

LEGAL STRATAGEMS (*HIYAL*) AND USURY IN ISLAMIC
COMMERCIAL LAW

by

MUHAMMED IMRAN ISMAIL

A thesis submitted to
The University of Birmingham
for the degree of
DOCTOR OF PHILOSOPHY

Department of Theology and Religion
College of Arts and Law
The University of Birmingham
May 2010

ABSTRACT

This thesis investigates the subject of legal stratagems (*hiyal*) in Islamic jurisprudence, in general and more particularly the *hiyal* used to evade the usury (*ribā*) prohibition. The context of this thesis is the nascent Islamic finance industry in which these *hiyal* play a leading role. The *hiyal* have been appropriated from the classical Islamic legal corpus without appreciating their historical contextual framework. This thesis seeks to explicate that framework and clarify the purpose and role of those *hiyal* as envisaged in the discourse of the classical Islamic jurists. The *hiyal* are shown to be premised upon a teleology which demarcates them as normative exits, *makhārij*. The *makhārij* are conditioned by the systematic reasoning of the Ḥanafī jurists, which both justifies their utility and provides their juridical remit.

The *hiyal* of *ribā* are demonstrated to have been utilised primarily as substitutes for philanthropy, and not in the commercial sector. The commercial sector relied on the Islamic prescriptions for equity investment partnerships which precluded the need for interest based loans. Although the jurists sanctioned the *hiyal* of *ribā* for the poor, they did so at the expense of systematic consistency. This meant that these *hiyal*, as opposed to the *makhārij*, are not regarded as normative exits, but rather, as transitory concessions. The use of these *hiyal* as financial norms is therefore unwarranted. The substantive repercussions of this juridical reassessment were demonstrated using the historical experience of the Ottomans, where the long term use of the *hiyal* of *ribā* resulted in the negative socio-economic conditions associated with usurious economies.

هذا البيع في قلبي كالجبال ذميم

اخترعه أكلة الربا -

الإمام محمد بن الحسن الشيباني

ACKNOWLEDGEMENTS

All praise is due to Allah the almighty without whose innumerable favours this thesis could not have been what it is. A contingent aspect of that gratitude is to thank those individuals who have aided or facilitated this work. I would like to begin by thanking my parents and family who have shown resolute patience in this prolonged journey. My brothers Zarar Ismail and Abrar Ismail provided financial assistance for which I am duly grateful. I would like to thank my supervisor Dr Bustami Khir, whose sincere advice and critical feedback was essential in the development of this thesis. In addition, it is incumbent upon me to thank all those who facilitated the acquisition of the source material. I would first like to thank the Jumaa Al Majid Centre for Culture and Heritage and the Royal Danish Academy of Science and Letters, for providing material free of charge. I would also like to thank the staff of the various libraries I visited: the Oxford University Bodleian libraries (Old, New and Law); the John Rylands and the Joule libraries at the University of Manchester; the Main library and the Palace Green law library at Durham University, the Islamic Foundation Library, Leicester, and the libraries of the University of Birmingham. In addition, I would like to thank my brother Arfan Ismail and his associates who acquired material from Saudi Arabia, Egypt and Pakistan. Finally, I would like to express my deepest gratitude to Mufti Husain Kadodia, who not only provided me with critically important texts, both in published and unpublished form, but whose extensive knowledge of the Ḥanafī literary corpus was put at my disposal. Mufti Husain was unexpectedly generous with his time and expertise.

CONTENTS

LIST OF TABLES	viii
TRANSLITERATION TABLE	ix
ABBREVIATIONS	x
INTRODUCTION	1

PART ONE *RIBĀ* IN ISLAMIC JURISPRUDENCE

CHAPTER ONE <i>Ribā</i> in the Qur’ān and the Sunna	15
1.1 <i>Ribā</i> in the Qur’ān	15
1.1.1 <i>‘Āmm</i> and <i>Mujmal</i>	16
1.1.2 The Mālikīs	17
1.1.3 The Shāfi’īs	19
1.1.4 The Ḥanafīs	20
1.1.4.1 <i>Mujmal</i> in Ḥanafī <i>Uṣūl</i>	21
1.1.5 Summary of the <i>‘Āmm/Mujmal</i> Dispute	24
1.2 <i>Ribā</i> in the Ḥadīth	24
1.2.1 <i>Ribā al-Faḍl</i> and <i>Ribā al-Nasā’a</i>	24
1.2.2 The Two Groups	26
1.2.3 Ratio of the Two Groups	27
1.2.3.1 The Mālikī-Shāfi’ī Method	29
1.2.3.1.1 The <i>Dalīl</i> for the Mālikī-Shāfi’ī Ratio	29
1.2.3.1.2 The <i>Istidlāl</i> for the Mālikī-Shāfi’ī Ratio	32
1.2.3.2 The Ḥanafī Method	33
1.2.3.2.1. The <i>Dalīl</i> for Genus	34
1.2.3.2.2 The <i>Dalīl</i> for <i>Qadr</i>	36
1.2.3.2.3 The <i>Istidlāl</i> for Measurement and Genus	38
1.2.3.2.4 Applying the Ḥanafī Ratios	41
1.2.4 Summary of the Jurists’ Positions	43
1.3 Integrating <i>Ribā al-Qur’ān</i> and <i>Ribā al-Sunna</i>	43
1.3.1 Credit sales, <i>Ribā</i> and the Time Value of Money	45
1.3.2 The Definition	47
1.3.2.1 <i>al-Faḍl</i> – The Excess	47
1.3.2.2 <i>al-Khālī ‘an al-‘Iwāḍ</i> – Devoid of a Countervalue	48
1.3.2.3 <i>al-Mashrūṭ</i> – Stipulated	50
1.3.2.4 <i>Fī al-Bay’</i> – In a Sale Transaction	52
1.3.3 <i>Ribā</i> Proper and Quasi- <i>ribā</i>	52

CHAPTER TWO Applying the Theory	54
2.1.1 <i>Mithliyyāt</i> and <i>Qīmiyyāt</i>	55
2.1.2 <i>ʿAyn</i> , <i>Dayn</i> and <i>Taʿyīn</i>	55
2.2 Forward Sale – <i>Salam</i>	57
2.2.1 <i>Salam</i> in Animals	58
2.3 The Concessionary Exchange, <i>Bayʿ al-ʿArāyā</i>	60
2.4 Debt: <i>Qarḍ</i> and <i>Dayn</i>	62
2.4.1 <i>Qarḍ</i>	62
2.4.2 <i>Dayn</i> – <i>Daʿ wa Taʿajjal</i>	65
2.5 Contractual Stipulations – <i>Shurūṭ</i>	67
2.6 Pledge – <i>Rahn</i>	70
2.7 Currency Exchange – <i>Ṣarf</i>	72
2.7.1 Gold, Pearls and Embellished Swords	74
2.7.2 At the Systematic Periphery	77
2.8 Summary of the Ḥanafī Theory of <i>Ribā</i>	79
2.9 Ibn al-Qayyim’s Theory of <i>Ribā</i>	80
2.9.1 Two Types of <i>Ribā</i>	80
2.9.2 The Ratio	81
2.9.3 Necessity and Need	82
2.9.4 Jewellery and Workmanship	83
2.9.5 Ibn al-Qayyim and Reform	85

PART TWO RECEPTION OF THE *ḤIYAL*: POLEMIC AND GENRE

CHAPTER THREE Reception of the <i>Ḥiyal</i> : The Polemic	88
3.1 al-Bukhārī and his <i>kitāb al-Ḥiyal</i>	88
3.1.1 al-Bukhārī’s Juridical Stance	94
3.2 Ibn Baṭṭa’s <i>Ibtāl al-Ḥiyal</i>	95
3.2.1 Ibn Baṭṭa’s Juridical Rebuttal	96
3.2.2 Ibn Baṭṭa on the Jurists	99
3.3 The Ḥanbalī Reformers and the <i>Ḥiyal</i>	100
3.3.1 <i>Maqāṣid al-Sharīʿa</i>	101
3.3.1.1 Outward Forms Vs Underlying Meaning	102
3.3.1.2 Using the <i>Maqāṣid</i> to Delineate the <i>Ḥiyal</i>	104
3.3.2 Intentions and Motives	107
3.3.3 Blocking the Means – <i>Sadd al-Dharāʿiʿ</i>	110
3.3.4 Summary of Ibn Taymiyya’s Approach	112
3.4 The <i>Maqāṣid</i> and al-Shāṭibī	113
3.5 The Ḥanafī Defence of the <i>Ḥiyal</i>	116
3.5.1 al-Shaybānī’s Prolegomena	117
3.5.2 Prescribing Exits - <i>Taʿlīm al-Makhārij</i>	120
3.5.2.1 The Plan of Prophet Yūsuf (as)	122
3.5.2.2 The Oath of Prophet Ayyūb (as)	123
3.5.2.3 Selling High Quality Dates for Low Quality Dates	124
3.5.3 al-Khaṣṣāf on Intentions	125

3.5.4 al-Sarakhsī's Paradigm	127
3.5.4.1 The <i>Ḥiyal</i> and Concessions	128
3.5.4.2 The Sharī'a and its Exits	129
3.6 Conclusion to the <i>Ḥiyal</i> Polemic	131
CHAPTER FOUR Reception of the <i>Ḥiyal</i> : The Genre	133
4.1 Occidental Contentions	133
4.1.1 The <i>Fiqh</i> as a Legal System	135
4.1.1.1 Theory and Practice	138
4.1.2 Islamic Commercial Law in Theory and Practice	141
4.1.2.1 Partnerships	142
4.1.2.2 <i>Commenda</i> and <i>Muḍāraba</i>	144
4.1.2.3 <i>Commenda</i> and Usury	147
4.1.3 The <i>Ḥiyal</i> as a <i>Modus Vivendi</i>	150
4.2 The <i>Kitāb al-Ḥiyal</i>	155
4.2.1 al-Shaybānī and the <i>Kitāb al-Ḥiyal</i>	158
4.2.2 The <i>Kitāb al-Ḥiyal</i> as the <i>Kitāb al-Makhārīj</i>	161
4.2.3 The Authorship of al-Shaybānī's <i>Kitāb al-Ḥiyal</i>	163
4.3 <i>Ḥiyal</i> in the Other Schools	165
4.3.1 The Shāfi'īs and the <i>Ḥiyal</i>	165
4.3.2 The Mālikīs and the <i>Ḥiyal</i>	166
4.3.3 The Ḥanbalīs and the <i>Ḥiyal</i>	168
4.4 The Controversial <i>Ḥiyal</i>	171
4.4.1 <i>Zakāt</i> – Alms-tax	171
4.4.2 <i>Shuf'a</i> – Pre-emption	176
4.4.3 <i>Tahlīl</i> – Marriage of the Validator	179
4.5 Contents of the <i>Ḥiyal</i> Genre	183
4.5.1 The Genre and the Normative Doctrine	184
4.5.2 Maintaining Systematic Consistency	188
4.5.2.1 The <i>Ḥiyal</i> and Juridical Differences	189
4.5.3 The Endogenous View	192
4.6 Genre and Polemic Conclusions	194
PART THREE THE <i>ḤIYAL</i> OF <i>RIBĀ'</i> : BETWEEN CONCESSION AND NORM	
CHAPTER FIVE The Usury Circumvents: <i>Bay' al-Wafā'</i> and <i>Bay' al-Ḍina</i>	198
5.1 Usury Circumvents	198
5.1.1 <i>Bay' al-Ḍina</i>	199
5.1.1.1 <i>Bay' al-Ḍina</i> and the Mālikīs	200
5.1.1.2 <i>Bay' al-Ḍina</i> and the Shāfi'īs	202
5.1.1.3 <i>Bay' al-Ḍina</i> and the Ḥanbalīs	205
5.1.1.4 <i>Bay' al-Ḍina</i> and the Ḥanafīs	207
5.1.2 <i>Tawarruq</i>	211
5.1.3 <i>Mu'āmalā</i>	213
5.1.3.1 Sale with a Loan	214

5.1.3.2 The <i>Mu‘āmala</i> Transaction	215
5.1.4 Conclusions Regarding Double-Sales	218
5.1.5 <i>Bay‘ al-Wafā‘</i>	219
5.2 The <i>Ḥiyal</i> Dynamic: Commercial Practice and Social Exigency	221
5.2.1 Interest and its Alternatives	222
5.2.2 The Analytical Model	223
5.2.3 The Commercial Sector	224
5.2.4 The <i>Irfāq</i> Sector	228
5.2.5 The <i>Ḥiyal</i> and the <i>Irfāq</i> Sector	229
5.2.5.1 The <i>Mu‘āmala</i> in Balkh	230
5.2.5.2 The <i>Bay‘ al-Wafā‘</i> in Transoxania	232
5.2.5.3 <i>Bay‘ al-wafā‘</i> , the Jurists and the rulers of Transoxania	237
5.3 The Teleology of the <i>Ḥiyal</i>	242
CHAPTER SIX The Cash <i>Waqf</i> in the Ottoman Empire	245
6.1 The <i>Waqf</i>	246
6.2 The <i>Waqf</i> of Movables	248
6.3 The Cash <i>Waqf</i> in the Ottoman Empire	249
6.3.1 The Cash <i>Waqf</i> and its <i>Modus Operandi</i>	252
6.3.2 The Cash <i>Waqf’s</i> Clientele and Beneficiaries	254
6.3.3 The Cash <i>Waqf</i> and the <i>Monte di Pietà</i>	258
6.3.4 The Cash <i>Waqf</i> and the <i>Ḥiyal</i>	260
6.3.5 The Cash <i>Waqf</i> as a Novel Institution	262
6.3.6 The Cash <i>Waqf</i> Controversy	263
6.3.7 The Legal Debate	266
6.3.7.1 The Legality of the Cash <i>Waqf</i>	266
6.3.7.1.1 Çivizade’s Attack on the Cash <i>Waqf</i>	268
6.3.7.1.2 Abū Sa‘ūd’s Defence	270
6.3.7.1.3 al-Birgivī takes up the Challenge	274
6.3.7.2 The Cash <i>Waqf</i> and the use of the <i>Mu‘āmala</i>	279
6.4 The Cash <i>Waqf</i> in the Arab Lands	282
6.5 The Use of the <i>Mu‘āmala</i>	285
6.6 Conclusion: The Tension between Concession and Norm	288
CONCLUSION	293
APPENDIX ONE	300
APPENDIX TWO	302
BIBLIOGRAPHY	305

LIST OF TABLES

Table 1.	<i>Ribā</i> and the Six Commodities	20
Table 2.	al-Bukhārī's <i>Kitāb al-Ḥiyal</i>	84
Table 3.	A Comparison of <i>al-Makhārij fī al-Ḥiyal</i> and <i>al-Aṣl</i>	294
Table 4.	The use of the word <i>Ḥīla</i> in <i>al-Aṣl</i> and in <i>al-Makhārij fī al-Ḥiyal</i>	296

TRANSLITERATION TABLE

Consonants:

ا		ض	ḍ
ب	b	ط	ṭ
ت	t	ظ	ẓ
ث	th	ع	‘
ج	j	غ	gh
ح	ḥ	ف	f
خ	kh	ق	q
د	d	ك	k
ذ	dh	ل	l
ر	r	م	m
ز	z	ن	n
س	s	ه	h
ش	sh	و	w
ص	ṣ	ي	y

Short Vowels:

<i>fatha</i>	—	a
<i>kasra</i>	—	i
<i>damma</i>	—	u

Long vowels:

<i>alif</i>	(ا)	ā
<i>yā’</i>	(ي)	ī
<i>wāw</i>	(و)	ū

Diphthongs:

او	aw
اي	ay

When a word begins with a *hamza* (ء) it is omitted from the spelling.

The *tā’ marbūṭa* (ة) at the end of a word is also omitted except in cases where the English equivalent has widespread usage, such as *ṣalāt* (صلاة) and *zakāt* (زكاة), or if the word occurs as the initial portion of a possessive construct, (*iḍāfa*). The construct جنة الاحكام would thus be rendered *jannat al-aḥkām*.

ABBREVIATIONS

Following the mention of honourable persons certain prayers are mentioned in abbreviated form within parenthesis.

- pbuh – peace be upon him. This is used exclusively after mentioning the last Messenger Muḥammad (pbuh).
- as – *alayhī al-salam*. This is used after any of the other Prophets of God.
- ra – *radī Allah ‘anhū/‘anhā/‘anhum*. This is used following the Companions of the Prophet Muḥammad (pbuh).

INTRODUCTION

The revival of Islamic jurisprudence and its foremost contemporary application, it may well be argued, is taking place in the realm of Islamic finance.¹ Muslims, in asserting their piety and religious consciousness are demanding the application of Islamic law, not only in their personal lives, but also in their public dealings. Although in the secular vernacular, such religious intrusions are strictly anathema, Islamic jurisprudence compels otherwise. Islamic law advocates equity finance and categorically prohibits usurious debt finance. All guaranteed returns on invested wealth are therefore proscribed and jurists demand that investment be made only in the form of mutual risk-bearing partnerships. The idea of bearing risk is clearly abhorrent to high street banks. In attempting to accommodate Muslim requirements, high street banks have teamed up with various Sharī'a scholars with the resulting financial products aiming to satisfy both parties. Banks idealise minimum or zero risk contracts whereas Islamic law demands bilateral exposure to risk. With banks leading the way, Islamic law has been manipulated in such a way as to minimise the effective risk-exposure banks face. This manipulation is apparently justified as it walks the line of legal literalism without manifestly crossing the boundary.

¹ Muhammad Taqi Usmani, *An Introduction to Islamic Finance* (Karachi: Idaratul Ma'arif, 1999), 238. For a less positive view of the direction of Islamic finance law, see Kilian Bälz, *Sharia Risk? How Islamic Finance has Transformed Islamic Contract Law* Occasional Publications 9 (Cambridge MS: ILSP Harvard Law School, 2008) [article online]; available from <http://www.law.harvard.edu/programs/ilsp/publications/occasional.php>; Internet; last accessed 02 May 2010.

INTRODUCTION

Rationale

Legal stratagems, or *hiyal*, have been heavily deployed in the nascent Islamic financial industry and the voice of opposition to their continued use grows incessantly louder.² There is a concern that they may well have become an industrial norm by providing the default templates for the future design of all new Islamic financial instruments. In 1998 Vogel pertinently asked ‘... whether the classical religious debate about the *hiyal* needs to be reopened ... [as] it is sometimes difficult to decide if a particular artifice merely overcomes inconvenience in the law or wholly defeats its purposes’.³ Later, in the sixth Harvard University Forum on Islamic Finance (2004), Walid Hegazy presented a paper in which he reiterated the need to avoid the use of exceptional (i.e. non-normative) rules, saying that they would ‘... result in a system defined by anomalies and exceptions and render unreasonable the claim that such a system was Islamic.’⁴ In the ensuing discussion of Hegazy’s paper, Nizam Yaqubi, a leading jurist in the field of Islamic finance, urged the author to include in his paper a study of the difference between *hiyal* and *makhārij* (lit. exits).⁵

² The dominant practices of Islamic banks are not therefore in profit-sharing vehicles such as *muḍāraba* and *mushāraka*, but rather, in mark-up transactions such as *murābaḥa* and *ijāra*. Estimates on their usage vary although the dominance of the mark-up sales is undisputed. See, for example, Muhammad Imran Ashraf Usmani, *Meezanbank’s Guide to Islamic Banking* (Karachi: Darul Ishaat, 2002), 125 (The author states that 66% of all transactions are for *murābaḥa* alone); Muhammad Saleem, *Islamic Banking: A \$300 Billion Deception* (USA: Xlibris, 2005), 7 (The author mentions that as much as 80% of Islamic banking is on the basis of *murābaḥa*). *Meezanbank’s Guide to Islamic Banking* (Karachi: Darul Ishaat, 2002), 125 (The author states that 66% of all transactions are for *murābaḥa* alone); Muhammad Saleem, *Islamic Banking: A \$300 Billion Deception* (USA: Xlibris, 2005), 7 (The author mentions that as much as 80% of Islamic banking is on the basis of *murābaḥa*).

³ Frank E. Vogel, Samuel L. Hayes III, *Islamic Law and Finance: Religion, Risk, and Return* (The Hague: Kluwer Law International, 1998), 40.

⁴ Walid Hegazy, “Fatwas and the Fate of Islamic Finance: A Critique of the Practice of *Fatwa* in Contemporary Islamic Financial Markets,” in *Islamic Finance: Current Legal and Regulatory Issues*, ed. S. Nazim Ali (Cambridge MS: Islamic Finance Project (ILSP) Harvard Law School, 2005), 140.

⁵ For Yaqubi’s comments, see *Islamic Finance Conference: Current Legal and Regulatory Issues: A Short Report* (Harvard, 2004), 2, [article online]; available from http://ifp.law.harvard.edu/login/sixth_harvard; Internet; last accessed 02 May 2010. Hegazy duly complied and both, in the published version of his paper and in a later paper, he briefly addresses the issue of *hiyal* and *makhārij*. In both works, he argues that whereas the latter represent legitimate solutions, the former are unlawful as they are based upon proscribed means or intend an unlawful outcome. See Walid Hegazy, *Fatwas and the Fate of Islamic Finance*, 138; idem, “Contemporary Islamic Finance: From Socioeconomic Idealism to Pure Legalism,” *Chicago Journal of International Law* 7, no. 2 (2006-7): 596.

INTRODUCTION

In the autumn of 2008 a group of jurisconsults in Pakistan issued a verdict declaring the practices of Islamic banks illicit. They followed up their verdict with a lengthy work which set out to systematically address the problems with the current *modi operandi* of these banks. One cornerstone of their argument was that, although the *hiyal* were permitted in certain circumstances, they could not be taken as a normative foundation upon which further edifices could be erected.⁶ They went on to say that they regarded the dominant Islamic financial instruments of *murābaḥa* and *ijāra* as ‘pure *hiyal*’.⁷ In defence of these *modi operandi*, Mufti Taqi Usmani, conceded that he did not totally disagree with his detractors, although he preferred a more nuanced approach. He argued that although the *modi operandi* of the Islamic banks was not ideal, this did not preclude their legal validity.⁸ He reinforced his verdict with reference to specific rulings in the Ḥanafī juridical tradition which apparently permit the use of certain *hiyal*.⁹

Despite the centrality of the *hiyal* in the *modi operandi* of Islamic banks, no serious in-depth study of the *hiyal* has been forthcoming. Indeed, in subsequent Islamic finance conferences the need to reopen the classical debate about the *hiyal* has been reiterated.¹⁰ One author recently pleaded that: ‘The authenticity of Islamic finance may be restored if the issue of *hila* is brought out into the open and lawful *hila* is transparently distinguished from unlawful

⁶ Written by associates to the office of *Iftā*’ at the Islamic University ‘Allāma Muḥammad Yūsuf Binnorī Town Karachī, *Murawwaja Islāmī Bankārī: Tajziyātī Muṭāla‘a, Shar‘ī Jā‘iza o Fiqhī Naqd o Tabṣira* (Karachi: Maktaba Bayyināt, 2008), 168.

⁷ Ibid, 227.

⁸ Muhammad Taqi Usmani, *Islāmī Bankārī: Tarīkh o Pas-Manẓar awr Ghalaṭ Fahmiyo kā Izāla* (2009), 36-38, [book online]; available from http://www.deeneislam.com/ur/misc/BOOKS/Islamic_Banking/; Internet: last accessed 04 May 2010.

⁹ Ibid, 40-42. At that very time that this defence was issued, the very historical precedent which he refers to, namely the Ottomans’ usage of the *hiyal*, was, fortuitously, a part of this study.

¹⁰ Abdurrahman Habil, “The Tension between Legal Values and Formalism in Contemporary Islamic Finance,” in *Integrating Islamic Finance into the Mainstream: Regulation, Standardization and Transparency*, ed. S. Nazim Ali (Cambridge MS: Islamic Finance Project (ILSP) Harvard Law School, 2007), 109.

INTRODUCTION

hila.¹¹ Although the views of the past jurists vis-à-vis the *hiyal* are well known, the framework, purpose and role of these *hiyal* remains elusive. A gap therefore exists between the practice of the Islamic banks and the requisite theoretical framework upon which its *modi operandi* are premised. This study will attempt to fill that lacuna.

Research Question

It must be stated, at the outset, that we will not be examining contemporary Islamic financial instruments, but rather, delineating from the classical sources of Islamic jurisprudence a framework through which the appropriate usage of the *hiyal* can be determined. The question that we will seek to answer is whether the *hiyal* used to circumvent the prohibition of *ribā*, are a part of the Ḥanafī jurists' normative doctrine. This question will require us to explore the Ḥanafī theory of *ribā* and also to examine the *hiyal* in general as a jurisprudential phenomenon. This study will focus on the Ḥanafī School of jurisprudence as they are the chief protagonists of the *hiyal* and the genre's most prolific authors. Having said that, the other Schools' opinions will also be mentioned for comparative and analytical purposes. Comparing and contrasting their opinions will also demonstrate the distinct legal methodology of each School and how this is singularly critical in determining their respective approaches to both *ribā* and the *hiyal*.

Structure of the Study

To answer the above research question, this study has been divided into three parts representing the main areas of investigation:

- Part one explores the concept of *ribā* in Islamic jurisprudence.

¹¹ Abdurrahman Habil, "Authenticity of Islamic Finance in Light of the Principle of Daman," in *Islamic Finance: Innovation and Authenticity* ed. S. Nazim Ali (Cambridge MS: Islamic Finance Project (ILSP) Harvard Law School, 2010), 108.

INTRODUCTION

- Part two presents the diachronic development of the *ḥiyal* polemic and examines the *ḥiyal* as an independent legal genre.
- Part three deals with the *ḥiyal* of *ribā*.

The main contours of these three parts will now be briefly mentioned. It is important to keep this framework in mind throughout the work so as not to get lost in the details.

Part One: *Ribā* in Islamic Jurisprudence

There are many works available now in English which deal with *ribā* and even some which purport to explicate the theory of *ribā*.¹² Most of these works, however, do not go beyond a simple presentation of the views of the jurists vis-à-vis *ribā* in the Qur'ān and the Sunna and their respective determinations of its ratio legis (*'illa*). Our presentation will attempt to construct a far wider theory of *ribā* from the Ḥanafī sources, which ties together their hermeneutical methodology and the juridical application of their *ribā* doctrine. In chapter one, therefore, we will begin by investigating the hermeneutical approach of the Ḥanafīs and attempt to demonstrate just how they constructed their definition of *ribā* according to its usage in the Qur'ān and the Sunna. In chapter two, their application of the *ribā* doctrine in the various branches of Islamic commercial law will be compared with that of the other Schools. This approach will allow us to see the systematic structure which underpins the legal discourse of the Ḥanafīs and the other Schools, and observe the significance of legal methodology in the jurists' differences. We will also present another noteworthy theory of *ribā*, namely that of Ibn al-Qayyim. His theory is important because it shows an alternative

¹² See, for example, Abdulkader Thomas, ed., *Interest in Islamic Economics: Understanding Riba* (London: Routledge, 2006); Ziauddin Ahmad, "The Qur'ānic Theory of Ribā," *Islamic Quarterly* 20, no. 22 (1978): 3-14; A. G. Muslim, *The Theory of Interest in Islamic Law and the Effects of the Interpretation of this by the Hanafi School up to the end of the Mughal Empire* (PhD diss., University of Glasgow, 1974); Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (Cambridge: CUP, 1986); Imran Ahsan Khan Nyazee, *The Concept of Ribā and Islamic Banking* (Islamabad: Niazi Publishing House, 1995).

INTRODUCTION

legal methodology at work, and because both he, and his teacher Ibn Taymiyya, wrote major treatises to refute the *ḥiyal*.

Part Two: The *Ḥiyal*: Polemic and Genre

The second part of the investigation will begin with an examination of the *ḥiyal* polemic. In chapter three, the polemic will be presented through the works of the *ḥiyal* opponents. The central concern here is to show the diachronic nature of the polemic and how it becomes more nuanced as time goes by. Starting from the traditionists al-Bukhārī and Ibn Baṭṭa, where the polemic begins in its rudimentary form, we move on to the works of Ibn Taymiyya and his student Ibn al-Qayyim, where the argument is far more developed and refined. The polemic ultimately ends with al-Shāṭibī, who attempts to underwrite it with his distinct teleological theory of the *maqāṣid al-Sharīʿa*. These nuanced views will then be compared with the Ḥanafī's defence of the *ḥiyal*. The Ḥanafīs' views on the role and justification of the *ḥiyal* will be discerned from the major treatises they authored in the *ḥiyal*.

We will then look at the *ḥiyal* genre and its purpose in chapter four. In relation to this, we will scrutinise the Orientalists' assertions regarding the purpose of the *ḥiyal* genre and the vitality of Islamic commercial law. The views of the Orientalists provide a useful backdrop against which the genre can be examined. To challenge their assertions we will examine the very first *Kitāb al-Ḥiyal* and its putative author. This will allow us to understand the nature of the genre and the source of its substantive content. For comparative purposes, this will be followed by an examination of the reception of the *ḥiyal* in the other Schools of Islamic law by noting their contributions to the genre. We will then assess the substantive contents of the Ḥanafī genre and examine the Ḥanafī stance on the controversial *ḥiyal*. Finally we will discern the actual relation of the *ḥiyal* genre to the standard Ḥanafī works.

INTRODUCTION

Part Three: The *Ḥiyal* of *Ribā*

In the final part of our study we will use the results of the preceding chapters to assess the validity and usage of the *ḥiyal* of *ribā*. In the main, the *ḥiyal* which are central to contemporary Islamic finance are the double-sales of *ʿīna* and *tawarruq*, and the sale with a right of redemption known as the *bayʿ al-waḳfāʾ*.¹³ These transactions will be examined in chapter five from the perspective of the standard Ḥanafī doctrine and also their later regional usage. Our main concern is to understand why the jurists permitted them and what function they played. To do this we will use an analytical model which demarcates the utility of the *ḥiyal* and provides us with a context for the rulings of the Ḥanafī jurists who permitted them. The analytical model is not restricted to merely explaining the earlier usage of the *ḥiyal*; but more significantly, it can be employed to circumscribe their juridical remit.

In chapter six, the analytical model will be used to examine the Ottoman practice of the cash *waqf*.¹⁴ This institution played a significant role in the development of the Balkan cities under the Ottomans, although it did so using various *ḥiyal*. The cash *waqf* and its various *ḥiyal* adjuncts were officially sanctioned in the Ottoman Empire and not surprisingly resulted in a major juristic controversy. The analytical model developed in chapter five, will be applied to the controversy to explain the phenomenon of the cash *waqf* and the use of the *ḥiyal*. The

¹³ To appreciate the importance of these transactions, see Usmani, *An Introduction to Islamic Finance*, 87-88, 120-26; idem (spelt in this publication as Mohammed Taqi Othmani), "Methods of House Building Financing According to Shari'ah," in *Islamic Banking Modes for House Building Finance*, ed. Mahmoud Ahmad Mahdi (Jeddah: IRTI, 1995), 70-74(61-74); Saiful Azhar Rosly and Azizi Che Seman, "Juristic Viewpoints on *Bayʿ al-ʿĪnah* in Malaysia: A Survey," *IJUM Journal of Economics and Management* 11, no. 1 (2003): 87-111; Saiful Azhar Rosly and Mahmood Sanusi, "Some Issues of *Bayʿ al-ʿĪnah* in Malaysian Financial Markets," *Arab Law Quarterly* 16, no. 3 (2001): 263-280; Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice* (Cambridge: CUP, 2006), 70-74.

¹⁴ The cash *waqf* is currently being touted as a model for Islamic finance innovation, see Magda Ismail Abdel Mohsin, *Cash Waqf: A New Financial Product* (Kuala Lumpur: Prentice Hall, 2009); Dian Masyita, Muhammad Tasrif and Abdi Suryadinata Telaga, *A Dynamic Model For Cash Waqf Management as One of the Alternative Instruments for the Poverty Alleviation in Indonesia* (paper submitted to the 23rd international conference of the Systems Dynamics Society, Boston: MIT, July 17-21, 2005); 'Abd al-Raḥmān Hābīl, "*Waqf al-Nuqūd al-Ahlī wa Ahammiyyatuhū li al-ʿAmal al-Maṣrifī al-Islāmī*," *Awqāf* 9 (2005): 147-155; Murat Cizakca, "The Relevance of the Ottoman Cash *Waqfs* (*Awqaf al-Nuqūd*) for Modern Islamic Economics," in *The Proceedings of the Third International Conference on Islamic Economics*, ed. S.A.H. Al-Junaid (Kuala Lumpur: International Islamic University, 1992), 393-413.

INTRODUCTION

widespread use of the latter, will also allow us to develop the analytical model further. The controversy is especially significant as it shows how the jurists dealt with a novel financial institution and critically measured it against the demands of Ḥanafī normative doctrine. This critical attitude is precisely what is currently required in Islamic finance.

Literature Review

The aim of this thesis is to present the legal framework and the historical context of the *ḥiyal* of *ribā* and we will therefore be utilising both legal and historical sources. In our initial explication of the Ḥanafī theory of *ribā* we will be using two types of legal genre to appreciate the distinct hermeneutical approach of the Ḥanafīs and also that of the other Schools. The first of these genres is that which deals specifically with the principles of jurisprudence i.e. the *uṣūl al-fiqh*. We will be using the earliest extant explication of Ḥanafī *uṣūl al-fiqh*; the *al-Fuṣūl fī al-Uṣūl* of al-Jaṣṣāṣ (d.370 AH).¹⁵ The other legal genre relates to the jurisprudence of the Qur'ān, and again it is the work of al-Jaṣṣāṣ, his *Aḥkām al-Qur'ān*, which will be utilised here.¹⁶ Scholars from the other Schools of Islamic law also authored works in the *Aḥkām al-Qur'ān* genre and these will be used to provide the opinions of the other Schools. The remainder of the Ḥanafī theory, in terms of the delineation of the ratio legis and the application of the *ribā* doctrine in the various branches of commercial law, will be discerned from the general works of *fiqh*. In this regard we will be using the most authoritative sources of the Ḥanafī School; the *al-Mabsūṭ* of al-Sarakhsī and the *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* of al-Kāsānī.¹⁷ These works are comprehensive compendia and

¹⁵ Abū Bakr Aḥmad ibn 'Alī al-Rāzī al-Jaṣṣāṣ, *Uṣūl al-Fiqh al-Musammā bi al-Fuṣūl fī al-Uṣūl*, 4 vols. (Kuwait: Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyya, 1994).

¹⁶ Abū Bakr Aḥmad ibn 'Alī al-Rāzī al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 5 vols. (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1992).

¹⁷ Abū Bakr Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūṭ*, 30 vols. In 15 (Beirut: Dār al-Kutub al-'Ilmiyya, 2001); 'Alā' al-Dīn Abū Bakr ibn Mas'ūd al-Kāsānī, *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'*, 10 vols. (Beirut: Dār al-Kutub al-'Ilmiyya, 2000).

INTRODUCTION

are renowned for their theoretical approach in systematically explicating the doctrine of the Ḥanafīs.

For our discussion of the *ḥiyal* polemic, we will be relying mainly on six works:

1. Ibn Baṭṭa's *Ibṭāl al-Ḥiyal*,¹⁸
2. al-Bukhārī's *Kitāb al-Ḥiyal* (a chapter in his compendium of authentic aḥādīth);¹⁹
3. Ibn Taymiyya's *Bayān al-Dalīl 'alā Buṭlān al-Taḥlīl*,²⁰
4. Ibn al-Qayyim's *I'lām al-Muwaqqi'īn*;²¹
5. Ibn al-Qayyim's *Ighāthat al-Lahfān*;²²
6. al-Shāṭibī's *al-Muwāfaqāt*.²³

All of these works are primary expositions and henceforth they can be used, not only as a source for the author's viewpoints, but also to note the diachronic nature of the *ḥiyal* polemic. The increased nuance in their arguments can thus be used to identify the general trend of the polemic chronologically.

For the Ḥanafī paradigm of the *ḥiyal*, we will be using the following works:

1. al-Shaybānī's *al-Makhārīj fī al-Ḥiyal*;²⁴

¹⁸ Abū 'Abdullah 'Ubayd Allah ibn Muḥammad ibn Baṭṭa al-'Ukbarī, *Ibṭāl al-Ḥiyal* (Beirut: Mu'assasat al-Risāla, 1996).

¹⁹ Muḥammad ibn Ismā'īl ibn Ibrāhīm al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Liechtenstein: Thesaurus Islamicus Foundation, 2000).

²⁰ Aḥmad ibn 'Abd al-Ḥalīm ibn 'Abd al-Salām ibn Taymiyya, *Bayān al-Dalīl 'alā Buṭlān al-Taḥlīl* (Beirut: al-Maktaba al-'Aṣriyya, 2007), 22. This book is also known as *Iqāmat al-dalīl 'alā ibṭāl al-taḥlīl*, and is the second part of vol. 3 in the author's *al-Fatāwa al-Kubrā*.

²¹ Shams al-Dīn Abū 'Abdullah Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyya, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn* (Beirut: Dār al-Kutub al-'Ilmiyya, 2004).

²² Shams al-Dīn Abū 'Abdullah ibn Qayyim al-Jawziyya, *Ighāthat al-Lahfān min Maṣā'id al-Shayṭān* (Cairo: Maktaba al-Thaqāfa al-Dīniyya, 2001).

²³ Abū Ishāq Ibrāhīm ibn Mūsā al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'a* (Beirut: Dār al-Kutub al-'Ilmiyya, 2004).

²⁴ 1) Muḥammad ibn al-Ḥasan al-Shaybānī, *al-Makhārīj fī al-Ḥiyal*, ed. Joseph Schacht (*Das kitāb al-maḥārīg fil-ḥijal des Muḥammad ibn al-Ḥasan aṣ-Ṣhaybānī. In Zwei Rezensionen* (Hildesheim: Georg Olsm Verlagsbuchhandlung, 1968). The Arabic portion of this work has been printed with similar pagination as Muḥammad ibn al-Ḥasan al-Shaybānī, *al-Makhārīj fī al-Ḥiyal*, ed. Joseph Schacht (Leipzig, Baghdad: al-Muthanna Library, 1930).

INTRODUCTION

2. al-Khaṣṣāf's *al-Ḥiyal wa al-Makhārij*;²⁵
3. al-Sarakhsī's *Kitāb al-Ḥiyal* (a chapter in his *al-Mabsūṭ*);²⁶
4. Sa'īd ibn 'Alī's *Jannat al-Aḥkām wa Junnat al-Khiṣām*;²⁷
5. Ibn Māza's *Kitāb al-Ḥiyal* (a chapter in his *al-Muḥīṭ al-Burhānī*).²⁸

These works are critically important as they present the endogenous view of the *ḥiyal* authors regarding the nature of the *ḥiyal* both as a genre and as a juridical technique. An examination of the nature of their substantive contents will reveal the Ḥanafī approach to the *ḥiyal*. In addition to these works, we will also make reference to the chapters on the *ḥiyal* which are found in the responsa (*fatāwā*) literature. As the discussion moves on to assess the nature of the *ḥiyal* genre and the assertions of the Orientalists, we will compare the published *al-Makhārij fī al-Ḥiyal* of al-Shaybānī with the latter's work *al-Aṣl*. The portion of this work which is relevant has not yet been published and hence we will be referring to the manuscripts of this work.

The sources mentioned above will all be used to explicate the legal framework of the *ḥiyal*. For the historical context of these *ḥiyal* we will use a wide range of secondary sources. These secondary sources have all been selected on the basis that they represent an accurate reflection of research into primary historical sources. Part of our criticism of the Orientalists, is their use of anecdotal evidence in determining the historical practice of Islamic law. We have therefore endeavoured to utilise those research-based studies which are based upon primary sources such as the following:

²⁵ Abū Bakr Aḥmad ibn 'Amru al-Shaybānī al-Khaṣṣāf, *Kitāb al-Ḥiyal wa al-Makhārij*, ed. Joseph Schacht (*Das Kitāb al-ḥiial ual- mahāriğ*), (Hildesheim: Georg Olms Verlagsbuchhandlung, 1968).

