



## Application of Ḥiyal (Legal Devices (LD)) in Murābahāh Transaction and Its Sharī'ah Perspective

Mohamad Sabri B. Zakaria<sup>(i)</sup>, Muhammed Buhary Muhammed Thabith<sup>(ii)</sup>, Muhammed Samrin Jailabdeen<sup>(iii)</sup>

### Abstract

At present, Murābahāh is the most widely used mode for investments among financial institutions worldwide. Similarly, this mode has been generally applied in Islamic Financial Institutions (IFIs) in Sri Lanka. However, some scholars said that the contemporary Murābahāh practices are not Islamic because it relies heavily on the element of Ḥiyal (legal devices). Thus, this investigation explores the doctrine of legal devices (LD) in classical Islamic jurisprudence and its application in modern Islamic finance. Legal devices (LD) are normally used for some modifications which led to the reasons for the criticism. Hence, the validity of these LDs is analyzed through classical and modern literature. This study found that using LD alone does not invalidate a contract. In addition, there are conditions and restrictions that should be applied on the use of LD. This research utilizes a doctrinal analysis, which involves both primary and secondary sources of information, such as statutes, practices, and reports. This study recommends the spheres of acceptable LD and suggests that the innovations should only be attempted within these spheres. Also, it suggests that in emerging financial products, Maṣlahah should be given major consideration; otherwise, the adoption of Islamic finance in non-Muslim countries such as Sri Lanka will be a challenge.

**Keywords:** Ḥiyal (Legal Devices), Islamic Finance, Murābahāh, Maṣlahah, Sri Lanka.

### تطبيق الحيل في المراجعة ونظرة الشريعة له

#### ملخص البحث

في الوقت الحالي، تعد المراجعة صيغة التمويل الإسلامي الأكثر استخداماً لاستثمارات المؤسسات المالية في جميع أنحاء العالم. فإن هذه الصيغة تستخدم بشكل عام في المؤسسات المالية الإسلامية في سريلانكا. إلا أن بعض العلماء قالوا إن المراجعة المعاصرة ليست إسلامية في الواقع، لأنها تعتمد بشكل كبير على عنصر الحيل. وبالتالي، فإن هذا البحث يحقق في قواعد الحيل الشرعية (Legal Devices) في الفقه الإسلامي الكلاسيكي وتطبيقاته في التمويل الإسلامي الحديث. يتم استخدام الحيل الشرعية لبعض التعديلات وهذا هو سبب للنقد. ومن ثم، شرعية الحيل الشرعية قد تم تحليلها عن طريق الدراسات الكلاسيكية والمعاصرة. وتوصلت هذه الدراسة إلى أن استخدام الحيل الشرعية لوحدها لا يجعل العقد غير صالح. إضافة إلى ذلك، هناك شروط وقيود ينبغي تطبيقها عند استخدام الحيل الشرعية. ولتحقيق ذلك تنتج الدراسة منهج التحليل النظري الذي ينطوي على البيانات الأولية والثانوية بما في ذلك القوانين والممارسات والسوابق القضائية والتقارير. توصي هذه الدراسة وتقرر بمجالات الحيل الشرعية المقبولة وتحذر أن الابتكارات يجب أن تكون في هذه المجالات الشرعية. ويُقترح أنه في المنتجات المالية الجديدة أن يولى الاهتمام بشكل واسع لمفهوم المصلحة؛ وإلا لا يمكن تطبيق التمويل الإسلامي في البلدان غير الإسلامية كسريلانكا.

كلمات مفتاحية: الحيل، التمويل الإسلامي، المراجعة، المصلحة، سريلانكا.

<sup>(i)</sup> Assistant Professor, Department of Fiqh and Usul al-Fiqh, AHAS KIRKHS, International Islamic University Malaysia: [sabriz@iiu.edu.my](mailto:sabriz@iiu.edu.my)

<sup>(ii)</sup> Phd Researcher, Ahmad Ibrahim Kulliyah of Laws (AIKOL), International Islamic University Malaysia: [thabit786@gmail.com](mailto:thabit786@gmail.com)

<sup>(iii)</sup> MA Researcher, Ahmad Ibrahim Kulliyah of Laws (AIKOL), International Islamic University Malaysia: [zamrin.mohammad@gmail.com](mailto:zamrin.mohammad@gmail.com)

## Contents

Introduction	89
Literal and Juridical Meanings of Legal Devices (LDs)	89
Literal Meaning of Legal Devices (LDs) (Hiyal) and Some Related Remarks	89
The Juridical Meaning of Legal Devices (LD)	89
The Islamic Juridical Schools and Their Views on Legal Devices (LD)	90
Using the Legal Devices (LD) in Islamic Finance	95
The Murābahah Finance in Sri Lanka	96
Application of Legal Devices (LD) in Murābahah Finance	97
Conclusion	97
References	98
Endnotes	98

## 1. Introduction

Ethical financing has found its voice after the failure of the conventional financial economics. Hence, Islamic financial institutions (IFIs) are particularly gaining interest even in non-Muslim countries. However, some products of IFIs have become an issue of intense debate and controversy among the Islamic finance scholars. Some scholars argue that the contemporary IFI practices are not Islamic because it relies heavily on the element of *Hiyal* (legal devices), such as in *Murābahah* and *Ijārah* (al-Iftā', 2008). Mansoori stated that some models of IFI are not real Islamic alternatives to conventional banking and finance. However, this is manipulated by the element of LD (Mansoori M. T., 2011). Similarly, legal devices (LDs) are utilized in order to affect a modification to an Islamic transaction, and the fact that these LDs are utilized in order to avoid an interest free transaction opened the source of the criticism. As a result, both classical and contemporary *fiqh* literature are considered to evaluate the correctness of these LDs. According to the findings of this study, the mere presence of an LD does not render a contract null and void. On the other hand, there are certain constraints and requirements that ought to be applied to the utilization of LDs.

