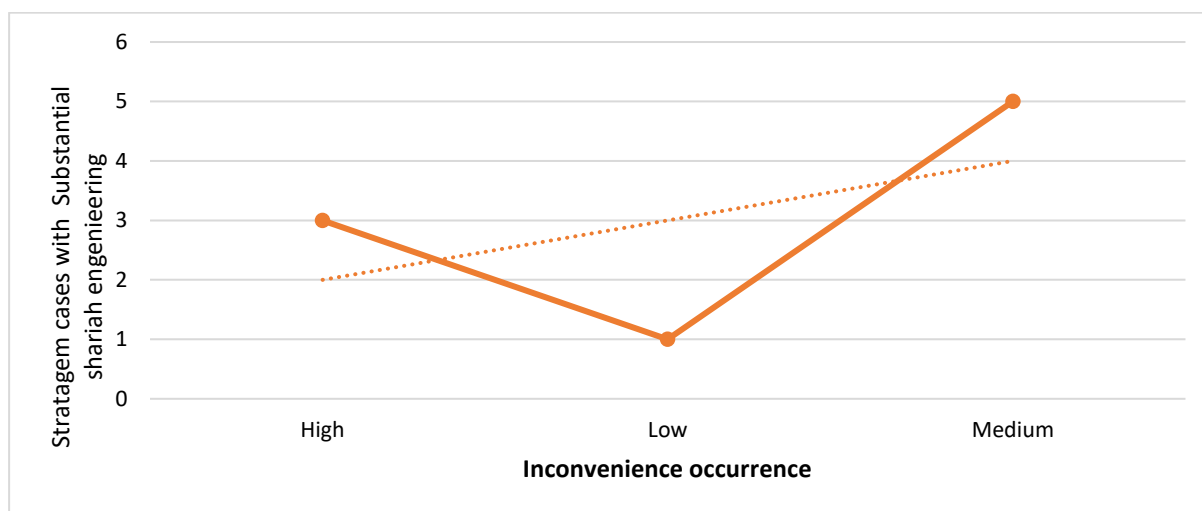
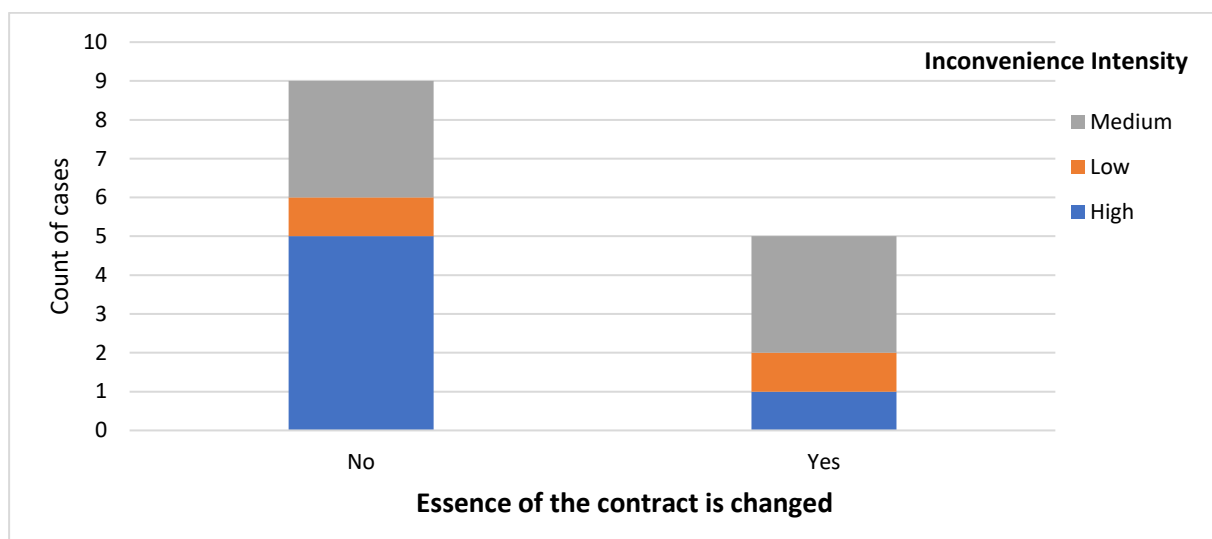


Figure 4: Inconvenience occurrence in the cases where the essence of the contract is changed



### 10. Conclusion

The study has thoroughly examined thirteen events where *Ḥiyal* (legal stratagems) have been applied by the jurists to circumvent the operational inconvenience under the content analysis approach. All the scenarios are related to financial matters. The findings of the analysis are generally, in accordance with the principles set by the jurists for advising stratagems and way outs. However, the research can be extended on the above successful method on other stratagems advised by elder jurists as well as today's Islamic finance scholars in contemporary issues.

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