²⁶ Abū Bakr Muḥammad ibn Aḥmad al-Sarakhsī, *Kitāb al-Ḥiyal min al-Mabsūṭ*, printed together with , *al-Makhārij fī al-Ḥiyal*, by al-Shaybānī, ed. Joseph Schacht.

²⁷ Sa'īd ibn 'Alī al-Samarqandī, *Jannat al-Aḥkām Junnat al-Khiṣām fī al-Ḥiyal wa al-Makhārij*, ed. Ṣafwat Kūsa and Ilyās Qablān (Beirut: Dār Ṣādir; Istanbul: Maktabat al-Irshād, 2005).

²⁸ Burhān al-Dīn Maḥmūd ibn Ṣadr al-Sharī'a Ibn Māza, *al-Muḥīṭ al-Burhānī li-Masā'il al-Mabsūṭ wa al-Jāmi'ayn wa al-Siyar wa al-Ziyādāt wa al-Nawādir wa al-Fatāwa wa al-Wāqī'āt Mudallala bi-Dalā'il al-Mutaqaddimīn*, 25 vols. (Karachi: Idārat al-Qur'ān, 2004).

INTRODUCTION

- Ottoman court records;
- Cairo Geniza documents;
- Family archives;
- Waqf documents (*waqfiyya*);
- Contemporary historical accounts.

Using these documents provides a far more accurate assessment of historical practice and thus provides a reliable base for further analysis.

Methodology

There are two main methodologies employed in this study; the first relates to the legal framework and the second to the historical context. In any study of a legal discourse the most important aspect is to recognise the hierarchy of legal sources. In Islamic jurisprudence each School of law as its own criteria for determining the hierarchy of both the jurists and the various works they have authored.²⁹ These hierarchies take into consideration the epistemic stature of the author-jurist and the reception of the specific text in the School. This last point is important as it should not be taken for granted that the authority of a work rests solely upon the stature of its author. The texts used in this work have been selected with due regard to these hierarchies. In addition to appreciating these hierarchies, it is equally important to recognise the variation within a School's juristic tradition with regards to different regions and time periods. We have therefore used those legal texts which have been authored by local

²⁹ Muḥammad Amīn Ibn 'Ābidīn, "Sharḥ al-Manzūma al-Musammā bi-'Uqūd Rasm al-Muftī," in *Majmū'a Rasā'il ibn 'Ābidīn*, idem (Beirut: Dār Iḥyā al-Turāth al-'Arabī, nd), vol. 1, 9-52; 'Abd al-Ḥayy al-Laknawī, "al-Nāfi' al-Kabīr li-man Yuṭāli' al-Jāmi' al-Ṣaghīr," as an introduction to *al-Jāmi' al-Ṣaghīr* by Muḥammad ibn Ḥasan al-Shaybānī (Beirut: 'Ālam al-Kutub, 1986), 5-31; Muḥammad Bakhīt al-Muṭī'ī, *Risāla fī Bayān al-Kutub allatī Yu'awwal 'alayhā wa Bayān Ṭabaqāt 'Ulamā' al-Madhhab al-Hanafī wa al-Radd 'alā Ibn Kamāl Bāshā* (Damascus: Dār al-Qādirī, 2008), 65-101; Norman Calder, "The 'Uqūd rasm al-muftī of Ibn 'Ābidīn," *Bulletin of the School of Oriental and African Studies* 63, no. 2 (2000): 217-228; idem, "al-Nawawī's Typology of Muftīs and its Significance for a General Theory of Islamic Law," *Islamic Law and Society* 3, no. 2 (1996): 137-55.

INTRODUCTION

jurists when discussing regional issues, such as those specific to Transoxania or to the Ottomans.

In the historical aspects of this inquiry our methodology is to analyse and present the research of contemporary researchers. The historical aspects of this study are those which pertain to the economic history of the medieval Islamic commercial system and also to the economic and legal history of the Ottoman cash *waqf* practice. With regard to the history of the medieval Islamic commercial system, the sources for this inquiry have been critically selected based upon the probative sources they employ. The use of material based upon primary sources allows us to challenge the paradigm of the Orientalists which was to a large extent premised upon anecdotal evidence. To facilitate our analysis of these historical practices we will be using (and developing) an economic model of Tag el Din which lays down a basic framework for relating the *ribā* prohibition to its Islamic alternatives. Although Tag el Din's model is an economic model designed for planning an Islamic economy, we will be using it here for historical analysis and to develop a framework for demarcating the utility of the *ḥiyal*.

In addition to these methods, we have also used some philological analysis for determining the authorship of the *al-Makhārij fī al-Ḥiyal* attributed to al-Shaybānī.³⁰ This involves an examination of the history of the text, and the language used in the text when referring to the *ḥiyal*. The context of this analysis is determined using biographical and other historical sources, which allude to, or comment on, this specific text and which also mention other

³⁰ For the historical use of philology in Oriental Studies, see Baber Johansen, "Politics, Paradigms and the Progress of Oriental Studies: The German Oriental Society (Deutsche Morgenländische Gesellschaft) 1845-1989," *M.A.R.S.* 4 (1995): 81-83; idem, "Islamic Studies. The Intellectual and Political Conditions of a Discipline," in *Penser l'Orient: Traditions et actualité des Orientalismes français et allemand*, ed. Youssef Courbage and Manfred Kropp (Beirut: Institut Français du Proche-Orient & Orient-Institut, 2004), 69-74, 81-91; Edward W. Said, "Islam, the Philological Vocation, and French Culture: Renan and Massignou," in *Islamic Studies: A Tradition and its Problems*, ed. Malcolm H. Kerr (California: Undena Publications, 1980), 53-72.

INTRODUCTION

jurists who have compiled works in this genre. This allows us to understand the beginnings of the genre and its relationship to the Ḥanafī normative doctrine.

In all, this study uses an interdisciplinary method utilising various methodologies (juridical, historical, economic and philological) depending on the specific requirements of each chapter or section. When considered as a whole, they allow for a broader analysis which encompasses the complete narrative of the *ḥiyal*. The result is a coherent account of the legal framework and the historical context the *ḥiyal*.

PART ONE

RIBĀ IN ISLAMIC JURISPRUDENCE

CHAPTER ONE

RIBĀ IN THE QUR'ĀN AND THE SUNNA

In this chapter the prohibition of usury in the Qur'ān and Sunna will be examined. The main concern is to present the approach of the various schools of law (*madhhab*, pl. *madhāhib*) in understanding the meaning of the term *ribā*. Although the focus of our investigation in this thesis is undoubtedly on the Ḥanafī theory of *ribā*, the opinions of the other major schools will also be mentioned for contrast and comparison. The ensuing presentation will hence explicate their respective articulations of the term *ribā*, while also highlighting the methodological variation in their hermeneutical strategies. In the first section of this chapter we will examine the jurists' views on the meaning of *ribā* in the Qur'ānic prohibition. This will be followed in the second section by an examination of the prophetic prohibition of *ribā*. In conclusion to this chapter, we will present the Ḥanafī definition of *ribā* premised upon the explication given in the preceding two sections.

1.1 *Ribā* in the Qur'ān

The treatment of *ribā* as mentioned in the Qur'ān will be looked at through the discourse of the jurists' exegesis of the word *ribā*.¹ Jurists have analysed the Qur'ānic injunction in the language of *uṣūl al-fiqh*. This *uṣūlī* analysis has a manifest import on the theories of *ribā*

¹ Juristic exegeses are generally entitled *Aḥkām al-Qur'ān* and form a distinct genre in the exegetical literature. These commentaries were written to show, not only that the hermeneutical basis of Islamic law is the specific injunctions in the Qur'ān, but also that the different methodological approaches of their authors towards the text, is what gives rise to juridical points of difference, *ikhtilāf al-fuqahā* that occurs between the *madhāhib*. The importance of the genre is then realised in the inter-*madhhab* polemic and in demonstrating the immediacy of, not only Islamic jurisprudence on the whole to the Qur'ān, but also of juristic differences in the detailed substantive law to specific verses. For a summary introduction to the genre and the various authors and their contributions, see Muḥammad Zāhid al-Kawtharī, introduction to *Aḥkām al-Qur'ān* by Abū 'Abdullah Muḥammad ibn Idrīs al-Shāfi'ī (Beirut: Dār al-Kutub al-'Ilmiyya, 1980), 14.

subsequently developed and shows the relationship, presupposed by the jurists, between the various prohibitions of *ribā* found in the Qur'ān and the prophetic Sunna. The key question addressed by the jurists is in regards to the meaning of the term *ribā* and whether this meaning is known from its contextual setting (i.e. the economic practices of pre-Islamic Arabia), in which case it is designated as *'āmm*, or whether the term is ambiguous and in need of further clarification, in which case it is termed *mujmal*.

1.1.1 *'Āmm* and *Mujmal*

In the general commentaries (*tafsīr*) on the Qur'ān, three types of usurious transactions are mentioned as having been in vogue contemporary to the *ribā* injunction:

1. An increase on the principal due to a default in repaying a loan.²
2. An increase on the principal due to a default in the payment due from a credit sale.³
3. An increase in the age of an animal due to default of supply, i.e. if a two year old camel was originally due; a defaulter is obliged to give a three year old.⁴

These specific instances need to be borne in mind as a central aspect of the ensuing presentation is focused on whether the *ribā* prohibition of the Qur'ān dealt only with these specific transactions, in vogue at the time of revelation, or whether they addressed a wider meaning, yet to be elaborated.

In *uṣūl al-fiqh* the term *'āmm* is understood to be the opposite of *khāṣṣ*. The former carries a general meaning, applying to genera and types, as opposed to *khāṣṣ* which applies to specific individuals or distinctive units. However, before evaluating whether a word is general or specific (*'āmm* or *khāṣṣ*), the jurists need to decide whether the meaning of the word is known

² Abū Ja'far Muḥammad ibn Jarīr al-Ṭabarī, *Jāmi' al-Bayān 'an Ta'wīl Āy al-Qur'ān* (Beirut: Dār al-Fikr, 1984), vol. 3, 101 (verse 2:275), vol. 3, 89-90 (verse 3:130); al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, 184.

³ al-Ṭabarī, *Jāmi' al-Bayān fī Tafsīr al-Qur'ān*, vol. 3, 101, 89-90; al-'Asqalānī, *al-Ujāb*, 227.

⁴ al-Ṭabarī, *Jāmi' al-Bayān fī Tafsīr al-Qur'ān*, vol. 3, 90; al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, 183-4.

or not. This means that a word whose meaning is unknown or obscure in its juridical (or even lexical) import cannot be classified as either *‘āmm* or *khāṣṣ*. To argue that the term *ribā* is *‘āmm* is to infer that its meaning is known and that it carries a general import.⁵ What is crucial to the exegetical discourse, is that by designating *ribā* as *‘āmm*, the jurists are asserting that its meaning at the instance of revelation was fully known and not in need of further clarification. This means that the prohibition of *ribā* mentioned in the Qur’ān relates directly to the general types of contracts in vogue at the time of revelation.

In contradistinction to this claim, the opposing jurists assert that the term *ribā* is *mujmal*, i.e. that it contains an element of ambiguity and is in need of further clarification. The upshot of this claim is that the Qur’ānic prohibition of *ribā* may be applied to additional types of contracts not current to the period of revelation or more significantly it may be applied to contracts which were in existent but not recognised or designated by the Arabs at the time to be usurious. Having understood the basis for the *‘āmm/mujmal* discourse, the views of the different Schools will now be examined.⁶

1.1.2 The Mālikīs

In his *Aḥkām al-Qur’ān*, Ibn al-‘Arabī explains that the linguistic meaning of *ribā* is ‘an increase (*al-ziyāda*)’ and mentions that the scholars have differed regarding the word *ribā*, whether it is *‘āmm* or *mujmal*. Representing the Mālikī School, he proceeds to defend their

⁵ al-Jaṣṣāṣ in his work on *uṣūl al-fiqh* makes it clear that what is *‘āmm* is also a *naṣṣ* (*mā yatanāwaluhū al-‘umūm fahuwa naṣṣ ayḍan*). The *naṣṣ* being a clear statement and the opposite of the *mujmal*; see al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, vol. 1 59.

⁶ The importance of the *mujmal* as an *uṣūlī* tool can be recognised by the fact that, as early an authority as ‘Īsā ibn Abān (a student of al-Shaybānī) is recorded to have written a treatise titled *Kitāb al-Mujmal wa al-Mufassar*. Additionally, Aḥmad ibn Hanbal, in praising the different aspects of al-Shāfi‘ī’s knowledge, lauded ‘his knowledge of *uṣūl al-fiqh*; like the *nāsikh* and the *mansūkh*, and the *mujmal* and the *mufassar* and his acceptance of the single narration’. These facts testify to the generally accepted importance of the *mujmal* in early Islamic jurisprudence. See, Murteza Bedir, “An Early Response to Shāfi‘ī: ‘Īsā b. Abān on the Prophetic Report (*Khabar*),” *Islamic Law and Society* 9, no. 3 (2002): 290; for the statement of Aḥmad see Aḥmad ibn ‘Abd al-Ḥalīm ibn Taymiyya, *Majmū‘at al-Fatāwā* (Cairo: Maktabat Ibn Taymiyya, 1978), vol. 20, 330.

position that the word is *‘āmm* and not *mujmal*. The current of his argument is that the Qur'ān was revealed to a people in their language, and business and trade was something known to them. Trade was recognised to be an exchange of countervalues exemplified in the following three generic transactions:

- commodity⁷ for commodity,
- commodity for debt,
- commodity for usufruct (i.e. hire).

The important point being that trade is conducted with the purpose of increasing one's wealth, and the means of that, is via the exchange of countervalues. The author then contrasts the increase of trade with the increase of *ribā*, by saying that the latter is also:

‘an increase, and the meaning of it in the [Qur'ānic] verse is every increase which is not equated with a countervalue, because increase is not prohibited in essence ... [otherwise] it would not be correct to equate it with [any] countervalue’.⁸

His argument is that the meaning of *ribā* is disclosed by dichotomising it with trade. Trade is therefore to be understood as the increase of wealth through the exchange of countervalues as opposed to usury. In the latter there is no countervalue in the transaction in lieu of the increase over the principal and it is hence this increase which is singularly regarded as *ribā*. This he asserts is known from the language of the verse itself and would have been immediately perceptible to its Arab audience.

The later Mālikī jurist al-Qurṭubī, expanding on the theme says that *ribā* in the Qur'ānic injunction was for a known meaning; *‘āmm* i.e. that which the Arabs were practising in their

⁷ The word used by the author in this passage is *‘ayn*, this does not exactly correspond to commodity, as we will later explain, but it suffices our purpose here.

⁸ Abū Bakr Muḥammad ibn ‘Abdullah Ibn al-‘Arabī, *Aḥkām al-Qur'ān* (Beirut: Dār al-Kutub al-‘Ilmiyya. 1984) vol. 1, 320-321.

trade, and subsequently it applies to that which was prohibited by the Prophet (pbuh).⁹ The important point being that the *ribā* prohibited in the Qur'ān injunction is linked to certain transactions while that prohibited by the Sunna relates to another set of transactions, qualitatively different from the former.

1.1.3 The Shāfi'īs

al-Shāfi'ī does not make a clear statement in his works on whether the term *ribā* is *āmm* or *mujmal*. In both his *Aḥkām al-Qur'ān* and his work on *uṣūl al-fiqh*, *al-risāla*, he only discusses the verse pertaining to *ribā* (2:275) but not the term *ribā* itself.¹⁰ Here it becomes clear that al-Shāfi'ī's overriding concern is to emphasise the epistemological relationship between the Qur'ān and the Sunna. With regard to the verse declaring the prohibition of *ribā* (2:275) he proffers the following possibilities: It could either be

1. an ambiguous (*jumla*)¹¹ rule subsequently clarified by the Prophet (pbuh), or
2. a general (*āmm*) rule by which something specific (*khāṣṣ*) is intended and hence the Prophet (pbuh) clarified what was intended, or
3. a general (*āmm*) rule, permitting all transactions except those expressly prohibited by the Prophet (pbuh).¹²

⁹ Abū 'Abdullah Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, *al-Jāmi' li Aḥkām al-Qur'ān* (Dār al-Kitāb al-'Arabī, 1952), vol. 3, 358.

¹⁰ The *Aḥkām al-Qur'ān* attributed to al-Shāfi'ī is actually a compilation by al-Bayhaqī, although the latter does claim that al-Shāfi'ī himself did author a similar work. See al-Shāfi'ī, *Aḥkām al-Qur'ān*, 19; Abū 'Abdullah Muḥammad ibn Idrīs al-Shāfi'ī, *al-Risāla* (Beirut: al-Maktaba al-'Ilmiyya, 1939), 232. Also see Majid Khadduri, *Islamic Jurisprudence: al-Shāfi'ī's Risāla*, 2nd ed. (Cambridge: Islamic Texts Society, 1961), 190-191.

¹¹ The word *jumla* is used here in the place of *mujmal*. Both of these words have a dual usage; they indicate ambiguity as well as generality, and hence in the latter sense can be used as a synonym for *āmm*. This latter usage may well cause confusion although the intended meaning can usually be garnered from the context. See al-Jaṣṣaṣ, *al-Fuṣūl fi al-Uṣūl*, vol. 1, 63. In his now published thesis on al-Shāfi'ī's *al-Risāla*, Joseph Lowry appears to be unsure on both the meanings and relationships of these words. See his *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfi'ī* (Leiden, Brill, 2007), 104-117.

¹² al-Shāfi'ī, *Aḥkām al-Qur'ān*, 135.

al-Shāfi'ī then goes on to say, that whichever of these approaches is correct, the upshot is that Allah has directed his creation to the obedience of his Messenger (pbuh).¹³ This epistemological focus also comes through in his treatise on *uṣūl al-fiqh*. Again using the same verse (2.275) he declares that the general scope of Qur'ānic permission to trade is limited by the specific injunctions of the Prophet (pbuh).¹⁴

Later Shāfi'ī scholars, reflecting their eponym's ambiguous stance, differed regarding the categorisation of *ribā*. al-Māwardī has recorded the extensive difference of opinion between the leading Shāfi'ī scholars,¹⁵ and although he does not immediately attempt to resolve the discord, he does, on numerous occasions in his compendium, declare *ribā* to be *'āmm*.¹⁶ The Shāfi'ī jurist known as Ilkiyā al-Harrāsī agreed with al-Māwardī's assessment, stating that the correct opinion is that *ribā* is *'āmm* despite narrating the opposite view from al-Shāfi'ī.¹⁷ The later Qur'ān commentator Fakhr al-Dīn al-Rāzī in his monumental work *al-Taḥfīf al-Kabīr* also narrates that al-Shāfi'ī's own personal opinion is that *ribā* is *mujmal*. al-Rāzī, as opposed to al-Harrāsī, agrees with al-Shāfi'ī and presents numerous proofs to support the point and concludes that before giving a specific verdict on any particular transaction, recourse must be made to the Prophet's (pbuh) clarifications.¹⁸

1.1.4 The Ḥanafīs

In his *Aḥkām al-Qur'ān*, al-Jaṣṣāṣ explains that *ribā*, in the juridical sense, encompasses more meanings which can be lexically accounted for. To corroborate his assertion he provides two

¹³ Ibid, 136.

¹⁴ al-Shāfi'ī, *al-Risāla*, 232; Khadduri, *al-Shāfi'ī's Risāla*, 190-191.

¹⁵ Abū al-Ḥasan 'Alī ibn Muḥammad ibn Ḥabīb al-Māwardī, *al-Ḥāwī al-Kabīr* (Beirut: Dār al-Kutub al-'Ilmiyya, 1999), vol. 5, 7-10.

¹⁶ Ibid, vol. 5, 81, 217, 289.

¹⁷ Muḥammad al-Ṭabarī Ilkiyā al-Harrāsī, *Aḥkām al-Qur'ān* (Beirut: Dār al-Kutub al-'Ilmiyya, 2001), vol. 1, pt. 1, 233.

¹⁸ Fakhr al-Dīn al-Rāzī, *al-Taḥfīf al-Kabīr* (Cairo: al-Maṭba'a al-Bahiyya al-Miṣriyya, nd.), vol. 7, 99.

main evidences: The first is a prophetic tradition in which delay (*nasā'a*) is called *ribā*, and the second is a statement of the Companion 'Umar (ra) in which he says that: 'the verse of *ribā* was one of the last to be revealed and the Prophet was taken before he could clarify it for us: so leave *ribā* and that which you doubt (*rība*).'¹⁹ al-Jaṣṣāṣ concludes that because 'Umar (ra) was a native speaker of the Arabic language, had the word *ribā* remained in its original linguistic sense then its legal meaning would not have needed further clarification. Additionally, he argues that its legal usage to describe delay, *nasā'ā* is not discernible from its lexical meaning. Similarly, in regard to a contract to supply an animal, if the supplier sought an extension on the delivery date, it was the practice of the Arabs to demand an increase in the age of the animal to be delivered. The increase in the age of the animal to be delivered represents an increase in value and acts as a compensation for the delay in delivery. al-Jaṣṣāṣ contends that, even though this was the practice of the Arabs, it was not known, or regarded by them, to be *ribā*.²⁰ This means that the scope of the term in its revelatory context was greater than its contemporaneous usage. The word, he concludes, has thus been removed from its linguistic meaning and has become a 'juridical term', known in the language of *uṣūl al-fiqh* as an *ism shar'i*.

1.1.4.1 *Mujmal* in Ḥanafī *Uṣūl*

In his work on Ḥanafī *uṣūl*, al-Dabbūsī notes that the linguists consider the *mujmal* to be similar to the *gharīb*; who, he explains, is an individual who becomes estranged from his homeland such that he can only be traced by enquiry.²¹ Likewise, he contends, the word *ribā* has become remote due to its relocation from its previous lexical assignment to a new

¹⁹ al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, 183.

²⁰ Ibid, vol. 2, 183-84.

²¹ Abū Zayd 'Ubaydullah ibn 'Umar ibn 'Isā al-Dabbūsī, *Taqwīm al-Adilla fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-'Ilmiyya, 2001), 118; E. W. Lane, *Arabic~English Lexicon* (Cambridge: Islamic Texts Society, 1863-93), vol. 2, 2243, third column.

meaning which remains inchoate and subject to further clarification.²² This does not, however, mean that those who heard the verse at the point of its revelation were not obliged to act upon it until its meaning was clarified. As al-Jaṣṣāṣ explains: '... the *mujmal* is that word, whose ruling can be utilised in relation to its situational emergence and which is dependant upon clarification in [cases] other than that.'²³ Later on in his treatise, he spells this out further by insisting that the *mujmal* may be implemented in the minimum portion that is known, while yet holding out for further clarifications.²⁴ Essentially this means that *ribā*, as practised and understood in pre-Islamic Arabia was explicitly prohibited with immediate effect, but also that the door remained open for additional transactions to be included under its rubric.

al-Jaṣṣāṣ then splits the *mujmal* into two types:

1. That in which the obscurity is due to the word itself, such that those to whom it is addressed are unaware of its meaning.
2. That in which the obscurity is not due to the word itself, but rather, due to an external factor.

After giving various examples of the former category, he goes on to say '... and from this type are the juridical terms (*asmā' al-shar'*) which are enacted for meanings not endowed [purely] through language.'²⁵ Common examples of these juridical terms include the words *ṣalāt* (prayer), *zakāt* (alms), and *ṣawm* (fasting).²⁶ These words which only have religious applications are significant examples as they show that a juridical term has no meaning other than that given to it by Islamic law. The linguistic meaning in these terms is regarded as

²² al-Dabbūsi, *Taqwīm al-Adilla*, 118.

²³ al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, vol. 1, 64.

²⁴ Ibid, vol. 1, 328.

²⁵ Ibid, 65; also see Marie Bernand, "Ḥanafī Uṣūl al-Fiqh through a Manuscript of al-Jaṣṣāṣ," *Journal of the American Oriental Society* 105, no. 4 (1985): 629.

²⁶ al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, vol. 1, 68-69.

obsolete when these words are found in the sacred texts, unless of course there is an indication that the original meaning is intended.

Putting *ribā* into this category is significant as it means that this term has only one meaning and that meaning is to be applied wherever the word is found in the sacred texts. This is clearly mentioned later on in al-Jaṣṣāṣ' treatise, when he is dealing with the net rule (*ḥukm*) of the *mujmal*. Here, he says regarding the juridical terms, that once these words have become established in their juridical meanings, then whenever they are used, that meaning will be assumed to be its primary meaning.²⁷ The implication here is that the word *ribā* is discerned to have a single meaning, not one specific to the Qur'ān and another specific to the Sunna, but rather one which encompasses all the various explications of *ribā* found in these two sources.

al-Jaṣṣāṣ goes on to say that there are two consequences of the *mujmal*:

1. The requirement to immediately subjugate one's soul or prepare one's mind for the impending ruling once the clarification appears.
2. Once the clarification occurs then the obligation is connected to the preceding injunction.²⁸

The second of these two points is critically important to our discussion, as it connects the clarification to the original Qur'ānic prohibition and shows that the Ḥanafīs intend to interpret *ribā* as a juridical term in which all subsequent Prophetic additions are linked to the original Qur'ānic injunction.

²⁷ Ibid, vol. 1, 334.

²⁸ al-Jaṣṣāṣ, *al-Fuṣūl fī al-Uṣūl*, vol. 2, 73.

1.1.5 Summary of the *ʿĀmm/Mujmal* Dispute

From this section we can see, summarily, that the Mālikīs have invariably declared *ribā* to be *ʿāmm*. Directly opposed to them are the Ḥanafīs who deem it to be *mujmal*. The Shāfiʿīs, however, appear to be in disagreement with some scholars arguing on each side.²⁹ In terms of identifying these results with the general characteristics of the different schools of law, it is clear that both the Ḥanafīs and the Mālikīs have coherently articulated a position in their *uṣūl* which, as will be witnessed later on, has a manifest import on their detailed legal rules. The Shāfiʿīs, it is clear, do not have a consistent stance on this point and, correspondingly, their elaboration of their substantive doctrine is not as firmly wedded to such general principles as the other two Schools.

1.2 *Ribā* in the Ḥadīth

The Qurʾānic prohibition of *ribā* was made in the context of the contemporary practice of Arabian commerce. In the ḥadīth literature these pronouncements are endorsed and augmented by additional rules which serve to extend the ambit of the *ribā* rules. These additional rules are the subject of this section and the aḥādīth in which they are mentioned are presented below together with an explanation of their application.

1.2.1 *Ribā al-Faḍl* and *Ribā al-Nasāʿa*

The following aḥādīth mention the additional forms of *ribā* proscribed by the Sunna:

1. ʿUbāda ibn al-Ṣāmit (ra) relates that the Messenger of Allah (pbuh) said ‘Sell gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for

²⁹ al-Qurṭubī claims that the majority of jurists (*jamhūr al-fuqahāʾ*) consider *ribā* to be *ʿāmm*. See his *al-Jāmiʿ li Aḥkām al-Qurʾān*, vol. 3, 356. This does not, however, appear to be correct, and in fact from the Mālikī School Ibn Rushd al-Ḥafīd, was in agreement with the Ḥanafī opinion. See Abū al-Walīd Muḥammad ibn Aḥmad ibn Rushd, *al-Muqaddimāt al-Mumahhidāt* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2002), vol. 2, 179.

salt, like for like, in equal amounts [and] hand to hand. If the genera differ then sell as you wish as long as it is hand to hand.'³⁰

2. Abū Sa'īd al-Khudrī (ra) relates that the Messenger of Allah (pbuh) said '[Sell] gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt, like for like, hand to hand. And whosoever increases or demands an increase has engaged in usury. The taker and the giver are, in [the act], equal.'³¹

These aḥādīth make two requirements in the sale of these specific commodities: the first requirement, for the items to be sold 'like for like', demands quantitative equality in the items exchanged. The second requirement that the transaction be 'hand to hand' necessitates that the delivery of the goods be made in the contractual session. These two requirements are clear from the wording of the ḥadīth itself and the *ribā* which ensues from a failure to observe these requirements, is known as *ribā al-faḍl* and *ribā al-nasā'a*, respectively. *Ribā al-faḍl* hence refers to the excess that results from quantitative disparity, whereas *ribā al-nasā'a* refers to a delay in delivery or payment beyond the contractual session.

These aḥādīth, self-evidently, explicate the above forms of *ribā* with reference to transactions in which both items of exchange belong to one genus, i.e. when gold is exchanged for gold or silver for silver or wheat for wheat etc. On such transactions, the ḥadīth stipulates that the items exchanged must be the same weight or volume; 5kg of gold must therefore be exchanged for 5kg of gold, no more and no less. If 5kg of gold are sold for 6kg of gold, the extra 1kg amounts to *ribā al-faḍl*. This is true even if the transaction is conducted with immediate delivery of both items. If 5kg of gold are exchanged for 5kg of gold and one of the items is delivered after the contractual session this violates the requirement of a 'hand to hand' exchange and constitutes *ribā al-nasā'a*. Again, this is the case even though both items

³⁰ Muslim ibn al-Ḥajjāj al-Qushayrī al-Naysābūrī, *Ṣaḥīḥ Muslim* (Liechtenstein: Thesaurus Islamicus Foundation, 2000), vol. 2, 676 (ḥadīth no. 4148).

³¹ Ibid, vol. 2, 676 (ḥadīth no. 4149).

are quantitatively equal, i.e. the mere fact of a delay in the delivery is regarded as *ribā al-nasā'a*, even though the amounts exchanged are equivalent.

1.2.2 The Two Groups

All the Schools of Islamic law agree that the six commodities mentioned in the two aḥādīth are divided into two groups; group one consists of gold and silver and group two of wheat, barley, dates and salt. They also agree that *ribā* only occurs from an exchange of commodities from within each group and that if items are exchanged between the groups there is neither *ribā al-faḍl* nor *ribā al-nasā'a*. So, in an exchange of a group one item for a group two item, such as gold for barley or silver for wheat, there is no *ribā* and the exchange is not conditioned by quantitative equivalence or immediate delivery. In the matrix below the transactions in which *ribā* cannot occur are marked with an X.

		Group One		Group Two			
		Gold	Silver	Wheat	Barley	Dates	Salt
Group One	Gold	RF + RN	RN	X	X	X	X
	Silver	RN	RF + RN	X	X	X	X
Group Two	Wheat	X	X	RF + RN	RN	RN	RN
	Barley	X	X	RN	RF + RN	RN	RN
	Dates	X	X	RN	RN	RF + RN	RN
	Salt	X	X	RN	RN	RN	RF + RN

Table 1. *Ribā* and the Six Commodities (RF – *ribā al-faḍl*, RN – *ribā al-nasā'a*)³²

³² The only point of disagreement in this table is that the Mālikīs regard wheat and barley as one *jins* and hence both types of *ribā* may occur in their exchange. See Ibn Rushd, *al-Muqaddimāt*, vol. 1, 358.

This table shows where *ribā* cannot occur and also where the different types of *ribā* can occur. The importance of dividing the commodities into two groups should now be apparent as *ribā* does not operate between the items of each group. After dividing the commodities into two groups, the maxim mentioned in the first ḥadīth – If the genera differ then sell as you wish as long as it is hand to hand – can be applied to each group separately. For example, in group one, if gold is exchanged for silver, which are regarded as different genera, then there is no possibility of *ribā al-faḍl* occurring but there is of *ribā al-nasā'a*. This means that within the group, quantitative equivalence is not necessary in exchanges of different genera, but delivery of both items must be made in the contractual session otherwise there will be *ribā al-nasā'a*. Similarly within the second group; if, for example, wheat is exchanged for salt, or barley for dates, the quantities may vary, but the transaction must be hand to hand. The result is that the proscription of *ribā al-faḍl* requires quantitative equivalence between items belonging to the same genus, whereas the proscription of *ribā al-nasā'a* is not limited to exchanges within a specific genus but rather to exchanges within a group. Therefore, within each group, both *ribā al-faḍl* and *ribā al-nasā'a* can occur in exchanges of items of the same genus whereas only *ribā al-nasā'a* can occur if the genera are different.

1.2.3 Ratio of the Two Groups

Apart from the Zāhirīs and a few other jurists, most of the scholars agree that the rules of *ribā al-faḍl* and *ribā al-nasā'a* are extendable to other commodities.³³ They differ, however, in identifying the ratio. In general, the approach of the various jurists can be expressed in three opinions which identify the critical characteristics of group one and two, respectively, as follows:

³³ Qatāda, Ṭawūs, and 'Uthmān al-Battī, together with Dawūd al-Zāhirī, are the prominent antagonists to extending the rules beyond these six commodities. See 'Abd al-'Azīm Jalāl Abū Zayd, *Fiqh al-Ribā* (Beirut: Mu'assasat al-Risāla Nāshirūn, 2004), 124-6.

1. Currency and foodstuffs,
2. Weight and measure,
3. Currency and foodstuffs, but only if sold by weight or measure.

The first opinion is held by the Mālikīs, the Shāfi'īs, and is one of three opinions in the Ḥanbalī School. Although it is not the preferred opinion of the Ḥanbalīs, it is favoured by Ibn al-Qayyim. The second opinion is held by 'Ammār (ra) from the Companions, the Kufan jurists Ibrāhīm al-Nakha'ī and Sufyān al-Thawrī, and the Madīnan traditionist al-Zuhrī. It is also the opinion of the Ḥanafīs and the dominant opinion in the Ḥanbalī School. The last opinion belongs to the eminent Madīnan jurist Sa'īd ibn al-Musayyab, Abū Thawr and is one of the minor opinions in the Ḥanbalī School.³⁴

To demonstrate the markedly different approach of the Schools we will present their views and consider their hermeneutical evidences. The Ḥanbalīs, whose three opinions coincide with that of the other Schools, will not be given a separate treatment, although the theory of Ibn al-Qayyim, a prominent reformer within the School, will be elaborated separately. The Mālikīs and Shāfi'īs, who have similar opinions, will be presented together to show both their commonalities and their differences. Finally, the method of the Ḥanafīs will be elucidated. The importance of the ratio is borne out when we see how the *ribā* rules are extended not only to other commodities but also into other areas of the law. This presentation will also serve to highlight the critical points of divergence between the Schools and the textual evidences they adduce in support of their opinions.

When putting forward their opinions, jurists employ different argumentative methods. The first, and more forceful, is to present a proof-text (*dalīl*) in the form of a verse of the Qur'ān

³⁴ For a simplified useful presentation, which includes all four *madhāhib* and also covers the *Zāhirīs* and the *Ibādīs*, see, Saleh, *Unlawful Gain and Legitimate Profit*, 15-16.

or narrations from the ḥadīth literature. These often include non-prophetic narrations, such as opinions or rulings given by the companions or even the successors.³⁵ The second is to use systematic arguments, *istidlāl*, which attempt to demonstrate the harmony of the jurists' inference to the established hermeneutically-based legal superstructure. Both forms of argument will be presented for each School.

1.2.3.1 The Mālikī-Shāfi'ī Method

The Mālikīs and the Shāfi'īs identify the pertinent characteristics of the first group to be their universal recognition as currency (*thamaniyya*), and in the second group that all the commodities are foodstuffs (*tu'miyya*).³⁶ The proof-text for this will be shown followed by an examination of how each of these Schools subsequently develops its own application of the rules.

1.2.3.1.1 The *Dalīl* for the Mālikī-Shāfi'ī Ratio

al-Shāfi'ī, in his *magnum opus*, the *kitāb al-Umm*, narrates a number of aḥādīth relating to the *ribā* prohibition and then sets out to explain the basis of the two groups. He begins with gold and silver and explains that they are different to all other things because they constitute the price of other things. By this he means that these metals are unique in their function as currencies for purchasing other goods. This distinct inherent utility, he argues, precludes that any other items should be regarded as analogous to them.³⁷ The Mālikīs employ similar reasoning as can be seen in the work of the Andalusian Ibn Rushd. He similarly argues that gold and silver are not analogous to other commodities and supports his argument by invoking juridical unanimity on the point that gold and silver may be exchanged for all

³⁵ These are known as ḥadīth *mawqūf* and ḥadīth *maqṭū'* respectively.

³⁶ Wahba al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhū*, 4th ed. (Damascus: Dār al-Fikr, 1997), vol. 5, 3716-3719.

³⁷ Abū 'Abdullāh Muḥammad ibn Idrīs al-Shāfi'ī, *Kitāb al-Umm* (Beirut: Dār al-Kutub al-'Ilmiyya, 1993), vol. 3, 24-25.

fungibles sold by weight or measure with a delay in delivery.³⁸ The implication being that even the jurists who regard the ratio as weight and measure, make an exception to the rules for gold and silver in recognition of their unique function as ubiquitously acceptable currencies.

The second ratio of the Mālikīs and Shāfi'īs is foodstuffs and finds a textual basis in the following prophetic tradition:

Ma' mar ibn 'Abdullah (ra) related that ... I used to hear the Messenger of Allah (pbuh) say '[Sell] food for food [only if it is] like for like.'³⁹

This ḥadīth shows that the underlying factor in group two of the six commodities is the fact that they are foodstuffs. The ruling given here demands equivalence in exchanges of all foodstuffs of one genus, and is not specifically restricted to the six items mentioned in the other tradition. This implies that the previous tradition is merely a specific application of a more general rule enunciated here.

The ruling in this ḥadīth is linked to a derivative word (*ism mushtaqq*), which is *ṭa'ām*, foodstuff and the principle according to the scholars of *uṣul al-fiqh* is that 'when a ruling is linked to a derivative word it indicates that the meaning, from which the word is derived, is the ratio of the ruling'.⁴⁰ For example, in the Qur'ānic verse which deals with the punishment for stealing, the verse reads: *al-sāriq wa al-sāriqa faqṭa 'ū aydiyahumā* – The male and female thief, you must cut [off] their hands (5:38). The scholars of *uṣūl* argue that the ratio for cutting is theft, *sariqa*, because firstly, the verse mentions the punishment linked to a derivative word, namely *al-sāriq*, and secondly because the meaning which is in this word, is not the thief but

³⁸ Ibn Rushd, *al-Muqaddimāt al-Mumahhidāt*, vol. 1, 347, 359.

³⁹ Muslim, *Ṣaḥīḥ*, vol. 2, 678 (ḥadīth no. 4164).

⁴⁰ 'Anna al-ḥukm idhā 'allaqa bi ism mushtaqq dalla 'alā anna al-ma'nā alladhī ushtuqqa minhū al-ism huwa 'illa al-ḥukm. See al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 5, 3719; al-Māwardī, *al-Ḥāwī al-Kabīr*, vol. 5, 86.

rather the action of theft itself.⁴¹ The ratio is hence derived from a ruling which is expressly connected, in a proof-text, to an *ism mushtaqq*. Applying this argument to the ḥadīth mentioned above, the demand for equivalence is linked to the derivative word *ṭa'ām*, which means foodstuff, and the ḥadīth therefore indicates this to be the characteristic which is causal to the *ribā* rules.

The Mālikīs and Shāfi'īs agree on this much, but in identifying the scope of the ratio of foodstuff, their doctrines substantially diverge. For the Shāfi'īs, foodstuff includes anything which is capable of being a source of nourishment as opposed to being limited to food proper, and so may include medicines and seasonings.⁴² If one looks at the *uṣūlī* argument given above, then strictly speaking it favours the interpretation of the Shāfi'īs because the principle is to derive the ratio from the *meaning* in the derivative word and not from the derivative word itself. So instead of making food the ratio, it is more accurate to allocate it to the linguistic root meaning of *ṭa'ām* which is *ṭu'm*. This is the descriptive element of the word food, as opposed to food itself and implies a wider application.