This paper attempts to determine the parameters for legal devices (LDs) and its position from the *Sharī'ah* perspective. Moreover, the earlier *Hanafi* scholars particularly discussed that not all LDs are prohibited from

the viewpoint of *Sharī'ah*, in fact some are acceptable. Furthermore, those who apply the LD to save themselves from a critical situation and to avoid the prohibited (*Ḥarām*) transaction in a contract will get the reward from Almighty Allah (SWT) (Uthmani, 2009).

This research gives a brief idea about the juridical and lexical definitions of LDs and illustrates the broad range of classifications mentioned by the earlier scholars. Additionally, contemporary applications of the LD in *Murābahah* practices of Sri Lanka and its *Sharī'ah* perspective are discussed.

## 2. Literal and Juridical Meanings of Legal Devices (LDs)

### 2.1 Literal Meaning of Legal Devices (LDs) (Hiyal) and Some Related Remarks

The Arabic expression *Hiyal* is the plural of *Hilah*, which means the legitimate tool, sharpness, lawful ingenuity, lawful trap, tricks, and lawful stratagems in basic English (Tawfiq, 2012). As per the Arabic dialect, the term *Hilah* and its different terms, for example, *Tahayyul*, and *Ihtiyāl* all indicate the meanings of imagination, sharpness of intelligence and skill in management of affairs (Ibn Manzūr, 1993). The cause of *Hilah* is *Hawla*, which implies change (*Tahawwul*) starting with one state then the next, conceivably through some finely executed plan that helps conceal the reality; it could likewise be a determination of the root term *Hawla* which implies capacity (*Quwwah*).

The term *Hilah* is utilized to indicate the medium of accomplishing or obtaining some goals, usually in a secret or covert manner. Despite the fact that the term is utilized more regularly to depict a method in the work of which there is some negative perspective, it is similarly used to demonstrate a technique which is judicious and practical (Sadique, 2008) as referred from "*al-Mausu'ah al-Fiqhiyah* (Ministry of Awqāf, 1983).

### 2.2 The Juridical Meaning of Legal Devices (LD)

The juridical meaning of *Hiyal*, the plural of *Hilah*, from the viewpoints of the schools of Islamic jurisprudence will be discussed in this section. Before discussing the

viewpoints of these schools, a general viewpoint about it will be provided here.

Ibn Ḥajar gives a simple meaning that *Ḥiyal* lead one to his goal through concealed means (Ibn Ḥajar, 1993). Similarly, Ibn Taymiyyah explained that *Ḥiyal* are intended to stifle an obligation or allow and permit a prohibition (*Ḥarām*) by activities which are not initially implied by *Shari'ah* or legislated for it (Ibn Taymiyyah, 1987). The definition does not appear to be fair, as it just covers the *Ḥiyal* which are intended to avoid the lawful decisions with a specific end goal to authorize the unlawful or reject the allowed. It considers no arrangement for *Ḥiyal* which are frequently confirmed in the *Shari'ah*, and likewise it could be on the grounds that when a person implied *Ḥiyal* he considered its standard significance and not the specialized importance, which will be discussed in the prospective segments.

Furthermore, Ibn Qayyim assumed that the *Ḥilah* is a kind of lid with which the practitioner endeavors to move a condition to another through it (Ibn Qayyim, 1991). As indicated by this definition, there must be a move from one condition to another. In other words, the decision or the condition should take a turn through the endeavor of the *Ḥiyal*.

In short, the juridical meanings above give a concise proposal of the regular characterizing factors for the *Ḥiyal* and the criteria for its acknowledgment. We may finish up from the explanations represented above with a demonstration to be considered as *Ḥiyal*. Hence, it can be applied to solve difficult problems just as Prophet Muhammad had taught his *Sahābah* in the case of the sale of dates (*al-Tamar*) after the battle of *Khaybar*. This *Ḥadith* shows that there is the proof for application of LDs in Islamic transactions to protect them from *Ribā* and *Ḥarām*.

### 3. The Islamic Juridical Schools and Their Views on Legal Devices (LD)

The Islamic jurists explained that LD is not rejected totally from the *Shari'ah* perspective. Some LDs are allowed from the *Shari'ah* viewpoint. It can even be used in critical

situations to save oneself and society from *Ribā* and *Ḥarām* transactions.

The truth is that the LD is mentioned by the *Qur'an* and *Sunnah* in two types of situations: the first is that it is valid and acceptable, and the second is that it is invalid and prohibited. About the invalid type, Prophet Muhammad (SAW) said that: "Allah cursed the Jews because grease (fat) had been forbidden for them, but they beatified it and sold it" (al-'Asqalānī, 1993, h. 3460). This *Ḥadith* clearly says that fat was forbidden for the Jews, but they did a trick by beatifying it and then sold it. This is a kind of LD, but it is forbidden in Islam.

Furthermore, Almighty Allah (SWT) cursed the people of "al-Sabt" in the Holy Qur'an. He banned (*Ḥarām*) fishing on Saturday, even though the amount of fish available was too much on this day compared to other days. They abused the ban, and hence the punishment came down from Almighty Allah (SWT) on this community. Based on this incident, some scholars said that the punishment came down on them because of their tricky activities.

Meanwhile, about the valid type of LD some verses of the Holy Qur'an can also be quoted here. One of them is the following verse that explains the history of Prophet Yusuf: "So, he began [the search] with their bags before the bag of his brother; then he extracted it from the bag of his brother. Thus, did We plan for Joseph. He could not have taken his brother within the religion of the king except that Allah willed. We raise in degrees whom We will, but over every possessor of knowledge is one [more] knowing" (Yusuf: 76)<sup>(4)</sup>.

This verse explained that the Prophet Yusuf used the element of LD to keep his brother with him. According to the sentence of this verse, "Thus did We plan for Yusuf" Almighty Allah (SWT) says that He taught Prophet Yusuf to follow the strategy from Him (Allah).