The Mālikīs, on the other hand, only adopt this broad meaning (with the exception of medicines) with regard to *ribā al-nasā'a*. When it comes to *ribā al-faḍl*, they restrict the meaning of foodstuff with two conditions; namely that it should be a staple food and also that it should be storable.⁴³ They infer this from the ḥadīth of the six commodities, where the four foodstuffs mentioned are wheat, barley, salt and dates. All of these items are characterised by the fact that they are staple and storable. The Mālikīs further argue that these items are functionally representative; in that, wheat and barley fulfil the basic dietary requirements and

⁴¹ al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 5, 3719; al-Māwardī, *al-Hāwī al-Kabīr*, vol. 5, 86.

⁴² al-Shāfi'ī, *Kitāb al-Umm*, vol. 3, 25-6.

⁴³ Ibn Rushd, *Bidāyat al-Mujtahid*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 1996), vol. 2, 160.

thus represent foodstuffs such as rice and corn; dates are both sweet and storable and represent foodstuffs such as sugar, honey and raisins, and salt, which is a necessary ingredient in the preparation of food, indicates other seasonings, like pepper and herbs.⁴⁴

1.2.3.1.2 The *Istidlāl* for the Mālikī-Shāfi'ī Ratio

The *istidlāl* for the two ratios of food and money is, as expected, similar in both Schools. They argue that the Sharī'a has augmented the conditions of normal contract permissibility in these six specific commodities with two extra provisions requiring equivalence and immediate delivery. Now, it is already known that whenever extra stipulations are mandated, the reason is invariably due to a meaning in the exchange items which implies a heightened risk, *ziyādat al-khaṭr*. This can be noted, for example, in the marriage contract, where over and above the normal conditions of offer and acceptance, the Sharī'a demands that a woman's guardian conduct her marriage contract on her behalf and also that the marriage be attested by two upright witnesses. These two extra provisions act as safeguards in a contract which is of palpably more significance than an ordinary commercial contract.

Following this reasoning leads them to search for a cause in these contracts which makes them of such critical importance that extra conditions are stipulated in their trade. They subsequently observe that the *ribā* rulings pertain to currency and foodstuffs. The preservation of human life is premised upon the availability of staple foods and the role of money, as a medium of exchange, is central to the economic activity of a society.⁴⁵ Both of these categories are of great importance to the material well being of each and every human being, such that there must be some form of protection in their trade. The two additional stipulations, therefore, act to prevent the spread of possible injustices in the economic supply of these

⁴⁴ See Abū Muḥammad 'Abd al-Wahhāb 'Alī ibn Naṣr, *al-Ma'ūna* (Beirut: Dār al-Kutub al-'Ilmiyya, 2004), vol. 2, 5-6; Abū Zayd, *Fiqh al-Ribā*, 157.

⁴⁵ See Abū Zayd, *Fiqh al-Ribā*, 155-7.

objects. By extensions, all other commodities which are similar in attribute, either as foodstuffs or currencies and are not mentioned in the ḥādīth literature explicitly, are also governed by the rules of *ribā* as they too are regarded as vitally important.

Additionally, it can be observed that because the extra stipulations are due to the *ziyādat al-khaṭr* of the exchange commodities, genus plays only a secondary role and is not regarded as a distinct ratio, but is rather designated as a necessary condition (*shart*).⁴⁶ Genus is hence only operative as a subsequent condition of *ribā al-faḍl* if one of the two ratios (i.e. foodstuffs or currency) is already present. If, for example, someone sells two food items, like barley and salt, or two monetary items like gold and silver, then the presence of the ratio in both cases means that delay is not permitted, although quantitative disparity is allowed due to the items belonging to different genera. If wheat for wheat is sold, or silver for silver, then we can see that the ratio is again present in both cases, and hence delay is proscribed. Additionally, because the items are of the same genus, there needs to be quantitative equivalence. This means that exchanging items belonging to the same genus will not be subject to the rules of *ribā* unless they are considered to be foodstuffs or currency. So the exchange of iron for iron or wool for wool or camels for camels can be done with quantitative disparity and with deferred delivery. This is different to the Ḥanafīs, for whom genus itself is one of the ratios.

1.2.3.2 The Ḥanafī Method

The Ḥanafīs, it will be recalled, determine the ratio in the six commodities to be linked to the mode of measurement. In group one (gold and silver) both items are sold by weight, whereas in group two, all the items are sold by volume. The ratio inferred here is called *qadr* and refers to the susceptibility of the object to quantifiable measurement either by weight or

⁴⁶ This is specifically mentioned as the opinion of the Shāfi'īs and also appears to be the opinion of the Mālikīs. See *ibid*, 170-1; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 5, 3719.

volume. The second ratio is genus. As with the presentation of the Shāfi'ī's opinion, firstly their textual evidences will be presented, then their *istidlāl* will be shown.

1.2.3.2.1. The *Dalīl* for Genus

The hermeneutic basis for the ratio of genus, is primarily what has already been mentioned in the two aḥādīth of Abū Sa'īd al-Khudrī (ra) and 'Ubāda ibn Ṣāmit (ra), where the ruling was given that 'if the types differed then sell as you wish'. The type, *ṣinf*, is taken here to mean the genera mentioned in the ḥadīth, as all the items mentioned belong to different genera.⁴⁷ It may be recalled that Shāfi'ī himself, noticing the importance of the genus in the *ribā* equation, did not neglect it completely, but rather made it a condition as opposed to a cause. This subtle distinction is not merely a pedantic *uṣūlī* rearrangement as it does have an impact on the substantive rulings. For the Shāfi'īs and the Mālikīs, it relegates genus to a secondary role; effective only in the presence of a ratio. What the Ḥanafīs are proposing is that genus itself is a ratio, effective on its own, like *qadr*. This means that whenever products of the same genus are sold, delay is prohibited, even if they are not fungibles sold by weight or volume.⁴⁸ Hence, cloth, animals, eggs, in fact, all commodities now fall into the preserve of the *ribā* prohibition if sold within the same genus, although the *ribā* which is occasioned by genus is only *ribā al-nasā'ā*.

⁴⁷ For a discussion on genera, see Baber Johansen, "The Valorization of the Human Body in Muslim Sunni Law," in *Law and Society in Islam* ed. Devin J. Stewart, Baber Johansen and Amy Singer (Princeton: Markus Wiener Publishers, 1996), 80-2; Brannon M. Wheeler, *Applying the Canon in Islam. The Authorization and Maintenance of Interpretive Reasoning in Ḥanaḥī Scholarship* (New York: SUNY Press, 1996), 216-220.

⁴⁸ Muḥammad ibn al-Ḥasan al-Shaybānī, *al-Ḥujja 'alā Ahl al-Madīna* (Beirut: 'Ālam al-Kutub, 1968), vol. 2, 644-647.

The Ḥanafīs find textual support for this in the following evidences:

1. Ḥasan (ra) narrated from Samra (ra) that the Messenger of Allah (pbuh) prohibited the sale of animals for animals with a delay.⁴⁹
2. Jābir ibn 'Abdullah (ra) narrates that the Messenger of Allah (pbuh) said '[There is] no problem [in exchanging] animals, two for one, hand to hand, [whereas] there is no goodness in it, [if it is] deferred.'⁵⁰

These aḥādīth prohibit the sale of animals for animals with a delay. The Ḥanafīs infer that the prohibition of delay here is *ribā al-nasā'ā*, as the second ḥadīth clearly permits a quantitative inequality – 'two for one'. It should also be noted that because *qadr* is absent (i.e. animals are not fungible) there must be another ratio at work here. Also worth mentioning, is that the ratios which the Mālikīs and Shāfi'īs propose are not present either, as live animals are neither money nor foodstuff. So apart from the ratios of measurement, foodstuff and currency what else could be the cause of the prohibition of delay, the Ḥanafīs infer that the only other possible effective cause is that the commodities belong to the same genus.

The Ḥanafīs opinion is further corroborated by the rulings given by various Companion and Succesor jurists:

1. [It is narrated] that 'Ammār ibn Yāsir (ra) said 'one slave [maybe] better than two slaves, and one camel [maybe] better than two camels, and one garment [maybe] better than two garments, [and hence, there is] no problem in [exchanging them, as long as it is] hand to hand, because *ribā* is only in the delay except in what is measured or weighed.'⁵¹

⁴⁹ Abū Ja'far Aḥmad ibn Muḥammad al-Taḥāwī, *Sharḥ Ma'ānī al-Āthār* (Beirut: Dār al-Kutub al-'Ilmiyya, 2006), vol. 3, 328-332.

⁵⁰ al-Shaybānī, *al-Hujja*, vol. 2, 495. For the provenance of these traditions, see *ibid*, 495, n.6.

⁵¹ Abū Bakr 'Abdullah ibn Muḥammad ibn Abī Shayba, *al-Kitāb al-Muṣannaf fī al-Aḥādīth wa al-Āthār* (Beirut: Dār al-Kutub al-'Ilmiyya, 1995), vol. 4, 310.

2. I (the narrator) asked Abū Hurayra (ra) about selling one sheep for two sheep with a delay; he prohibited me and said 'No! Unless it is hand to hand'.⁵²
3. [It is narrated] from Mujāhid that he said '[There is] no problem [in exchanging] one egg for two eggs, [if it is] hand to hand'.⁵³
4. Ibn 'Uyayna says 'I asked Ayyūb about [exchanging] one garment for two garments with a delay and he said [that] Muḥammad used to disapprove of it'.⁵⁴

The first tradition, from the companion 'Āmmār ibn Yāsir (ra), appears to be in congruity with the position of the Ḥanafīs. By giving three examples of commodities, all of which are non-fungible, it becomes clear that the ratio of *qadr* is immediately discounted. Also, because the items are neither foodstuffs nor money, the ratio of the Mālikīs and Shāfi'īs is dispelled. So we are left with three commodities which are being sold within their own genus. The ruling that emerges is that quantitative excess is permitted but a delay in delivery is not. This is taken from the companion's words '*ribā* is only in delay' i.e. when the items are non-fungible and of the same genus. The next three traditions, in sheep, eggs and garments, all express the same ruling.

1.2.3.2.2 The *Dalīl* for *Qadr*

The proof-text for the second ratio of *qadr* is located in the following Prophetic tradition and the subsequent ruling of a leading Madīnan jurist.

1. [It is narrated] from 'Ubāda (ra) and Anas ibn Mālik (ra) that the Prophet (pbuh) said '[Sell] what is weighed like for like, if it is one genus, and [sell] what is measured in the same manner, but if the [items] are two different genera then there is no problem'.⁵⁵

⁵² Ibid, 312.

⁵³ Ibid.

⁵⁴ Ibid, 311. The Muḥammad mentioned in this tradition is Muḥammad ibn Sīrīn the famous Baṣran jurist and the teacher of Ayyūb Sakhtiyāni (the narrator).

2. Ma'mar informed us that al-Zuhrī said 'Everything which is weighed is to be dealt with in the [same] way as gold and silver, and everything which is measured is to be dealt with in the [same] way as wheat and barley.'⁵⁶

In the first ḥadīth, the condition of equivalence has been stipulated with regard to *wazn* and *kayl*, i.e. weight and volume. This is an explicit mention of *ribā al-faḍl* with regards, not to food or money, but to the measurement of these fungibles. The subtlety of distinguishing between the method of measuring and the commodities themselves is an important point in the Ḥanafī jurists' argument. The second ḥadīth shows one of the great Successor jurists making an analogy in line with the Ḥanafī opinion, although somewhat predating them in this. His differentiation of things measured by weight to be treated as gold and silver, while those things measured by volume to be treated like wheat and barley, is clear in identifying the critical feature dividing the six commodities into two groups.

This leads us to the second evidence which is based upon a hermeneutical method from *uṣūl al-fiqh*, known as *iqtiḍā' al-naṣṣ*. This method is used to make an addition to the text, which is required in order to give it a coherent meaning. Without this required addition, the sentence would not give a conceptually valid meaning and hence fail in its juridical function.⁵⁷ This is similar to the method of *ḥadhf* of the grammarians, which assumes additions to the text for syntactical purposes. In the *uṣūlī* notion of *iqtiḍā'* the necessity arises, not out of syntax, but rather to discern the juridical import of the prophetic ruling. al-Sarakhsī presents this proof as follows:

In his (i.e. the Prophet (pbuh)) statement: 'Sell wheat for wheat', the sale is not conducted using [simply the term] wheat because this term may be used for a single grain, which no-one would sell [on its own]

⁵⁵ 'Alī ibn 'Umar al-Dāraqūṭnī, *Sunan al-Dāraqūṭnī* (Beirut: Dār al-Kutub al-'Ilmiyya, 2003), vol. 2, book 3, 14-15 (ḥadīth no. 2829).

⁵⁶ Abū Bakr 'Abd al-Razzāq ibn Hammām al-Ṣan'ānī, *al-Muṣannaf* (Johannesburg: al-Majlis al-'Ilmī, 1983), vol. 8, 37.

⁵⁷ Fakhr al-Islām al-Bazdawī, *Uṣūl*, printed with its commentary *Kashf al-Asrār*, by 'Alā' al-Dīn 'Abd al-'Azīz ibn Aḥmad al-Bukhārī (Beirut: Dār al-Kitāb al-'Arabī, 1997), vol. 2, 438-39.

... and even if it was sold as such, it would not be permitted because it is not a legally recognised object of sale.⁵⁸ And it is known by necessity that the meaning of wheat is the legally recognised object of sale. And its exchange value cannot be determined except through measurement ... and hence it is as though he (the Prophet (pbuh)) said – Sell gold weighed for gold and wheat measured for wheat.⁵⁹

These additional adjectives, to the words gold and wheat, now give them the explicit quality of being measured and weighed commodities. Using another *uṣūlī* principle, he states that ‘the adjective of a noun operates in the capacity of a ratio ... and thus what is established by *iqtiḍā’ al-naṣṣ*, is equivalent to what has been explicitly mentioned.⁶⁰ By this technique, the ratio of the Ḥanafīs is read directly into the proof-text.

1.2.3.2.3 The *Istidlāl* for Measurement and Genus

al-Sarakhsī begins his presentation of the *istidlāl* by clarifying a subtle point, which although it may appear to be pedantic, is actually quite significant as it highlights the paradigmatic basis of the Ḥanafī approach. He points out that the ruling of *ribā*, contrary to what many might assume, is not a prohibition of excess, *ḥurmat al-ziyāda*, but rather an obligation of equivalence, *wujūb al-mumāthala*.⁶¹ His point is not to negate the other, but merely to say that *the latter is the cause of the former* and not the other way round, as is commonly assumed. Clearly these are two sides of the same coin, as any excess will nullify the equivalence and vice versa, a lack of equivalence can only be due to an excess in one of the countervalues.⁶² His specific emphasis on the *wujūb al-mumāthala*, however, portrays a deeper analytical point.

⁵⁸ For the meaning of legally recognised object, *māl mutaṭawwim*, see Muḥammad Abū Zahra, *al-Milkiyya wa Naẓariyyat al-‘Aqd* (Cairo: Dār al-Fikr al-‘Arabī, 1996), 48-49; Muḥammad Wohidul Islam, “Al-Mal: The Concept of Property in Islamic Legal Thought,” *Arab Law Quarterly* 11, no. 4 (1999): 361-368; Mahdi Zahraa and Shafaai M. Mahmood, “Definition and Scope of the Islamic Concept of the Sale of Goods,” *Arab Law Quarterly* 16, no. 3 (2001): 215-238.

⁵⁹ al-Sarakhsī, *al-Mabsūt*, vol. 6, book 12, 137.

⁶⁰ ‘*Wa al-ṣifa min ism al-‘alam yajrī majrā al-‘illa li al-ḥukm ... wa mā thabata bi muqtaḍā al-naṣṣ fahuwa ka al-manṣūṣ.*’ Ibid, vol. 6, book 12, 137.

⁶¹ Ibid, vol. 6, book 12, 137.

⁶² For two examples where this is not the case, see ibid, vol. 6, book 12, 138.

Equivalence is described by al-Kāsānī as a normative requirement in contracts of commutative exchange.⁶³ The notion of equality is major concern of the Ḥanafī jurists and is pursued thoroughly by them in the elaboration of contractual rights, obligations and permissibility.⁶⁴ If the inequality of an exchange contract results in a material benefit for one of the two parties and is superfluous to the actual exchange, then this excess is deemed to be without a compensation and hence akin to usury. al-Kāsānī explains that: ‘sale is a contract of exchange by way of compensation and equality in the two countervalues ... and so it is appropriate to deem every stipulated excess *ribā*’.⁶⁵ The significance of this approach is that it translates the usury prohibition, not as a specific requirement in the trade of certain commodities, but rather, *ribā* is deemed to be a violation of the normative requirement of contractual equality underlying all commercial exchange contracts. This implies that the scope of the usury prohibition is conceptually as large as commercial law itself.

If the import of the usury prohibition affects all commercial exchange contracts, the question arises as to why the ḥadīth specifically mentions only six items. The Ḥanafīs argue that the crucial point behind the ḥadīth is in articulating objective criteria for the legal measure of equivalence. Only non-equivalence which is objectively ascertained can be averted,⁶⁶ as opposed to that which is judged by subjective assessment. The Ḥanafīs’ explanation of what constitutes the legal measure of equivalence is premised on, and explains, the ḥadīth of the six commodities.

⁶³ al-Kāsānī, *Badā’i*, vol. 7, 236. Also see Hussein Hassan, “Contracts in Islamic Law: The Principles of Commutative Justice and Liberality,” *Journal of Islamic Studies* 13, no. 3 (2002) 262, 282-97.

⁶⁴ See Nahed Samour, “The Principle of “Just Exchange” in the Private and Public Spheres of Islamic Law: The Consequences of the Construction of Property and Proprietor for the Hanafi Woman,” in *Yearbook of Islamic and Middle Eastern Law*, ed. Eugene Cotran (Leiden: Kluwer Law, 2002), vol. 7, 85-95; Johansen, *Valorization*, 100, n.4.

⁶⁵ al-Kāsānī, *Badā’i*, vol. 7, 69.

⁶⁶ al-Kāsānī, *Badā’i*, vol. 7, 62.

The objective equivalence of objects can only be discerned for objects which are replaceable in kind i.e. those that are fungible. For example, 1 kg of wheat is, for commercial exchange purposes, deemed to be equivalent to another kg of wheat; likewise one *dirham* is equivalent to another. These items are regarded as legally equivalent such that in cases of destruction, compensation is awarded in kind as opposed to monetary value. This legal equivalence, the Ḥanafīs argue, is premised upon evaluating an object from two ontological aspects; its external form (*sūra*) and its meaning (*ma'na*). Equivalence in the external form is determined through quantified measurement, whereas equivalence in meaning is by identifying the genus.⁶⁷ A person who negligently destroys 5kg of wheat, for example, will be charged with replacing it with that which is equivalent in terms of both its external form i.e. 5kg and its internal meaning i.e. its genus as wheat. An object which matches these two aspects of form (*qadr*) and meaning (genus), presents a commercially acceptable equivalent. The Ḥanafīs thus infer the ratio of the usury prohibition to be *qadr* and genus as these are the sole determinants of legally-recognised objective equivalence.

In the six commodities mentioned in the ḥadīth it will be noted that all the items are fungibles, and so are replaceable in kind, and hence their inclusion in the *ribā* prohibition. al-Sarakhsī concludes that:

When it is established that the rule [of *ribā*] is an obligation of equivalence and it is inconceivable to apply a ruling in the absence of its locus, we come to know, a priori, that any object which does not accept [a measure of] equivalence, is not a commodity [susceptible to] *ribā*.⁶⁸

The rational argument given here for the notion of equivalence is, it must be noted, conditioned by the ḥadīth. This means that the measure of equivalence is determined by the text as opposed to rationality or market custom. This becomes apparent in two ways:

⁶⁷ Ibid, vol. 7, 62; al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 12, 139.

⁶⁸ al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 12, 139.

1. Firstly, when qualitative disparities occur in exchanges of quantitatively equal objects. For example, to exchange 5 kg of high quality gold for 5kg of low quality gold is acceptable to the Ḥanafīs and not considered usurious, although it could be argued that there is a clear advantage to one party. The Ḥanafīs, in fact, demand that as a condition to the ratio being effective, the notion of quality be dropped when objects in the same genus are exchanged for each other.⁶⁹
2. Secondly, other forms of measurement, such as length and counting are not included as measures indicative of equivalence. The only forms of measurement which are legally recognised for determining equivalence are weight and volume. These are therefore known exclusively as legal measures, *al-mi'yār al-shar'ī*.

For the Ḥanafīs, their rational argument conditioned by the ḥadīth, forms the basis for extrapolating the *riba* rules into other areas of commercial law. As will be shown later, the two points mentioned above, which show that the measures of objective equivalence are restricted to those upheld in the ḥadīth, is evidenced in their substantive doctrines and explains some points of divergence with the other schools.

1.2.3.2.4 Applying the Ḥanafī Ratios

al-Qudūrī has summarised the *modus operandi* of these rules in three sentences:

1. If the two ratios, i.e. legal measure and genus, are absent then both excess and delay are allowed.
2. If both ratios are present, then both excess and delay are prohibited.

⁶⁹ Ibid, vol. 6, book 12, 139; al-Kāsānī, *Bada'i*, vol. 7, 73.

3. If only one characteristic, either legal measure or genus is present, then excess is allowed and delay is prohibited.⁷⁰

Commenting on these rules al-Marghīnānī concludes that *ribā al-faḍl* occurs only when both ratios are present, whereas *ribā al-nasā'ā* occurs in the presence of a single ratio.⁷¹

Immediate exchange can thus be mandated if both exchange items are the same genus, or if they are sold by the same type of measurement. So in an exchange of gold for silver, where the legal measure is present but genus is absent, the presence of only one ratio means that equivalence is not necessary but exchange must be immediate, otherwise there will be *ribā al-nasā'ā*. The same rules apply if wheat is sold for dates, only the ratio of legal measure is present whereas genus is absent, and so only *ribā al-nasā'ā* needs to be avoided. Now in the scenario where we have the same genus, but different legal measures, again equivalence is not an issue but *ribā al-nasā'ā* is. This means that in exchanges of non-fungibles within the same genus, the only condition is that delivery must be immediate. For example one hundred metres of satin can be exchanged for ten metres of the satin, or seven pieces of fur for 8 pieces of fur, the only proviso being that the exchange of goods occur within the contractual session.

When both ratios are present then both conditions must be observed, so both quantitative equivalence and immediate delivery are required. This occurs when fungibles, and only fungibles, are exchanged with their own genus. Hence, in addition to the six commodities mentioned in the ḥadīth, *ribā al-faḍl* will also apply in an exchange of copper for copper, or rice for rice, or cement for cement etc; these must all be exchanged for equal amounts and without deferment.⁷²

⁷⁰ Aḥmad ibn Muḥammad al-Qudūrī, *al-Mukhtaṣar* (Multan: Maktaba Haqqāniyya, nd), 74.

⁷¹ Burhān al-Dīn Abū al-Ḥasan 'Alī ibn Abī Bakr al-Marghīnānī, *al-Hidāya* (np. Mişbah, nd), vol. 2, 79.

⁷² This, of course depends on whether these items are indeed sold as fungibles, the deciding factor being local custom, *'urf*. As opposed to the six commodities mentioned in the ḥadīth, which are not only perpetually

1.2.4 Summary of the Jurists' Positions

In this section, the hermeneutical approach of the four schools to the prohibition of *ribā* in the ḥadīth has been examined. The Ḥanbalīs have been noted for vacillating in identifying the *ratio legis* without a specific approach identifiable with their school, although individuals within the School do adopt specific opinions. Ibn al-Qayyim, for example, takes a very distinct approach and this will be dealt with later on. From the other three schools, the Mālikīs and Shāfi'īs adopt a similar approach, identifying foodstuffs and currency as the effective ratios. The former, however, establish a particularly nuanced framework in delineating the scope of these ratios relative to the different types of *ribā*. Finally the Ḥanafīs build the ratio through the notion of contractual equality, in which objective assessment of material excess is the underlying concern. The ḥadīth is interpreted in this light and hence weight and volume (the measure for the six commodities) are identified as sharī'a endorsed measures.

1.3 Integrating *Ribā al-Qur'ān* and *Ribā al-Sunna*

The outcome of the Ḥanafīs analysis on the Qur'ānic prohibition is that the verse prohibits a number of specific transactions, but that these transactions are not the defining notion of *ribā*. Three transactions were previously mentioned, which were contemporaneous to the *ribā* injunction. Instead of applying the injunction to all three transactions separately, the Ḥanafīs probe for a common denominator present in all three which is the locus of the rule. When looking at all three transactions what is common to each transaction, is that when the debt becomes due, the creditor demands that the debtor either pay up or extend the deadline by increasing the amount due. This is captured in their saying: 'either pay up or increase [what is

considered to be fungibles, but also the mode of measurement is not to be changed. So gold and silver will always be sold by weight and the other group (wheat, barley, dates and salt) by volume. In a dissenting opinion Abū Yūsuf declares that even these items are subject to *ʿurf*. See *ibid*, vol. 2, 80.

due]'.⁷³ This type of *ribā* is often referred to as either *ribā al-Jāhiliyya* or *ribā al-nasā'a*. In addition to this form of *ribā*, two additional types of *ribā* are proscribed in the prophetic ḥadīth, namely *ribā al-faḍl* and *ribā al-nasā'a*.⁷⁴

These are three generic meanings to which the term *ribā* refers to in the texts. However, after mentioning these three, al-Jaṣṣāṣ, goes on to conclude that '... on the whole, what the term *ribā* in the law, comprises of, is delay (*al-nasā'a*) and excess (*al-tafāḍul*).'⁷⁵ It seems that *ribā al-Jāhiliyya* has been subsumed under the Sunna types of *ribā*. To appreciate this, the meaning of these terms in a simple sale of gold for gold will be examined.

- *Ribā al-faḍl* is an excess in the same genus of fungibles (of weight or volume) in a spot transaction; so a transaction of 5kg of gold for 6kg of gold with immediate payment constitutes *ribā al-faḍl*.
- *Ribā al-nasā'a* is when 5kg of gold is exchanged for 5kg of gold and the delivery of either item is not immediate but rather deferred beyond the contractual session.
- *Ribā al-Jāhiliyya* occurs, for example, when 5kg of gold is due either from a loan or a credit sale and the creditor grants the debtor additional time to pay his debt in lieu of an increase in the amount owed to 6kg.

In this final form what has occurred is that 5kg has been exchanged for 6kg with a stipulated delay. The rules of *ribā al-faḍl* demand that 5kg should be exchanged for 5kg, which means that the additional 1kg constitutes an excess, *faḍl*. We also notice that according to the rules of *ribā al-nasā'a* this transaction should have occurred immediately due to both exchange items belonging to group one, which means that this contract also contains *nasā'a*. This implies that in *ribā al-Jāhiliyya* both *faḍl* and *nasā'a* are operative. Additionally, and more critically to

⁷³ The common phrase in Arabic is: *immā an taqḍī wa immā an turbī*.

⁷⁴ 'Wa ism al-ribā ya 'tawiruhū fī al-shar' ma 'ān, aḥaduhā al-ribā alladhī kāna 'alayhi ahl al-jāhiliyya wa al-thānī al-tafāḍul ... wa al-thālith al-nasā'a.' al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, 184.

⁷⁵ Ibid, vol. 2, 184.

note however, is the fact that not only are these two present, but, that the additional amount that constitutes the *faḍl*, is given in lieu of the additional time period which constitutes the *nasā'a*. Hence *ribā al-Jāhiliyya* is composed of the essential elements (*faḍl* and *nasā'a*) of the other two forms of *ribā*, albeit with each acting as the countervalue of the other.⁷⁶ This has been summed up by Prof. Nyazee, who describing the functioning of *nasā'a* and *faḍl* says:

‘They are like the two arms or hands of *ribā*. *Ribā* sometimes uses one hand and sometimes the other, but true *ribā* exists when both hands are clasped together.’⁷⁷

1.3.1 Credit sales, *Ribā* and the Time Value of Money

From the outset of the *ribā* prohibition, questions were raised as to the substantive difference between a credit sale and the rules of *ribā*. The Meccan traders are noted in the Qur'ān as saying: ‘Surely trade is the same as usury’.⁷⁸

Let us compare the two transactions:

- A normal credit sale in which a watch is sold for £60 to be paid for after two months.
- A credit sale where following the end of the time period an additional time period is added on, in lieu of an extra payment, e.g. the same watch bought for £50 with one month credit. When the debtor defaults, the creditor extends the period for an extra month adding ten pounds to the cost, totalling £60.

Now in both examples the result is that the watch is purchased for £60 to be paid after two months. The first transaction is however, permissible and the second is *ribā*. Although both transactions appear to be the same, one of these transactions places time as an express countervalue whereas the other does not, and it is this transaction which is prohibited. This

⁷⁶ ‘*Fa kānat al-ziyāda badal min al-ajal*’, see al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, 186.

⁷⁷ Imran Ahsan Khan Nyazee, *The Concept of Ribā and Islamic Banking* (Islamabad: Niazi Publishing House, 1995), 28. Note that Nyazee regards *nasī'ah* and *nasā'*, as interchangeable, whereas they are not. This is a common error and the cause of much confusion. *Nasā'a* is a delay, whereas *nasī'a* is when the delay is in exchange for an excess. See Rafīq Yūnus al-Miṣrī, *Fiqh al-Mu'āmalāt al-Māliyya* (Damascus: Dār al-Qalam, 2005), 111.

⁷⁸ ‘*Qālū innamā al-bay' mithl al-ribā*’ (2:275); Abū Zayd, *Fiqh al-Ribā*, 74-6.

means that the debtor is not really just buying a watch for £60, as in the normal credit sale, rather he is purchasing a watch plus one month (additional) delay for £60. The price is also split into two components; £50 for the watch and £10 for the delay. *Faḍl* is present in the extra £10 and *nasā'a* in the extra one month delay and each one is acting as the countervalue of the other, and this constitutes *ribā al-Jāhiliyya*.

From this analysis of *ribā al-Jāhiliyya* the Ḥanafīs also extract the specific point that time does not qualify as *māl*, the *res in commercio*, and that its commoditisation is implicitly annulled in the Qur'ānic prohibition. al-Ṭaḥāwī describing *ribā al-Qur'ān* says that when the debtor asks for a respite in lieu of an increase in the *dirhams* he owes, he is, in effect, 'buying time with money'.⁷⁹ al-Jaṣṣāṣ also highlights this point in his commentary of the verse which orders people to give up what remains of *ribā* (2:277), where he infers that the verse is thereby 'prohibiting that a countervalue be taken for time'.⁸⁰ The prohibition of time commoditisation is pursued relentlessly by the Ḥanafīs in their substantive doctrines, and is one of the hallmarks of their systematic application of the *ribā* injunction.

The central components of the *ribā* theory have now been identified; both components; *faḍl* and *nasā'a*, are demonstrably operative in the *ribā* prohibited in the Qur'ān and the Sunna. The difference between the two is that the transactions prohibited in the former are those in which the excess amount is given in lieu of the delay. This is called *ribā al-Jāhiliyya* or *ribā al-nasā'a*. This latter term is not to be confused with *ribā al-nasā'a*, which together with *ribā al-faḍl*, is what is prohibited in the Sunna. In the Sunna the components of Qur'ānic *ribā* have been singled out and the transactions in which they occur individually are prohibited. Having shown that both the *ribā* in the Qur'ān and that in the Sunna can be reduced to two types; *faḍl*

⁷⁹ 'Fa yakūn mushtariy li al-ajal bi māl', see al-Ṭaḥāwī, *Sharh Ma'ānī al-Āthār*, vol. 3, 334.

⁸⁰ 'Ḥaẓar an yu'khadha li al-ajal 'iwad', see al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, 186.

and *nasā'a*, the Ḥanafīs then go on to derive a definition from these two types, which they designate as the actual meaning of *ribā* as a juridical term.

1.3.2 The Definition

al-Sarakhsī has given the following definition for *ribā*: *Ribā* is that stipulated excess [which is] devoid of a countervalue in [a contract of] sale.⁸¹

There are four elements to this definition:

1. *al-faḍl* – the excess,
2. *al-khālī 'an al-'iwaḍ* – devoid of a countervalue,
3. *al-mashrūṭ* – stipulated,
4. *fī al-bay'* – in a sale transaction.

Each point will be analysed to show its jurisprudential context and its importance in the definition.

1.3.2.1 *al-Faḍl* – The Excess

The meaning of *al-faḍl* in this definition applies both to material excess, and also to an excess in time.⁸² al-Sarakhsī explaining the usage of the word *al-faḍl* in the prophetic ḥadīth⁸³ says

⁸¹ '*al-Ribā huwa al-faḍl al-khālī 'an al-'iwaḍ al-mashrūṭ fī al-bay'*', see al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 12, 127. Definitions by other Ḥanafī scholars are very similar and later accretions do not alter the substantive premises: al-Marghīnānī, (d.593) gives the following definition: *Ribā* is that stipulated excess [which] is due to one of the two contractors in an exchange [which is] devoid of a countervalue (*al-Hidāya*, vol. 2, 78). Later al-Tumurtāshī (d.1004) expands this with: '[*Ribā* is a] stipulated excess [which is] devoid of a countervalue, [based upon] a legal measure, for one of the two contractors, in an exchange contract' (Muḥammad ibn 'Abdullah al-Tumurtāshī, *Tanwīr al-Abṣār wa Jāmi' al-Biḥār*, printed with the commentary of Muḥammad ibn 'Alī al-Ḥaṣḥafī *al-Durr al-Mukhtār* (Beirut: Dār al-Kutub al-'Ilmiyya, 2002), 340). al-Marghīnānī has specified that the excess must go to one of the contracting parties, and al-Tumurtāshī has included this and added that the excess is known by the legal measure. al-Sarakhsī's definition can thus be taken as the basic formula as it concerns all the essential elements of the later definitions. The later additions signify a need to stress certain aspects previously assumed or understood, but later mentioned explicitly to remove any doubt. They are important insofar as they demonstrate an agreement on the underlying concepts and signify different attempts to capture those concepts in a single definition. These additions, which are no doubt correct, do not, however, change the substantive notion of *ribā* and hence it is al-Sarakhsī's definition which will be used.

⁸² Rafīq Yūnus al-Miṣrī, states that: 'It appears that it is difficult, to define *ribā*, [in a] single definition [which] encompasses all three types of *ribā*, and [thus] the attempts of the jurists remain obscure and difficult to comprehend'. He then goes on, to use al-Sarakhsī's definition to show the meaning of *ribā al-faḍl*, assuming that

that this 'incorporates excess in amount and it incorporates excess in state, such that one of the two [represents] cash and the other delay, and both of them are intended by the [prophetic] statement'.⁸⁴ By virtue of this interpretation, i.e. that excess refers both to the commodity and the time factor, al-Sarakhsī ensures that his definition covers the quantitative excess in *ribā al-faḍl* and the excess of delay in *ribā al-nasā'a* and also when they occur together in *ribā al-Jāhiliyya*.⁸⁵ Another important point is that the meaning of *faḍl* is not to be understood linguistically, as any excess, but rather, as that excess which is specified by the law to be an excess.⁸⁶

1.3.2.2 *al-Khālī 'an al-'Iwāḍ* – Devoid of a Countervalue

In commercial exchange the jurists identify a legal countervalue using the term *māl mutaḳawwim*.⁸⁷ This binary term is made up of two separate concepts; 1) *māl*, which refers to any object; goods and property as long as they have a tangible utility (*al-intifā' ḥaqīqa*), and 2) *mutaḳawwim*, which means that the object's utility is upheld by the law (*al-intifā' shar'*) and hence the object carries an exchange value.⁸⁸ These two terms operate individually and are not always complementary, such that not all things considered as *māl* are regarded by the law as having an exchange value, and conversely, not all things with an exchange value are *māl*. This means that countervalues in a synallagmatic contract fall into one of four typologies:

faḍl in the definition refers to *ribā al-faḍl* alone. See the author's *al-Ribā wa al-Ḥasm al-Zamanī fī al-Iqtiṣād al-Islāmī* (Damascus: Dār al-Maktabī, 2000), 11-12.

⁸³ 'Wa al-faḍl al-ribā'.

⁸⁴ al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 12, 130.

⁸⁵ Rafīq Yūnus al-Miṣrī, *al-Jāmi' fī Uṣūl al-Ribā*, 2nd ed. (Damascus: Dār al-Qalam, 2001), 169.

⁸⁶ This is perhaps why al-Tumurtāshī has included it in his definition by adding the proviso, using a legal measure.

⁸⁷ Abū Zahra, *al-Milkiyya*, 48-50.

⁸⁸ al-Kāsānī, *Badā'i*, vol.6, 549-68.

1. Those which are neither *māl* nor are they *mutaqawwim*; such as a free person or Oxygen in the air.⁸⁹ These are not susceptible to any type of contractual exchange.
2. Objects which are *māl* but are not *mutaqawwim*. Wine and pigs are considered *māl* but for Muslims they have no *taqawwum*, i.e. the law does not uphold their utility, and hence they have no exchange value. These items can only be exchanged by non-Muslims for whom the law does guarantee their exchange value.⁹⁰
3. Things which are *mutaqawwim* but are not considered *māl*. This manifests in non-commercial transactions in which a monetary value is designated by the law for objects which are not *māl*, yet are valorised. These monetary values are known by specific terms such as *diya* (blood money), *arsh* (compensation), *mahr* (nuptial payment) and occur in what Baber Johansen has termed, contracts of social exchange.⁹¹
4. Objects which are both *māl* and *mutaqawwim*, such as food, metals, horses etc. Objects which accept this dyadic appellation exclusively qualify for commoditisation in contracts of commercial exchange and form the *res in commercio*.

This typology has a two-fold significance with reference to the definition of *ribā*. The first is that only legally recognised commodities are regarded as valid countervalues (*iwaḍ*) and hence subject to the rules of *riba*.⁹² Secondly, anything which is an acceptable *iwaḍ* can act as a countervalue and its presence, irrespective of its actual value, necessitates the absence of

⁸⁹ al-Sarakhsī, *al-Mabsūṭ*, vol. 6 book 11, 73.

⁹⁰ Ibid, vol. 7, book 13, 30; Abū Zahra, *al-Milkiyya*, 49-50.

⁹¹ Baber Johansen, "Commercial Exchange and Social Order in Hanafite Law," in *Law and the Islamic World: Past and Present*, ed. Christopher Toll and Jakob Skovgaard-Petersen (Copenhagen: The Royal Danish Academy of Sciences and Letters, 1995), 89, 93.

⁹² al-Kāsānī, *Badā'i*, vol.7, 81; Johansen, *Commercial Exchange*, 90.

ribā. This particular aspect of the definition will become important later on when the specific substantive rules are examined.⁹³

1.3.2.3 *al-Mashrūṭ* – Stipulated

This term implies that the excess must be stipulated in the contract to be considered as *ribā*. In a loan transaction when returning payment of the debt, it is an acknowledged rule that not only is it allowed to return more than the debt, but also, that it is recommended to do so. In numerous instances when the Messenger of Allah (pbuh) had loaned an animal, he returned one that was better than it saying that the best of mankind are those who are better in fulfilling their dues.⁹⁴ In another tradition it is reported that the Prophet (pbuh) bought a camel on credit from his companion Jābir ibn ‘Abdullah (ra) for four *dīnārs*. When they reached Medina the Prophet (pbuh) ordered Bilāl (ra) to pay Jābir (ra) with an increase, whereupon he gave him four *dīnārs* and added one *qīrāṭ*.⁹⁵ al-Shaybānī, commenting on a similar ḥadīth, says ‘there is no harm in it [as long as] it is not a stipulation which he is bound to. And that is the opinion of Abū Ḥanīfa.’⁹⁶ If, however, the extra amount to be returned is stipulated from the outset then it is clearly *ribā*.⁹⁷ Another important point is that if the local custom is one where usury is the norm, and gifts are expected in return for loans then it would also be illicit to proffer a gift even if the intention behind it is gratuitous. This is expressed in the saying of the jurists that: prevailing customs are equivalent to expressed conditions; *al-ma‘rūf ka al-mashrūṭ*.⁹⁸

⁹³ See Saiful Azhar Rosly, “*Iwaḍ* as a Requirement of Lawful Sale: A Critical Analysis,” *IIUM Journal of Economics and Management* 9, no. 2 (2001): 187-201.

⁹⁴ Muslim, *Ṣaḥīḥ*, vol. 2, 683-84 (ḥadīth no. 4192, 4194, 4195, 4196).

⁹⁵ Ibid, vol. 2, 682-82 (ḥadīth no. 4185).

⁹⁶ Muḥammad ibn al-Hasan al-Shaybānī, *The Muwaṭṭa of Imām Muḥammad* (London: Turath Publishing, 2004), 362. This statement from al-Shaybānī refutes the assertion by Farooq that al-Jaṣṣāṣ was responsible for inserting “stipulated excess” into the “orthodox definition” of *ribā*. See Mohammad Omar Farooq, “Stipulation of Excess in Understanding and Misunderstanding *Riba*: The Al-Jassas Link,” *Arab Law Quarterly* 21, no.4 (2007) 285-316.

⁹⁷ al-Sarakhsī, *al-Mabsūṭ*, vol. 7, book 14, 44-46.

⁹⁸ Ibid, vol. 7, book 14, 45.

In sales, the juridical norms affect the form that the stipulation can take. According to the Ḥanafīs, any additions made to the object of the sale contract are subsumed into it, irrespective of the giver's intention.⁹⁹ Such additions are hence *mashrūṭ* in the sale and all corresponding rights and liabilities apply. In a sale of gold for gold, if the buyer volunteers an extra gram of gold for free, even if it is not a condition of the contract, it would still be impermissible. A report regarding the prominent Companion Abū Bakr al-Siddīq (ra) states that he was involved in selling two silver anklets; after placing them on one side of the scales, they were slightly outweighed by the silver *dirhams* on the other side. The buyer then says to him regarding the extra amount:

‘That’s for you; I permit it for you’. He (ra) replied ‘[even] if you permit it for me then definitely Allah does not permit it for me, I have heard the Messenger of Allah (pbuh) say ‘gold for gold weight for weight, and silver for silver, weight for weight, he who increases and the one who accepts it are in the fire’’.¹⁰⁰

This narration shows the point, as this is a sale transaction without a previously stipulated condition for the extra amount. However, as the Ḥanafīs say, the additions to a contract are subsumed into it and hence the extra silver the buyer is offering is actually included into the contract and violates the equivalence necessary when silver is sold for silver. Abū Ḥanīfa regards not only additions but also reductions as contractual obligations as both of these would offset the necessary equivalence with the result that the contract would be void. al-Shaybānī, however, reasons that because a reduction is gratuitous in nature, it should, a priori, be designated as a gift and thus separate to the contract.¹⁰¹

⁹⁹ al-Qudūrī, *al-Mukhtaṣar*, 73.

¹⁰⁰ al-Ṣan‘ānī, *al-Muṣannaḥ*, vol. 8, 124.

¹⁰¹ Zayn al-Dīn ibn Ibrāhīm ibn Muḥammad ibn Nujaym, *al-Baḥr al-Rā‘iq Sharḥ Kanz al-Daqa‘iq* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1997), vol. 6, 142; al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 5, 3689-90; ‘Abd al-‘Azīm, *Fiqh al-Ribā*, 262-3. Imām Abū Yūsuf invalidates the additions and reductions and allows the initial contract.

To conclude, it can be said that term *mashrūṭ* applies both to loans and sales. In loans the stipulation is either expressly stated, or a customary norm, whereas in sale contracts all additions are automatically *mashrūṭ*. Since loans and sale transactions essentially serve opposite purposes, the rules governing them are understandably different. In loan transactions, which are gratuitous in nature, additions are automatically perceived as gifts, unless stipulated. In sales, the opposite is true as sale transactions are based upon exchange and all additions to the contract become part of the exchange, unless of course an express statement is given to the contrary.

1.3.3.4 *Fī al-Bay'* – In a Sale Transaction

The significance of this term is merely to say, that had the above transaction (regarding additions to sales) been concluded by expressly stating that the extra amount was a gift, then it would not be regarded as *ribā*.¹⁰² Gift transactions are not included in the *ribā* prohibition even if they are honoured by a reciprocal gesture (*al-hiba bi al-'iwad*).¹⁰³ If, however, the gift exchange is stipulated as commutative from the outset (*al-hiba bi sharṭ al-'iwad*), it becomes subject to the normal rules of sale.¹⁰⁴

1.3.4 *Ribā* Proper and Quasi-*ribā*

The Ḥanafīs draw a unique distinction between the different forms of *ribā* based upon their interpretation of objective equivalence determined using the legal measure. This hierarchy stands in stark contrast to the other Schools, Ibn al-Qayyim and most modernist jurists. The latter base their distinction on a legislative hierarchy which leads to a bifurcation of *ribā* into *ribā al-Qur'ān* and *ribā al-Sunna*. For the Ḥanafīs, having established that the ratio of *ribā* is

¹⁰² al-Tumurtāshī, *Tanwīr al-Abṣār*, 430.

¹⁰³ al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 12, 91.

¹⁰⁴ 'Wa idhā wuhiba bi-sharṭ al-'iwad ... kāna fī ḥukm al-bay', see al-Qudūrī, *al-Mukhtaṣar*, 119; also 'fa idhā sharaṭa al-'iwad yakūnu bay', see al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 12, 92-4.

underpinned by an objective measure of equivalence they divide the *ribā* rules into those which deal with an objectively discernable inequality and those *ribā* rules which apply to cases which lack objective measurement.

Ribā proper (*ḥaqīqī*) is thus applied to exchanges of the same genus with an excess amount or a time delay. Between five kilograms of gold and six kilograms of gold there is an objectively measurable increase of one kilogram, using the legal measure of weight. Additionally, five kilograms of gold sold as cash in exchange for five kilograms of gold delivered after one month, gives the benefit of an extra month; described by al-Kāsānī as the 'preference of immediacy over delay'.¹⁰⁵ These exchanges occur in the same genus, where inequity is objectively discernible whereas in contracts of different genera, this situation is rather different; how, for example, can inequity be observed in an exchange of five kilograms of gold for six kilograms of silver, or one litre of milk for two litres of petrol.

The Ḥanafīs note that in transactions of different genera objective equivalence is not possible as the weight of one commodity does not correspond in value or meaning to the weight of another commodity, and hence *ribā al-faḍl* does not operate across different genera. The *ribā al-nasā'a* which applies to the sale of different genera is not *ribā* proper but rather quasi-*ribā* (*shubhat al-ribā*). This means that the *Shar'īa* has prohibited both *ribā* proper and quasi-*ribā*. This bifurcation is not, as can be seen based upon hermeneutical provenance but rather on their developed notion of objective equivalence.

¹⁰⁵ 'Faḍl al-ḥulūl 'alā al-ajal', al-Kāsānī, *Badā'i*, vol. 7, 55.

CHAPTER TWO

APPLYING THE THEORY

Having established the general framework of the Hanafī theory, its application into the body of commercial law will now be examined. One of the significant outcomes of the Ḥanafīs approach is that by presenting a definition of *ribā* which takes its prerogative from a Qur'ānic injunction, there is a perceptible increase in the importance and legislative force of the *ribā* rules. It will be shown how in a number of disputed cases in substantive law, the Ḥanafīs, invariably give priority to the *ribā* rules, and the specific application of their theory. Six cases will be discussed as examples of how the Ḥanafīs use their theory and also to show the approach of the other Schools:

1. Forward sale – *salam*,
2. The concessionary exchange known as *bay' al- 'arāyā*,
3. Debt: *qarḍ* and *dayn*,
4. Contractual stipulations – *shurūṭ*,
5. Pledge – *rahn*,
6. Currency exchange – *ṣarf*.

Before delving into the substantive law, some fundamental juridical concepts need to be clarified. First is the distinction of goods into fungibles and non-fungibles and secondly is the notion of personal obligation, *dayn* and its relation to fungibility.

2.1.1 *Mithliyyāt* and *Qīmiyyāt*

Non-fungibles, *qīmī*, are items sold *in specie*, which means that the contract of sale relates to specific items and not to a generic quantity. If they are destroyed they are not replaced by similar goods, but compensation is based upon the specific items value. al-Sarakhsī notes that the value of an object is indeed called *qīma* (a derivative of the verb *qāma*, to stand) because ‘it stands in the place of the actual good, the ‘*ayn*’.¹ In terms of jurisprudence, items which are *qīmī* are designated as ‘*ayn*’, and always sold *in specie* as specific goods. Because the liability which relates to them is for a specific good they themselves are never considered to be a *dayn*.

Fungibles are items which are determined in a contract through their weight, volume and number and are termed *mithlī*; meaning that which has an equivalent and is therefore replaceable in kind.² Because fungibles are replaceable in kind, this means that they are often sold as personal obligations. Personal obligations are termed *dayn* and are dichotomised with items sold *in specie*, ‘*ayn*’.

2.1.2 ‘*Ayn*, *Dayn* and *Ta ‘yīn*

According to the Ḥanafīs, fungibles are of two types; those which accept specification or individualisation, *ta ‘yīn*, and those which do not. Fungibles which do not accept *ta ‘yīn*, i.e. they cannot be specified, are always sold as personal obligations, *dayn*, whereas those that do accept specification can either be sold as a *dayn* or as specific goods. Gold and silver, either as ore or when minted, constitute the first category, other fungibles fall into the second. Gold and silver are such that even if they are specified by the contracting parties they resist

¹ ‘*al-Qīma summiyat qīma li qiyāmihā maqām al-‘ayn*’, see al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 12, 203.

² See Abū Zahra, *al-Milkiyya*, 54-58; Black’s Law Dictionary defines fungibles as: Moveable goods which may be estimated and replaced according to weight, measure, and number. Things belonging to a class, which do not have to be dealt with *in specie*. Henry Campbell Black, *Black’s Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 6th ed. (St. Paul, Minn: West Pub. Co., 1990) s.v. “fungibles”, 675.

specification,³ although in specific forms such as silverware or jewellery they may be specified.⁴ Zufar, a leading Ḥanafī jurist, together with al-Shāfi‘ī take the opposite opinion and regard both gold and silver, in all its forms, as subject to specification.⁵

A *dayn* is thus a personal obligation composed either of gold, silver, or a non-specified fungible.⁶ Fungibles, such as wheat, barley, salt etc., can all be sold as personal obligations, or they can be sold as specific goods. It is up to the contracting parties to determine this by a process of *ta’yīn*. If the fungibles are specifically appropriated to the contract they become its object and are regarded as a *‘ayn*.⁷ This means that delivery must be made *in specie*, not in kind, and that their destruction prior to delivery would annul the contract.⁸ If the items are not specified and are sold as a *dayn* then the destruction of these objects is immaterial and the seller is under obligation to deliver an equivalent.

³ ‘*Wa al-nuqūd lā tata‘ayyan fī ‘uqūd al-mu‘āwāḍāt bi al-ta’yīn*’, see al-Sarakhsī, *al-Mabsūṭ*, vol. 7, book 14, 21.

⁴ al-Sarakhsī also mentions that if minted coins are given to a money changer as a commodate loan (i.e. not for consumption), then they are regarded as specific and the exact same coins need to be returned. al-Sarakhsī’s formulation of the principle (see previous note) takes this into account as he restricts the rule to contracts of exchange (‘*uqūd al-mu‘āwāḍāt*). See *al-Mabsūṭ*, vol. 6, book 11, 155.

⁵ al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 5, 3373.

⁶ See Baber Johansen, *The Salam Contract: Law and Capital Formation in the Abbasid Empire (11th and 12th Centuries)*, 13, trans. Harvey L. Mendelsohn, [article online]; available from <http://law.harvard.edu/faculty/bjohansen/pubs.php>; Internet; last accessed 03 May 2010.

⁷ A similar approach can be seen in the Common law; a textbook on commercial law states that: Whether assets are fungibles depends not on their physical characteristics but upon the nature of the obligation owed with respect to them. It matters not whether the subject of the contract is grain, flour or a motor car, or whether it is tangible or intangible. In a contract for the sale of unascertained, or generic goods, the goods are *ex hypothesi* fungibles, since the duty of the seller is to sell and deliver not a specific chattel identified at the time of the contract but an article (i.e. *any* article) which answers to the contract description. Roy Goode, *Commercial Law*, 3rd ed. (London: Penguin, 2004), 59-60.

⁸ See Muhammad Wohidul Islam, “Dissolution of Contract in Islamic Law,” *Arab Law Quarterly* 13, no. 4 (1998): 348.

2.2 Forward Sale – *Salam*

Salam is a forward contract in which the seller takes payment for goods which he promises to supply in the future.⁹ What makes this contract critically distinct is that what is being sold is a personal obligation, a *dayn*.¹⁰ In a normal sale contract an *‘ayn* is sold for a *dayn* and the object of the sale (*mabī‘*) is invariably the *‘ayn*. In *salam*, however, the object of the sale is the *dayn*. In order to escape the prohibition of selling a *dayn* for a *dayn*,¹¹ the price must be paid immediately. The object is then to be delivered at an agreed time and in conformity with the stipulated conditions. The contract allows poor farmers to sell their produce in advance and thereby provides them with ready finance, while allowing the investor to purchase goods at a reduced price. Because *salam* is a sale of fungibles with a delay, the danger of *ribā al-nasā’a* entering the contract becomes a paramount concern of the jurists.

The *Kitāb al-Aṣl* of al-Shaybānī is the first comprehensive work of substantive law in the Ḥanafī School and represents the backbone of Ḥanafī doctrine.¹² At the outset of the chapter on sales and *salam*, al-Shaybānī precedes his presentation of the detailed law with two citations: The first is the ḥadīth mentioned earlier relating to *ribā* and the six commodities. The second is a statement from the Successor jurist Ibrāhīm al-Nakha‘ī which harmonises the *ribā* injunction with the *salam* contract. al-Nakha‘ī sets out the rules of *salam* in the language of the Ḥanafī ratio:

⁹ See a detailed treatment of this contract, see S. M. Hasanuz Zaman “*Bay‘ Salam: Principles and Practical Application*,” *Islamic Studies* 30, no. 4 (1991): 443-61.

¹⁰ *Ibid*, 21-2

¹¹ For the prohibition of selling a debt for a debt, see the ḥadīth in al-Ṣan‘ānī, *al-Muṣannaḥ*, vol. 8, 90; also see Ziyād Ibrāhīm Miqdād, *Bay‘ al-Dayn: Aḥkāmuḥ wa Taṭbīqātuḥ al-Mu‘āṣira* (Beirut: Dār al-Kutub al-‘Ilmiyya, 2003), 55-6.

¹² In fact, it is the first in Islamic jurisprudence *per se*.

Conduct *salam* in what is [sold by] measure for what is [sold by] weight, and conduct *salam* in what is [sold by] weight for what is [sold by] measure. Do not conduct *salam* in what is [sold by] measure for what is [sold by] measure, nor in what is [sold by] weight for what is [sold by] weight.¹³

When items are sold using the same legal measure, there is a danger of *ribā al-nasā'a*. In the *salam* contract, this is averted by ensuring that the commodities sold have different legal measures. Weighed items are hence not to be sold for other weighed items, but rather for items measured by volume and vice versa. The fact that the *salam* contract is premised upon a delayed delivery precludes, by way of the *ribā al-nasā'a* prohibition, that both items belong to the same group.

The obvious possibility of *ribā al-nasā'a* is not lost on the other schools of jurisprudence either, all of whom, *mutatis mutandis*, also develop similar rules to prevent *ribā al-nasā'a* in their juridical prescriptions for *salam*. For the Mālikīs and Shāfi'īs this means that the contract should not have, as both its object and price, foodstuffs.¹⁴

2.2.1 *Salam* in Animals

According to the Ḥanafīs it is prohibited to exchange animals with a delayed delivery. al-Ṭahāwī, however, states that this is not based upon the prohibition of selling two items of the same genus with a delay. Otherwise, he argues, it would be permissible to sell animals belonging to different genera with a delay. The prohibition, rather, is related to the selling of an animal as a personal obligation.¹⁵ Animals are individual creatures and each one is recognisably different from another of the same species. It goes without saying that the four schools agree on the fungibility of commodities sold by weight, measure length, and

¹³ Abū 'Abdullah Muḥammad ibn al-Ḥasan al-Shaybānī, *Kitāb al-Aṣl al-Ma'rūf bi al-Mabsūṭ* (Beirut: 'Ālam al-Kutub, 1990), vol. 5, 6.

¹⁴ This includes foods that are fungibles, non-fungibles, storable or perishable. Ibn Rushd, *al-Muqaddimāt*, vol. 1, 350; Abū Zayd, *Fiqh al-Ribā*, 180-1.

¹⁵ al-Ṭahāwī, *Sharḥ Ma'ānī al-Āthār*, vol. 3, 330-2.

number.¹⁶ When it comes to animals, however, the Mālikīs, Shāfi'īs, and Ḥanbalīs, as opposed to the Ḥanafīs, all assert that an animal can be sold as a personal obligation.¹⁷ The former base their opinion on the strength of the aḥādīth allowing such a transaction. The Ḥanafīs also cite aḥādīth which support their opinion and uphold their systematic reasoning.¹⁸

The Ḥanafīs maintain that animals, and in fact all non-fungible items, can not be sold as a personal obligation, *dayn*. al-Sarakhsī argues that when a fungible is sold as a *dayn*, it is sold against a description. This description is possible because fungibles are identified as being units of a type which are all interchangeable. At the point of delivery, if the fungible matches the description of its type then the sale is automatically concluded. If not, then a fungible which does match the description needs to be given. This, however, is not the case in sales based upon the description of an animal. In fact, al-Sarakhsī contends, it is almost impossible for the description to correspond perfectly with the actual dimensions of the animal delivered. The resulting discrepancy represents an excess for one of the parties which is not accounted for in the contract and thus the excess does not have a countervalue.¹⁹ The possibility of this excess occurring means that the rules of *ribā* are applied to the contract. The *ribā* alluded to here is what the Ḥanafīs call quasi-*ribā* and, as explained earlier, leads only to a prohibition of delay.²⁰ This application of the definition of *ribā*, to explain a point of jurisprudence which already has a textual basis – albeit in aḥādīth which are weaker than the aḥādīth of the other schools – is important in that it demonstrates the approach of the Ḥanafīs and their method of achieving systematic consistency.

¹⁶ al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 5, 3374. Articles sold by number, are deemed to be fungibles if they are *mutaqārib*, i.e. very similar, to the point where individually they do not have distinct values, like eggs, walnuts, etc.

¹⁷ Ibid, vol. 5, 3621. The Mālikīs additionally allow all chattels and animals that can be precisely described. See Ibn Rushd, *al-Muqaddimāt*, vol. 1, 350-1.

¹⁸ al-Shaybānī, *al-Hujja*, vol. 2, 479-98.

¹⁹ al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 12, 139.

²⁰ al-Marghīnānī, *al-Hidāya*, vol. 2, 79.

2.3 The Concessionary Exchange, *Bay' al-'Arāyā*

In an exchange of different types of dates, the rules of *ribā* demand both quantitative equivalence and immediate delivery. The requirement for quantitative equivalence means that dates can not be sold through an estimation (*juzāf*) of their quantities and that ascertaining equivalence using the legal measure is a necessary condition of contractual validity.²¹ In addition to this requirement, all the schools of law, except the Ḥanafīs, also prohibit the sale of fresh dates (*ruṭab*) for dried dates (*tamr*) even if they are sold in equal quantities.²² This is due to the retrospective disparity which occurs due to a decrease in the volume of fresh dates as they subsequently dry up.²³

Bay' al-muzābana is also a sale of fresh dates for dried dates although the fresh dates are still on the date-palms and their sale thus entails an estimation of their quantity.²⁴ This sale has been specifically proscribed in the ḥadīth as it clearly infringes the rules of *ribā*.²⁵ For the Ḥanafīs, the requirement of equivalence is violated because the quantities are sold by estimation. For the other schools the prohibition relates to the prohibition of selling fresh dates for dry dates and also because the items are sold by estimation.

The *bay' al-'arāyā* is a sale which appears to be similar to the *bay' al-muzābana* and although the schools agree that it is permissible, they differ in understanding just what it refers to.

²¹ al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 5, 3685.

²² Abū Yūsuf and al-Shaybānī, disagree with Abū Ḥanīfa on this point and also prohibit this transaction, although later on al-Ṭahāwī upholds the eponym's opinion. See al-Shaybānī, *al-Muwatṭa*, 335-6; al-Ṭahāwī, *al-Mukhtaṣar*, 77.

²³ The reasoning itself is propounded in a prophetic ḥadīth, see Ibn Abī Shayba, *al-Kitāb al-Muṣannaḥ*, vol. 4, 333-4.

²⁴ The meaning of *muzābana* given here is the one which is generally agreed upon although there is considerable disagreement regarding its meaning. See Abū al-Walīd Sulaymān ibn Khalf al-Bājī, *al-Muntaqā: Sharḥ Muwaṭṭa Mālik* (Beirut: Dār al-Kutub al-'Ilmiyya, 1999), vol. 6, 186-205; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *al-Majmū' Sharḥ al-Muhadhdhab* (Beirut: Dār al-Fikr, 2000), vol. 11, 31-35; Shams al-Dīn Abū al-Farj 'Abd al-Raḥmān Ibn Qudāma al-Maqdisī, *al-Sharḥ al-Kabīr* (Beirut: Dār al-Kutub al-'Ilmiyya, nd), vol. 4, 152; Abū Zayd, *Fiqh al-Ribā*, 285-6.

²⁵ al-Ṣan'ānī, *al-Muṣannaḥ*, vol. 8, 104; Abū Zayd, *Fiqh al-Ribā*, 286; in a version of the ḥadīth recorded by al-Ṭahāwī, the Prophet (pbuh) adds '*dhālika al-ribā*', *Sharḥ Ma'ānī al-Āthār*, vol. 3, 294.

APPLYING THE THEORY

According to the Shāfi'īs and the Ḥanbalīs, it is a concession for those who need to purchase fresh dates while all that they possess are a surplus of dried dates. The concession thus permits the sale by estimation and limits the amount of fresh dates that can be purchased in a single transaction.²⁶ The Shāfi'īs, however, do not restrict this trade to the needy but rather permit it for the rich and the poor and allow them to use this concession as frequently as they please.²⁷ The Ḥanbalīs, on the other hand, argue that because the concession is premised on the need of the purchaser it should not be given general sanction.²⁸ The Mālikīs discern that the concession is based, not on economic need, but rather on alleviating inconvenience. The background to the concession, according to them, is that an owner of a date-palm grove gives in charity the specific produce of one or more date-palm trees. He subsequently finds the repeated entry of the donee a nuisance. To avoid this inconvenience he estimates the amount of dates on the specified trees and in exchange gives the donee an equivalent amount of fresh dates.²⁹

Irrespective of their explications, what all three Schools agree upon, is that the permission for this transaction is a concession from the *ribā* rules in two aspects; firstly, from the prohibition to sell fresh dates for dried dates and secondly to sell these items by estimation. What is noteworthy is that both of these strictures are based upon the rule of *ribā al-faḍl* and the concessions therefore represent a relaxation of the *ribā* rules. In fact, for the Mālikīs, the *'arāyā* concession presents itself as a model for further exemptions to the *ribā* injunctions in cases of mitigating hardship.³⁰

²⁶ The limit is five *awsuq* of dates per transaction. See al-Ṭaḥāwī, *Sharḥ Ma'ānī al-Āthār*, vol. 3, 277; Ibn Qudāma, *al-Sharḥ al-Kabīr*, vol. 4, 153.

²⁷ al-Shāfi'ī, *Kitāb al-Umm*, vol. 3, 66-7.

²⁸ Ibn Qudāma, *al-Sharḥ al-Kabīr*, vol. 4, 152-3.

²⁹ al-Bājī, *al-Muntaqā*, vol. 6, 156-60; Ibn Rushd, *Bidāya*, vol. 2, 260-63.

³⁰ al-Bājī, *al-Muntaqā*, vol. 6, 158.

The Ḥanafīs explanation of the *bay' al-arāyā* is essentially the same as the Mālikīs, except that the Ḥanafīs do not regard the initial charity of the date-palm owner as conferring ownership of the dates. The owner is therefore at liberty to substitute other dates in their place as he pleases. The owner, who is inconvenienced by the donee's presence, estimates the quantity of dates that the specified trees would yield and replaces them with an equivalent amount of fresh dates.³¹ This explanation posits the *'arāya*, in the category of charity rather than sale and implies that it is not a contract of commutative exchange.³² Whereas the other schools accept the possibility of a concession to the *ribā* rules, the Ḥanafīs prefer to offer an alternative explanation which allows them to maintain their systematic application of the *ribā* rules.

2.4. Debt: *Qarḍ* and *Dayn*

The term *dayn* has been mentioned earlier as a personal obligation, and is a general term used to indicate an outstanding debt without regard to its source. The term *qarḍ* also refers to an outstanding debt, although it is restricted to debts arising from loans and not credit transactions or forward sales, and is therefore a specific type of *dayn*.³³

2.4.1 *Qarḍ*

The gratuitous loan is the philanthropic Qur'ānic norm and usury is its diametric opposite. This dichotomy demands that the two be analytically incongruent and systematically differentiated. However, in real terms, it appears that a loan could easily be expressed as an exchange of currency (*ṣarf*) of equal quantities of the same genus with a time delay; which technically is *ribā al-nasā'a*. In order to distinguish between the two, it would be impossible

³¹ al-Taḥāwī, *Sharḥ Ma'ānī al-Āthār*, vol. 3, 295-99.

³² al-Shaybānī, *The Muwatta*, 333-4; idem, *al-Ḥujja*, vol. 2, 547-550; al-Kāsānī, *Badā'i*, vol.7, 86.

³³ Najm al-Dīn Abū Ḥafṣ 'Umar al-Nasafī, *Ṭilbat al-Talaba fī Isṭilāḥāt al-Fiqhiyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 1997), 255.

to prohibit any delay from a loan, as that would amount to a repayment in the contractual session in which the money is loaned. The answer proffered by some of the early jurists was to regard the loan as due immediately although its repayment is inevitably delayed. This means that no specific time limit is acceptable and even if a time limit is agreed by the lender and the borrower, it is a priori an ineffective clause. Ibrāhīm al-Nakha‘ī, is reported to have said ‘a loan is due immediately [*hāll*], even if [the parties agree] to a time’.³⁴

The Ḥanafīs, following their Kufan predecessor, give the same ruling.³⁵ al-Jaṣṣāṣ, in trying to show the hermeneutical basis of this ruling, says that ‘what indicates the invalidity of assigning a time [to the loan] is the saying of the Prophet (pbuh) ‘surely *ribā* is only in delay’³⁶ and he did not differentiate between sales and loans and hence it [applies] to both’³⁷ The Ḥanafīs find agreement in this point with the Shāfi‘īs and also, in one narration, from Aḥmad, although the opposite has also been reported from him. The Mālikīs, and notably the later Ḥanbalīs Ibn Taymiyya and Ibn al-Qayyim, do permit a time delay on loans.³⁸

Rafīq Yūnus criticises the previous explanations for why there should be no time limits on loans, noting that the real distinction is that loans are philanthropic whereas sales are commercial.³⁹ Yūnus, however, fails to develop this into a juridical framework which means that the intentions of the lender and the borrower become critical in determining whether the

³⁴ Ibn Abī Shayba, *al-Muṣannaḥ*, vol. 4, 324. This is also the opinion of al-Awzā‘ī, see ‘Abdullah ibn Muḥammad al-‘Umrānī, *al-Manḥa‘a fī al-Qarḍ* (Riyadh: Dār Ibn al-Jawzī, (1427 AH), 180.

³⁵ ‘*al-Qarḍ fa inna ta’jilahū lā yaṣīḥh*’, see al- Qudūrī, *al-Mukhtaṣar*, 73; al-Ṭaḥāwī, *Mukhtaṣar*, 84; al-Sarakhsī, *al-Mabsūṭ*, vol. 7, book 14, 42.

³⁶ ‘*Innamā al-ribā fī al-nasī’a*’.

³⁷ al-Jaṣṣāṣ, *Aḥkām al-Qur’ān*, 468.

³⁸ For other scholars who also permit this, see al-Miṣrī, *al-Ribā wa al-Ḥasm al-Zamanī*, 37; idem, *al-Jāmi‘*, 227-232.

³⁹ al-Miṣrī, *al-Ribā wa al-Ḥasm al-Zamanī*, 37; idem, *al-Jāmi‘*, 230.

exchange is commercial or altruistic.⁴⁰ In the work of al-Sarakhsī, however, we find that not only is this point noted but that it finds expression in a systematic interpretation of the loan.

Islamic jurisprudence distinguishes between commodate loans and non-commodate loans; the former are known as *‘āriya* and the latter as *qarḍ*. The difference being that in *‘āriya* a specific good, a *‘ayn* is given to a borrower who benefits from its usufruct. The borrower, in turn, must return the exact same good once he has finished with it. In *qarḍ* loans, the usufruct can only be obtained through the consumption of the goods, and hence the borrower is only obliged to return an equivalent.⁴¹ The question becomes that if the *qarḍ* is not a specific good then does this mean that it is a *dayn*? If the answer is in the affirmative, it implies that *qarḍ* is a contract of a *dayn* for a *dayn* with a delay which is exactly the same as a currency exchange with a delay. To overcome this problem, the Ḥanafīs grant the *qarḍ* a dual nature; in its outward form (*ṣūra*) it is regarded as a *dayn*, whereas in its juridical designation (*fi al-ḥukm*) it is a *‘ayn*.⁴² By considering it outwardly as a *dayn* recognises the fact that what is returned in reality, is not the actual item loaned, but rather, its equivalent. This is then regarded juridically, to be the very item that was loaned (*‘ayn al-maqbūḍ*).⁴³

Its designation as an *‘ayn* is important in that it links the *qarḍ* into the Ḥanafī jurisprudential framework in another way. According to the Ḥanafīs only a *dayn* can accommodate a time delay, as opposed to a *‘ayn* which must be delivered immediately following the conclusion of a contract.⁴⁴ The *qarḍ*, now designated as a *‘ayn*, cannot therefore by definition, like the

⁴⁰ This is not however an unusual opinion, as it finds expression in the work of Ibn al-Qayyim. See Ibn al-Qayyim, *I‘lām al-Muwaqqi‘in*, 537-38, 543-44.

⁴¹ al-Sarakhsī, *al-Mabsūt*, vol. 7, book 14, 43; Nyazee, *The Concept of Ribā*, 49.

⁴² al-Sarakhsī, *al-Mabsūt*, vol. 7, book 14, 43; al-Nasaḥī, *Tilbat al-Ṭalaba*, 255.

⁴³ al-Sarakhsī, *al-Mabsūt*, vol. 7, book 14, 38, 42.

⁴⁴ *‘Wa al-ajal lā yathbut illā fi al-duyūn’*, see al-Sarakhsī, *al-Mabsūt*, vol. 6, book 12, 167; al-Kāsānī, *Badā‘i‘*, vol. 7, 23-4.

‘*āriya*, have a time limit.⁴⁵ Although earlier jurists, as mentioned above, had the opinion that loans are necessarily free from time limits, the jurisprudential re-structuring of the *qarḍ* by the Ḥanafīs means that this rule is now neatly tied into their theoretical legal framework.

To conclude, the legal analysis of the Ḥanafīs focuses on drawing substantive jurisprudential distinctions between *qarḍ* and a currency exchange with a time delay. The result is that instead of resigning the matter to the intention of the two contracting parties, two points of divergence are noted:

1. *Qarḍ* is a transaction which does not admit of a time delay and is hence due at the creditor’s immediate discretion.
2. Money given in a *qarḍ* is regarded juridically to be a ‘*ayn* as opposed to money owed from contracts of commercial exchange which are termed *dayn*.

2.4.2 *Dayn – Ḍa‘ wa Ta‘ajjal*

One of the conditions for a valid credit sale is that the credit must have a time limit which is stipulated from the outset.⁴⁶ Although the jurists unanimously permit the deferred price to be higher than the cash price, they do not infer that the addition is in lieu of the time gap.⁴⁷ The deferment is merely a condition which binds both parties, giving respite to the buyer and a price increase to the seller. The issue at hand is whether the creditor and debtor can agree, before the expiry of the time period, to reduce the debt in return for immediate repayment.⁴⁸ This practice is known as *ḍa‘ wa ta‘ajjal*, i.e. to reduce (the debt) and hasten (the payment). This issue has been contentious from the very beginning of Islamic jurisprudence with the

⁴⁵ Ibid, 143-4.

⁴⁶ al-Qudūrī, *al-Mukhtaṣar*, 65.

⁴⁷ al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 5, 3461.

⁴⁸ After the time period has expired, it is allowed by way of conciliation (*ṣulḥ*). See Abū Zayd, *Fiqh al-Ribā*, 397. For the usage of this transaction in Islamic finance, see Usmani, *An Introduction of Islamic Finance*, 141-43.

earliest authorities divided over its legitimacy. From the companions Ibn ‘Abbās (ra) allowed it, whereas ‘Umar (ra), his son ‘Abdullah (ra) and Zayd ibn Thābit (ra) all prohibit it.⁴⁹ Among the four schools there seems to be unanimity over its prohibition, although there is a dissenting narration from Aḥmad.⁵⁰ Notably, Ibrāhīm al-Nakha‘ī allowed it, as did the later Ḥanbalīs, Ibn Taymiyya and Ibn al-Qayyim.

al-Shaybānī argues that this practice is prohibited due to the disparity between the debt and the settlement amount. He says ‘it is as though he is selling a small [amount] immediately for a large[r amount] deferred’.⁵¹ This means that the transaction is interpreted as though it contains both *ribā al-faḍl* and *ribā al-nasā’a*. Later, al-Jaṣṣāṣ explains in clear terms the underlying reason for the prohibition:

The reduction has only been made in lieu of the time, and this is the meaning of *ribā* which Allah the exalted has clearly proscribed. There is no disagreement that if a thousand *dirhams* were due immediately and he said to him [i.e. the creditor] ‘give me a deferment and I will increase you in it by a hundred’, that it is not permissible, because the hundred is a compensation for the time. Likewise, reduction has the [same] meaning as increase because he has made it a countervalue for time.⁵²

As was noted earlier, the commoditisation of time is proscribed as an element in the Qur’ānic prohibition of *ribā*.⁵³ Ibn al-Qayyim argues however, that *ḍa‘ wa ta‘ajjal* is the exact opposite of *ribā*; the latter is an *increase* in a debt for an *increase* in delay, whereas the former is a *decrease* in the debt for a *decrease* in the delay and such reductions represent creditor empathy rather than exploitation.⁵⁴

⁴⁹ al-Shaybānī, *The Muwatta*, 337.

⁵⁰ There is also a narration that Shāfi‘ī allowed it, but this is only recorded in the works of the Mālikīs and his own work seems to suggest the opposite. See Abū Zayd, *Fiqh al-Ribā*, 401-2.

⁵¹ al-Shaybānī, *The Muwatta*, 337.

⁵² al-Jaṣṣāṣ, *Aḥkām al-Qur’ān*, 467.

⁵³ Also see Abu Umar Faruq Ahmad and M. Kabir Hassan, “The Time Value of Money Concept in Islamic Finance,” *The American Journal of Islamic Social Sciences* 23, no. 1 (2006): 66-89.

⁵⁴ A similar statement is recorded from the companion Ibn ‘Abbās (ra), see Abū Zayd, *Fiqh al-Ribā*, 403; and for an alternative reason for this concession see al-Miṣrī, *al-Jāmi‘*, 324-5.

2.5 Contractual Stipulations – *Shurūṭ*

A prophetic maxim states that Muslims are bound by their contractual stipulations as long as the condition does not make something licit which is illicit, or vice versa, it forbids what is permissible.⁵⁵ This maxim is augmented by other aḥādīth which prohibit stipulations in sale contracts and making sales conditional upon loans.⁵⁶ The jurists differ in their interpretation of these aḥādīth regarding the extent of contractual liberty delegated to individuals.⁵⁷ Although it is agreed that certain stipulations are permitted, such as demanding a pledge or a guarantor in lieu of a credit sale, the method of distinguishing between acceptable and unacceptable conditions is itself disputed. The Ḥanafī treatment of stipulations effectively yields three categories:⁵⁸

1. Acceptable stipulations: Further divided into four sub-types: a) those which are normative requirements; b) those mentioned specifically in a proof-text; c) those that conform (*mulā'im*) with the purpose of the contract and d) customary stipulations.
2. Void or annulled stipulations: These carry no benefit for either party but may run counter to contractual requirements resulting in some harm to one of the parties.
3. Invalid Stipulations: This includes any stipulation which does not fit into one of the four categories mentioned above in 1), and more specifically, results in an additional benefit for one of the parties.

In categories one and two, the contract is deemed to be valid, although the stipulation in category one is effective whereas in category two it is annulled. In category three, the stipulations result in an invalid transaction which can only be remedied by removing the

⁵⁵ 'al-Muslimūn 'alā shurūṭihim illā sharṭ aḥall ḥaram aw ḥarrām ḥalāl'. See Usmani, *An Introduction to Islamic Finance*, 73.

⁵⁶ See al-Ṭahāwī, *Sharḥ Ma'ānī*, vol. 3, 313; Muḥammad 'Uqlat al-Ibrāhīm, *Ḥukm Bay' al-Taqsīt fī al-Sharī'a al-Islāmiyya* ('Ammān: Maktaba al-Risāla al-Ḥadītha, 1987), 25-6.

⁵⁷ Muḥammad Yūsuf Mūsā, "The Liberty of the Individual in Contracts and Conditions According to Islamic Law," *Islamic Quarterly* 2 (1955): 79-85, 252-63.

⁵⁸ See al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 5, 3466-73; Ibn Nujaym, *al-Baḥr*, vol. 6, 140-2.

offending condition. The important thing to notice here is that the classification singles out ‘stipulations which carry an additional benefit for one party’ as the *sine qua non* of the prohibition of contractual stipulations.⁵⁹

With respect to the above three categories, the Shāfi‘īs regard stipulations in category one (apart from d) as valid, whereas stipulations in category two and three lead to contracts which are void and have no legal effect. The lack of distinction between the two categories means that they regard these stipulations, *per se*, as an infringement to the rules of exchange. They justify their stance as the ḥadīth which prohibits contractual stipulations is a general statement without any indication of distinct categories. The Mālikīs directly oppose the Ḥanafīs and Shāfi‘īs by validating stipulations with an additional benefit for one party. With regard to category two, they agree with the Shāfi‘īs and regard these contracts as void. The Ḥanbalīs are the most liberal in allowing stipulations. In general they allow all stipulations as long as they are solitary;⁶⁰ if two conditions are imposed (which are from category 2 and/or 3) then the contract is void. Ibn Taymiyya goes one step further and permits stipulations outright, asserting that the freedom to contract is a necessary corollary of the Qur’ānic mandate for trade based upon mutual consent (*tarāḍī*). He thus allows all stipulations in contracts as long as the object of sale is permissible.⁶¹

Without delving deeply into the substantive doctrines of the different Schools, a number of conclusions regarding the method adopted by them can be inferred. Although a number of aḥādīth can be marshalled to support all their opinions, what is more critical is the

⁵⁹ al-Shaybānī, *The Muwaṭṭa*, 347; al-Sarakhsī, *al-Mabsūṭ*, vol. 7, book 13, 18.

⁶⁰ With some exceptions, see al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 5, 3475.