Moreover, Almighty Allah (SWT) said that in the history of Prophet Ayyub, when he promised and swore by Almighty Allah (SWT) on the issue of his wife: [We said], "And take in your hand a bunch of thin grass and strike with it (your wife) and do not break your oath." Indeed, we found

him patient, an excellent servant. Indeed, he was one repeatedly turning back [to Allah]" (Sād: 44).

The part of the verse "take in your hand a bunch of grass and strike with it", teaches us that an oath should not be broken. This clearly shows that Almighty Allah (SWT) has educated Prophet Ayoub to use the LD before breaking his oath, which he did on his wife. Based on this case, the juristic scholars have mentioned the different opinions on the applications of LDs, as explained below.

Hence, we can understand from the history of Prophets and some verses that the application of LDs is permissible according to the situation, and its explanations are as follows.

### 3.1 Approach of Ḥanafī School on Legal Devices (LDs)

Al-Ṣarakhsī stated that the majority of the scholars agreed on the validity of the LD, which is a mechanism to solve the issue, to remove it and to direct the solutions to the critical situations. Furthermore, he referred to the solution from the Holy *Qur'ān* when Almighty Allah (SWT) told Prophet Ayoub: [We said] "And take in your hand a bunch of thin grass and strike with it (your wife)" (Sād:44). He also discussed the story of Prophet Yusuf: ﴿So he began [the search] with their bags before the bag of his brother; then he extracted it from the bag of his brother (Yusuf: 76). On the other hand, he said that as for those who do not agree on the legitimacy of the LD, it is because of their shortage of consideration and thinking as well as generosity and liberation (al-Sarakhsī, 1993).

Moreover, al-Nasafī brought forth the thought of *al-Jaṣṣāf* which is that the LDs are valid tools for contracts in Islamic commercial law and he explained by an example of the issue of capital for *Muḍārabah* contract: when a person needs to do *Muḍārabah* partnership, but he has only foods and no money, *al-Jaṣṣāf* said that firstly he has to sell the foods to *Muḍārib* by cash and then enter the *Muḍārabah* agreement by using the cash. Based on this example, *al-Jaṣṣāf* explains that using foods in the place of money for *Muḍārabah* contracts is a LD, and thus, this kind of LD is not prohibited from the *Sharī'ah* perspective (al-Nasafī, 2004).

Furthermore, Al-Burhanūdīn (2004) explained on the issues of oath and sworn statement under the topic of "In sexual intercourse and related to intercourse and other" involving a resident who makes an oath and swears to his wife during the month of *Ramaḍān* that he will have sexual intercourse with her (the wife) during the day. In this case, the application of the LD is that the husband goes out of town with his wife, walking for three days to a destination, and if they committed sexual intercourse, then upon returning to their home it does not have an impact on the oath and swearing. Hence, it is clarified that when faced with any serious situation by mistake or error, we can solve this kind of problem by using the LD and it is acceptable from the *Sharī'ah* viewpoint.

In brief, *Ḥanafī* scholars' utilization of the LD shows that a large number of them have agreed on the possibility of the LD being used in contemporary applications by Islamic financial institutions as a business tool. However, a referred article stated that the application of the LD recommended by some *Ḥanafī* researchers is plainly abusing its use on the transaction, and it is a trick to excuse the rejection of *Ribā* (Mansoori D. M., 2011). Nevertheless, the reality is not like this because the LD is currently utilized in Islamic banking and finance to impersonate the regular interest-bearing items due to a financial *Maṣlahah*.

### 3.2 Approach of Shāfi'ī School on Legal Devices (LDs)

Like the *Ḥanafī* jurists, numerous *Shāfi'ī* jurists advocate the application of LDs. One *Shāfi'ī* scholar (al-Shirwānī, 1996) discussed that the evidence for using the LD is the popular *Ḥadīth* at the battle of *Khaybar* when a *Ṣaḥābī* sold one *Ṣā'* goods with two *Ṣā'*s, Prophet Muhammad (SAW) said that he should not sell like this. He (Prophet Muhammad) said, firstly you sell all the goods, then you will buy the goods for how much you need with the money that you have now. So, al-Shirwānī stated that in this *Ḥadīth*, the Prophet has taught the *Ṣaḥābī* the method of using the LD to prevent and save him from usury. Based on this *Ḥadīth*, al-Subqī stated that using the LD is not *Makrūh* but it is sanctioned.

Furthermore, a few jurists al-'Anṣārī (2011), al-Ramlī (2011) & al-Haytamī (2011) from the Shāfi'ī school pointed out that the application of elements of LDs is permissible in transactions and it is not disrespectful from the *Sharī'ah* perspective. Moreover, they referred to the *Ḥadīth* of *Khaybar* narrated by al-Bukhārī, that: ((*Narrated Abū Sa'īd Al-Khudrī and Abū Hurayrah: Allah's Apostle appointed somebody as a governor of Khaybar. That governor brought to him an excellent kind of dates (from Khaybar). The Prophet asked, "Are all the dates of Khaybar like this?" He replied, "By Allah, no, O Allah's Apostle! But we barter one Ṣā' of this (type of dates) for two Ṣā's of dates of ours and two Ṣā's of it for three of ours." Allah's Apostle said, "Do not do so (as that is a kind of usury) but sell the mixed dates (of inferior quality) for money, and then buy good dates with that money*))<sup>(2)</sup> (al-Bukhārī, 2009).

In brief, this *Ḥadīth* obviously explains that Prophet Muhammad (SAW) taught the *Ṣaḥābah* to apply the element of LD to save from *Ribā*, and they followed the order of Prophet Muhammad (SAW). Therefore, the element of LD can be used in transactions, and it is permitted in Islam.