⁶¹ For a full account of stipulations in Ḥanafī and Ḥanbalī law and the subsequent development in the latter’s doctrine, see Oussama Arabi, “Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya,” *International Journal of Middle East Studies* 30 (1998), 41-3. Reprinted in idem, *Studies in Modern Islamic Law and Jurisprudence* (The Hague: Kluwer Law International, 2001), 57-60.

hermeneutics behind their treatment of these texts. What is relevant to this study is to demonstrate that the Ḥanafīs, singularly, have sought to interpret this branch of contract law with reference to their *ribā* doctrine. For the Shāfi'īs, the dictates of the ḥadīth prohibiting stipulations become paramount, and hence all stipulations not exempted by a specific proof-text are deemed to invalidate the contract. The Mālikīs differ with them, but only in regard to the type of exemptions found in the proof-texts. Their approach is substantially the same inasmuch as it makes the prohibition of contractual stipulations paramount and then looks for textual concessions as exemptions to the norm. In direct opposition to this, is the method of Ibn Taymiyya, which is to declare that the guiding principle in contractual stipulations is permissibility and only when a condition opposes either the legal purpose of the contract or a textual injunction, will the contract be invalidated.⁶²

For the Ḥanafīs the normative of commutative exchange is contractual equality (*wujūb al-mumāthala*) and the rules relating to contractual stipulations are interpreted according to this norm. If one party stipulates an additional benefit over and above the requirement of the exchange contract, this stipulated addition has no countervalue in the transaction and is thus deemed by them to be *ribā*.⁶³ By applying their definition of *ribā* to this issue the Ḥanafīs are not merely explaining the underlying reasoning to the injunction, but are also suggesting a yardstick for differentiating between the different types of stipulations. This leads to a divergence with the other schools, not only in doctrine but also in method. In explaining why the stipulations mentioned in category two lead to the annulment of the stipulation and not the contract, al-Kāsānī reasons that it is:

⁶² Abu al-‘Abbās Taqī al-Dīn Aḥmad ibn Taymiyya, *Kitāb al-Ikhtiyārāt al-‘Ilmiyya* in *al-Fatāwā al-Kubrā* (Baghdad: Maktaba al-Muthannā, nd), vol. 5, 73; Arabi, *Contract Stipulations (Shurut) in Islamic Law*, 42-3, 59-60.

⁶³ al-Marghīnānī, *al-Hidāya*, vol. 2, 59; al-Kāsānī, *Bada’i*, vol. 7, 12.

APPLYING THE THEORY

‘a stipulation with no benefit in it for anyone and so it does not require invalidation [of the contract]. This is because annulling the transaction in stipulations such as these is because they incorporate *ribā*, which is an additional stipulated benefit in the contract, with no compensating countervalue. This is not present in this [type of] stipulation because there is no benefit in it for anyone, [the only issue is that] it is an invalid condition. This does not affect the contract and hence the contract is permitted and the condition annulled.’⁶⁴

What transpires is that stipulations are placed on the measure of equivalence; if they disturb the balance and violate the required *mumāthala*, the contract is deemed to be invalid, if not, the stipulation itself is annulled and the contract stands.

2.6 Pledge – *Rahn*

The validity of stipulating a pledge is unanimously upheld by the jurists, what concerns us here is whether they permit the pledgee to benefit from the pledge. The jurists allow pledges to be given for most types of debts whether they are credit sales, forward sales or loans.⁶⁵ The pledge, which represents a form of security, is to be returned once the debt has been paid. If the pledgee benefits from the pledge during this period, the additional benefit constitutes an excess without a countervalue and is deemed to be *ribā*.⁶⁶

The Ḥanafīs treat the pledge as any other stipulation, in that if the additional benefit is a contractual stipulation it is prohibited as it is *ribā*, whereas if the pledger gives the pledgee non-contractual permission to benefit from the pledge it is allowed. Additionally, they apply the rule that contemporary practice and custom are equivalent to contractual stipulation and if in a particular locale it becomes customary for the pledgee to benefit from the pledge then in

⁶⁴ Ibid, vol.7, 14.

⁶⁵ al-Zuhaylī, *al-Fiqh al-Islāmī*, vol. 6, 4222-23.

⁶⁶ See Nicholas H. D. Foster, “The Islamic Law of Real Security,” *Arab Law Quarterly* 15, no. 2 (2000): 140-41, 145-48.

such places the pledgee will be prohibited a priori from benefiting from the pledge.⁶⁷ In fact some of the Ḥanafī jurists prohibited the pledgee from benefiting from the pledge outright, whether the pledger grant him permission or not, arguing that it is *ribā* and thus not subject to the pledger's permission. Others argued that it was reprehensible even if permitted or that it was permissible legally but not morally.⁶⁸

The Mālikīs and the Shāfi'īs agreed with the Ḥanafīs in general although they allow the pledgee to benefit from the pledge in contracts of sale as opposed to debt and if the benefit is stipulated in the contract and it is for a known period. They permit this by arguing that it can be interpreted as though it is a contract of sale and hire, where the item pledged is regarded as under hire and the rent is apportioned from the object of the sale.⁶⁹ This reinterpretation is precluded from applying to loans as there is no object of sale in it. In terms of the pledger granting permission to the pledgee to benefit from the pledge, the Mālikīs prohibit this whereas the Shāfi'īs allow it.

The Ḥanbalīs like the other schools also prohibit the pledgee from benefiting from the pledge except that they make an exception in the case where the pledge is an animal. In this case they allow the use of the animal for carriage and also for its milk to be consumed.⁷⁰ This opinion is upheld by Ibn al-Qayyim as it premised upon their reading of a prophetic ḥadīth although the other schools interpret it differently.⁷¹ The Ḥanbalīs also, like the Mālikīs, do not allow the

⁶⁷ al-Zuhaylī *al-Fiqh al-Islāmī*, vol. 6, 4289-90; Abū Zayd, *Fiqh al-Ribā*, 369-70.

⁶⁸ For a complete account of the issue in the Ḥanafī school see, Muḥammad 'Abd al-Ḥayy al-Laknawī, "*al-Fulk al-Mashhūn fīmā Yata'allaq bi-Intifā' al-Murtahin bi-al-Marhūn*," in Majmū'a Rasā'il al-Laknawī, ed. Na'im Ashraf Nūr Aḥmad (Karachi: Idārat al-Qur'ān, 1419 AH), vol. 3, 401-416.

⁶⁹ al-Zuhaylī *al-Fiqh al-Islāmī*, vol. 6, 4291-92; Shams al-Dīn Muḥammad 'Arafa al-Dusūqī, *Hāshiyat al-Dusūqī 'alā al-Sharḥ al-Kabīr* (np: Dār Ihyā' al-Turāth al-'Arabī, nd.), vol. 3, 246. The later Shāfi'īs appear to disagree on this issue with their eponym; see al-Shāfi'ī, *Kitāb al-Umm*, vol. 3, 183.

⁷⁰ Ibn Qudāma *al-Mughnī*, vol. 4, 341; al-Zuhaylī *al-Fiqh al-Islāmī*, vol. 6, 4292.

⁷¹ al-Ṭahāwī, *Sharḥ al-Ma'ānī al-Āthār*, vol. 3, 373-75; Ibn al-Qayyim, *I'lām al-Muwaqqi'īn*, 474-5. Ibn al-Qayyim also suggests a *ḥīla* to allow the pledgee to benefit from the pledge, see *ibid*, 737.

pledgee to benefit from the pledge with the permission of the pledger in debts arising from loans.⁷²

The danger of *ribā* accruing on the pledge can be seen from the stance of the four schools and their caution in allowing the pledgee to benefit from it while the pledger is indebted to him. The potential exploitation of the pledge in this scenario is not lost on the Schools of law and later on their concerns will be seen to be justified when we examine the case of the antichretic pledge, known as the *bayʿ al-wafāʾ*.

2.7 Currency Exchange – *Ṣarf*

There is a general agreement amongst the schools that both quality and workmanship are disregarded in sales of *ribā* commodities. This means that gold and silver, whether they be of a high or low quality and whatever their form, either as jewellery, minted coins, bullion or raw metal, are always to be sold in equal quantities. The ḥadīth of the six commodities clearly prescribes equivalence in quantity. This legal imperative is, in the language of the *uṣūlīs*, a *muṭlaq* command, i.e. it is absolute with no textual qualifications. Factors, such as quality and form, which undoubtedly impact the commercial value of these metals, are necessarily negated from consideration when determining equivalence. Equivalence, it will be recalled is restricted to the legal measures of weight and volume. The corollary of this, however, is that quantitative equivalence may be achieved despite a disparity in the commercial value of the exchanged items.

The lack of coins minted by the early Islamic state meant that individuals were often forced to mint their own coins from private mints. In this regard, Mālik is reported to have granted a

⁷² Ibn Qudāma *al-Mughnī*, vol. 4, 341; al-Zuhaylī *al-Fiqh al-Islāmī*, vol. 6, 4292-3.

concession for those in urgent need, to exchange raw gold for minted coins with an additional amount of gold to cover the production cost of the mint. This dispensation from the normal rules is due to a mitigating necessity, a technique observed previously in the Mālikī approach to the *‘arāyā* and in line with their general principles. This ruling was however overturned by the later Mālikīs on the grounds that a) the increased presence of government mints overcame the previous extenuating circumstances and b) the violation of the rules of *ribā al-faḍl* is unwarranted.⁷³ al-Qurṭubī, clearly incensed by the concession, declares it to be pure *ribā* and defends the School’s eponym by saying that the narration from him is unknown and not authenticated.⁷⁴

In a case where somebody destroys another person’s gold or silver jewellery, the question arises whether compensation should be according to its weight or its value. If a gold ring is replaced by an equivalent weight of raw gold, it is clear that the market value of the latter will be far less than the former. If it is replaced according to the market value of the ring, more gold will be required than was contained in the original. This, however, violates the requirement for quantitative equivalence. The Ḥanafīs rule that in order to provide equitable compensation, it is the market value which must be replaced. The replacement, however, must not violate the rules of *ribā al-faḍl* and so the payment must be made in a different currency, i.e. by using silver.⁷⁵ This solution achieves both aims of equitable compensation and maintains the systematic application of the *ribā* rules. This example shows that even in cases of compensation, priority is given to the systematic application of the *ribā* rules.

⁷³ al-Bājī, *al-Muntaqā*, vol. 6, 228-9.

⁷⁴ al-Qurṭubī, *al-Jāmi‘*, vol. 3, 351-2.

⁷⁵ al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 11, 95.

2.7.1 Gold, Pearls and Embellished Swords

Having established that quality and value are redundant in transactions of *ribā* commodities, the jurists differed on the application of this principle in sales of items which contain gold or silver. These are exemplified in the works of jurisprudence by two items; a necklace consisting of gold and pearls and an embellished sword. The first represents an example of an object in which the gold can be separated and the second where it can not. The first example finds explicit mention in a ḥadīth, where the companion Faḍāla ibn ‘Ubayd al-Anṣārī (ra) narrates that:

‘I bought, on the day of Khaybar, a necklace of gold and pearls for twelve *dīnārs*. Subsequently, I separated it (i.e. the gold from the pearls) and found that it (the gold) was more than twelve *dīnārs*. I mentioned that to the Prophet (pbuh) and he said: It is not to be sold until it is separated’⁷⁶

The jurists differed in regards to their interpretation of this ḥadīth. For the Ḥanbalīs and the Shāfi‘īs the ruling is clear; objects containing gold should not be exchanged for gold unless the gold is separated and sold for an equal weight of gold and the remainder of the object sold separately.⁷⁷ If the items cannot be separated then the object should not be sold for gold but with silver, or vice versa if the object is adorned with silver. The Mālikīs give a similar ruling for separable objects, whereas for inseparable objects, or those in which the separation would damage the object, they took into consideration the relative quantity of gold in the object of sale. If the gold constitutes less than one third then it is considered to be subordinate (*taba‘*) to the object and equivalence is disregarded as a necessary condition.⁷⁸ If the amount of gold or silver is more than one third then the sale is not permitted.

⁷⁶ Muslim, *Ṣaḥīḥ*, vol. 2, 678 (ḥadīth no. 4160).

⁷⁷ Ibn Qudāma, *al-Mughnī*, vol. 4, 155-7; al-Miṣrī, *al-Jāmi‘*, 150-1.

⁷⁸ *Ribā al-nasā‘a* must also be avoided and the exchange must therefore be immediate. See Saḥnūn ibn Sa‘īd al-Tanūkhī, *al-Mudawwana al-Kubrā* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1994), vol. 3, 22-3; al-Bājī, *al-Muntaqā*, vol. 6, 248-51.

al-Ṭaḥawī demonstrates that alternative narrations of the ḥadīth show that the injunction ‘not to sell until separate’ is not uniformly recorded in all the lines of transmission of the ḥadīth. From this, he infers that far from being a distinct substantive rule, the prohibition is basically a cautionary measure, where the unknown quantities of gold may lead to *ribā al-faḍl*. Whether the gold or silver can be separated or not, is immaterial for the Ḥanafīs, the crucial issue is determining equivalence. They state that if equivalence can be ascertained through a judicious inspection of the objects of sale, then as long as the gold or silver in the price is more than the gold or silver in the object, the sale is allowed.⁷⁹

This line of argument, however, involves more than simply estimating the quantities of gold or silver. A major aspect of the problem is not merely to ensure that the *ribā* commodities are sold with due regard for equivalence, but also to determine whether the individual *value* of each component in the transaction needs to be taken into account. In a sale where two items are purchased for a single price, the price distributes itself proportionally between the items according to their respective values.⁸⁰ For example, if a table and chair are purchased for a combined price of £100, the price is distributed across the two items depending on their relative values. If the table has a market value of £90 and the chair a value of £30 then clearly the ratio of their values is three to one. This means that from the price of £100, three quarters, £75, will be apportioned to the table and the remaining quarter, £25, to the chair.

Apart from the Ḥanafīs, all the other schools insist that this standard rule is also effective in transactions of gold and silver. Hence, even if the gold is assumed to be more than the gold in the object, when the price is distributed across the items it may transpire that the amount apportioned to the gold in the object is not equal to it. For example, if a sword contains 5kg of

⁷⁹ al-Ṭaḥāwī, *Sharḥ Ma‘ānī al-Āthār*, vol. 3, 342-7.

⁸⁰ Ibn Qudāma, *al-Mughnī*, vol. 4, 157.

APPLYING THE THEORY

gold and the other materials that make up the sword are worth 2½kg of gold, the ratio of the value of the gold with the rest of the sword is two to one. If this sword as a whole is exchanged for 6kg of gold, the price is distributed in the ratio of two to one. The result is that 4kg of the price are apportioned to the 5kg of gold and the remaining 2kg to the remainder of the sword. This, however, constitutes *ribā al-faḍl*.

The Ḥanafīs argue that in exchanges of the commodities of *ribā*, value is not taken into consideration and only equivalence in weight is relevant. Although they agree that distribution by value is the norm of commercial exchange, they prioritise the demands of the *ribā* rules to negate the notion of value from this transaction. In the example above, they assert that the apportioning of the price is irrespective of the proportional ratios of their values, and hence 5kg of gold from the price is equated with 5kg of gold in the sword, and the remaining 1kg of the price is allocated to the remainder of the sword. As long as there is enough gold in the price to cover the gold in the sword and some left over to allocate to the remainder of the sword they permit it.

al-Ṭaḥāwī argues for this point using the following simple example:⁸¹ A 2kg bullion of gold is exchanged for two *dīnārs*. The *dīnārs* weigh 1 kg each, but one is of a higher quality than the other and is twice its value. If, as the other Schools argue, the proportional value of each separate item is considered in distributing the price, then two thirds of the gold bullion should be allocated to the higher quality *dīnār* and one third to the low quality *dīnār*. This means that the high quality 1kg *dīnār* is allocated to 1⅓kg of the gold bullion and the lower quality 1kg *dīnār* to ⅔kg of the gold bullion. This quantitative disparity, which occurs if the price is apportioned according to value, is tantamount to *ribā al-faḍl*. This according to al-Ṭaḥāwī

⁸¹ Numerical clarification has been added to the example. al-Ṭaḥāwī, *Sharḥ Ma'ānī al-Āthār*, vol. 3, 343-4.

would invalidate the sale, whereas in actual fact this sale is unanimously upheld by the jurists. The Ḥanafīs therefore argue that when distributing the price over numerous items of exchange, the value of each item must not be taken into consideration and instead sales involving usurious commodities should be analysed solely with regard to the legal measure.

2.7.2 At the Systematic Periphery

The line of argument outlined above can be seen in a report that Abū Ḥanīfa said that it is permitted for X to sell 100 *dirhams* plus 1 *dīnār* to Y, in exchange for 1000 *dirhams*. X's 100 *dirhams* are allocated to 100 *dirhams* from Y's 1000 *dirhams* and X's *dīnār* is allocated to Y's remaining 900 *dirhams*.⁸² This reasoning, however, when taken to its logical conclusion may lead to some undesirable results. Once value is negated, it quickly becomes apparent that there is a possibility of exploiting this explanation. al-Shaybānī, for example, was asked how he felt about a transaction of a number of *dirhams* for a number of *dirhams* in unequal weights, with the owner of the lower quantity compensating for the difference with some copper coins. He replied that although it was substantively permissible it was reprehensible. The interlocutor then asked him how it felt in his heart, to which he replied 'like a mountain'.⁸³

The clear danger, not lost on the Imām, is of circumventing the requirement of equivalence by inserting nominal items into the contract which are relatively insignificant in price, such as a copper coin or a handkerchief. al-Shaybānī's dislike of this transaction is mirrored in al-Kāsānī's delineation of such transactions into the following types:

- permissible without reprehension
- permitted but reprehensible

⁸² al-Kāsānī, *Bada'i*, vol. 7, 79; al-Shaybānī, *al-Ḥujja*, vol. 2, 584.

⁸³ al-Kāsānī, *Bada'i*, vol. 7, 79.

- invalid

The demarcation between a permissible exchange without reprehension and one that is allowed but reprehensible is based on whether the additional item is, by market standards, of similar exchange value as the extra amount of gold or silver. If the additional item is only a nominal item, such as a single copper coin or a walnut and clearly not equivalent to the extra amount of gold or silver, then the sale is reprehensible. If the additional item is of no commercial value, i.e. not considered *māl mutaḡawwim*, then the transaction is invalid.⁸⁴

The important point to note is that although it may be clear that an item has been inserted into the transaction nominally, and only for the purposes of exploiting the substantive doctrine of the Ḥanafīs, they still permit it, albeit reprehensively. Their commitment to their systematic reasoning is clearly expressed by their refusal to prohibit this transaction. The Madinan jurists including Mālik held this transaction to be prohibited saying that it is a means (*dhariʿa*) to *ribā*. al-Shaybānī, in a telling rejoinder to them, repeatedly asserts that jurisprudence is not formulated based upon doubts or possible outcomes and the accusations that they may occasion.⁸⁵ It is, rather, the result of a methodically consistent application of legal theory. Commenting on the method of the Ḥanafīs in contrast to their predecessors, Ansari pertinently, although somewhat exaggeratedly, states that:

‘Again and again established practices were disregarded, considerations of administrative and judicial convenience were set aside, and even the demands of ethical considerations ignored by Abū Ḥanīfah in favour of the dictates of systematic consistency.’⁸⁶

⁸⁴ Ibid, vol. 7, 80.

⁸⁵ al-Shaybānī, *al-Hujja*, vol. 2, 585, 575.

⁸⁶ Zafar Ishaq Ansari, *The Early Development of Islamic Law in Kūfah with Special Reference to the Works of Abū Yūsuf and Shaybānī* (PhD diss., McGill University, 1966), 330.

2.8 Summary of the Ḥanafī Theory of *Ribā*

The Ḥanafī theory of *ribā* has been traced through the exegetical and jurisprudential compendia. The approach of this School is characterised by an attempt to present an analytically coherent account for the different types of *ribā* mentioned in the texts of the Qur'ān and the Sunna. Having articulated their hermeneutical interpretation, they apply their doctrine into the various branches of commercial law. A number of examples were selected to demonstrate the application of the theory and also to compare and contrast their approach with the other Schools of Islamic law. From this presentation of their substantive doctrine a number of conclusions can be drawn.

- Systematic consistency backed by the Qur'ānic prerogative (based on *ribā* being *mujmal*) results in the pursuance of substantive doctrines which defy concessionary jurisprudence and prioritise coherency.
- They attempt to incorporate an objective component into the meaning of *ribā* and establish the means of objective equivalence through the legal measure and also to restrict it to this.
- They negate quality and value in the equation, such that the legal measure takes precedence in all contracts of exchange of *ribā* commodities, even when accompanied by non-*ribā* commodities as well.
- By making *ribā* a sub-narrative of the norm of contractual equality, they pursue all material gains resulting from commercial exchange which have no contractual countervalue and designate them as *ribā*; most profoundly witnessed in the field of contractual stipulations (*shurūṭ*).
- They regard time commoditisation as a major component of the *ribā* prohibition.

2.9 Ibn al-Qayyim's Theory of *Ribā*

In this final section, Ibn al-Qayyim's theory of the *ribā* prohibition will be briefly presented. Ibn al-Qayyim was the illustrious successor of the Ḥanbalī reformer Ibn Taymiyya, a fact amply reflected in much of his scholarly output. Ibn Taymiyya, himself, had a great number of opinions which were distinct from the Ḥanbalī School's juridical and theological doctrines which were the cause of great controversy, both in his time and up to the present day. The theory of *ribā* is no less significant and many of the nineteenth and twentieth century reformist scholars inclined to his approach and believed it offered a transitory relief from the strict application of the Sharī'a rules.⁸⁷ This, in a period, when Muslims were adjusting to evermore pervasive norms of usury-based finance projected from the West through colonial and indeed post-colonial institutions.

2.9.1 Two Types of *Ribā*

Ibn Qayyim lays out the basis of his theory at the very outset of his essay on *ribā*:

'*Ribā* is of two types; manifest (*jalī*) and discrete (*khafī*). As for the manifest, it is proscribed due to the great harm that is in it, [whereas] the discrete is proscribed [only] because it leads to the manifest [type]. Hence prohibition of the former is intended (*qaṣd*) and the latter is precautionary (*wasīla*)'⁸⁸

The dichotomy presented by Ibn al-Qayyim reflects what is often expressed by the jurists as *ribā al-Qur'ān* and *ribā al-Sunna*. The former is also known as *ribā al-Jāhiliyya* or *ribā al-nasī'a*, whereas the latter is referred to, in its constituent two types, as *ribā al-faḍl* and *riba al-nasā'a*. Although this may appear to be invoking a legislative hierarchy in differentiating

⁸⁷ Muḥammad Rashīd Riḍā, *al-Ribā wa al-Mu'āmalāt fī al-Islām* (Cairo: Dār al-Kulliyāt al-Azhariyya, 1986), 120-3; 'Abd al-Razzāq al-Sanhūrī, *Maṣādir al-Ḥaq fī al-Fiqh al-Islāmī* (Beirut: Dār Iḥyā al-Turāth al-'Arabī, 1997), vol. 1, book 3, 143-171; Fazlur Rahman, "Ribā and Interest," *Islamic Studies* 3 (1964): 32-41; Abdullah Saeed, *Islamic Banking and Interest: A Study of Prohibition of Riba and its Contemporary Interpretation* (Leiden: Brill, 1996), 41-50; Munīr Ibrāhīm Hindī, *Shubhat al-Ribā fī Mu'āmalāt al-Bunūk al-Taqlīdiyya wa al-Islāmiyya* (Alexandria: al-Maktab al-'Arabī al-Ḥadīth, 2003), 180-81; Chibli Mallat, "The Debate on Riba and Interest in Twentieth Century Jurisprudence," in *Islamic Law and Finance*, ed. idem (London: Graham and Trotman, 1988), 69-88.

⁸⁸ Ibn al-Qayyim, *I'lām al-Muwaqqi'īn*, 326.

between the two, Ibn al-Qayyim has a different point to stress. He quotes Aḥmad as identifying the former type as the *ribā* regarding which there is no doubt, and which corresponds to the formula ‘pay up or increase’.⁸⁹ This, he contends, is the crux of the *ribā* prohibition due to the inevitable inequitable social and economic consequences which result from the perpetual increases the debtor incurs as his financial situation deteriorates.

Ribā al-faḍl, he argues, will not in itself lead to those consequences directly as the excess is given on the spot and time is not the issue. However, had traders been permitted to trade for an excess in gold for gold, it would not be long before they developed a greed to offer an excess in lieu of a time delay. *Ribā al-faḍl* is hence only prohibited because it will lead to *ribā al-nasī’a*.⁹⁰ Similarly, *ribā al-nasī’a*, he explains, if permitted, would mean that gold would be traded for gold and food for food, even though at equal quantities but with a time delay. Once the time delay expired, it would inevitably lead to the creditor giving the debtor an ultimatum on default of ‘pay up or increase’, and hence, this too would ultimately lead to *ribā al-nasī’a*.⁹¹ He suggests that to prevent people falling into *ribā al-Jāhiliyya* they were weaned off delayed transactions of similar commodities (in type) through the *ribā al-nasī’a* injunction, and then they were weaned off taking an excess in the same genus through the *ribā al-faḍl* injunction.⁹² Prohibiting these two types of sales, he surmises, is solely for the purpose of ‘closing the avenues’ (*sadd al-dharī’a*) which might lead to *ribā al-Jāhiliyya*.

2.9.2 The Ratio

In determining the ratio, he opts for the opinion of the Shāfi‘īs and the Mālikīs, i.e. currency and foodstuffs. He goes on to explain why these are the critical features using arguments

⁸⁹ Ibid.

⁹⁰ Ibid, 327.

⁹¹ Ibid, 328.

⁹² Ibid.

similar to those already mentioned by their original protagonists. In essence, his purpose is to show that social and economic realities are determining factors in the *ribā* prohibition. Gold and silver are universal currencies and as such they are the standard against which all other commodities are valued. Had *ribā al-faḍl* been permitted in different qualities of gold, this would have led to trading in currencies, which, as witnessed by the trade of copper coins in his age, leads to great harm and oppression. Money is not to be traded in, he argues, as it is not a commodity, but rather a measure of exchange value, and it is their capacity to act as currencies which is the effective ratio in their prohibition. He goes on to say that foodstuffs, which are often the only means of trade for Bedouins and villagers who have no *dirhams* or *dīnārs*, needs to be exchanged in the contractual session to prevent it becoming a vehicle of credit which will lead to *ribā al-nasīʾā*.

Ibn al-Qayyim's identification of the ratio and his stress on the economic functions of money is not for the purpose of extending the rules, but rather, to link the explanation of these ratios to his dichotomy of *ribā* into two types.

2.9.3 Necessity and Need

An agreed upon principle in Islamic jurisprudence is that in life-threatening situations mandatory prohibitions are temporarily sanctioned. The unanimous agreement on this principle stems from its enunciation in various verses in the Qur'ān, which allow a person in dire need to consume prohibited foods, or when a person is forced by an enemy to renounce his belief, a concession is granted to outwardly utter the words while keeping faith in his heart.⁹³ This principle may also be applied to the rules of *ribā*; if a person finds no other way of acquiring food to keep himself alive, then in such a situation *ribā* would be permitted for

⁹³ Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal al-Fiqhi al-ʿĀmm* (Damascus: Dār al-Qalam, 2004), vol. 2, 1003-4.

him up to acquire the minimum that would suffice his need. Ibn al-Qayyim, however, wishes to extend the mandate of these concessionary rules based upon life-threatening necessities. Concessions should also be granted where a general public benefit or need requires it. Such concessions, however, will apply only to those proscriptions which are precautionary and do not independently, represent the ultimate purpose of the law. Ibn al-Qayyim presents numerous examples where such a principle is observable from various branches of the law.⁹⁴ The examples are rulings which the jurists would unanimously agree upon, although none prior to him, having enunciated any such underlying principle for further application.

The importance of Ibn al-Qayyim's bifurcation of *ribā*, into intended and precautionary, can now be realised. *Ribā al-faḍl* is to be permitted where a public benefit or need demands it whereas *ribā al-nasī'a* is not.⁹⁵ He begins his application of this principle, with an issue in which the concession to the *ribā* rules is provided by a prophetic judgement. The *'arāyā* concession has already been discussed and was noted as being a model which the Mālikīs had used in developing concessions to the stringent application of the *ribā* rules in cases of hardship. The example is useful for Ibn al-Qayyim, in that it provides a textually based precedent for the application of his principle to a *ribā* transaction. The pertinence of the example is enhanced when it is noted that the *'arāyā* concession relates to *ribā al-faḍl* and not to *ribā al-nasī'a*. This lends legitimacy to his bifurcation of *ribā* and to the application of his principle to only one type.

2.9.4 Jewellery and Workmanship

Previously it was noted that the jurists, in unanimity, regarded all forms of gold, irrespective of their form, as subject to the requirement of equivalence by weight. Ibn al-Qayyim deviates

⁹⁴ Ibn al-Qayyim, *I'lam al-Muwaqqi'im*, 330.

⁹⁵ Ibid, 329.

from this consensus and attempts to show that jewellery should be exempt from the rules of *ribā*. It will be recalled that when determining the ratio of *ribā*, he gives specific emphasis to the economic and social problems underpinning the usury prohibition. His aim is to maintain a tight link between the purpose of the divine laws and the specific substantive doctrines and hence his attempt to regard sales of jewellery as extraneous to the *ribā* injunction.

The crux of his hermeneutical argument is that in the aḥādīth which prohibit *ribā* in exchanges of gold and silver, reference is made to prevailing currencies and their raw counterparts and not to jewellery. This is because the workmanship (*ṣunʿa*) that goes into their production, transforms them from currency to commodity and therefore, like any other commodity, they may be sold without the need for quantitative equivalence.⁹⁶ He argues vehemently that it would be absurd to expect someone to sell his jewellery for an equivalent weight of raw gold or silver and thereby lose the value of the workmanship:

The intelligent [person] would not sell this [jewellery] for its weight of the same genus because it is foolish and a waste of the workmanship and the legislator is wiser than to bind the community to that ... The legislator does not say to the craftsman: sell your work for an equal weight and lose your workmanship, and he does not say: do not work as an artisan; leave it, and neither does he say: connive to sell your product for a greater weight with numerous stratagems (*ḥiyal*).⁹⁷

His reference to the *ḥiyal* is important here as he repeatedly mentions them juxtaposed with his own principle, effecting thereby a comparison of techniques for alleviating problems felt by the public in maintaining strict adherence to the *ribā* rules elaborated by the jurists. His qualm is that the jurists who oppose him, deploy stratagems to circumvent the law which they themselves have determined. His suggestion, is that the focus of the *ribā* prohibition should revolve around the Qurʾānic type, as this is the original vice being addressed. The Sunna

⁹⁶ Ibn al-Qayyim, *Iʿlam al-Muwaqqiʿ*, 330.

⁹⁷ Ibid, 329, 331.

complements this original ruling by blocking the means which are likely to lead to the Qur'ānic type. His argument is that, instead of instituting *hiyal*, one should turn to the law itself. The law provides relief in the form of concessions whenever there is an overwhelming public need (*al-maṣlaḥa al-rājiḥa*) as evidenced in the *'arāyā* dispensation.

2.9.5 Ibn al-Qayyim and Reform

In other branches of commercial law it becomes clear that on most of the issues discussed earlier where the Ḥanafīs make the *ribā* rules paramount, the opposite can be said of Ibn al-Qayyim. In the contract *da' wa ta'ajjal*, as already stated, all of the Schools prohibit this whereas Ibn al-Qayyim, and indeed his mentor Ibn Taymiyya, permit this. In contractual stipulations the Ḥanafīs are noted for attempting to make strict contractual equivalence a normative requirement of the *ribā* prohibition, the opposite can be seen from the Ḥanbalī reformers, who take a decidedly liberal stance, allowing all stipulations in principle where the object of sale is valid. Ibn al-Qayyim's stance on *'arāya* has been noted and not surprisingly, in opposition to the Ḥanafīs, he chooses to interpret the exchange as a concession from *ribā* rather than as an act of charity. Also with the regard to the pledge, they differ with the Ḥanafīs in allowing the pledgee to benefit from the pledge if the latter is an animal. The final issue with regard to loans, he adopts the opinion of the majority that time limits on loans are permitted and concludes that the only difference between a loan and an exchange of currencies with *ribā al-nasā'a* is the intention of the parties concerned.⁹⁸ This again is in contradistinction to the Ḥanafīs who leave no room for the intention of parties in determining the legality of transactions. This point assumes critical importance in the subject of the *hiyal*, where accusations regarding the purpose and intention of the *hiyal* contracts lead to sustained polemics between the protagonists and their opponents.

⁹⁸ Ibid, 543-4.

APPLYING THE THEORY

Ibn al-Qayyim's legal methodology stands in stark contrast to the method of the Ḥanafīs. This is observable both in his *ribā* typologies and also in his substantive rulings. For Ibn al-Qayyim, the purpose of the law, as opposed to its specific enactments, is given priority when understanding the nature of the *ribā* injunction. This concern is also reflected in his substantive rulings, where concessions are liberally granted where the purpose of the law deems it necessary. For the Ḥanafīs, law must be based upon objective assessments. *Ribā* is not bifurcated according to its legislative purpose, but rather according to whether it is objectively discernible or not. In the substantive rules a similar approach is observable. The law is applied consistently according to their juridical definition of *ribā*. Ibn al-Qayyim disagrees with this approach as it often leads to iniquitous results. In these situations, he confidently demonstrates that his approach is vindicated as it provides solutions in the form of concessions and does not require the use of stratagems. The latter, although, consonant with the letter of the law, defy the purpose for which the laws themselves are revealed. This contrasting approach is critically important and needs to borne in mind as we embark on a discussion of the *ḥiyal*.

PART TWO

RECEPTION OF THE *ḤIYAL*: POLEMIC AND GENRE

CHAPTER THREE

RECEPTION OF THE *ḤIYAL*: THE POLEMIC

In this chapter the polemic occasioned by the *ḥiyal* will be examined. The polemic begins with a chapter in al-Bukhārī's collection of ḥadīth in which the author adduces a number of ḥadīth to refute the methodology of the *ḥiyal* proponents and which appear to anticipate the use of certain *ḥiyal*. The opposition of the traditionists to the *ḥiyal* is subsequently articulated in specific works. An early extant example, the *Ibtāl al-Ḥiyal* of Ibn Baṭṭa will be discussed and the author's substantive arguments noted. The polemic at its apex in the works of the Ḥanbalī reformers Ibn Taymiyya and Ibn al-Qayyim will then be examined. Finally, al-Shāṭibī's views on the *ḥiyal* will be presented, as his inquiry into the *maqāṣid*, the higher purposes of the law, is crucial for grounding the *ḥiyal* in their normative context.

3.1 al-Bukhārī and his *Kitāb al-Ḥiyal*

The leading Ḥanafī jurist in al-Bukhārī's home town was Abū Ḥafṣ al-Kabīr, a direct student of al-Shaybānī. He was also an authoritative narrator of all the latter's major works and the sole narrator of the *ḥiyal* treatise attributed to him. al-Bukhārī, in his youth, is reported to have studied jurisprudence with Abū Ḥafṣ and later to have travelled in his search for knowledge with the latter's son, Abū Ḥafṣ al-Ṣaghīr.¹ al-Bukhārī would therefore have known Ḥanafī jurisprudence and the types of *ḥiyal* they were advocating. He would also have been acquainted with the more controversial *ḥiyal* such as those occasioning the reaction of his fellow traditionists. In his compendium of authentic traditions, al-Bukhārī devotes a chapter to

¹ 'Abd al-Fattāḥ Abū Ghudda, introduction to *Kaṣḥf al-Iltibās 'ammā Awradahū al-Imām al-Bukhārī 'alā ba'ḍ al-Nās*, by 'Abd al-Ghanī al-Ghunaymī al-Maydānī (Aleppo: Maktab al-Maṭbū'āt al-Islāmiyya, 1993), 7-8.

the *ḥiyal* gathering therein the traditions he regards as antithetical to the methodology of the *ḥiyal* protagonists. The material is arranged into fifteen sections where he narrates one or more aḥādīth to demonstrate a specific point. On some occasions he mentions the opposing opinion of ‘some people’; an elliptical reference to those who disagree with him, which is generally taken to refer to the Ḥanafīs, although not exclusively so.² Although this is a term he uses throughout his compendium, the number of times it occurs in the *Kitāb al-Ḥiyal*, fourteen, exceeds the number of times it occurs in the rest of his work.³ This fact alone shows the significance of the *ḥiyal* as a point of contention between the Ḥanafīs and the traditionists.⁴

The following table shows the section headings, the number of aḥādīth narrated in the section and how often al-Bukhārī mentions the opinion of ‘some people’. This latter point serves to indicate whether a specific contention is being addressed or not. The use of the term ‘some people’ is not spread evenly throughout these sections, and in fact, the fourteen times that it does occur is limited to only six sections. The remaining sections are consequently of little relevance to the juridical notion of the *ḥiyal*, but rather qualify by considering the broader linguistic sense of the term.

² See Maḥmūd ibn ibn Aḥmad Badr al-Dīn al-‘Aynī, *Umdat al-Qārī Sharḥ Ṣaḥīḥ al-Bukhārī*, 112/24, [book online]; available from http://www.islamport.com/isp_eBooks/srh/; Internet; last accessed 04 May 2010; Abū Ghudda, *Taqdima*, 7-8. Also for the various explanatory texts dealing with this term, see ibid, 12-15.

³ ‘Abd al-Majīd Maḥmūd, *al-Ittijāhāt al-Fiḥiyya ‘inda Aṣḥāb al-Ḥadīth fī al-Qarn al-Thālith al-Hijrī*, cited in Abū Ghudda, *Taqdima*, 32.

⁴ See ibid, 16-32; also see Christopher Melchert, *The Formation of the Sunnī Schools of Law, 9th-10th Centuries C.E.* (Leiden: Brill, 1997), 9. Although the author identifies the *ḥiyal* as a bone of contention between the *aṣḥāb al-ra’i* and the *aṣḥāb al-ḥadīth*, his use of the sources is both uncritical and inaccurate. The former relates to his acceptance of al-Khaṭīb’s evidently biased narrations regarding the ascription of the *Kitāb al-Ḥiyal* to Abū Ḥanīfa, and the latter to his understanding regarding the use of the verb *iḥtāla* in regards to ḥadīth. The author translates this as ‘using legal devices to nullify hadith’ (p.9), whereas legal devices have nothing to do with the science of ḥadīth and its use in his source’s context is in its original linguistic sense.

RECEPTION OF THE *ḤIYAL*: THE POLEMIC

Section	Subject Matter	‘Some People’
1	Abstaining from <i>ḥiyal</i> : based upon the ḥadīth of intention.	0
2	On prayer	0
3	On <i>Zakāt</i> – alms tax	3
4	On <i>nikāḥ</i> – marriage	2
5	On restricting the water of a well	0
6	Deception in raising the price (<i>najsh</i>)	0
7	Deception in sales	0
8	Prohibition of the guardian exploiting a female minor	0
9	Returning stolen property to its owner upon recovery	1
10	Using deceptive arguments to win a court case	0
11	On <i>nikāḥ</i>	3
12	Deceiving one’s spouse	0
13	Fleeing from plague	0
14	Gifts and pre-emption - <i>shuf’a</i>	4
15	A tax-collector using <i>ḥiyal</i> to receive gifts	1

Table 2. al-Bukhārī’s *Kitāb al-Ḥiyal*

Upon further examination we can note that section four and eleven relate to marriage, and that the issues discussed in section fifteen relate to pre-emption and thus belong to the preceding section, and although section fourteen relates to ‘gifts and pre-emption, the subject under the heading of gifts, actually relates to *zakāt*. In total, the number of subjects in which al-Bukhārī takes issue with the Ḥanafīs is therefore reduced to four (3, 4(&11), 9, 14). In the remaining sections, in which the term ‘some people say’ is not used, the subject matter relates either; to issues with which the author disagrees with a specific Ḥanafī ruling (2) or where the linguistic usage of *ḥiyal* is being applied to an issue (5, 6, 7, 8, 10, 12, 13). These issues are

not relevant to this study and will not be tackled as other studies have dealt with them and discussed them at length.⁵ The four points that remain are:

1. *Zakāt* – alms-tax,
2. *Nikāḥ* – marriage
3. Returning stolen property to its owner upon recovery
4. *Shufʿa* – pre-emption

We will now discuss points two and three in reverse order.

Point three, relating to stolen property, is not about an actual *ḥīla* proposed by the Ḥanafīs, but rather, the possible exploitation of a juridical stance the Ḥanafīs take with regard to misappropriated property. According to the rules of jurisprudence, property which is usurped must be returned to its rightful owner. If, however, the item is not forthcoming and the thief claims it to be destroyed or lost, the owner is entitled to compensation. The Ḥanafīs argue that if the owner accepts the compensation, he forfeits his right to the item should it reappear. al-Bukhārī's objection is that this viewpoint may be regarded as a *ḥīla* by an individual who wishes to acquire an object which the owner refuses to sell. If he misappropriates the item and then claims that the article is destroyed or lost, he will be ordered to compensate the owner. If the latter accepts the compensation, the ownership of the object passes to the thief, who may then produce the item and claim it as his own. In the example furnished by al-Bukhārī, a female slave is stolen whom the thief subsequently claims has died, once he compensates the owner with her market price, the slave girl legally belongs to him.⁶ Ibn Ḥajar al-ʿAsqalānī, a renowned Shāfiʿī commentator on al-Bukhārī's compendium, discusses the point in detail and

⁵ See al-ʿAynī, *Umdat al-Qārī*, 108/24-125/24; Aḥmad ibn ʿAlī ibn Ḥajar al-ʿAsqalānī, *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī* (Riyadh: Dār al-Salām, 1997), vol. 12, 408-439.

⁶ Muḥammad ibn Ismāʿīl ibn Ibrāhīm al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Liechtenstein: Thesaurus Islamicus Foundation, 2000), vol 3, 1407.

explains that this not a *ḥīla* for the thief. It is rather, due to the Ḥanafī juridical principles of contract and the Ḥanafī's would condemn any such exploitation of the rules as a sin.⁷

There are two sections (4, 11) on *nikāḥ* in al-Bukhārī's *Kitāb al-Ḥiyal*, in which the author discusses three distinct issues. As with the point three, none of these issues are *ḥiyal* proposed by the Ḥanafīs, but rather, are possible loopholes which may appear due to their particular juridical views. The first issue addressed, is the marriage contract known as *shighār*,⁸ the second, *mut'ā*,⁹ and the third, marriage by a judicial decree based upon false testimony. None of these are put forwarded as *ḥiyal* by the Ḥanafīs, but they all represent points of contention with the other Schools. As Ibn Ḥajar notes, the inclusion of *shighār* in this section is difficult to justify especially since the Ḥanafīs do not permit it, *per se*, but rather mandate that if it is contracted the conditions of the contract will be annulled and the marriages in their correct legal form will be effected. Ibn Ḥajar then presents a possible scenario where the *shighār* may appear to take the form of a *ḥīla*, although even then, not as a tool advocated by the Ḥanafīs, but rather as an exploitation of their juridical rules.¹⁰ The argument against *mut'ā* is aimed at an opinion of Zufar which appears to permit a time restricted marriage (*nikāḥ mu'aqqat*), although on further inspection, it, like in the previous example, means that the marriage is effected while the stipulation of time is held to be void. Although Zufar's opinion in this issue is not the official ruling in the School, clearly what he is not upholding is *mut'ā* marriage and al-Bukhārī's equating his verdict relating to *nikāḥ mu'aqqat* with the latter is itself, questionable.¹¹

⁷ See Ibn Ḥajar, *Fath al-Bārī*, vol. 12, 423. The Ḥanafī commentator, Badr al-Dīn al-'Aynī, treats the issue briefly stating only that: 'He (al-Bukhārī) intends by 'some people' Abū Ḥanīfa [although] his mentioning of this chapter here has no justification because it is not the place for it; all he intended by it was to disparage the Ḥanafīs'. al-'Aynī, *Umdat al-Qārī*, 115/24.

⁸ *Shighār* is to when a girl is wedded on the condition that the sister of the groom is wedded to her brother.

⁹ *Nikāḥ al-mut'ā* is to contract a marriage for a limited period of time. At the end of the time period the contract automatically expires.

¹⁰ See Ibn Ḥajar, *Fath al-Bārī*, vol. 12, 417-8.

¹¹ Ibid, vol. 12, 419; al-'Aynī, *Umdat al-Qārī*, 112-3/24.

The last issue related to *nikāḥ* is the use of false witnesses to testify to a marriage. The Ḥanafīs are of the opinion that in a case where a man claims a woman to be his wife and she denies the claim, then once a judge has given a verdict in favour of the man based upon witness testimony, a man may have licit relations with his wife which are morally and legally correct. That being the case, it would be possible then for any individual to marry the girl of his choice by using such false witnesses in the knowledge that the verdict of the judge will legalise and give religious sanction to his sexual relations with the women. Again this is not a *ḥīla* put forward by the Ḥanafīs, but a result of their position regarding the ethical and legal value of a *qāḍī*'s verdict; a subject far greater than this single instance of possible misuse.

These examples are important in understanding the nature of the *ḥiyal* polemic as they show that in many instances what is being argued against is not an actual *ḥīla* advocated by the School, but rather, the possible stratagems that persons acting *mala fide* may employ. al-Shaybānī, himself identifies material in the jurisprudence of the Medinese jurists which he regards as potential routes for exploitative *ḥiyal*, although the authors of such opinions never intended them as such.¹² Likewise, for most jurists the *ʿīna* contract is perhaps the most manifest *ḥīla* for *ribā*, yet it is part and parcel of al-Shāfiʿī's normal doctrine; not advocated as a *ḥīla*, because, as is well known, he was generally opposed to the *ḥiyal*. The point being that although jurists themselves have not identified some of their own normative doctrines as valid *ḥiyal*, their opponents have often highlighted them as such.

Having discussed the issue of indemnity and *nikāḥ*, that leaves two topics, *zakāt* and *shufʿa*. These two issues represent the substantive material of al-Bukhārī's chapter as they relate to actual *ḥiyal* suggested by the Ḥanafīs and are perhaps the most controversial *ḥiyal* permitted

¹² See for example al-Shaybānī, *al-Ḥujjā*, vol. 2, 503-509. Where he comments: '*mā ahwan hadhihī al-ḥīla fī al-ribā in kānat tajūz*' – what a simple ruse for usury were it permissible.

by them. After a thorough study of al-Bukhārī's *Kitāb al-Ḥiyal*, a recent scholar, 'Abd al-Majīd Maḥmūd, similarly concluded that:

There is not in the *ḥiyal* for which al-Bukhārī reproached the Ḥanafīs, what can possibly be counted amongst the *ḥiyal* which are attributed to them, except what is connected to *zakāt* and *shuf'a* ... As for what is besides these two issues, then the opinion of the Ḥanafīs in them is not from the *ḥiyal* type, even though their opinion may facilitate the way for a *ḥīla* for the one who desires it.¹³

These two *ḥiyal*, as well as those used to avoid the usury prohibition, are perhaps the most controversial of all the *ḥiyal*, not only between the Schools, but also within the Ḥanafī School itself. We will discuss these two topics in the next chapter when we deal with *ḥiyal* genre.

3.1.1 al-Bukhārī's Juridical Stance

To have composed a chapter of fifteen sections of which only two genuinely reflect the Ḥanafīs position may seem to be a rather weak case. In defence of al-Bukhārī's approach, it may be argued that his purpose is not to merely highlight actual or potential *ḥiyal*, but rather, to demonstrate that the problem lies more profoundly in the juridical approach of the *ḥiyal* protagonists.¹⁴ This can be inferred from the fact that the initial section relates to intention and is entitled 'the section on abstaining from *ḥiyal* and for each individual is that which he intends; [both] in his belief and in other than it.' al-Bukhārī then goes on to narrate the *ḥadīth* of the Prophet (pbuh) which states that:

'O mankind, indeed actions are by their intentions and for a person is only that which he intended. So whoever migrates to Allah and his Messenger, his migration will be to Allah and his Messenger, and

¹³ Maḥmūd, *al-Ittijāhāt al-fiqhiyya*, 50.

¹⁴ See Scott C. Lucas, "The Legal Principles of Muḥammad B. Ismā'īl al-Bukhārī and their Relationship to Classical Salafī Islam," *Islamic Law and Society* 13, no. 3 (2006): 289-324. Lucas mentions that there are three chapters in al-Bukhārī's work which he regards as an 'articulation of legal theory' (p.290). These are *Kitāb al-I'tisām bi-l-Kitāb wa al-Sunna*, *Kitāb Akhbār al-Āḥād*, and *Kitāb al-Hiyal* (p.290, n. 1). Lucas goes on to discuss the first two chapters, but not the latter. He does, however, note later on that he regards all of the chapters in the *Kitāb al-Hiyal* as a demonstration by al-Bukhārī of '[i]nvalid techniques of *ijtihād* and inappropriate sources of Islamic law.' (p.297, n. 34).

whoever migrates to temporal thing, to acquire it, or to a woman, to marry her, then his migration will be to that to which he migrated'.¹⁵

After quoting this *ḥadīth* al-Bukhārī moves on to the next section without giving any commentary or mentioning his purpose for quoting it. The critical importance of this *ḥadīth* to the subject of the *ḥiyal* and its perceived neglect at the hands of the *ḥiyal* protagonists, is not, however, lost on the reader and this is perhaps what the chapter then goes on to substantiate: Those who disregard the role of an individual's intention in determining the legality of his actions, will either promote *ḥiyal* directly or their jurisprudence will necessarily give rise to them. The role of intention is a crucial aspect of the *ḥiyal* opponents' argument and al-Bukhārī's quoting of the *ḥadīth* is clearly intended to give a decisive verdict regarding it.

3.2 Ibn Baṭṭa's *Ibtāl al-Ḥiyal*

Ibn Baṭṭa (d.387 AH), a prominent Ḥanbalī jurist and traditionist,¹⁶ wrote his refutation to the *ḥiyal* in response to a specific *ḥīla* proffered by a Muftī which involved the marriage dissolution procedure known as *khul'*. A man had sworn an oath that his wife would be divorced thrice if he did not kill an innocent Muslim with whom he had had a dispute. Regretting his oath and not wanting to carry out the killing or that his wife should be permanently divorced, he petitioned the Muftī to provide him with a way out. The Muftī suggested that the man should get his wife to ask for a *khul'* by which their marriage could be terminated. He reasoned that once the *khul'* was given and the marriage ended, the oath would be rendered inoperative. The man could then remarry his wife and be absolved from his oath.¹⁷

¹⁵ al-Bukhārī, *Ṣaḥīḥ*, vol 3, 1405 (ḥadīth no. 7039).

¹⁶ See his biography in Abū Ya'īlā, *Ṭabaqāt al-Ḥanābila*, vol. 2, 125-132.

¹⁷ Ibn Baṭṭa, *Ibtāl al-Ḥiyal*, 49-50.

Although Ibn Baṭṭa is responding to this specific *ḥīla*, his extensive answer includes a rebuttal of the *ḥiyal* in general. He therefore begins by explaining the problems with the Muftī's solution and then draws a general conclusion from which he sets out to refute the *ḥiyal* as a whole. A large portion of his work is also taken up in explicating his perspective on the nature of the jurists' role and the traits and characteristics they should aspire to.¹⁸

3.2.1 Ibn Baṭṭa's Juridical Rebuttal

Ibn Baṭṭa summarily dismisses the solution given by the Muftī because it ignores the fact that merely by requesting the solution, the petitioner has broken his resolve to kill his opponent, meaning that the triple divorce had already been effected.¹⁹ He then goes on to deal with the answer put forward by the Muftī. His first assertion is that no real jurist or jurisconsult would give such a *fatwā*, as the job of the jurist is to teach and guide to that which is true,²⁰ and not to teach *ḥiyal* which are a deception to God and his Prophet (pbuh).²¹ He substantiates this assertion with two key arguments: Firstly, God has prescribed *khul'* for a specific situation which is clearly mentioned in the Qur'ān (2:229), and its usage in this *ḥīla* contradicts that legal purpose.²² Ibn Baṭṭa quotes numerous traditions and ruling from the jurists to corroborate his point.²³ In one tradition the Prophet (pbuh) says 'what is wrong with people that they play with the limits of Allah and mock his signs [by saying]: I grant you *khul'*, I take you back, I divorce you'.²⁴ Ibn Baṭṭa is making a very important point here, namely that the laws of God have been set for a specific purpose and that they should only be used for that

¹⁸ Ibid, 50-92, 131-143. The total length of the epistle is 98 pages and thus his treatment of the jurists represents more than a half of the total work.

¹⁹ Ibid, 92-93.

²⁰ 'Ta'īm al-ḥaq wa al-dalāla 'alayh', see ibid, 93.

²¹ Ibid, 94.

²² 'Qad waḍa' al-khul' fī ghayr mā šana 'Allāh lahū wa qāṣad'. This is a point he makes repeatedly throughout his epistle which shows its importance to his argument. See ibid, 96, 105, 111, 116, 125.

²³ Ibid, 96-105.

²⁴ Ibid, 106-7. In the following tradition he quotes, the words of mockery are: I divorce you, I take you back, I divorce you, I take you back.

purpose, and to use them contrarily or for one's own purpose is tantamount to playing with, or mocking, the divine law.

His second point is that a distinguishing characteristic of the *ḥiyal* is that in their outward forms they conform to the law, whereas internally, they do not. He compares this approach to the behaviour of the hypocrites, who outwardly profess themselves to be Muslims, whereas inwardly, they are not. The result of this technique is that, according to its outward manifestations, an action may be legally permitted, whereas religiously it is reprehensible. At this juncture he mentions the specific warning from the Prophet (pbuh) regarding the *ḥiyal*:

Do not commit that which the Jews committed, such that you make permissible the prohibitions of God by the smallest of *ḥiyal*.²⁵

Following this he goes on to discuss some of the Jewish *ḥiyal* which this ḥadīth maybe alluding to. The Qur'ān itself refers to the cause of one of these *ḥiyal*:

Ask them (O Muhammad) of the township that was by the sea, how they did break the Sabbath, how their big fish came unto them visibly upon their Sabbath day and on a day when they did not keep Sabbath came they not unto them. Thus did We try them for that they were evil-livers.²⁶

The Jews were rebuked for setting out their fishing nets on the day before the Sabbath. The fish would be trapped as they appeared on the Sabbath and the Jews would then take them from the nets on the next day. By this argument the Jews intended to violate the Sabbath, not openly, but by outwardly conforming to the law while intending the opposite. The Jewish tendency to interpret their religious rules in this way is highlighted in a tradition where the

²⁵ 'Lā tartakibū mā irtakabat al-yahūd fa-tastahillūn maḥārim Allāh bi adnā al-ḥiyal', see Ibn Baṭṭa, *Ibtāl al-ḥiyal*, 112. This Jewish use of numerous legal fictions has been discussed by many authors, and with specific regard to the usury prohibition they have been fully documented in Hillel Gamoran, *Jewish Law in Transition: How Economic Forces Overcame the Prohibition Against Lending on Interest* (New York: Hebrew Union College Press: 2008). For Jewish legal fictions in general, see Ze'ev W. Falk, *Introduction to the Jewish Law of the Second Commonwealth* (Leiden, E. J. Brill, 1972), vol. 1, 22; Bertram B. Benas, "The Legal Device in Jewish Law," *Journal of Comparative Legislation and International Law* 11, no. 1 (1929): 78; B. Felsenthal, "The Law of Release, as Understood and Practised in the Apostolic Age," *The Old Testament Student* 3, no. 5 (1884): 147; Solomon Goldman, "The Legal Fiction in Jewish Law," in *Presentation Volume to William Barron Stevenson*, ed. C. J. Mullo Weir (Glasgow: Glasgow University Oriental Society, 1945), 63; Ephraim E. Urbach, *The Halakhah: its Sources and Development* (Tel-Aviv: Modan, 1996), 253.

²⁶ (7:163), trans. by Marmaduke Pickthall.

Prophet (pbuh) says: May God curse the Jews they prohibit the fat of the sheep and [instead] they consume its price.²⁷ Commenting on this incident Ibn Baṭṭa remarks that God only cursed them because they used a *ḥīla* to ‘consume’ the fat.²⁸ In these examples Ibn Baṭṭa is demonstrating that what is important is not mere outward conformation to the letter of the law, but rather to inwardly accept the substantive import of the law and that it, like the outward, must equally be upheld.

He demonstrates the importance of inward conformity using a tradition in which the Prophet (pbuh) prohibits a person, who has just concluded a sale contract, from immediately departing from the other party out of fear that the latter may rescind the contract. From this, he infers that this prohibition is premised upon the intention to use the departure as a *ḥīla* to prevent the other party from rescinding the contract. Had there been no such intention, the departure would be both normal and acceptable.²⁹ This is an important step in the argument of the detractors of the *ḥiyal*, as the notion of intent, like in al-Bukhārī’s work, is identified as an important factor in assessing the legitimacy of actions. Ibn Baṭṭa supports this inference by quoting Aḥmad’s statement when asked about this *ḥadīth*, in which he replies: it is the invalidation (*ibṭāl*) of *ḥiyal*.³⁰

Ibn Baṭṭa’s approach thus contains three principal arguments:

1. The legal rules must be used as per their prescription and divine mandate and the *ḥiyal* do the exact opposite.

²⁷ Ibn Baṭṭa, *Ibṭāl al-ḥiyal*, 113. ‘Consuming its price’ is explained in a similar narration which says: May God fight the Jews, whereas fat was prohibited to them, they melted it and sold it. See Ibn Taymiyya, *Bayān al-Dalīl*, 35.

²⁸ Ibn Baṭṭa, *Ibṭāl al-ḥiyal*, 113-14.

²⁹ Ibid, 116.

³⁰ Ibid, 117.

2. The *ḥiyal* are a deception as they outwardly simulate licit actions whereas inwardly they aim to legalise the proscribed.
3. The intentions of the parties are critical in determining the legality of actions.

3.2.2 Ibn Baṭṭa on the Jurists

Apart from his juridical arguments, another important aspect of Ibn Baṭṭa's epistle is his views regarding the jurists and the nature of the office they hold. At the outset of the epistle he outlines that the most significant characteristic of the jurist is his God-consciousness and his scrupulousness in this regard; the jurist is one who is imbued with the fear of God. Just how this translates into a juridical methodology is explicated in his concluding chapter. Here he quotes a number of jurists who advise that one should refrain as much as possible from giving verdicts or delving into complex and difficult issues and that whoever tries to answer every possible question is a madman.³¹

But more telling than this are his quotes which advise against pursuing exits (*makhārij*) for people. The Maḍīnan jurist Rabī'a is thus advised: 'If a man asks regarding an issue, do not exert yourself in giving him an exit but let your exertion be in extricating yourself.'³² Ibn Baṭṭa even attempts to vindicate this position with reference to a tradition which says that 'speech is the agent of tribulation'. He infers from this, that the difficulties which befall an individual are due to carelessness in speech and if a person swears an oath mindlessly, then the consequences that he faces are his own doing. This, Ibn Baṭṭa claims, belies all those who employ *ḥiyal* to avoid breaking their oaths and those who seek exits from their oaths and thereby try to avoid the harm that their oaths may entail.³³

³¹ Ibid, 131-40.

³² Ibid, 133-34.

³³ Ibid, 141-42.

3.3 The Ḥanbalī Reformers and the *Ḥiyal*

Ibn Taymiyya wrote an extensive polemic against the *ḥiyal* which focuses on the particular *ḥīla* known as *tahlīl*. This *ḥīla* is used to permit the remarriage of a triple divorcee to her former husband. Additionally though, he also addresses the subject of the *ḥiyal* in a more general juridical framework. Prior to the works of Ibn Taymiyya and Ibn al-Qayyim, no systematic analysis of the *ḥiyal* had been attempted.³⁴ The works of Ibn Baṭṭa and al-Bukhārī relied mainly on textual proofs, while also recognising the need for a deeper analysis by highlighting the importance of intentions and motives. In the work of the Ḥanbalī reformers we find a comprehensive treatment of the *ḥiyal* in terms of its jurisprudential implications.

Ibn Taymiyya, and subsequently followed by his protégé Ibn al-Qayyim, builds his case against the *ḥiyal* on three distinct pillars: 1) the purposes of the law, *maqāṣid al-Sharīʿa*, 2) the role of intentions, *niyya*, and 3) the *uṣūlī* tool of blocking the means, *sadd al-dharāʿi*. Although each pillar represents a distinct argument against the *ḥiyal*, the Ḥanbalī reformers use them as mutually complimentary pillars to build a comprehensive paradigm to stand in contrast to their opponents. The first two elements, *maqāṣid* and *niyya*, are used to demonstrate how the *ḥiyal* are intrinsically antithetical to Islamic law, whereas the *dharāʿi* argument is to show the incoherency of the *ḥiyal* with the general trend of the law. Each pillar will be examined in turn and their importance to the *ḥiyal* polemic noted.

³⁴ A manuscript written by a Ḥanbalī Abd al-Raḥmān ibn Ibrāhīm ibn Uthmān under the title *al-Radd ʿalā man Tamassak bi-Madhhabay Imāmayn Abī Ḥanīfa wa al-Shāfiʿī fī Istibāḥat al-Ribā bi-al-Ḥiyal*, has been edited and published. The manuscript is dated 674/1275 and therefore predates the work of both of these authors. Although no information beyond the name of the author is given. I have been unable to find any other biographical information regarding this author and the editor of the manuscript has notified me (in a personal communication) that he also could find no other information regarding the author. The arguments given by Ibn Taymiyya and Ibn al-Qayyim are similar to those given in this earlier treatise, although the latter is certainly not as lengthy or as thorough as the former two. The precise relationship of this treatise and its author to Ibn Taymiyya and his treatise awaits further investigation. See Saffet Köse, “Hile-i Şerʿiyye Konunsunda İlginç Bir Risâle,” *İslam Hukuku Araştırmaları Dergisi* 1 (2003) 231-255.

3.3.1 *Maqāṣid al-Sharī'a*

Maqāṣid al-Sharī'a refers to the purposes, aims and objectives of Islamic law and represents an attempt by certain jurists to decipher a teleology from the positive injunctions of the Sharī'a. Ibn Taymiyya was a keen proponent of the *maqāṣid* theory and also of its jurisprudential corollary *maṣlaḥa*.³⁵ The importance of the *maqāṣid* to Ibn Taymiyya's arguments against the *ḥiyal* become apparent from the very outset of his volume devoted to their refutation. Ibn Taymiyya, like Ibn Baṭṭā associates the *ḥiyal* with its pejorative meanings of deception and trickery. The meaning which is common to all these terms, he avers, is that of someone who performs a good action outwardly, while inwardly intending the opposite in order to achieve his objective.³⁶ He goes on to show how the two terms *ḥiyal* and *khid'a* are used interchangeably and how one early scholar even describes the book of *ḥiyal* as a book of deception.³⁷ His point is to stress, as he says, that 'to deceive God is prohibited and the *ḥiyal* are an attempt to deceive God'.³⁸

What is more important though, is how he explains this point and links it to the *maqāṣid* in a profound way: Statements are the medium through which contracts, treatises and marriage are concluded and their effect is to allow and permit the use of what would otherwise be prohibited. A person who makes these statements and yet does not intend the realities behind these contracts, nor intends their *maqāṣid*, for which these very words have been designated, but rather intends the opposite, is guilty, according to him, of in fact mocking the signs of

³⁵ For his arguments in defence of the *maqāṣid*, see Ibn Taymiyya, *Majmū'a Rasā'il wa al-Masā'il* (Cairo: Maṭba'a al-Manār, nd), part 3, 30 (each part has separate pagination). For his use of *maṣlaḥa*, see al-Matroudi, *The Hanbalī School of Law*, 80; Abū Zahra gives a detailed account of Ibn Taymiyya's standpoint vis-à-vis *al-maṣlaḥa al-mursala*, see his, *Ibn Taymiyya: Ḥayātuhū wa 'Aṣrūhū – Ārā'uhū wa Fiqhuhū* (Cairo: Dār al-Fikr al-'Arabī, nd); 495-500; Benjamin Jokisch, "Ijtihād in Ibn Taymiyya's *Fatāwā*," in *Islamic Law: Theory and Practice*, ed. Robert Gleave and Eugenia Kermeli (London: I.B.Tauris, 2001), 128.

³⁶ Ibn Taymiyya, *Bayān al-Dalīl*, 22.

³⁷ Ibid, 23.

³⁸ Ibid, 24.

God because contracts and agreements are from the signs of God.³⁹ In essence, Ibn Taymiyya is arguing that the outward forms of contracts and marriages themselves are not what God has legislated; rather, it is the underlying purposes and realities which they serve. The medium by which contracts occur is through human communication, specific forms of which have been mandated by the law in order to ensure mutual understanding of the contracting parties regarding the underlying meanings of their actions. If a person has no intention of upholding those meanings or even effecting them, but rather involves himself in the procedure for a purpose which contradicts the very purpose of the outward form, then this clearly is a case of deception. The *ḥiyal*, he argues, all fit into this description.

3.3.1.1 Outward Forms Vs Underlying Meaning

A number of textual proofs are garnered to demonstrate that changing the outward forms or the names of things does not affect their ruling. Ibn Baṭṭa narrates a ḥadīth in his work regarding the Jews being prohibited from selling the fat of the sheep, in response to which they merely sold it after melting it down. Ibn Baṭṭa, it will be recalled, regarded this as a *ḥīla*. Ibn Taymiyya explains that when they were prohibited from sheep fat they deviously interpreted it to mean its oral consumption and deemed fat to refer only to its original solid state. The original term used in the prohibition is *shaḥm*, which refers to fat in its original state, whereas once it has been melted it is called *wadak*. They hence melted it down and sold it, thereby consuming its price as opposed to consuming the fat itself. Ibn Taymiyya argues that they ignored the fact that if God prohibits one to benefit from something, then there is no difference between benefiting from its essence or its countervalue, or between its solid and melted state, and that is so irrespective of a change in nomenclature.⁴⁰ The purpose behind the ruling was to prohibit the Jews from taking any benefit whatsoever from the fat. Ibn

³⁹ Ibid, 25.

⁴⁰ Ibn Taymiyya, *Bayān al-Dalīl*, 35-7.

Taymiyya uses this example to demonstrate that the laws of God relate to meanings and purposes and not merely to outward forms and names.

To support this, he presents a number of ḥadīth which prophesy that a time will come when some Muslims will permit alcohol, usury, bribery, killing and adultery, by giving them alternative names.⁴¹ Bribes, adultery, and usury will hence euphemistically be renamed as gifts, marriage and sale, respectively. Ibn Taymiyya commenting on these traditions says:

This is exactly what proponents of the *ḥiyal* do, because they intend to observe the rules by adhering to them merely through [their] words and they claim that what they have permitted is not included in what has been prohibited even though the intellect knows that the meaning of it is the [same as] the meaning of the prohibited thing and that it was the[ir actual] purpose.⁴²

He goes on to stress that renaming a things does not in itself result in a change in the rule,⁴³ because institutions like sale and marriage have very distinct characteristics (*khaṣā'is*) which define them, and if these are not present then these terms will not apply. Similarly, if the characteristics of wine or usury are observable then the ruling relating to them will apply and not the rule of their euphemistic alternatives. Ibn al-Qayyim, who relies heavily on his mentor's works, concurs with his analysis on this point. *Ribā*, he points out, is not prohibited merely due to its contractual form or wording, rather, what is prohibited is its reality, its meaning and its purpose, and these three aspects are equally present in the *ḥiyal* of *ribā* as they are in its overt form. This, he goes on, is not lost on the contracting parties or on anyone who witnesses their conduct and God knows that what they actually intend is nothing other than the prohibited *ribā* except that they have arrived at it through an unintended contract, to which they have given a false name. It is known, he concludes, that this does not remove the

⁴¹ Ibid, 38-43.

⁴² Ibid, 43.

⁴³ 'Tabdīl al-nās li al-asmā' lā yūjib tabdīl al-aḥkām', see ibid, 44.

injunction, nor does it remove the essential harm which is the cause of its prohibition, rather, it increases the harm due to the deception that it entails.⁴⁴

Both of the Ḥanbalī authors stress that the substantive rules of the Sharī‘a are based upon its purposes and objectives and do not relate merely to the outward forms and procedures. If the Sharī‘a rules are aimed at achieving certain socio-economic results this means that a failure to adhere to the rules will result necessarily in the rise of the precise socio-economic problems which the Sharī‘a seeks to prevent. Will the use of *ḥiyal* protect the community from these social and economic ills or augment their rise? What the Ḥanbalī reformers are arguing is that the *ḥiyal* are contemptuous of the purposes of the Sharī‘a and their usage will result in the very same results as those produced by overt violations of the law. This is a very important consequentialist type of argument and we will later note its critical relevance when assessing the validity of the Ottoman cash *waqf*.

3.3.1.2 Using the *Maqāṣid* to Delineate the *Ḥiyal*

In addition to using the *maqāṣid* as a benchmark for identifying those *ḥiyal* which are impermissible, Ibn Taymiyya also asserts that any *ḥiyal* which are used in pursuit of the *maqāṣid* through legal methods are not to be regarded as *ḥiyal*. He raises this point to refute al-Sarakhsī’s paradigm of the *ḥiyal* as exits. In fact all *ḥiyal* which are used in pursuit of the *maqāṣid* are not to be designated as *ḥiyal*, whether their protagonists call them as such or not.⁴⁵ Ibn Taymiyya’s argument is not one of mere words, (i.e. use of the word *ḥiyal*) but rather one of substance, he is therefore not opposed to the *ḥiyal* as a genre, but rather the usage of specific *ḥiyal* which violate the *maqāṣid*.

⁴⁴ Ibn al-Qayyim records the successor traditionist Ayyūb as having earlier stated: ‘*Law ataw al-amr ‘alā wajhihī kān ahwan*’, see Ibn al-Qayyim *Ighāthat al-Lahfān*, 277-9.

⁴⁵ Ibn Taymiyya, *Bayān al-Dalīl*, 126-7.

This becomes apparent in his treatment of equivocal speech, where he asserts that it is subjected to the five-fold scale of legal values. Its usage would thus be obligatory (*wājib*) if used to prevent a killer locating his would-be victim; in other situations it may be recommended (*mustaḥab*) or permissible (*mubāḥ*), alternatively though, it may also be prohibited, especially in situations where complete disclosure is necessary. The discerning factor he invokes is the presence of a *maṣlaḥa*, i.e. the prevention of harm, either for the listener or for the speaker.⁴⁶ This is justified because the *maqāṣid* of the law are geared towards the prevention of harm and also because, while equivocation does contain a type of deception, it is not the same as overtly lying and therefore constitutes the lesser of two evils.⁴⁷

Ibn Taymiyya uses the *maṣlaḥa* yardstick to both justify the use of equivocal speech and more crucially, to limit its juridical remit and thereby prevent its usage in synallagmatic contracts. If equivocal speech is used to circumvent what the law mandates, such as *zakāt* and *shuḥʿā*, or to permit what has been prohibited such as *ribā* and the remarriage of the triple-divorcee, then, he infers, the *maṣlaḥa* is clearly lost and in its place the *mafsada* remains. He argues therefore that the utility of equivocal speech is based upon the latitude which exists in the meanings of the words and how they are understood.⁴⁸ In contradistinction to this, are the words which are effective in contracts which permit no equivocation. He quotes Aḥmad as saying that the use of equivocal language does not apply to sale transactions. Sale and marriage are words which have legally defined meanings, if a person uses them to mean usury or as a conduit for remarriage (*tahḥīl*) respectively, his use of these words goes beyond the domain of their possible legal meanings. This, he argues, is because if these actual words (i.e. usury, or *tahḥīl*) are used then the contracts would be invalid. Using alternative euphemisms in

⁴⁶ Ibid, 116-7.

⁴⁷ This is a principle strongly endorsed by the *maqāṣid* theory, see ‘Izz al-Dīn ibn ‘Abd al-Salām, *Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām*, (Cairo; Maṭba‘ā al-Istiḳāma, nd), 48-9, 79-83.

⁴⁸ Ibn Taymiyya, *Bayān al-Dalīl*, 117.

contracts is therefore comparable to lying and not equivocation; in the former, words which do not encompass the reality are used, whereas in the latter, there is a possibility that they do. Sale, he argues does not encompass usury, nor does marriage encompass one being an intermediary for remarriage. The *ḥiyal* are, analogically speaking, akin to lying and not to equivocation.⁴⁹ This is a very powerful argument from Ibn Taymiyya which ties together both the *maqāṣid* and *maṣlaḥa*, with the words used in a contract, to provide a coherent argument against the use of *ḥiyal* in bilateral contracts.

Using this approach, however, Ibn Taymiyya concedes the legitimacy of the numerous *ḥiyal* which do not violate the *maqāṣid*. These *ḥiyal*, he states, do not fall under the purview of what he is referring to as *ḥiyal* in his refutation. Consequently, his treatise focuses on what are the more controversial *ḥiyal*; the *ʿīna* contract and the *tahlīl* marriage, whilst also referring occasionally to those relating to *zakāt* and pre-emption. It is clear that what these authors are averse to is a limited number of *ḥiyal* and not the genre or technique itself. This can be noted by Ibn Taymiyya's reference to the good *ḥiyal* (*al-ḥiyal al-ḥasana*)⁵⁰ and more clearly by the large number of *ḥiyal* proposed by his student Ibn al-Qayyim; over one hundred in his *I'lām al-Muwaqqi'īn* and over eighty in his *Ighāthat al-Lahfān*.⁵¹ Ibn al-Qayyim's introductory formula reveals their essential viewpoint, he states that the *ḥiyal* are evaluated according to the purpose for which they are invoked; if the *maqṣūd* is good then the *ḥīla* is also good and if it is bad then the *ḥīla* is also bad, if the purpose is obedience and worship then the *ḥīla* is likewise, whereas if the purpose is disobedience and iniquity so is the *ḥīla*.⁵² In short, the Ḥanbalī reformers conclude that the *ḥiyal*, both as a genre and as a legal technique, are value neutral and that what is actually critical to their legality is the individual purposes they serve.

⁴⁹ Ibid, 117-8.

⁵⁰ Ibn Taymiyya, *Bayān al-Dalīl*, 119.

⁵¹ See pages 672-740 and 302-360, respectively. Surprisingly, he even provides a *ḥīla* for *tahlīl* to be instigated by the divorcee, see, his *I'lām al-Muwaqqi'īn*, 739.

⁵² Ibn al-Qayyim, *Ighāthat al-Lahfān*, 302.

3.3.2 Intentions and Motives

Ibn Taymiyya sets out to conclusively demonstrate that intentions determine the legitimacy of contracts and that their impact is not restricted to mere moral reproval. It is generally known that the Ḥanafīs and Shāfi‘īs do not nullify contracts based upon unlawful intents, whereas the Mālikīs and Ḥanbalīs do.⁵³ However, as Nabil Saleh judiciously notes, their difference is not regarding unlawful intentions when they are overtly expressed, as these would be unanimously rejected, but rather on the probability or suspicion of an unlawful intention.⁵⁴ For the Ḥanafīs and the Shafi‘īs, contracts and transactions are always deemed to be lawful in the absence of an expressed unlawful intent. This however is directly opposed by the Mālikīs and Ḥanbalīs who nullify contracts if the parties harbour an intention to violate the law, whether that intention is made overt or not is immaterial to the legal ruling. Ibn Taymiyya defends this position and his presentation is hence focused on demonstrating that intent has a significant role to play in the validity of contracts.

Ibn Taymiyya demonstrates the importance of intentions firstly through the use of textual sources which stress its centrality both to the religious value of an action and also to its legal ruling. By religious value is meant the consequences of the action in the next life, whereas the legal ruling relates to its temporal evaluation. The ḥadīth quoted by al-Bukhārī is, in this context, very important as it stresses that all actions are evaluated by their intentions and is taken by the *ḥiyal* antagonists to apply in the religious sense and also in the legal sense. Ibn

⁵³ For a detailed exposition see, Oussama Arabi, “Intention and Method in Sanhuri’s *Fiqh*: Cause as Ulterior Motive,” *Islamic Law and Society* 4, no. 2 (1997): 200-223; Muhammad Waḥīd al-Dīn Siwār, *al-Ta’bīr ‘an al-Irāda fī al-Fiqh al-Islāmī*, (‘Ammān: Maktaba Dār al-Thaqāfa, 1998); Paul R. Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunnī Fiqh* (Leiden: Brill, 2006), 97-121. Powers, although relying heavily on Arabi’s work, questions whether his characterisation of the Ḥanafīs is correct. His conclusion however, is based upon his clearly errant reading of al-Kāsānī’s discussion on the topic, where he reads al-Kāsānī’s statement *waqa’at al-ḥāja* as ‘*waqa’at al-ḥāja*’ which he translates as ‘I insist on the specification [of the contract] by *niyya*’. See Ibid, 109-10.

⁵⁴ Nabil Saleh, “Are the Validity and Construction of Legal Acts Affected by Cause (Sabab)? A Comparative Study under Islamic and Arab Laws,” *Arab Law Quarterly* 7, no. 2 (1992): 125-6.

Taymiyya quotes two ḥadīth which explicitly show the religious importance of having the correct intention at the time of entering into a contract.

1. ‘Whoever marries a woman for a dowry which he intends not to give to her, is a fornicator and whoever incurs a debt intending not to fulfil it, is a thief’.
2. ‘Whoever takes the wealth of people intending [at the time] its repayment, God will pay it on his behalf, [whereas] whoever takes it intending to destroy it, God will destroy him.’⁵⁵

These aḥādīth clearly show the important role of one’s intention and the religious value attached to them. Although the outward forms of contracts may satisfy the legal conditions for validity, it is clear from the ḥadīth, that those performed *mala fide* will ultimately be judged according to the intent behind them.

He then goes on to show how intent can govern the legal ruling of an action and determine the subsequent outcome. Three examples will suffice, although he provides a host of others:

1. A *muḥrim* (person in the state of *iḥrām*) is prohibited from hunting although he is permitted to consume the meat of the prey if it is hunted by a non-*muḥrim*. If the latter, however, makes the intention at the time of the hunt, that the meat is specifically for the former then, according to some jurists, it becomes prohibited for the *muḥrim* to consume.⁵⁶
2. The rules of *ribā al-nasā’a* prohibit fungible items of the same genus to be exchanged without immediate delivery. The same, however, is permitted when the intention behind it is to give a gratuitous loan. Both contracts involve one party acquiring *dirhams*, for example, and then returning their equivalent after the conclusion of the

⁵⁵ Ibid, 59-60. The editor notes that first ḥadīth is to be found in the Musnad al-Bazzār, with a weak chain, and the second in the collections of al-Bukhārī, Ibn Mājah and Aḥmad.

⁵⁶ Ibid, 58-59. It should be noted that this is not the Ḥanafī position as Ibn Taymiyya, himself, notes. See al-Kāsānī, *Badā’i*, vol. 2, 328.

contract. The difference between the rulings is based upon the intention of the parties.

The first transaction is commercial and hence premised upon exchange and profit, whereas the second is philanthropic.⁵⁷

3. Transactions of the coerced (*mukrah*) and the joker (*hāzil*) are disregarded, precisely due to their lack of intent.⁵⁸

Ibn Taymiyya concludes that from these examples that intents do impact the legal ruling of actions and contracts and this, he says, uproots the very basis of the *ḥiyal*, because someone who uses a *ḥīla*, not only, does not intend the purpose of the contract which it is designed to serve, but over and above that, he intends its exact opposite. The result is that instead of realising the purpose of the contract, he does the opposite and seeks thereby to deny someone's legal right or to permit for himself what is not licit for him. The validator (*muḥallil*), hence, does not only, not intend the marriage he contracts, as the coerced or joker does, but rather he also intends to divorce his would be wife. Similarly the person who uses the *ṭina* transaction does not intend by the sale to acquire ownership of the intermediary items, but rather to give, say a £100 pounds cash in order to receive £200 later on, which is nothing but *ribā*.