Furthermore, Abdur al-Rahmān (2000) stated that he agreed with the thought of the scholars of the *Shāfi'ī* School who classified that the application of LDs is not conflicting with the *Sharī'ah* and neither is it an inversion of the *Sharī'ah*. Rather, it is narrated by a principal source of *Sharī'ah* where Almighty Allah (SWT) says in the Holy *Qur'ān*: "And take in your hand a bunch of thin grass and strike with it (your wife)" (Ṣād: 44). Evidently, this part of the verse shows that there is evidence to use the LD, and both the classical and the contemporary scholars agreed to the use of that on transactions to protect from the practices that involve *Ribā*.

In short, a great number of *Shāfi'ī* classical and contemporary scholars agreed that the application of LDs is permissible in *Sharī'ah* and they very much expected that the LDs do not damage any *Sharī'ah* rule. At the same time, the *Shāfi'ī* scholars opined that the LD must be used to get a more remarkable advantage within the validity of

the *Sharī'ah* and public interest (*Maṣlaḥāh*) can be applied to save the transactions from prohibited *ribā*.

### 3.3 Approach of Mālikī School on Legal Devices (LDs)

As the School proposed the standards of "*Sadd al-dharā'ī*", the jurists of the *Mālikī* School are known to have firmly rejected the use of LDs. However, mostly the *Mālikī* researchers could be divided into two general groups. The first group rejected the use of LDs (al-Qurṭubī, 1992, al-Mālikī, al-Khurāshī & al-Dārdīr, 1992), saying that the application of LDs is not valid in activities of religious worship such as prayers as well as in business transactions. They believed that the trade contract that uses the LD elements is void and invalid under the *Sharī'ah* and it is not permissible and an illegal agreement.

In contrast, the second group holds the opinion that the use of the LD is accepted and can be revised for application in Islamic financing practices. Moreover, al-Shaṭībī and Ibn 'Āshūr wrote about the use of the LD and they studied the issues from both points of view. These jurists explained that,

"it has been built up that the LDs which had been disproved, censured, and prohibited, are each one of those which demolish a *Sharī'ah* rule or negate a *Sharī'ah* intrigue. What is more, in the event that we accept that the LD does not pulverize a *Sharī'ah* standard, nor repudiate a *Sharī'ah* intrigue, the Law esteems it right. It is, at that point, avoided from the preclusion, nor is it rejected" (Tawfiq, 2012, p. 78).

In short, we have investigated that the application of LDs is not valid in the thought of the *Mālikī* School, but some of the *Mālikī* scholars including al-Shaṭībī and Ibn 'Āshūr proposed some conditions and practices for the LD. Based on these conditions, al-Shaṭībī stated that if the LD will try to change the law of *Sharī'ah* then it is prohibited such as in the case of *Nikāḥ al-Muḥallil*, which is the marriage with a woman who is divorced three times. On the other hand, if it does not contradict the *al-Maṣlaḥah al-Shar'īyyah* then it is valid, such as *al-Bay' al-'Ājil*, which is the sale for a period with more than the sale price in cash (al-Shaṭībī, 1997).

### 3.4 Approach of *Ḥanbalī* School on Legal Devices (LD)

The *Ḥanbalī* scholars frequently have very different views from the other two schools, *Shāfiʿī* and *Ḥanafī* on their position of using the LD. In that respect, few jurists of the *Ḥanbalī* School such as al-Zarkhashī (1993), al-Bahūti (1997) & Ibn Dawyān (1989) generally scorned and despised the use of LDs, and they said that all elements of the LD which are applied in contracts make the contracts not valid and even *Ḥarām* from the *Sharīʿah* point of view, and there is no reward from Almighty Allah (SWT) for all those activities.

Additionally, Aḥmad bin Ḥanbal avowed his position against a general utilization of the LD by referring to the *Ḥadīth* where the Prophet Muhammad (SAW) disallowed the Muslims to imitate the way of the Jews, that is ((*the Prophet Muhammad (peace and blessings of Allah be upon him) said: Do not commit what the Jews committed, and they will resort to God's prohibitions with the lowest tricks*)). He referred to another *Ḥadīth* narrated by Abū Dāwūd: "*Whoever introduces a horse between two horses, he means that he is not sure that it will precede him*)" (Ibn Qudāmāh, 1997). These two *Ḥadīths* bolster and fortify each other on the unethical utilization of the LD. Thus, Imām Aḥmad rejected a general acceptance of the LD.

To put it plainly, we have examined that the use of the LD is not legitimate from the perspective of the *Ḥanbalī* School. However, some *Ḥanbalī* scholars, such as Ibn Baṭṭāh and Ibn Taimīyyah, proposed a few conditions for the application of the LD. In addition, there have been some *Ḥanbalī* scholars who endorsed certain LDs. We have seen some of those cases in the previous section (Tawfiq, 2012). Then again, Ibn Qayyim held a very much adjusted position on the LD among the numerous scholars who contributed to this issue. He presented the opinions and evidences from both groups, the antagonists as well as the protagonists of LDs. He considered LDs invalid from the perspective of "*Sadd al-Dharīʿah*", as these are both antipathetic to each other, and they cannot come together. (Ibn Qayyim, 1991).

The position of the *Ḥanbalī* scholars, as we have seen, shows that they hold an adjusted position, in contrast with the other schools mentioned previously. It is critical to take note that they were among the principal individuals to write obtusely, disapproving of the LD.

### 3.5 Approach of Other Scholars on Legal Devices (LDs)

Ibn Ḥajar stated that the LD is intended to reach by a hidden way, and there are several types of intended actions and intentions (*niyyah*). He mentioned several types of LDs. One of them is that if a permissible way or technique is used to nullify a right or to establish a wrong thing, then it is forbidden (*Ḥarām*). Another one is that if this technique is used for establishment of a right or to prevent a wrong thing from occurring, then it is either obligatory (*Wājib*) or recommended (*Mustaḥab*). Furthermore, if it is done through a permissible way for the safety of the life and existence of the people, then the application of the LD is not only desirable (*Mustaḥab*) and permissible (*Mubāḥ*), rather, it is obligatory (*Wājib*) (al-'Asqalānī, 1993).

Mullā 'Alī al-Qārī referred to a *Ḥadīth* (narrated by al-Bukhārī) on the validity of using the LD ('Alī al-Qārī, 1994), in which the Prophet Muhammad (SAW) ordered the *Ṣaḥābah* to avoid *Ribā* by using the LD that he had instructed them: ((Narrated Abū Sa'īd al-Khudrī and Abū Hurayrah: *Allah's Apostle appointed somebody as a governor of Khaybar. That governor brought to him an excellent kind of date (from Khaybar). The Prophet asked, "Are all the dates of Khaybar like this?" He replied, "By Allah, no, O Allah's Apostle! But we barter one Ṣā' of this (type of dates) for two Ṣā's of dates of ours and two Ṣā's of it for three of ours." Allah's Apostle said, "Do not do so (as that is a kind of usury) but sell the mixed dates (of inferior quality) for money, and then buy good dates with that money*))<sup>(3)</sup> (Al-Bukhārī, 2009).

He said that *Shāfiʿīs*, *Ḥanafīs*, and others discuss the permissibility of applying the LD by referring to the following part of the *Ḥadīth*: "*Do not do so (as that is a kind of usury) but sell the mixed dates (of inferior quality) for money, and then buy good dates with that money*".

Hence, Prophet Muhammad (SAW) demanded from the *Ṣaḥabāh* to run away from usury and follow his command, either by applying LDs or other devices for their transactions to save them from *Ḥarām* contracts.

Besides, al-Kashmirī (2005) argued for the consideration of the application of LDs in Islamic finance by referring to the same *Ḥadīth*. He said that there is a division of cases, and some of them may be valid under the law of *Sharī'ah*. Furthermore, by referring to the Holy *Qur'ān*, *Ḥadīth*, and thoughts of classical jurists, this review on the application of LDs summarizes and divides them to five types: Forbidden LDs (*al-Ḥiyal al-Muḥarramah*); Permissible (neither encouraged nor discouraged) LDs (*al-Ḥiyal al-Mubāḥah*); Recommended LDs (*al-Ḥiyal al-Mandūbah*); Reprehensible LDs (*al-Ḥiyal al-Makrūhah*); and Obligatory LDs (*al-Ḥiyal al-Wājibah* or *al-Ḥiyal al-Ḥalāl*) (Ibrāhīm, 1985, Ibn Qayyim, 1991 & Ibn 'Āshūr, 2001).

1- Forbidden LDs (*al-Ḥiyal al-Muḥarramah*) are not valid, and those who use these elements will get the punishment from Almighty Allah ((SWT) instead of reward. For example, any prohibited (*Ḥarām*) good such as *Ribā* money, change of which by applying the element of LD will cause a superficial and apparent (*Zāhirī*) change, not the actual (*Ḥaqīqī*) change. As for the reason, Prophet Muhammad (SAW) said that: ((Allah cursed the Jews because grease (fat) was forbidden for them, but they beatified it and sold it)) (al-'Asqalānī, 1993, H.N-3460).

According to this *Ḥadīth*, the Jews had changed, by applying the element of LD, the rule of the *Sharī'ah*, which is banned (*Ḥarām*) in Islam.

In addition to this, al-Bukhārī narrated another *Ḥadīth* as a reference on the unacceptable use of the LD, that is: ((Narrated Anas: Abū Bakr wrote to me what was made compulsory by Allah's Apostle and that was (regarding the payment of *Zakāt*): Neither the property of different people may be taken together nor the joint property may be split for fear of (paying more, or receiving less) *Zakāt*))<sup>(4)</sup> (al-Bukhārī, 2009, H.N-1450).

Based on this *Ḥadīth*, Imām Shāfi'ī and Imām Abū Ḥanīfah stated that there are people who fear for the unpaid *Zakāh* and then they apply the LD with their intention (*Niyyah*), or they try to reduce the amount of *Zakāh*. According to the jurists, these people actually try to drop or cut off their obligations from the *Sharī'ah* by preferring to use this kind of LD, which is not valid under the *Sharī'ah* perspective. Their critical thinking and application are not acceptable in Islam, and they will be guilty under the *Sharī'ah* perspective. However, Imām Abū Ḥanīfah said that the amount of *Zakāh* should not be decreased by using the LD, and thus the applicant is guilty, and he must pay the full amount of *Zakāh* (Usmani M. M., 2009).

2- Reprehensible (*Makrūh*) LDs are those where the applicant of the LD may be guilty based on his or her intention (*niyyah*), but the use of the LD causes a contract to be ineffective in Islam. For instance, if a person who must pay the obligatory (*Wājib*) *Zakāh* donates his money to his wife or buys a commodity such as a house or a vehicle for self-use before the completion of the year for paying *Zakāh*, he will have no obligation (*Wujūb*) to pay *Zakāh* from his money. Nonetheless, because of this avoiding position, he is guilty of choosing the element of LD to avoid payment of *Zakāh*, and at the same time there is no obligation (*Wujūb*) of *Zakāh* on his wife's money that she has received from her spouse (Ibrāhīm, 1985 & Usmani, 2009).