The response of the Shari'a to the *ḥiyal* is to invalidate the transaction if both parties are guilty of acting *mala fide*, and if it be unilateral then the transaction will stand but the real purpose will be countered. Hence the transaction of a person who sells part of his wealth to avoid the alms-tax, or divorces his wife to disinherit her, will be upheld although he will still be liable to pay the tax, and his divorced wife will retain her inheritance right.⁵⁹ Ibn al-Qayyim, again concurs with his mentor:

⁵⁷ Ibid, 60-1. This is also contrary to the Ḥanaḥī viewpoint and has been discussed earlier in the chapter on *ribā*.

⁵⁸ Ibid, 61-74.

⁵⁹ Ibid, 75.

Whoever ponders over the Sharīʿa and is endowed with a juridical noesis (*fiqh al-naḥs*), will observe that it nullifies the goals of the *ḥiyal* proponents and counters them [by establishing] its opposite. ... [For example,] the invalidation of a bequest, if the beneficiary kills his benefactor ... [or] the nullification of an affirmation of money [owed] by a terminally ill [person] to his inheritor, because he uses it as a *ḥīla* to make a bequest for him.⁶⁰

He also goes one step further and claims that not only is it the Sharīʿa which enacts the opposite ruling but also the divine destiny (*qadr*) of the offender will result in the opposite of his unlawful intent.⁶¹

3.3.3 Blocking the Means – *Sadd al-Dharāʿiʿ*

The phenomenon of *sadd al-dharāʿiʿ* is well established in the Sharīʿa, as not only are the major sins prohibited, but so is whatever is likely to lead to them: Fornication is prohibited as are all actions which can lead to it, such as an unwarranted gaze at a marriageable woman or to be in seclusion with her. Likewise alcohol consumption is prohibited and so its production and trade. Although there are many examples which corroborate it as a phenomenon in the Sharīʿa, not all jurists agree to its use as a jurisprudential tool. The Mālikīs and Ḥanbalīs are in favour of it whereas the Ḥanafīs and Shāfiʿīs oppose it.⁶² This divergence of opinion notably reflects their difference of opinion on the role of intent.

The *sadd al-dharāʿiʿ* argument builds upon the previous two and complements them and shows that not only are the *ḥiyal* inherently counter to the Sharīʿa, but also that they are opposed by the general trend of the Sharīʿa as embodied in this principle. Ibn al-Qayyim states:

⁶⁰ It is not permitted to make a bequest for an inheritor. See Ibn al-Qayyim, *Ighāthat al-Lahfān*, 281.

⁶¹ For the examples he puts forward to demonstrate this, see *ibid*, 281-2.

⁶² Kamali, *Principles of Islamic Jurisprudence*, 310-20.

RECEPTION OF THE *ḤIYAL*: THE POLEMIC

The *ḥiyal* are routes (*wasā'il*) to the prohibited [whereas] *sadd al-dharā'ī* is the opposite of that and so between the two chapters is the greatest contradiction. The legislator has prohibited the *wasā'il* even if [what is] prohibited is not intended by them, because [ultimately,] they lead to them. So what if the prohibited [thing] itself is the intended [purpose].⁶³

These *wasā'il* are, however, of different grades and do not necessarily lead to a prohibited consequence. If an action definitively leads to an illicit end, then all the jurists agree on the prohibition of the route.⁶⁴ It is regarding the case when there is only a probability that it may lead to that unlawful end that the jurists differ; the Ḥanafīs and Shāfi'īs do not use this principle to pre-emptively prohibit such routes, whereas the Mālikīs and Ḥanbalīs do.

Ibn Taymiyya divides the routes into three types; 1) those which inevitably lead to the illicit; these are prohibited outright, 2) those which may or may not lead to the prohibited, but generally and normally do so; these are also prohibited and 3) those which only lead to the illicit sometimes; if they result in a preponderant benefit (*maṣlaḥa rājiḥa*) then they are permitted otherwise these too are prohibited. The purpose of this discussion, Ibn Taymiyya tells us, is that the law prohibits all of these routes even in the absence of an individual's intention due to the fear that it may lead him to an illicit act. If a person purposely intends to ultimately arrive at the illicit through a *ḥīla*, then this is more worthy of being blocked than the routes and if the routes themselves are prohibited, then the *ḥiyal*, which purposely exploit these routes, should be proscribed *a fortiori*.⁶⁵

⁶³ Ibn al-Qayyim, *Ighāthat al-Lahfān*, 283.

⁶⁴ Kamali, *Principles of Islamic Jurisprudence*, 314-5.

⁶⁵ Ibn Taymiyya, *Bayān al-Dalīl*, 163. For the role of the *a fortiori* argument in *uṣūl al-fiqh*, see Wael B Hallaq, "Non-Analogical Arguments in Sunni Juridical Qiyās," *Arabica* 36, no.3 (1989): 289-296; idem, "Legal Reasoning in Islamic Law and the Common Law: Logic and Method," *Cleveland State Law Review* 34, no. 1 (1985-86): 82-5.

3.3.4 Summary of Ibn Taymiyya's Approach

Ibn Taymiyya's and Ibn al-Qayyim's arguments against the *ḥiyal* are far more advanced than those which preceded them. They examine the *ḥiyal* through a range of jurisprudential discourses based upon the advances and development of legal science that had occurred prior to their time. This leads to a far more nuanced argument against the *ḥiyal*, but also to a differentiation of the *ḥiyal* into those which are acceptable and those which are necessarily anathema. Using a three-pronged approach they attempt to show that those *ḥiyal* which serve to violate the law, either by evading one's legal duty or by circumventing the right of another, must be definitively proscribed.

The juridical structure upon which their arguments rest, is primarily informed by the teleology of the *maqāṣid*. Studies in *uṣūl al-fiqh* were increasingly focusing on the *maqāṣid* and their importance to the *ijtihād* process. Ibn Taymiyya, a clear advocate of this approach, combines them into a solid narrative together with the necessity of lawful intent. The *ḥiyal* are premised upon ignoring both of these crucial aspects and are hence intrinsically void. To advocate the *ḥiyal* is to deny that the Sharī'a has a purpose other than its transmitted positive injunctions, and to ignore the role of intent is to separate the temporal from the religious; in the latter all agree that it is intent which will be critically effective in securing one's reward. The final corroborative proof is found in the principle of *sadd al-dharī'a*, where they demonstrate that as a legal trend, the *ḥiyal* are ontologically opposed to the firmly established jurisprudential tool of *sadd al-dharī'a*. The latter seeks to close any possible routes which may lead to the illicit whereas the former seek to open and exploit those routes.

In the final analysis, however, it must be recalled that as the polemic has advanced, the degree of recognition amongst the detractors, for certain *ḥiyal* has increased. Specifically, those *ḥiyal*

are tolerated which have a normative utility and provide valid exits to the myriad of problems faced in sincerely following the sacred law. Ibn al-Qayyim is noted in this regard for proffering numerous *ḥiyal* himself in both his works against the *ḥiyal*. In a recent study of the *ḥiyal* relating to the rules of personal status (*aḥwāl shakṣiyya*), the author Ṣāliḥ Būshīsh, praises Ibn al-Qayyim for laying down both types of *ḥiyal*; permissible and impermissible, and extols his permissible *ḥiyal* for their complexity. These are solutions which are composed of several *ḥiyal* linked together and are a mark of distinguish in Ibn al-Qayyim's *ḥiyal*.⁶⁶ This, he avers, is due to the time-lag between Ibn al-Qayyim's own work and that of the Ḥanafīs, which meant that at the time of composing his treatise, he would have had before him all of their works from which he could eclectically extract suitable *ḥiyal*.⁶⁷ Other studies on Ibn al-Qayyim's *ḥiyal* have also confirmed that many of them have been taken straight from the works of the Ḥanafīs.⁶⁸ The point here is not to note the reliance of the latter on the former, but rather to highlight the diachronic development, both of the genre and the polemic.

3.4 The *Maqāṣid* and al-Shāṭibī

By the time of al-Shāṭibī (d.790), research into both the *maqāṣid* and the *ḥiyal* had reached their apex. In the works of Ibn Taymiyya, the integration of both subjects had already begun, where the former was used as a yardstick to evaluate the latter. Inquiry into the *maqāṣid* reached their pinnacle in al-Shāṭibī's work on *uṣūl al-fiqh*, *al-Muwāfaqāt*. al-Shāṭibī dealt briefly with the *ḥiyal* and although he does not provide a lengthy analysis, his views are important in that they represent the culmination of the diachronic development of the jurist's

⁶⁶ Ṣāliḥ ibn Ismā'īl Būshīsh, *al-Ḥiyal al-Fiqhiyya: Ḍawābiḥuhā wa Taṭbīqātuhā 'alā al-Aḥwāl al-Shakṣiyya* (Riyadh: Maktabat al-Rushd, 2005), 162-3, 256.

⁶⁷ This is also suggested by another author, see Muḥammad ibn Ibrāhīm, *al-Ḥiyal al-Fiqhiyya fī al-Mu'āmalāt al-Māliyya* (Tunis: Dār Suḥnūn; Cairo: Dār al-Salām, 2009), 231.

⁶⁸ Ibid, 177, 199-200, 249-51, 290-292; also see Muḥammad 'Abd al-Wahhāb al-Baḥīrī, *al-Ḥiyal fī al-Sharī'a al-Islāmiyya wa Sharḥ mā Warad fihā min al-Āyāt wa al-Aḥādīth* (np. Maṭba'a al-Sa'āda, 1974), 307.

understanding and assessment of the *maqāṣid* and the *ḥiyal*. All that is left for al-Shāṭibī to do is to fit the *ḥiyal* into his expansive work on the *maqāṣid* and provide a narrative for them.

In the short section devoted to the *ḥiyal* al-Shāṭibī summarises the arguments surrounding the *ḥiyal* drawing on the work of his predecessors.⁶⁹ His arguments in this regard, need not, then, be reproduced.⁷⁰ Following his presentation of the evidences proscribing the *ḥiyal* he concludes that they relate to those *ḥiyal* which demolish a *sharīʿa* principle or oppose a *sharīʿa maṣlaḥa*. If, however, they do neither of these, then they are neither included in the proscription, nor are they invalid.⁷¹ The *ḥiyal* are thus divided by al-Shāṭibī into three categories; those which are unanimously nullified, those which are unanimously upheld, and finally, those in which the jurists differ. al-Shāṭibī, then sets out to explain this third category through the paradigm of the *maqāṣid*.

The fact that there is a difference of opinion regarding the legality of this third group is because it is not categorically clear whether it opposes a *maṣlaḥa* or not. The proponents are of the opinion that it does not oppose a *maṣlaḥa*, whereas their opponents argue that it does. al-Shāṭibī's purpose here is not to deliberate over the various debates, but rather, to explain the nature of the difference and its significance:

It is not correct to say that those who permit the use of a *ḥīla* in certain issues concur [with the claim] that it opposes in that [specific instance] a purpose of the law-giver. Rather they permit it only based

⁶⁹ In discussing al-Shāṭibī's legal theory, Hallaq asserts that according to al-Shāṭibī 'The practice of *ḥiyal*, of arbitrary eclecticism of the four schools' positive legal doctrines, as well as the virtual abandonment of the law is ... an outcome not only of the abstract character of legal theory, but also of its highly theological, non-humanistic outlook.' In another work he presumes that al-Shāṭibī's defence of certain *ḥiyal* is due to the fact that they had crept into Mālikī authoritative doctrine. Hallaq's viewpoint is unsurprising given that he uncritically subscribes to Schacht's *ḥiyal* thesis. See the following, respectively, Wael B. Hallaq, "The Primacy of the Qur'ān in Shāṭibī's Legal Theory," in *Islamic Studies Presented to Charles J. Adams*, ed. Wael B. Hallaq and Donald P. Little (Leiden: Brill, 1991), 89; Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: CUP, 1997), 187; idem, *Model Shurūṭ Works*, 119.

⁷⁰ al-Shāṭibī, *al-Muwāfaqāt*, 448-50.

⁷¹ Ibid, 451.

upon an inquiry into its purpose and [knowing] that the issue is subsumed under the type of *ḥiyal* in which the purpose of the law-giver is known.⁷²

It is unbecoming to think that the masses would openly oppose the law, let alone that the great scholars would also do so. Similarly, he argues, that those who oppose a *ḥīla* only do so when they deem it to be against the *maqāṣid*. Without taking sides, al-Shāṭibī is effectively arguing that both sides argue from the same epistemological premise, although they differ in its application. He goes on to demonstrate this by discussing two of the most controversial *ḥiyal*; *taḥlīl* and *bayʿ al-ājāl*. For both, he elaborates the various *maṣāliḥ* which are used to argue in favour of them, whilst recognising that those who argue against them also have their evidences.

al-Shāṭibī concludes his treatment of the *ḥiyal* by saying that his reason for discussing the *ḥiyal* is due to the lack of Ḥanafī and Shāfiʿī works available in the western lands (*al-Maghrib* and *al-Andalus*).⁷³ The Mālikīs in the West may well decry the *ḥiyal* of their eastern juridical counterparts without even knowing their detailed legal reasoning behind them. This is accentuated by the fact, he argues, that a jurist who is accustomed to only type of legal methodology will be averse to the work of the other schools due to his ignorance regarding their methodology.⁷⁴ al-Shāṭibī's purpose is to give the benefit of the doubt to both sides by arguing that what underpins and is central to both arguments, is the teleological pursuit of the *maqāṣid*.

The question which arises out of this is whether the *ḥiyal* protagonists do actually recognise the *maqāṣid* in their jurisprudence or not. It should be recalled that *maṣlaḥa*, as a source of law, is only recognised by the Mālikīs and the Ḥanbalīs, whereas the Ḥanafīs and the Shāfiʿīs reject it altogether. Additionally, the Ḥanafīs did not contribute at all to the development of

⁷² Ibid, 452.

⁷³ Muhammad Khalid Masud, *Shāṭibī's Philosophy of Islamic Law* (Islamabad: IRI, 1995), 209-11.

⁷⁴ Ibid, 453-4.

the *maqāṣid* discourse in their *uṣūl* works, whereas the Shafi'īs played a leading role. How then, can the Ḥanafī borne *ḥiyal* be justified through the *maqāṣid*? Although it seems that al-Shāṭibī's defence for the *ḥiyal* proponents contradicts their own historical record in recognising the role of the *maqāṣid*, his stance may yet be vindicated. Aḥmad al-Raysūnī, in his analysis of al-Shāṭibī's *maqāṣid* theory, discusses the Ḥanafīs and their position vis-à-vis the *maqāṣid*:

In fact, the *uṣūliyyūn* of the Ḥanafite school were less mindful of the objectives of Islamic law than were the scholastic theologians⁷⁵ I have reviewed a number of their writings, including both earlier and later scholars, but have found nothing of note on this score despite the fact that among jurists, it is the Ḥanafites who have most frequently interpreted Islamic legal rulings – both those having to do with daily transactions and those dealing with forms of worship – in terms of their bases and objectives.⁷⁶

al-Raysūnī's claim is not however backed up with any detailed examples and its application to the *ḥiyal* needs to be investigated further. As we take up the argument of the Ḥanafīs and their defence of the *ḥiyal*, the centrality of these teleological concerns can be observed.

3.5 The Ḥanafī Defence of the *Ḥiyal*

The argument of the Ḥanafīs will be presented initially through al-Shaybānī's introduction to the work of *ḥiyal* ascribed to him, known as *al-Makhārij fī al-Ḥiyal*. Building upon this, later authors also discussed the paradigm of the *ḥiyal* and using the works of authorities such as al-Jaṣṣāṣ, al-Khaṣṣāf and most importantly al-Sarakhsī, the perspective of the school as a whole will be explicated.

⁷⁵ By this he means the other three schools as their *uṣūl al-fiqh* works are based upon the method of the scholastic theologians.

⁷⁶ Ahmad al-Raysuni, *Imam al-Shāṭibī's Theory of the Higher Objectives of Islamic Law* (London: IIIT, 2005), 30.

3.5.1 al-Shaybānī's Prolegomena

al-Shaybānī's discussion begins with the interlocutor asking whether there is a *ḥīla* for a person who repudiates his wife by saying: 'You are divorced'. He answers in the affirmative saying that the person should follow up his repudiation by immediately saying 'if God wills' (*in shā' Allāh*). al-Shaybānī also states that one could use this exception after a statement of manumission in order to prevent its legal effect. Statements of Marriage, divorce and manumission are considered irrevocable in Islamic law, such that their utterance even in jest mandates their legal effect. The statements of an individual to his wife, 'you are divorced', or to his slave 'you are free', will result, necessarily, in divorce and manumission respectively. al-Shaybānī shows, however, that if the speaker immediately follows up one of these phrases with the exception 'if God wills' then their legal effect will be mitigated. He supports this position by mentioning that the Companions 'Alī, Ibn Mas'ūd, and Ibn 'Abbās (ra) and the Successor Ibrahīm al-Nakha'ī all held the same opinion.⁷⁷ To justify why such exceptions should be permitted, he narrates a number of traditions from the Prophet (pbuh) extolling the virtues of marriage while deprecating divorce as the worst of all permissible deeds.⁷⁸ Its mitigation through legal means should therefore be facilitated to maintain the former and avoid the latter. He then cites a ḥadīth in which the Prophet (pbuh) is reported to have said: Whosoever swears an oath and then says: 'if God wills', has gotten out of his oath'.⁷⁹ The Successor jurist Ṭāwūs is asked by Layth ibn Sa'd whether this ḥadīth applies to divorce and manumission, and he replies that it does. The same jurists from the Companions and Successors, mentioned previously, are quoted as concurring that exceptions are permitted in

⁷⁷ al-Shaybānī also mentions the scholars who hold the opposite opinion; Ibn Sīrīn, al-Ḥasan al-Baṣrī and Shurayḥ. The latter held that this would be possible only if the exception preceded the statement. al-Shaybānī, *al-Makhārīj*, 1-2.

⁷⁸ Ibid, 2.

⁷⁹ Ibid, 3.

oaths.⁸⁰ The purpose being to show that the principle of presenting an exit from a legally binding statement, is general in its import and not specific to one issue.

The next step in al-Shaybānī's argument is to show how the intent of a person taking the oath can affect its meaning. The interlocutor asks:

What is your opinion regarding a person who is asked to swear an oath, [and although] he wants to swear the oath, he wants to intend something else by it. Be he an oppressor or the one oppressed, what should he do?

He said: Ya'qūb (i.e. Abū Yūsuf) told us from Abū Ḥanīfā from Ḥammād from Ibrāhīm that he said: If a person is asked to take an oath and he is oppressed, then his oath will be according to what he has intended, [whereas] if he is asked to take an oath and he is the oppressor then the oath will be according to the intention of the one requesting the oath.⁸¹

al-Shaybānī demonstrates the legitimacy of this principle by quoting a prophetic tradition which says that 'your oath is upon that which your companion attests'. The narrator says that he was unsure about its meaning, so he asked the Kufan traditionist Sufyān al-Thawrī who explained it using the same principle as al-Nakha'ī.⁸² al-Thawrī was a traditionist jurist and his concurrence on this point gives al-Shaybānī's argument added credence.⁸³

In a critical final question to al-Thawrī, the narrator asks him regarding oaths with equivocal meanings, in which the person taking the oath is neither an oppressor nor an oppressed. al-Thawrī replies that there is no harm in it.⁸⁴ al-Shaybānī corroborates al-Thawrī's opinion by adducing a number of aḥādīth:

⁸⁰ Ibid, 3.

⁸¹ Ibid, 3.

⁸² Ibid, 3-4.

⁸³ For the notion of traditionist jurisprudents, see Scott Lucas, "Principles of Traditionist Jurisprudence Reconsidered," *The Muslim World* 100, no. 1 (2010): 145-56; Christopher Melchert, "Traditionist-Jurisprudents and the Framing of Islamic Law," *Islamic Law and Society* 8, no.3 (2001): 383-406.

⁸⁴ al-Shaybānī, *al-Makhārij*, 4.

- 1) The Prophet is reported to have been asked regarding a specific verse in the Qur'ān to which he replied 'I will not leave [the mosque] until I inform you [about it].' After getting up from his discussions in the mosque he got and headed for the exit. No sooner had he (pbuh) placed one foot out of the mosque, than he informed the questioner regarding the verse.⁸⁵
- 2) A number of narrations are mentioned in which a man was caught by his wife with his slave girl. His wife demanded that he demonstrates that he was not in a state of ritual purity by reciting from the Qur'ān. If he was in a state of impurity it would be due to him having had sexual intercourse with the slave-girl. The man, who indeed had had intercourse with the slave-girl did not want his wife to know. So instead of reciting from the Qur'ān, he read some lines of poetry in a manner that led his wife to believe that he was actually reciting from the Qur'ān. Later on he enquired from the Prophet (pbuh) regarding his ruse. The Prophet (pbuh) saw no harm in it and in one narration remarked that this was indeed from '*ma 'ārīd al-kalām*', equivocal speech.⁸⁶

With regards to this last statement, al-Shaybānī quotes the Companion 'Umar (ra) as having said: 'Indeed in equivocal speech there is what suffices a Muslim man from lying'.⁸⁷ In the final section of his prolegomena, he quotes a number of earlier authorities who support his assertions, either verbally or through their actions.⁸⁸

In summary, al-Shaybānī's introduction goes through four steps.

1. Allowing exceptions in divorce and manumission.
2. Permissibility of exceptions in all oaths.
3. Interpreting the oath according to the intention of the oppressed.

⁸⁵ Ibid, 4.

⁸⁶ Ibid, 4-5.

⁸⁷ Ibid, 4.

⁸⁸ This includes the companions; 'Umar, 'Alī, Ḥuḏayfa, Ibn Abbās, and Ibn 'Umar (ra) and from the successors; Ibrāhīm, Shurayḥ, 'Aṭā', and Mu'āwiya ibn Hishām.

4. The general use of equivocal speech to avoid lying.

Much of the substantive material in the Shaybānī's treatise revolves around these four aspects and thus oaths, in general, and in particular with regards to divorce and manumission, represents the largest portion of his work.

3.5.2 Prescribing Exits - *Ta'lim al-Makhārij*

Ibn Baṭṭa's viewpoint regarding the role of the jurist is an important aspect of his argument. The Ḥanafī's view of the jurists, both in general and with specific regard to the *ḥiyal*, is in stark contrast to the views of Ibn Baṭṭa. The general view of the Ḥanafī jurists can be gleaned from al-Sarakhsī's commentary on al-Shaybānī's book of acquisition, *Kitāb al-Kasb*. He narrates in his commentary that it was said to al-Shaybānī: 'If only you had authored something in abstention (*zuhd*) and piety (*war'*)', to which he replied: 'I have composed the book of sales (*Kitāb al-Buyū'*)'.⁸⁹ The question put to al-Shaybānī would have been in response to the works produced by the traditionists such as 'Abdullah ibn Mubārak and Aḥmad ibn Ḥanbal under the title *Kitāb al-Zuhd*. What al-Shaybānī's answer shows is that for the Ḥanafīs adherence to the law in all of one's temporal dealings is itself a pious endeavour.

al-Sarakhsī reports that subsequent to this question al-Shaybānī began composing the *Kitāb al-Kasb*. In this work he discusses the importance and necessity of earning a livelihood and that one should not rely solely on divine intervention for their worldly provision without undertaking material action. al-Sarakhsī castigates the ignorant ascetics for restricting the permission to work to the minimum that is necessary.⁹⁰ For the Ḥanafīs piety is not merely to

⁸⁹ Muḥammad ibn al-Ḥasan al-Shaybānī, *Kitāb al-kasb*, printed with al-Sarakhsī's commentary although no distinction is discernable between the original text and its commentary (Aleppo: Maktaba al-Maṭbū'āt al-Islāmiyya, 1997), 230.

⁹⁰ Ibid, 81. al-Sarakhsī may well be referring to the Karrāmiyya ascetics. See C. E. Bosworth, "The Rise of the Karrāmiyyah in Khurasan," *The Muslim World* 50 (1960): 5-14 Margaret Malamud, "The Politics of Heresy in

abstain from temporal pleasures or worldly acquisitions, but rather, to adhere to the sacred law in ones dealings whilst partaking and engaging in the temporal world. The Prophet (pbuh) was not sent with difficult monasticism but rather with lenient monotheism, al-Sarakhsī narrates.⁹¹ In fact the jurists' purpose is to guide the ignorant in precisely how to acquire their worldly provisions through the means approved of by the sharī'a.⁹²

This general concern of the jurists manifests very specifically in the area of the *ḥiyal* in, what the Ḥanafis call, *ta'lim al-makhraj*, i.e. to prescribe an exit for one in difficulty. It is this notion which underpins their paradigm of the *ḥiyal* and which they attempt to establish as a normative aspect of the jurists' work. There are three key proof texts which are used to substantiate the normativity of *ta'lim al-makhraj*:

1. The plan of the Prophet Yūsuf (as) to retain his brother.⁹³
2. The oath of the Prophet Ayyūb (as).⁹⁴
3. A prescription of the Prophet Muḥammad (pbuh) in selling dates.⁹⁵

Medieval Khurasan," *Iranian Studies* 27, no. 1-4 (1994): 42-44; Aron Zysow, "Two Unrecognized Karrāmī Texts," *Journal of the American Oriental Society* 108, no. 4 (1988): 583-84.

⁹¹ Ibid, 245.

⁹² Recently, Mufti Taqi Usmani said that, although he could not say for certain whether it was obligatory on a jurist to provide a legitimate alternative, it was certainly a prophetic Sunna, and that it was the practice of the preceding jurists to provide a viable alternative as much as possible. Interestingly he basis his opinion on the same evidence to be presented here regarding the sale of dates and the alternative provided by the Prophet (pbuh). He then expresses his views regarding the role of the jurists, in line with the Ḥanafī viewpoint: 'A jurist is not he who merely issues *responsa*, but rather he is a propagator (dā'ī), and the propagator's work is not just this; that he should declare something as simply prohibited. It is Imām Sufyān Thawrī's (may Allah have mercy on him) statement that 'Knowledge, according to us, is a concession from the trustworthy. As for saying this is prohibited, then anyone can master that.' For this reason, if there is an alternative, in which there is no legal infraction, then it is not just appropriate for it to be proffered, but rather in the context of preventing the Muslim Ummah from going towards the prohibited, it is necessary.' See Usmani, *Islāmī Bankārī*, 52-54.

⁹³ Abū Bakr Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Kitāb al-Ḥiyal*, ed. Joseph Schacht, printed together with al-Shaybānī's *al-Makhārīj*, 88; al-Jaṣṣāṣ *Aḥkām al-Qur'ān*, vol. 4, 392.

⁹⁴ al-Sarakhsī, *Kitāb al-Ḥiyal*, 88; al-Jaṣṣāṣ *Aḥkām al-Qur'ān*, vol. 4, 392.

⁹⁵ al-Khaṣṣāf, *al-Ḥiyal wa al-Makhārīj*, 6; al-Jaṣṣāṣ *Aḥkām al-Qur'ān*, vol. 4, 392.

3.5.2.1 The Plan of Prophet Yūsuf (as)

The Qur'ān gives a detailed account of the plan used by the Prophet Yūsuf (as) to retain his younger brother Binyāmīn.⁹⁶ Unbeknown to his ten brothers, Yūsuf (as) had become the minister in charge of distributing the food rations in the drought season in Egypt. Yūsuf (as) had demanded from them that when they returned in the following year that they must bring their youngest brother Binyāmīn with them. They thus returned with Binyāmīn in their subsequent visit and it was on this occasion that Yūsuf (as) used his plan to retain Binyāmīn in Egypt. The essence of the plan was that a cup belonging to the king of Egypt was placed in the luggage of Binyāmīn. Once the brothers had taken their supplies and were about to depart they were called back and told that a cup of the king was missing and that their bags would be checked. Their luggage was searched and the cup was retrieved from the bag of Binyāmīn. Yūsuf (as) had told his brothers that the punishment for the offender would be according to their own law, the law of their father, Prophet Ya'qūb (as) and not according to the law of Egypt. According to the latter a thief was to be beaten and fined whereas in the former the thief was to be enslaved.⁹⁷ The punishment for Binyāmīn was therefore that he would be held by Yūsuf (as) as he had planned from the outset.

Following the narration of this event in the Qur'ān the verse reads: 'and thus did We plan for Yūsuf',⁹⁸ from which a number of commentators have averred that this *ḥīla* was divinely inspired.⁹⁹ This, as such, constitutes a direct incidence of prescribing an exit. al-Jaṣṣāṣ

⁹⁶ See Abdul Hakim Ibrahim al-Matroudi, "Circumstantial Evidence and Legal Stratagems in Sūrat Yūsuf (*al-Qarīna wa al-Ḥīla fī Sūra Yūsuf*)," *Journal of Qur'anic Studies* 9, no. 1 (2007): 199-235.

⁹⁷ *Ibid*, 213.

⁹⁸ 'Kadhālika kidnā li-Yūsuf' (12:76).

⁹⁹ al-Matroudi says that a number of commentators (some of whom he later mentions by name as Ibn al-ʿArabī, Ibn ʿAṭīyya and Ibn Ḥibbān) have stated that the legality of this *ḥīla* is due to it being divinely inspired. See al-Matroudi, *Circumstantial Evidence*, 213-214.

comments that this is an indication of the permissibility of using a *ḥīla* as a conduit to the licit or in appropriating one's rights.¹⁰⁰

3.5.2.2 The Oath of Prophet Ayyūb (as)

The Prophet Ayyūb (as) spent a great number of years in tribulation throughout which his wife remained steadfast by his side.¹⁰¹ However, in one instance he became angry with his wife and swore that he would give her one hundred lashes. The Qur'ān mentions that in order to avoid him breaking his oath, he should strike his wife with a bunch of twigs or stalks instead.¹⁰² This divine command to Ayyūb (as) is incontrovertibly a prescription for exiting from his oath.¹⁰³ The importance of this example accentuates when we see that on different occasions the Prophet (pbuh) himself issued a similar ruling with regard to the *ḥadd* punishment for fornication. In cases where the perpetrator was physically unable to withstand the hundred lashes, he (pbuh) ordered that the guilty be struck once with a bundle of a hundred sticks. The Yemeni traditionist al-Shawkānī, commenting on this says '... this practice is from the legally permissible *ḥiyal* which Allah has permitted the like of' referring to the exit given to Ayyūb (as).¹⁰⁴

Another important point which is taken from the exit provided to the Prophet Ayyūb (as) is that regard was given to the words of the oath, as opposed to his intention behind them. The successor jurist 'Aṭā' was once asked about a man who took an oath that he would not clothe his wife until she stood at 'Arafa. He replied that he should take her there and stand with her and thus absolve himself of his oath. The questioner replied that in his oath he did not intend by 'Arafa, merely the place but rather meant the day of 'Arafa, i.e. the ninth day of the *ḥajj*

¹⁰⁰ al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 4, 392.

¹⁰¹ Abū al-Fidā' ibn Kathīr, *al-Bidāya wa al-Nihāya* (Beirut: Dār al-Kutub al-'Ilmiyya, 2003), vol.1, 262-267.

¹⁰² 'Wa khudh bi-yadika ḍighth fa-ḍrib bihī wa lā taḥnath', (38:44).

¹⁰³ al-Sarakhsī, *Kitāb al-Ḥiyal*, 88.

¹⁰⁴ Būshīsh, *al-Ḥiyal al-Fiqhiyya*, 80-1.

pilgrimage. ‘Aṭā’ responds by asking him that when Ayyūb (as) swore to strike his wife a hundred times did he intend to strike her with a bundle; no, rather he was ordered (subsequently) to take a bundle and strike her with it. He then goes onto say ‘indeed the Qur’ān has pronounced’.¹⁰⁵ As in the other examples, regard is given not to the intention behind the oath, but rather to the words which constitute it, and the maximum legal scope they embody is what gives rise to the exit.

3.5.2.3 Selling High Quality Dates for Low Quality Dates

Both al-Khaṣṣāf and al-Jaṣṣāṣ present the following ḥadīth to substantiate the Ḥanafī position on the *ḥiyal*. This ḥadīth is well known to the traditionists and like the previous two examples demonstrates the normativity of prescribing an exit. The ḥadīth relates to an exchange of high quality dates known as *janīb*, for low quality dates known as *jam* ‘:

Abū Hurayra narrated regarding the Prophet (pbuh) that a person, employed to [oversee] Khaybar, came to him with some *janīb* dates. The Messenger of Allah (pbuh) said ‘Are all the dates of Khaybar like this?’ he said ‘No by Allah! O Messenger of Allah (pbuh), indeed we obtain one *ṣā* ‘ for two *ṣā* ‘s, [or] two *ṣā* ‘s for three. To which he (pbuh) said: Don’t do that, [rather] sell *al-jam* ‘ for *dirhams* and then buy with these *dirhams* the *janīb*.¹⁰⁶

Commenting on this ḥadīth al-Jaṣṣāṣ notes that the Prophet (pbuh) prohibited the transaction due to *ribā al-faḍl* and also taught him a *ḥīla* so he could legally acquire the dates.¹⁰⁷ The Prophet (pbuh) recommends that the buyer should avoid the *ribā al-faḍl* prohibition by taking an alternative approach; firstly he should sell his dates for cash and then use this cash to buy the other dates. This tradition is critically important as it captures the response of the Prophet (pbuh) to a transaction of *ribā* and also the solution he (pbuh) personally proposed to overcome the problem. Ibn Māza also quotes this ḥadīth in his introduction to his lengthy

¹⁰⁵ Ibid, 74.

¹⁰⁶ The wording of the ḥadīth from the narration of al-Bukhārī, it is also narrated in the collection of Muslim. See al-Bukhārī, *Ṣaḥīḥ*, vol. 1, 407 (ḥadīth no. 2241); Muslim, *Ṣaḥīḥ*, vol. 2, 678-79 (ḥadīth no. 4165, 4166, 4167, 4168).

¹⁰⁷ ‘*Allamahū kayfa yaḥtāl fī al-tawaṣṣul ilā akhdh ḥādḥā al-tamr*’, see al-Jaṣṣāṣ, *Aḥkām al-Qur’ān*, vol. 4, 392.

chapter on the *ḥiyal*. Again focusing on the notion of *ta'lim al-makhraj*, he comments on the solution given by the Prophet (pbuh), saying: 'it is to prescribe a stratagem', and that the ḥadīth is an unequivocal proof-text on the matter.¹⁰⁸

3.5.3 al-Khaṣṣāf on Intentions

In our earlier discussion on the *ḥiyal* polemic the centrality of intention and motive to the argument of the opponents to the *ḥiyal* was noted. al-Khaṣṣāf deals with the issue of intention and its role in determining the legality of transactions in his introduction to his *ḥiyal* treatise.¹⁰⁹ The first point which becomes apparent in al-Khaṣṣāf's presentation is that he unequivocally regards the intention to act *mala fide* as reprehensible, although the act which accompanies the intention is legally upheld. Although al-Kaṣṣāf makes it clear that he regards such intentions and motives as reprehensible, he qualifies this by saying that their reprehension is based only on juristic opinion.¹¹⁰

He then goes on to show the textual evidence from which this 'opinion' is inferred. However, his substantive point is not that the intention is reprehensible, but rather, that it is an 'opinion' as opposed to a clear text. This is then contrasted with the general rules of the Sharī'a which are based upon clear proof-texts. He demonstrates that intentions do not prevent legal causes occasioning their effects, with reference to an instance where intention itself is clearly prohibited. He refers to a verse of the Qur'ān in which a husband is prohibited from harming his wife by retaining her and not granting her a divorce. He then quotes the Successor jurist

¹⁰⁸ 'Wa ḥadhā ta'lim al-ḥila, wa innahū naṣṣ fī al-bāb'. Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 21, 67.

¹⁰⁹ This section is missing from Schacht's edition but is available in the earlier Cairo edition. See Aḥmad ibn 'Amr (or 'Umar) Abū Bakr al-Khaṣṣāf al-Shaybānī, *Kitāb al-Khaṣṣāf fī al-Ḥiyal* (Cairo: Maktaba al-Qāhira, 1314), 5-11. Horii notes that: '[I]n the last half of the introductory chapter of his *Makhārij*, left unpublished by Schacht, Khaṣṣāf argued, in response to the criticism of a contemporary, that a legal act must be judged according to its appearance, irrespective of the real intentions behind it.' See, *Reconsideration of Legal Devices*, 316.

¹¹⁰ 'Innamā karihnā lahū hadhihī al-niyya bi-ra'yinā', see *Kitāb al-Khaṣṣāf*, 7.

Masrūq, as having given the background to the verse, of a man who repudiates his wife and then just as her waiting period (*‘idda*) is about to terminate, he takes her back. The husband has no intention of remaining with her, but takes her back solely to spite her. al-Kaṣṣāf’s point is that, even though the husband’s intention is clearly condemned, it still does not mean that his act of taking her back is invalid. He therefore raises the question that if an intention which is textually prohibited does not intervene between a legal cause and its contingent effect then how can an intention which is based upon juristic opinion do so.¹¹¹

al-Khaṣṣāf makes another strong argument regarding intentions impeding legal causes. Looking at the arguments of his detractors, he notes that they refer to various substantive rulings which appear to anticipate an improper motive, suggesting thereby, that intentions do indeed have a role to play. The example he discusses, refers to a woman who is triply divorced and in her waiting period when her husband passes away. The Sharī‘a has noted the possibility that a man may divorce his wife shortly before his death merely to disinherit her; it therefore provides that should he die while she is still in her waiting period, then she will not be denied her rightful share of his estate. al-Khaṣṣāf, however, uses this very case to bolster his own stance. He points out that in this case, the rule, as laid down by the Sharī‘a, has no relation to the intention of the husband; for whether he divorced her genuinely or merely to disinherit her, the rule is the same, namely that she will inherit him as long as she is in her waiting period.¹¹²

In fact, he argues, to show that intentions do have a legal consequence, one would have to find a rule which is contingent upon sound intent such that in its presence the ruling will result in its legal effect and in its absence that it will not. He then shows that cases where it often

¹¹¹ Ibid.

¹¹² Ibid, 9.

appears that intent is taken into account are not so, as the rule is applied even if one acts with a genuinely licit motive.¹¹³ This means that although a rule may appear to be premised upon an improper motive this does not mean that the rule will not apply when the intent is absent. Conversely, the normal rules of sales, and marriage, etc in which a sound intent is assumed, are not interdicted if a person acts with unlawful intent. The upshot is that although it may be that the Sharī‘a rules are premised upon certain assumed motives and intents, these latter do not act as legal causes and hence, they neither occasion, nor preclude, legal effects.

3.5.4 al-Sarakhsī’s Paradigm

al-Sarakhsī’s *magnum opus*, *al-Mabsūṭ*, is perhaps the most authoritative reference of all Ḥanafī legal works and compendia.¹¹⁴ Written as a commentary on the *al-Kāfi* – an abridgement of al-Shaybānī’s works – al-Sarakhsī presents the substantive rulings of the School in a consolidated juridical framework. Within his compendium, he not only discusses the *ḥiyal* in different chapters but also includes a separate chapter devoted to them. The latter was edited and published by Schacht and appended to the work of al-Shaybānī. Although al-Sarakhsī’s chapter is far shorter than al-Shaybānī’s, he includes numerous additional evidences for the *ḥiyal* and together with the references to the *ḥiyal* in his compendium a broader framework can be garnered from his work. There are two key aspects which distinguish al-Sarakhsī’s presentation. Firstly he draws a clear difference between *ḥiyal* as exits and *rukḥṣas* and secondly, he expands the notion of exits from reactionary prescription to one of normative explication.

¹¹³ Ibid.

¹¹⁴ Ibn ‘Ābidīn, records in his *Sharḥ Rasm ‘Uqūd al-Muṭṭī* (which serves as a primer for budding jurisconsults) the following statement of al-Tarsūsī: ‘The *al-Mabsūṭ* of al-Sarakhsī; whatever goes against it is not acted upon and dependency, *fatwā* and reliance is not on [any work] other than it’. See, *Majmū‘a Rasā’il ibn ‘Ābidīn* (Beirut: Dār Iḥyā al-Turāth al-‘Arabī, nd), vol. 1, 20.