3- Obligatory (*Wājibah*) LD is legitimate (*Shar'yy*) to obtain and obligatory (*Wājib*) by *Sharī'ah* perspective, and this positive and obligatory (*Wājib*) LD is for obtaining necessities such as eating, drinking, and dressing. Moreover, the element of LD is to fulfill the necessity and it is obligatory (*Wājib*) to use the LD from the *Sharī'ah* perspective. Additionally, the necessities should be for maintaining the body in order to perform the duties to Almighty Allah (SWT) that are entrusted to us in this life such as *'Ibādah* and *Mu'āmalāt* like a purchase and sale contract. When there is a need to fulfil the *'Ibādah* and *Mu'āmalāt* contracts, then there

is a need to apply the element of LD as a license (*Rūkhṣah*) of *Sharī'ah* to fulfill all obligations of *Sharī'ah* (Ibrāhīm, 1985). According to this category of the LD, we know from these examples that this category includes the LD in the oaths which do not affect others' rights, like if someone swears not to enter the house, or not to wear a specific dress. By breaking the oath, he will be liable for the expiation (*Kaffārah*) of it, as the *Sharī'ah* demands. The objective of such a demand is, in fact, to venerate the name of Almighty Allah who was made to witness to the oath. If anyone finds it difficult to keep the sanctity of the oath but finds an exit from it that resembles exerting it, then the objective of venerating Almighty Allah (SWT) is fulfilled. Ibn 'Āshūr illustrated his stance with an example from Qāḍī Ibn 'Arabī's book, where he witnessed Abī Bakr al-Shāshī, while at his court, was consulted by a man who swore not to wear a dress. The Imam, then, cut a portion with the size of a digit from his dress, and told him that he is not guilty of breaking his oath now. Similarly, some *Ḥanafī* jurists, when consulted about one's oath not to enter the house, would advise him to enter from the windows or the skylight (Ibn 'Āshūr, 2001).

Hence, the scholars such as Shāfi'ī, Abū Ḥanīfah, Ibn Qayyim, Ibn 'Āshūr, and others explained that the LD can be used in order to come out from a difficult situation due to greater benefit (*Maṣlahah*) and is not only a solution but also a means of obtaining rewards from Almighty Allah (SWT) for the action.

It can be summarized from the discussion about the application of LDs that it is not permissible to use LDs on *Tbādah* but it is permissible to use on transactions. Accordingly, this study recommends that the application of the LDs be permitted to face and come out from challenges and difficulties when the IFIs are competing with conventional financial institutions in the modern world.

#### 4. Using the Legal Devices (LD) in Islamic Finance

In principle, Islamic banks should be promoting a greater number of profit-lost sharing (PLS) items over profit markup items. Islamic banks have repackaged the products by utilizing the LDs on the Islamic financing products to imitate the conventional *Ribā* bearing products as a financial engineering tool when there is greater economic benefit (*Maṣlahah*).

However, Yaakob, M. A. Z. B., Khalid, M. M., Mohd Sirajuddin, M. D., Osman, M. R., Yakob, M. A., Bhari, A., & Suliaman, I, brought this assertion forward that the current instruments of *Murābahah* and *Ijarah* use the application of LDs which is not Islamic and is not an alternative to conventional banking (Yaakob, 2016).

Tawfiq stated that Islamic banks don't lend cash to make money, but instead sell goods to other banks that need cash and make money from the sale. Cash for extra cash is *Ribā'* but selling something for a profit is allowed. Because of this, Islamic banks use the Commodity *Murābahah* facility to meet their needs for cash (Tawfiq, 2014). Thus, this transaction has been influenced by the element of the LD in the IBF world.

The LDs are often applied in order to bring in a benefit, hence these are closely related with engaging with the *Maṣlahah*. In every LD, there are certainly some *Maṣlahah*, which may render the LD valid and acceptable. For example, a floating rate in the *Murābahah-Sukuk* is often considered unacceptable, as the originator can only claim a fixed rate based on the agreed upon rate. However, the fixed rate *Sukuk* are prone to many market risks, especially when the *Sukuk* is for longer terms, for instance 20 years or so, and the market rate changes with time marking a great difference between the fixed rate profit and the market rate. To follow the *Sharī'ah* requirements of fixed rate return and at the same time attempting to mitigate the market risks with a floating rate return, the *Murābahah-Sukuk* is based on a master *Murābahah* agreement with several subordinate *Murābahah* agreements therein. In the subordinate *Murābahah* agreements, which are of shorter term than the master *Murābahah* agreement, the profit was set based on the



market rate of that specific time frame. Hence, as the market risk was mitigated, while the *Shari'ah* compliance is also maintained, this is a pleasant LD which opened the gateway to greater *Maṣlahah* (Tawfique, 2014).

Another reason for the application of LDs is that the expenses are high, and the procedures are entangled for the PLS products (Garner, 2013). Despite the fact that the PLS products have various macroeconomic advantages, these expensive and confusing procedures are not being consumed by individual banks. With a specific end goal to expand--benefit now and cut costs--Islamic banks like to mirror the conventional products. Thus, regulators must effectively offer impetuses to the Islamic banks to develop PLS products up to the point when the products turn out to be less perplexing and expenses are lower. This would be a door to creating *Shari'ah* based products. At the point of its introduction, for Islamic banking and finance to proceed and maintain its business, it is important to utilize LDs. The regulators' support, coupled with more awareness of Islamic banking would help the industry to move away from those products developed through the LDs (al-Jarhi, 2016).

Some earlier scholars allowed the use of LDs in Islamic transactions as a financial engineering tool when there is greater economic benefit (*Maṣlahah*). Hence, when a greater benefit (*Maṣlahah*) is established, LDs can be used in order to come out of a difficult situation, and it is not only a solution but will also earn the reward from Allah for the action.

Thus, if we somehow happened to dismiss all the LDs on the principle that it does not hold the soul of Islam, Muslims and others would be denied of an alternative financing technique. Moreover, it is exceptionally difficult to move away totally from the LD despite the fact that it is undesirable. We require a continuous change and as shown, the LDs should be used sparingly as and when required. Controllers should assume a noteworthy role to help move the business from just copying conventional banks to advancing exceptional products and to make the Islamic bank and finance industry self-sustaining.

## 5. The Murābahāh Finance in Sri Lanka

The practice of the *Murābahāh* contract in the Islamic Financial Institutions (IFIs) of Sri Lanka is such that the client is appointed as an agent to buy the commodity. For instance, the IFI has the arrangement of an agent, whereby a person (and he may be the IFI's client) is appointed as an agent under the terms of the agency arrangement made between the CDB Meezan, which is the Islamic Finance wing of Citizens Development Business Finance PLC (CDB) which operates under the guidance of the Islamic *Shari'ah* concept ((CBSL), 2016). The practice is normally because of a situation in which the IFI does not have any commodity at its stores, and it is not doing only one transaction, but several transactions with different companies and parties at the same time. Therefore, the IFI cannot buy the commodity by itself for all of its customers. Due to this reason, the IFI enquires from the customer the type of commodity that the customer needs and then informs the customer to buy the commodity as an agent of the Institution from the market or from the supplier. Subsequently, the IFI sells the commodity to the customer based on the rules of the *Murābahāh*.

Moreover, it can occur that the supplier, seller and buyer is the same person which is unacceptable from the *Shari'ah* perspective, and also cannot be relied on as a justification for using the LDs.

What is the point of appointing the customer as an agent? The IFI does not appoint the client as its agent every time and for all transactions, but sometimes the Institution buys the commodity and sells it to the client. The *Shari'ah* boards of the IFI should ensure that the practices should be applied at every branch. Furthermore, Muhammad Taqi Usmani said that it is not necessary for the IFI to appoint an agent to buy the goods, and the Institution must do the sale and purchase by itself. Although the appointment of an agent is not necessary for the *Murābahāh* sale, it is permissible in normal sales such as *al-Musāwamah* and *al-Tawliyah*. Besides, he said that for the commodity to be financed through the *Murābahāh* sale where there is no ownership by the IFI, the Institution

must buy new commodities through the client, yet the responsibility and ownership remain with the IFI. After that the client buys the good from the IFI. For this practice, there is no *Shari'ah* issue on its validity (Usmani T., 2009).

### 6. Application of Legal Devices (LDs) in Murābahah Transaction

Additionally, some contemporary scholars argued that the appointment of the client as an agent of the IFI is a prohibited LD. So, the question is why are the Islamic banks using this element of LD? Assuming that the IFIs are really using this element of LD, under which category does the LD fall into from the *Shari'ah* point of view? Here, we have the view that the IFIs are applying the agent using the element of the LD because the IFIs have several transactions with different clients from time to time, and sometimes they do not have the experience to buy the specific good or commodity requested by the clients. The Accounting and Auditing Organization for Islamic Financial Institutions ((AAOIFI), 2015) stated that: *3/1/3 The original principle is that the Institution itself purchases the item directly from the supplier. However, it is permissible for the Institution to carry out the purchase by authorizing an agent, other than purchase orderer, to execute the purchase; and the customer (the purchase orderer) should not be appointed to act as an agent except in case of a dire need. Furthermore, the agent must not sell the item to himself. Rather, the Institution must first acquire title of the item and then sell it to the agent ((AAOIFI), 2015, p. 207).*

It is clearly evident from the above rule of the AAOIFI that the IFI can purchase the item through appointing its customer as an agent, and this is permissible from the *Shari'ah* perspective. In addition, Abdul-Rahman discussed in his book that: *In Murābahah transactions, the customer is appointed as the financier's buying agent (wakīl). Thus, the customer may proceed as the financier's wakīl to purchase the property on the financier's behalf (Abdul-Rahman, 2011, p. 208).*

As a conclusion, these references show that the appointment of the client as an agent is valid even though it is an element of LD. It is a separate agreement and valid

that is practiced in the contracts of the IFIs of Sri Lanka. However, there are several rules and regulations that must be followed in these financing models. Hence, the LD can be used in order to come out of a difficult situation and due to greater benefit (*Maṣlahah*) and it is not only a solution but will also earn rewards from Almighty Allah (SWT) for the effort.

### 7. Conclusion

Through the presentation and discussion of the evidence, we can conclude that the application of LDs has been an issue of many arguments among classical and contemporary scholars. Moreover, those who say that the use of the LD is permissible, also maintain that it is not permitted in *'Ibadah*. *'Ibadah* cannot be changed unless there is a disclosure from Almighty Allah (SWT), and it must be done exactly in the way that Almighty Allah (SWT) has commanded, and his Prophet (SAW) has guided. Thus, control of using the element of LD in *'Ibadah* is equivalent to misdirecting the requests and charges of Almighty Allah (SWT), resisting His orders, and doing the *'Ibadah* in an alternate way that does not fulfil its obligation.

However, LDs can be used in *Mu'āmalāt* when faced with the greater benefit (*Maṣlahah*) for economic development. At the point when a need is built up, LDs can be utilized to leave a troublesome circumstance, and although it is not always the honest way, yet it will get the reward from Almighty Allah (SWT). In addition, the LDs of jurisprudence are valid and truthful contracts in the judgment of the *Shari'ah* and the applicant of the LD is not guilty from the *Shari'ah* perspective. According to the view of *Shari'ah*, the LD is to bring a good benefit and interest and it is to ward off a perverse spoiler, and the LD is established to obtain greater economic benefit (*Maṣlahah*).

Although using LDs that are dependent on defeating the rights of others is prohibited in Islam, the majority of scholars allowed the application of LDs in *Mu'āmalāt* to avoid *Ribā* and bring *Halāl* contracts by referring to *Ḥadīth* of *Khaybar*. According to this finding,

we can decide that the practice of the LD is allowable in IFIs, Islamic capital markets, and Islamic investments. Furthermore, the application of LDs in the Islamic trade of banking goods can be studied to extend and expound the literature on the LD.

## References

- (AAOIFI), A. a. (2015). *Shari'ah Standards*. Kingdom of Bahrain: Dār al-Maiman.
- (CBSL), C. B. (2016). *Central Bank of Sri Lanka: Licensed Commercial Banks*. Colombo: Central Bank of Sri Lanka (CBSL).
- Abū Zahrāh, Muḥammad. (2006). *Muqāranah al-Adyān al-Diānāt al-Qadīmah*. Beirut: Dār al-Fikri al-Arabi
- al-'Asqalānī, Aḥmad. (1993). *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*. Beirut: Dār al-Fikr.
- al-Bukhārī, Muḥammad. (2009). *Ṣaḥīḥ al-Bukhari*. Mika'il al-Almany.
- al-Ifta, R. D. (2008). *Murevveje Imlamic Bankaary*. Karachi: Maktheba Bayynath Jamiyyah Uloom Islamiyyah Allama Binuri Daun Karachi.
- al-Jarhi, M. A. (2016). An Economic Theory of Islamic Finance Regulation. *Islamic Economic Studies Vol. 24, No.2*.
- al-Nasafi, 'Abdullāh. (2004). *Kanz al-Daqā'iq*. Beirut: Dār al-Kutub al-'Imiyyah.
- al-Qārī, 'Alī. (1994). *Mirqāt al-Mafātīh*. Beirut: Dār al-Fikr.
- al-Ṣarakī, Muḥammad. (1993). *al-Mabsūṭ*. Beirut: Dār al-Kutub al-'Imiyyah.
- al-Shātibī, Ibrāhīm. (1997). *al-Muwāffaqāt Fī Uṣūl al-Shari'ah*. Beirut: Dār al-Fikr.
- Garner, J. M. (2013). A Critical Perspective on the Principles of Islamic Finance Focusing on Sharia Compliance and Arbitrage. *Leeds Journal of Law & Criminology Vol. 1 No. 1*.
- Ibn 'Āshūr, Muḥammad. (2001). *Maqāsid al-Shari'ah al-Islamiyyah*. Jordan: Dār al-Nafīs.
- Ibn Ḥajar, Aḥmad. (1993). *Fathūl al-Bārī Sharḥ Ṣaḥīḥ al-Bukhari*. Beirut: Dār al-Fikr.
- Ibn Manzūr, Muḥammad. (1993). *Lisān al-'Arabi*. Beirut: Dār al-'Thyā' al-Turāth al-Srabi.
- Ibn Qayyim, Muḥammad. (1991). *I'āmu al-Muwaqqi'in 'An Rab al-'Ālamīn*. Beirut: Dār al-Kutub al-'Imiyyah.
- Ibn Qudāmah, 'Abdullāh. (1997). *al-Mughnī 'alā Mukhtasar al-Khuraī*. Dār al-'Ālam al-Kutub.
- Ibn Taymiyyah, Aḥmad. (1987). *Kitāb al-'khtiyārāt al-'Imiyyah In al-Fatāwā al-Kubr'*. Beirut: Dār al-Kutub al-'Imiyyah.
- Ibrāhīm, M. I. (1985). *al-Ḥiyal al-Fiqhiyah Fī al-Mu'āmalah al-Ma'āhiyyah*. al-Dār al-Arabyyah lil-Kutub.
- Mansoori, M. T. (2011). Is "Islamic Banking" Islamic? Analysis of Current Debate on Shari'ah Legitimacy of Islamic Banking and Finance. *Islamic Studies, Volume 50, No. 3/4, 383-411*.
- Mansoori, M. T. (2011). Use of *Hiyal* in Islamic Finance and its Shari'ah Legitimacy. *Journal of Islamic Business and Management Vol.1 No.1, 69-92*.
- Ministry of Awqāf, K. (1983). *al-Mausu'ah al-Fiqhiyyah*. Kuwait: Ministry of Awqāf wal-shu'nul al-Islami- Kuwait.
- Sadique, M. A. (2008). Early Juristic Approaches To The Application Of *Hiyal* (Legal Devices) In Islamic Law. *IJUM Law Journal Vol. 16 No. 2, 157-180*.
- Tawfiq, A.-M. (2012). *Ḥiyal and Their Applications in Contemporary Islamic Financial Contracts: Towards Setting Acceptable Norms*. Qatar: Qatar Faculty of Islamic Studies, Hamad Bin Khalifa University.
- Tawfiq, A.-M. (2014). The use of *Hiyal* as a Financial Engineering Tool. In M. H. Aionon, *Islamic Transactions and Finance: Principles and Developments* (pp. 1-21). KL: Malaysian Current Law Journal and IAIS.
- Usmani, M. T. (2008). *An Introduction to Islamic Finance*. Karachi, Pakistan: Quranic Studies Publishers (Maktaba Ma'ariful Qur'an).
- Usmani, M. T. (2013). *Buhuth Fi Qalayya Fiqhiyyah Maasirah*. Dhaoolah Qatar: Wazarethul Al-Auqqaf Wa-Al-Shoonu Al-Islamiyyah.
- Usmani, M. T. (2015). *Fiqh-Ul-Al-Boyyū'*. Karachi: Maktabatu M'arif Al-Qurān.
- Usmani, T. (2009). *Ghair Soodi Bankari*. Karachi: Quranic Studies Publishers.
- Yaakob, M. A. (2016). Application of *hiyal* (legal stratagems) on Al-Ijarah-Based contract in Islamic financial institution in Malaysia: In: Contemporary Issues and Development in the Global Halal Industry. *Springer, Singapore, 391-400*.

## Endnotes

- <sup>(1)</sup> Translate by Quran.Com (Also Known as The Noble Quran, Al Quran, Holy Quran, Koran) Is A Pro Bono Project. © 2016 Quran.Com. All Rights Reserved.
- <sup>(2)</sup> Translated by M. Muhsin Khan.
- <sup>(3)</sup> Translated by M. Muhsin Khan.
- <sup>(4)</sup> Translated by M. Muhsin Khan.