3.5.4.1 The *Ḥiyal* and Concessions

al-Sarakhsī presents the evidences which support the use of equivocal language and concludes that there is no problem in using such language to save oneself from lying, because lying is prohibited and no dispensation or concession can be permitted in it.¹¹⁵ What is critical about al-Sarakhsī's statement is his dichomotising of exits and concessions. Both of these juridical methods provide solutions to exigencies, although the method of the Ḥanafīs is clearly to provide an exit as opposed to grant a concession. This line of argument is very important as we have already seen in the Ḥanafī application of the *ribā* rules, where they prefer to maintain systematic consistency rather than allow concessionary exceptions.

Although exits are being dichotomised with concessions, it is important to appreciate the fine line which often stands between them. The exits contrast with concessions in that the former are clearly premised upon the extension of the systematic rules, whereas the latter abandon them. This distinction is vitally important as it implies that the exits given by the Ḥanafīs must be systematically consistent with their normative principles and doctrines. In the next chapter the concern of the *ḥiyal* authors in this regard will be noted. If, in a given *ḥīla*, the systematic rules are not upheld, the *ḥīla* cannot be regarded as a normative exit, but is rather categorised as a temporary concession. The concessions differ from the exits, in that their validity is restricted to the mitigating circumstances which occasion them. Later on, when we examine the *ḥiyal* of *ribā*, the question of, whether these *ḥiyal* constitute an exit or a concession, will be addressed.

¹¹⁵ Ibid, 90.

3.5.4.2 The Sharīʿa and its Exits

al-Sarakhsī presents a number of other incidents from the Qurʾān and the ḥadīth to show the pervasive use of exits and then goes on to explain the paradigm underpinning them. The idea of an exit is to be found in the sharʿīa rules themselves, he asserts, and thus, the *ḥīla* for a person who loves a woman and wants to approach her, is for him to marry her. Or, if he desires a slave girl, then the *ḥīla* is for him to purchase her. Conversely, the *ḥīla* for someone who dislikes his wife and wants to exit from his marriage, is to divorce her. He goes on to say that:

Hence, he who disapproves of the *ḥiyal* in the [substantive] rulings has indeed disapproved, in reality, of the rules of the sharīʿa. And this type of doubt only befalls one due to a lack of reflection.¹¹⁶

The key point which al-Sarakhsī is emphasising here is that when the Sharīʿa makes an action or a specific means or method illicit, it also provides a licit alternative. In the place of fornication it prescribes marriage and while proscribing adultery it sanctions polygamy. These exits are thus a necessary corollary of each prohibition, not to evade or circumvent the rules, but rather to facilitate adherence to them. The underlying message is that man need not suppress his carnal desires or worldly ambitions, but rather that he should pursue them within the means given to him by the Sharīʿa. These means can, according to this paradigm, be found necessarily within the Sharīʿa itself.

A good example of how this paradigm is interwoven into the substantive rules can be seen in the arguments regarding the ratio of *ribā*. We have already covered the positions of the various Schools regarding the ratio and one of the arguments advanced by al-Sarakhsī against the Shāfiʿī and Mālikī position is relevant to our discussion here. In an exchange of non-fungible fruit, such as an apple for an apple or watermelons for watermelons, the latter two Schools prohibit this transaction because the ratio, in their opinion, is foodstuffs. However,

¹¹⁶ al-Sarakhsī, *Kitāb al-Ḥiyal*, 88.

not only do they prohibit the transaction, but additionally, they offer no alternative method for a valid exchange. Regarding this al-Sarakhsī remarks that:

‘These are not from the commodities of *ribā* and the proof of it is that the law-giver did not lay down the law of *ribā* without linking it to an exit (*makhlaṣ*). Therefore any ratio which prescribes a law in a place which has, in principle, no exit, is an invalid ratio.’¹¹⁷

His statement that the law is linked to an exit, is a reference to the ḥadīth of the six commodities, where the prohibition to exchange these commodities is immediately followed by an exit, which is that they be sold ‘like for like’ and ‘hand to hand’. al-Sarakhsī’s point is that when deducing the underlying ratio of a rule, it should be borne in mind that the ratio should not be one which renders the exit to the prohibition ineffective, but rather, one which maintains its utility.

The viewpoint of the Ḥanafīs is that the Sharī‘a prohibitions are not merely positive injunctions, but that they are also prescriptive of their legal alternatives. The jurists’ role is to facilitate man in his worldly pursuits by discovering and prescribing these permissible alternative means, while also upholding the injunctions of the Sharī‘a as well.¹¹⁸ The use of these exits are not therefore absolute, but rather qualified, in that, only if they are used to save a person from doing a prohibited action, or provide him with a permissible route, are they acceptable. Those which are used to usurp the rights of others or to create doubts in regard to them, or which seek to conceal or disguise an invalid act, are regarded as reprehensible.¹¹⁹ Simple evasions, circumventions or ruses are hence precluded in al-Sarakhsī’s paradigm; it is *ḥiyal* qua *makhārij* (i.e. stratagems that are exits) that are being endorsed, the latter having a normative value in the Sharī‘a’s juridical structure.

¹¹⁷ al-Sarakhsī, *al-Mabsūṭ*, vol. 6, book 12, 138.

¹¹⁸ Ibid, vol. 7, book 14, 5-6.

¹¹⁹ al-Sarakhsī, *Kitāb al-Ḥiyal*, 88-9; al-Khaṣṣāf, *al-Ḥiyal wa al-Makhārij*, 5.

3.6 Conclusion to the *Ḥiyal* Polemic

In this chapter we have discussed the *ḥiyal* polemic from its inception in the works of the traditionists. The treatment of the *ḥiyal* in the works of al-Bukhārī and Ibn Baṭṭa was presented and the importance of juridical method and the notion of intent were made apparent. The work of the later Ḥanbalī reformers, Ibn Taymiyya and Ibn al-Qayyim was then presented in which the arguments of the opponents to the *ḥiyal* were given their fullest explication. This focused on three aspects; the *maqāṣid*, intents and motives, and *sadd al-dharīʿa*. The *ḥiyal* as a juridical method was noted for its violation of the requirements of the first two aspects and in direct opposition to the third aspect. The polemic in the works of these authors reaches its apex, both in terms of the coherency of its arguments and in terms of delineating its subject matter. The latter is identified by using the yardstick of the *maqāṣid*, and the authors find themselves not only permitting certain *ḥiyal* but in the case of Ibn al-Qayyim endorsing and contriving numerous complex *ḥiyal* himself as exits to possible exigencies. Finally, al-Shāṭibī's contribution to the discourse is noted. This author recognises that the *ḥiyal* are ultimately premised upon a recognisable teleology and that the authors of such works are certainly not writing *mala fide*. In fact an important point raised by this author is that the opposition to the *ḥiyal* is generally due to the inaccessibility of the Ḥanafīs works in this genre. Had their opponents known their works and appreciated their methodology al-Shāṭibī assumes their reaction would not be the same.

The Ḥanafīs for their part defended the use of the *ḥiyal* by positing them as *makhārij*, exits. They demonstrate a degree of hermeneutical legitimacy for these exits and suggest that instructing people in the usage of these exits is a normative aspect of the jurists' societal role. They also argue that the injunctions that have been sent down are always accompanied with a legal alternative. These alternatives represent the exits by which one is expected to fulfil ones

requirements. The *ḥiyal* are an extension to this concept and require that the jurist find legitimate means by which people can achieve their legal objectives. The Ḥanafīs also make clear that these exits should not be used to deny anyone their legitimate rights or avoid one fulfilling one's legal duties. Whether the Ḥanafīs live up to these maxims will be observed in the next chapter, as we examine the substantive content of the *ḥiyal* genre.

CHAPTER FOUR

RECEPTION OF THE *ḤIYAL*: THE GENRE

In this chapter we will begin by examining the Orientalist's views regarding the nature of Islamic law in terms of its theory and practice. The particular focus will be on their assertions regarding Islamic commercial law and its relation to customary practice and the role of the *ḥiyal* in accommodating the former to the latter. The Orientalists description of the purpose and function of the *ḥiyal* genre, will therefore be explored. This will lead us to examine the very first work on the *ḥiyal* which has come down to us and identify its authorship, purpose and contents. We will also present the trend of the other schools of law vis-à-vis the *ḥiyal*. A number of *ḥiyal* which are central to the controversy of the *ḥiyal* as a genre will be presented and the position of the Ḥanafīs towards them explored. The chapter will conclude with an examination of the contents of the various *ḥiyal* works as a basis for characterising the genre as a whole.

4.1 Occidental Contentions

The colonisation of Muslim lands was the cause and *raison d'être* for occidental works on Islamic law.¹ The Colonial powers desired control of indigenous legal systems as they were seen as the most efficient conduit by which they could entrench their hold and control over

¹ See John Strawson, "Islamic law and English Texts," in *Laws of the Postcolonial*, ed. Eve Darian-Smith and Peter Fitzpatrick (Ann Arbor: The University of Michigan Press, 1990); idem, "Revisiting Islamic Law: Marginal notes from Colonial History," *Griffin Law Review* 12, no. 2 (2003): 362-383; Michael R. Anderson, "Legal Scholarship and the Politics of Islam in British India," in *Perspectives on Islamic Law, Justice and Society*, ed. R. S. Khare (Oxford: Rowman and Littlefield Publishers, 1999), 73-84; Henry Preserved Smith, "Review: Sachau on the Mohammedan Legal System," *The American Journal of Semitical Languages and Literatures* 15, no. 3 (1899): 177-81; David S. Powers, "Orientalism, Colonialism and Legal History: the Attack on Muslim Family Endowments in Algeria and India," *Comparative Studies in Society and History* 31, no. 3 (1989): 543-551.

the conquered peoples.² The initial focus of Orientalist scholars was therefore to produce explications of Islamic law which would give colonial judges direct access to the law without the need for recourse to indigenous jurists.³ Following these early explications; articles, handbooks and lectures were published which focused on the history of Islamic law, its origins and development, the different schools of law and their doctrines and the various legal *œuvres* in contemporary usage.⁴ The most significant author to emerge from this colonialist-Orientalist nexus was the Dutch scholar Snouck Hurgronje, who was both a product of, and an active participant in, the Dutch colonial venture in Indonesia.⁵

Hurgronje is regarded as one of the founding fathers of the academic study of Islamic law in the occident.⁶ There are a two of aspects of Hurgronje's characterisation of Islamic law which are critical to this study. The first is his assessment that the term 'Islamic law' is not an

² In the words of Hallaq: 'The legal system was, and continued to be, the sphere that determined and set the tone of economic domination. But most importantly for the British, the avid desire to reduce the economic costs of controlling the country led them to maximize the role of law. Law was simply more financially rewarding than brute power.' For a discussion of the British in India and the Dutch in Indonesia, see Wael B. Hallaq, *An Introduction to Islamic law* (Cambridge: Cambridge University Press, 2009), 85-93; and in more detail in, idem; *Sharī'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 371-395.

³ In British India the following works were produced according to the Ḥanafī school: Charles Hamilton, *The Hedaya*, 4 vols. (London: T. Bensley, 1791); William Jones, *Al Sirājiyyah: or The Mohammedan Law of Inheritance with a Commentary* (Calcutta: Joseph Cooper, 1792) and, Neil Baillie, *A Digest of Moohumudan Law*, 2 vols. (London: Smith, Elder and co., 1865). In German East Africa, a work on Shāfi'ī *fiqh* was written: Eduard Sachau, *Muhammedanisches Recht nach Schafīitischer Lehre* (Stuttgart: W. Spemann, 1897). In French Algeria a two volume work was co-authored by Sautayra and Cherbonneau on personal law, *Droit Musulman: du Statut Personnel et des Successions*, 2 vols. (Paris: Maisonneuve, 1873-74).

⁴ See for example J. H. Harrington, "Remarks upon the Authorities of Mosulman Law," *Asiatic Researches: or Transactions of the Society Instituted in Bengal* 10 (1808); Shama Churun Sircar, *The Muhammadan Law: being a Digest of the Law Applicable Especially to the Sunnis of India* (Calcutta: Thacker, Spink and co., 1873) and L.W.C. van den Berg, *De Beginselen van het Mohammedaansche Recht, volgens de Imāms Aboe-Ḥanīfat en asj-Sjāfe'ī* (The principles of Muhammadan Law according to the Imāms Abū Ḥanīfa and al-Shāfi'ī), 1874, mentioned in Brugman, "Snouck Hurgronje's Study of Islamic Law," in *Leiden Oriental Connections 1850-1940*, ed. William Otterspeer (Leiden: E. J. Brill, 1989), 84.

⁵ He had supplemented his academic study of Islamic law with a trip to the city of Mecca, disguising himself as a Muslim student under the name 'Abd al-Ghaffār. He used the opportunity to observe the practices of the Muslims in the sacred city and more crucially to acquaint himself with a number of its resident scholars. Harry J. Benda, "Christiaan Snouck Hurgronje and the Foundations of Dutch Islamic Policy in Indonesia," *The Journal of Modern History* 30, no.4 (1958): 338-47; Robert van Niel, "Christiaan Snouck Hurgronje: In Memory of the Centennial of his Birth," *The Journal of Asian Studies* 16, no. 4 (1957): 591-594; Snouck Hurgronje, "Some of my Experiences with the Muftis of Mecca," in *Jaarverslagen* 4 (1934-1940): 2-16.

⁶ According to his protégé Joseph Schacht he was 'one of the founders of the scholarly study of Islamic law in the West and the scholar to whom we are all indebted for what understanding of its nature and system we may have'. See his review of Y. Linant de Bellefonds, *Traité de Droit Musulman Comparé*, in *Middle Eastern Studies* 3, no.4 (1967): 416-7.

accurate representation of the *fiqh*, as the latter represents a system of ethics not law. He therefore determined the *fiqh* to be a deontology; a doctrine of duties which was unsusceptible to rational analysis or logical principles, but rather, represented the inscrutable and (consequently) immutable will of God.⁷ The second aspect, which arises from the first, is that due to its rigid and imperceptible nature, the law was not susceptible to diachronic development. This meant that as society changed and progressed, an inevitable cleavage occurred between the idealised *fiqh* doctrines and actual social practice.⁸ The *fiqh* was therefore restricted in its application to worship and private matters, such as family law, inheritance and *waqf*, in contrast to public matters such as constitutional or criminal law where it had little or no influence.⁹ As for commercial law, Hurgronje considered it to be a ‘dead letter’,¹⁰ and with specific regard to the usury prohibition he blamed the jurists for ‘inventing a wide choice of means of circumventing the letter of the law which gave rise to a special branch of legal literature (*hīlas*).’¹¹

4.1.1 The *Fiqh* as a Legal System

Hurgronje not only stressed that the *fiqh* was not a legal system, but he also regarded it as ‘senseless’ to analyse Islamic law with European legal concepts as it was more akin to Canon or Mosaic law.¹² Although most Orientalists¹³ understood from Hurgronje’s presentation that he did not discern a legal system within the *fiqh*, Schacht, his dutiful protégé, strenuously

⁷ C. Snouck Hurgronje, *Selected Works of C. Snouck Hurgronje*, ed. and trans. G.–H. Bousquet and J. Schacht (Leiden: Brill, 1957), 52, 256-263.

⁸ ‘The restricted possibilities of continual adaptation to changing conditions, have necessarily limited its direct influence on life. Furthermore, when its rules were formulated, they were not the result of a legislation which expressed the needs of contemporary society, but were the work of groups of scholars who kept themselves remote from the teeming life around them. ... Muslim life has never really been ruled by the *sharī‘a* and escapes its control more and more.’ See *ibid.*, 73-4.

⁹ *Ibid.*, 66-74.

¹⁰ Hurgronje, *Selected Works*, 260, trans. by Udovitch in *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970), 7.

¹¹ Hurgronje, *Selected Works*, 69; Schacht, *Introduction*, 76-85, 200, 210, 260.

¹² See J. Brugman, *Snouck Hurgronje’s Study of Islamic Law*, 88.

¹³ See for example, *ibid.*, 88-89; Baber Johansen, “The Muslim Fiqh as a Sacred Law,” in *idem*, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), 42-46.

defended Hurgronje from this inference.¹⁴ Schacht, himself, had already reluctantly conceded that in the *fiqh* there is ‘a clear distinction between the purely religious sphere and the sphere of law proper’.¹⁵ In his apology, Schacht dialogically reconstructs Hurgronje’s viewpoint in line with his own conclusions.¹⁶ This, however, is untenable as it does not reflect Hurgronje’s approach to the question of doctrine and practice which is premised on his understanding that the *fiqh* is only an ethical system, a deontology.

For Hurgronje, both the *fiqh*, and its proponents the *fuqahā*, resorted to ethical suasion, rather than judicial practice, as the medium for effecting their idealised doctrines: ‘[T]he influence of the *sharī‘a* is essentially moral, and its strength depends on the piety of the individual’.¹⁷ His judgements regarding the vitality of Islamic commercial law were hence underpinned by anecdotal observations of the practices of individuals. There are two main sources for this type of evidence; the first appears as comments made by the jurists regarding the religious condition of their contemporary society.¹⁸ He thus uses al-Ghazālī’s remarks in the eleventh century that ‘anyone concluding commerce in accordance with the law was looked upon as ridiculous by all other merchants’, as evidence of Islamic commercial law being a dead letter’.¹⁹ Schacht, who also accepts the probative value of these contemporaneous observations, declares that ‘hostile references to practice in works of Islamic law are an important source of information on it for the Middle Ages’.²⁰

¹⁴ See his review of de Bellefonds’ *Traité de Droit Musulman Comparé*, 416-7.

¹⁵ Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1982), 201. His comments preceding this statement convey the reluctance with which he makes this admittance.

¹⁶ ‘Snouck Hurgronje has never ... denied that the *fiqh* contains elements of law (in the narrow meaning of the term), but he has insisted that the *fiqh* as a whole is not a system of law as we understand it but a system of religious duties (which, incidentally, comprises duties in the field of law).’ See his review of de Bellefonds’ *Traité de Droit Musulman Comparé*, 417-418.

¹⁷ Hurgronje, *Selected Works*, 74.

¹⁸ Hurgronje, *Selected Works*, 57, 265-6, 292.

¹⁹ Hurgronje, *Selected Works*, 260, trans. in Udovitch, *Partnership and Profit*, 7.

²⁰ Schacht, *Introduction*, 85.

The second source of anecdotal evidence is in European chronicles of the Orient written by both colonialists and travellers. Hurgronje, himself, made a record of his own observances in both Mecca and Indonesia.²¹ In Mecca, having observed Indian and Yemeni moneylenders using various *hiyal* to circumvent the usury law, he concludes that ‘many usurers have no scruple about violating the canon-law and the interpretation of it gives them every sort of opportunity of getting round it.’²² In Indonesia he reported similar activities by the Achenese.²³

Schacht’s recognition of a sphere of law, as opposed to a purely religio-ethical sphere, however, impacts directly on the question of doctrine and practice. More importantly it raises questions on how to ascertain the relationship between the two. Whereas Hurgronje was content to invoke anecdotal evidence, the appraisal of a functioning legal system requires substantively greater sources. This is not to downplay the importance of the anecdote, but rather to reallocate it in the probative hierarchy. The degree of societal conformity to the *fiqh* does have an important meaning; as its doctrines are not positivist but definitively normative, but the process of communicating its norms is not merely spiritual exhortation, it also, and perhaps more importantly, includes its judicial application. The question of determining the degree of conformity of practice to doctrine therefore rests on more than a modicum of sparse anecdotes. The question of the relation of the theory to practice is therefore considerably enlarged and requires us to ask just what exactly these terms refer to.

²¹ C. Snouck Hurgronje, *Mekka in the Latter Part of the 19th Century: Daily Life, Customs and Learning: the Moslems of the East-Indian-Archipelago*, trans. James Henry Monahan (Leiden: E. J. Brill, 1931); idem, *The Achenese* 2 vols, trans. A.W.S. O’Sullivan (Leiden: Brill, 1906).

²² Hurgronje, *Mekka*, 4-5.

²³ Hurgronje, *The Achenese*, vol. 1, 271, 293. For a wide gathering of anecdotes on the use of these stratagems, see Maxime Rodinson, *Islam and Capitalism*, trans. Brian Pearce (London: Allen Lane, 1974), 35-45.

4.1.1.1 Theory and Practice

If the *fiqh* represents the theory or doctrinal corpus of Islamic law, what sources constitute its authoritative expression? Initially, Orientalists selected an epitome, a *mukhtaṣar*, as an authoritative statement of the *madhhab*. Schacht, for example, used as his source for Ḥanafī *fiqh* the *Multaqā al-Abḥur*; a primer used extensively in the Ottoman curriculum.²⁴ These short authoritative manuals are known as *mutūn* and are selected based upon the wide approval they gain within the School. They present the fundamental doctrines of the school as extracted from its *corpus juris*.

Mohammad Fadel described these manuals as representing a form of ‘codified common law’.²⁵ Using the *Mukhtaṣar al-Khalīl*, he attempted to show that the purpose of these authoritative epitomes was to prevent legal indeterminacy through the codification of the *madhhab*’s *corpus juris*.²⁶ The *mukhtaṣar* was to function as a code; a univocal statement of Mālikī *fiqh*, although Fadel himself noted that on many issues univocality was precluded by legal pluralism.²⁷ Fadel, in a later article, went on to test his thesis, by positing the *Mukhtaṣar al-Khalīl* as the ‘theory’, and measuring ‘practice’ by comparing the former work to the *fatāwā* given by the jurisconsults of Granada.²⁸ The result of his study, in summary, was that although the jurisconsults did give their verdicts according to the *mukhtaṣar*, numerous divergences were also noted. These were, in general, based upon alternative works from the

²⁴ Schacht, *Introduction*, 112; also see Şükrü Selim Has, *A Study of Ibrāhīm al-Ḥalabī with Special Reference to the Multaqā* (PhD diss., University of Edinburgh, 1981), 219-221, 279-281.

²⁵ Mohammed Fadel, “The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*,” *Islamic Law and Society* 3, no. 2 (1996): 233.

²⁶ *Ibid*, 224-6.

²⁷ *Ibid*, 226.

²⁸ Mohammed Fadel “Rules, Judicial Discretion, and the Rule of Law in Naṣrid Granada: An Analysis of *al-Ḥadīqa al-mustaḥilla al-naḍra fī al-fatāwā al-ṣādira ‘an ‘ulamā’ al-ḥaḍra*,” in *Islamic Law: Theory and Practice*, ed. Robert Gleave and Eugenia Kermeli (London: I.B.Tauris, 2001), 49-86.

Mālikī legal corpus,²⁹ and as such, demonstrated, not that the ‘theory’ was discordant to practice, but rather, that the ‘theory’ had been unduly restricted in its definition.

Prior to this work, however, Bellefonds had already made the point that the epitomes were insufficient for the needs of the jurisconsults, judges, or teachers. It was, he asserted, in the system of the commentaries (*sharḥ*) and glosses (*ḥāshiya*) that Islamic law was to be found.³⁰ Orientalists were however reluctant to consider these latter as anything significant, as they post-dated the alleged closure of the gate of *ijtihād*. What they contained was hence derided as ‘nothing more than abstract systematic constructions which affected neither the established decisions of positive law nor the classical doctrine of *uṣūl al-fīkh*.’³¹ It is however in the system of commentaries and glosses that the corpus of Islamic law is to be found, both as a record of its earliest expositions and as an ongoing discourse reflecting its diachronic development. For the purposes of this study it is these works which serve as the ‘theory’ of Islamic law, and indeed in our earlier presentation of *ribā*, it was these works which were the essential source.

Having identified the commentaries and glosses as the repositories of theory, where then is the ‘practice’ located? Recent research in Islamic law has focused on three sources for evaluating practice. The first and obvious source is the court records; the *dīwān* of the *qāḍī*; these represent an accurate reflection of historical juridical practice and allow a straightforward comparison with the theory.³² Although these records are the ideal source for

²⁹ Ibid, 64-5

³⁰ Y. Linant de Bellefonds, “The Formal Sources of Islamic Law,” trans. M. Khalid Mas‘ud, *Islamic Studies* 15, no. 3 (1976): 190-1.

³¹ Schacht, *Introduction*, 71-2.

³² Iris Agmon and Ido Shahar, “Theme Issue: Shifting Perspectives in the Study of *Shari‘a* Courts: Methodologies and Paradigms,” *Islamic Law and Society* 15, no. 1 (2008): 1-19. Ahmed akgündüz, “Shari‘ah Courts and Shari‘ah Records: The Application of Islamic Law in the Ottoman State,” *Islamic Law and Society* 16, no. 2 (2009): 202-30.

such a comparison, beyond the archives of the Ottoman courts, little else has been preserved.³³ The second source is in historical documents such as contracts, family archives, accounting books and other practical documents which give an accurate insight into the law as a living system.³⁴ The final source is the *responsa* literature; these works are written in response to real questions posed to jurisconsults and allow researchers to build a picture of the role and function of the jurisconsults in the Islamic legal system. Researchers like Hallaq and Powers have demonstrated the relationship of the *fatāwā* works to practice and how these works serve as conduits for juridical innovation to enter into the body of substantive doctrine.³⁵ Additionally Johansen has shown the value accorded by the author-jurists to these *fatāwā* in relation to established legal doctrines.³⁶

In summary the sources for assessing the conformity of theory to practice can be tabulated as follows:

Theory	Practice
1. Authoritative manuals – <i>mutūn</i>	1. Court records – <i>qāḍī's dīwān</i>
2. Commentaries – <i>sharḥ</i>	2. Historical documents
3. Glosses – <i>ḥāshiya</i>	3. <i>Responsa</i> literature

³³ The fact that court records have not survived from the pre-Ottoman period does not mean that they did not exist. See Wael B. Hallaq, "The *Qāḍī's Dīwān* (*sijill*) before the Ottomans," *Bulletin of the School of Oriental and African Studies* 61, n. 3 (1998): 419-421;

³⁴ The Cairo Geniza being an example of such documents, see S. D. Goitein, "The Cairo Geniza as a Source for the History of Muslim Civilisation," *Studia Islamica* no. 3 (1995): 75-91.

³⁵ Wael B. Hallaq, "From *Fatwās* to *Furū'*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society* 1, no.1 (1994): 29-65; David S. Powers, "*Fatwās* as a Source for Legal and Social History: A Dispute over Endowment Revenues from Fourteenth-Century Fez," *Al-Qantara* 9, no. 2 (1990): 295-340; David S. Powers, "A Court Case from Fourteenth-Century North Africa," *Journal of the American Oriental Society* 110, no. 2 (1990): 240-43; idem, "kadijustiz or Qāḍī-Justice? A Paternity Dispute from Fourteenth-Century Morocco," *Islamic Law and Society* 1, no. 3 (1994): 332-366;

³⁶ Baber Johansen, "Legal Literature and the Problem of Change: the Case of the Land Rent," in *Islam and Public Law. Classical and Contemporary Studies*, ed. Chibli Mallat (London: Graham and Trotman, 1993), 31-36; reprinted in Johansen, *Contingency*, 448-454.

4.1.2 Islamic Commercial Law in Theory and Practice

The German Orientalist Bergsträsser noted that the practice of Islamic law varied in time and place and that a final conclusion on the issue of doctrine and practice was, as yet, premature. With regard to commercial law he posited that it lay midway on the scale of practice; neither fully observed nor completely neglected.³⁷ Later research would, however, show that Islamic commercial law was critically influential in determining both mercantile enterprise organisation and trade practices. Although Islamic commercial law covers many different areas, the focus of our presentation will be on investment partnerships and credit arrangements. This is for two reasons; firstly these areas have been sufficiently researched to give a fairly clear picture of historical practice, and secondly, because the forms of investment and credit sanctioned by the *fiqh*, is based, to a large extent, on their being free of *ribā*. What is to be demonstrated is that not only was commercial law practiced in conformity with the *fiqh*, but that its practice also stood as a bulwark against the proliferation of usurious alternatives.

The mercantile tradition of medieval Islam is well noted in economic history, both in its contradistinction to Christian antipathy to trade and in its influence on the revival of trade in the southern Mediterranean shores of eleventh century Europe.³⁸ Merchant activity was characterised by a number of specific partnership forms which were widespread in the Islamic lands and which also enjoyed an unparalleled longevity. Schacht, who could not but admit the

³⁷ G. Bergsträsser, *Grundzüge des Islamischen Rechts*, ed. J. Schacht (Berlin, 1935), 3, cited in Udovitch, *Partnership and Profit*, 7.

³⁸ Alfred E. Lieber, "Eastern Business Practices and Medieval European Commerce," *The Economic History Review* n.s. 21, no. 2, (1968): 230-243; S. D. Goitein, "The Rise of the Early Near-Eastern Bourgeoisie in Early Islamic Times," *Journal of World History* 3 (1957): 583-604; Subhi Y. Labib, "Capitalism in Islam," *The Journal of Economic History* 29, no. 1 (1969): 79-96; A. K. S. Lambton "The Merchant in Medieval Islam," in *A Locust's Leg: Studies in Honour of S. H. Taqizadeh*, ed. W. B. Henning and E. Yarshater (London : Percy Lund, Humphries & Co., 1962), 121-130; S. D. Wyndham Anstis Bewes, *The Romance of the Law Merchant: Being an Introduction to the Study of International Law and Commercial Law with some Account of the Commerce and Fairs of the Middle Ages* (London: Sweet and Maxwell Ltd, 1923), 1-11; Fernand Braudel, *Civilization & Capitalism 15th-18th Century: The Wheels of Commerce*, trans. Siân Reynolds (Berkley: University of California Press, 1992), vol. 2, 555-9.

influence of Islamic mercantile practice upon Europe due to the presence of commercial loan words in European languages taken from Arabic, quickly discounted its Islamic nature. Instead, he argued that it was the customary commercial law which formed the substance of the merchant law and not the *fiqh*; the *fiqh*, in fact, developed *ḥiyal* to align itself with the customary law:

Several institutions of this customary commercial law were transmitted to medieval Europe through the intermediary of the law merchant, the customary law of international trade ... The customary commercial law was brought into agreement with the theory of the *sharīʿa* by the *ḥiyal*.³⁹

To assess Schacht's claims we will examine the practice of medieval Muslim merchants and note the religious significance of their practices.

4.1.2.1 Partnerships

Working with the Cairo Geniza documents, Goitein documented the nature of enterprise and trade in the Fāṭimid and Ayyūbid periods, and demonstrated from the ubiquity of partnerships in the Middle Ages that they were the dominant economic model for enterprise.⁴⁰ The popularity of the partnership form he attributed to 'the fact that it substituted in two large fields which are covered today by other forms of contracts: employment on the one hand and loans on interest on the other.'⁴¹ At the same time that Goitein was working on the Geniza fragments, Udovitch was working on the juridical explications of partnerships in the works of *fiqh*.⁴² Using Goitein's results and comparing them with his own work, he noted that between

³⁹ Schacht, *Introduction*, 78.

⁴⁰ S. D. Goitein, "Commercial and Family Partnerships in the Countries of Medieval Islam," *Islamic Studies* 3, no. 3 (1964): 315-337; idem, "Mediterranean Trade in the Eleventh Century: Some Facts and Problems," in *Studies in the Economic History of the Middle East: from the Rise of Islam to the Present Day*, ed. M. A. Cook (London: Oxford University Press, 1970), 51-62; idem, "Bankers Accounts from the Eleventh Century A.D.," *Journal of the Economic and Social History of the Orient* 9, no. 1/2 (1966): 28-66; idem, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza*, vol. 1, Economic Foundations (Berkeley: University of California Press, 1967), chap. iii.

⁴¹ S. D. Goitein, *Commercial and Family Partnerships*, 317.

⁴² Udovitch, *Partnership and Profit in Medieval Islam*; idem, "Commercial Techniques in Early Medieval Trade," in *Islam and the Trade of Asia: A Colloquium*, ed. D. S. Richards (Oxford: Bruno Cassirer; Pennsylvania: University of Pennsylvania Press, 1970), 37-62.

the Cairo Geniza documents and the 8th century juridical formulations, not only is there a ‘remarkable symmetry’ between the two, but also that there ‘is an almost one-to-one relationship between the importance of problems as reflected in the Geniza papers, and the amount of space and attention they receive in the law books.’⁴³

Additionally, the Cairo Geniza documents not only reflected the *fiqh* prescriptions, but by providing the background context to them, also helped to clarify hitherto misunderstood juridical formulations: Goitein had previously reported the extensive use of informal business co-operation between merchants. This was identified by Udovitch with the juridical contract of *biḍā‘a*. What is significant to note, as Udovitch himself says, is that ‘seemingly casuistic discussions assume a new relevance’.⁴⁴ Orientalists, who had been quick to denounce the casuistry of the jurists and the speculative nature of their works, are now beginning to recognise, due to the testimony of contemporaneous documents, the eminently practical nature of the jurists’ discourses and, in this particular case, their important mercantile utility.⁴⁵ Udovitch, based upon his research, suggested that the juridical treatises themselves could be used as an independent source for the economic history of medieval Islam,⁴⁶ and with the regard to the operation of the *commenda* and partnerships proposed that they be viewed as a ‘veritable Law Merchant’.⁴⁷

⁴³ Abraham L. Udovitch, “The “Law Merchant” of the Medieval Islamic World,” in *Logic in Classical Islamic Culture*, ed. G. E. von Grunebaum (Wiesbaden: Otto Harrassowitz, 1970), 128.

⁴⁴ Udovitch, *The Law Merchant*, 127-8; idem, “Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World,” in *Individualism and Conformity in Classical Islam*, ed. Amin Banani and Speros Vryonis, Jr. (Wiesbaden: Otto Harrassowitz, 1977), 61-81.

⁴⁵ In an investigation of the Islamic Maritime law, Khalilieh also concluded that: ‘The documentary and legal evidence presented above sheds light on the daily life of Geniza traders. It proves that the inquiries addressed in Islamic jurisprudence were not hypothetical but represented actual situations that merchants and sailors encountered on the high seas and on land. See Hassan S. Khalilieh, “Legal Aspects from a Cairo Geniza Responsum on the Islamic law of the Sea: Practice and Theory,” *The Jewish Quarterly Review* 96, no. 2 (2006): 201.

⁴⁶ Udovitch, *Commercial Techniques*, 39; idem, *The Law Merchant*, 115.

⁴⁷ Ibid, 130; idem, *Partnership and Profit*, 259.

Although Udovitch's conclusions appear to show that the Islamic law of partnership was not merely theoretical, but rather practical, his explanation of why this is the case, is based heavily on Schacht's theses. Udovitch gives three main reasons why Islamic commercial law was consonant with merchant practice:

1. The religious element of Islamic commercial law was limited to the prohibitions of unjustified enrichment (*ribā*) and the exclusion of any element of chance (*gharar*).⁴⁸
2. In the main it was customs and actual practice which underpinned the legal institutions of *commenda* and partnership.⁴⁹
3. One of the key techniques of bringing custom into line with the theory was through the use of *ḥiyal*.⁵⁰

These assertions raise two questions: firstly, whether the juridical structure of the *commenda* contract has any religious significance or is it, as Udovitch asserts, merely a product of indigenous custom, and secondly, what role the *ḥiyal* actually played vis-à-vis its structure and practicality.

4.1.2.2 *Commenda* and *Muḍāraba*

To truly understand the uniqueness of the *muḍāraba* contract, we will examine the claim, of Udovitch and other Orientalists that this contract was the precursor to the European *commenda*. The purpose will not be to assess that claim, although their argument is not without merit, but rather to use their discussions as a source for identifying its critical features, medieval usage and mercantile purpose.

⁴⁸ Udovitch, *The Law Merchant*, 124; idem, *Commercial Techniques*, 40; idem, *Partnership and Profit*, 254.

⁴⁹ Udovitch, *The Law Merchant*, 124-5; idem, *Partnership and Profit*, 254; idem, "Theory and Practice of Islamic Law," *Studia Islamica* 32 (1970): 289-303.

⁵⁰ Udovitch, *The Law Merchant*, 120-1; idem, *Partnership and Profit*, 252.

In 1953 Alberto Gaiani noted in his article on the *muḍāraba*, that prior to himself, there were only two other advocates of the influence of the *muḍāraba* on the *commenda*; Kohler and Santillana, and that ‘it would not appear to be only a chance that those few who have paid some attention to the Eastern Institution should have advanced the said proposition’.⁵¹ In other words, whoever had studied both institutions had come to a similar conclusion, namely that the structural similarity of both contracts is highly suggestive of an influence of the former on the latter. Udovitch took up the study of the origins of the *commenda* and wrote an influential essay in which he compared the *commenda* to similar contracts which could possibly have been its forerunner.⁵²

The *commenda* contract, can be summarised as a contract in which an investor (*commendator*) gives a sum of money to an agent (*tractator*) who trades with the capital for profit. Upon completion the agent returns the capital to the investor and the profit is divided between them according to a preagreed ratio. Udovitch compared the *commenda* to three other contracts as possible sources for it; the Jewish *‘isqa*, the Byzantine *chreokoinonia* and the Muslim *muḍāraba*. Without getting into the details of his presentation, he concluded that the closest contract to the *commenda* was the Muslim *muḍāraba*.⁵³ The aspect which transpires as singularly unique to the *commenda* and the *muḍāraba*, while absent from the other contracts, is the restriction of liability to the investor.

The Jewish *‘isqa*, which is also a contract between an investor and an agent, offers two scenarios:

⁵¹ Alberto Gaiani, “The Juridical Nature of the Moslem Qirād,” *East and West* 4, no. 2 (1953): 86. *Qirād* is another name for *muḍāraba*, whereas the former was used in Medina, the latter was native to Iraq. In this work only the word *muḍāraba* will be used.

⁵² Abraham L. Udovitch, “At the Origins of the Western *Commenda*: Islam, Israel, Byzantium?,” *Speculum* 37, no. 2 (1962): 198-207.

⁵³ *Ibid*, 207.

1. An equal division of profits, while the investor bears two thirds of the liability and the agent one third.
2. An equal division of liability, while the investor receives one third of the profits and the agent two thirds.

Ultimately however the rabbis did not conceive of an arrangement whereby the agent held no liability for the principle.⁵⁴ What is also noteworthy is Udovitch's comment, that what underpinned the Rabbi's formulas was the need to 'obviate any element of indirect usury or unfair advantage'.⁵⁵ In the other alternative, the Byzantine *chreokoinonia*, the contract again is noted as being between an investor and an agent, liability is borne according to each partner's share in the profit.⁵⁶ As with the *'isqa*, the agent in the *chreokoinonia* also bears a portion of the liability.

The Islamic *muḍāraba* and the European *commenda* however both share the essential feature of limiting the liability to the investor, and it is this which marks them out from the rest. Whereas the earliest records of the *commenda* in Europe date from the tenth century, the Islamic *muḍāraba* is juridically explicated in the earliest works of Islamic jurisprudence two centuries earlier. The case for a European borrowing from their eastern neighbours is hence very strong. Although Udovitch's claim of an eastern source for the *commenda* has been (unconvincingly) challenged,⁵⁷ the central point of distinction of these two contracts, is an acknowledged fact.

⁵⁴ Ibid, 199-201.

⁵⁵ Ibid, 199.

⁵⁶ Ibid, 201-2.

⁵⁷ John H. Pryor, "The Origins of the *Commenda* Contract," *Speculum*, 52, no. 1 (1977): 5-37.

4.1.2.3 *Commenda* and Usury

Udovitch's claim that the *commenda* was formed from custom as opposed to religious dictates needs to be examined. We have already quoted Udovitch's description of the Jewish *'isqa* as being based upon the need to avoid the usury prohibition, the same, however, he does not infer for the *muḍāraba*. This is unfortunate as all other researches have immediately recognised that the structure of the *muḍāraba* is based to a large extent on its being an alternative to *ribā*.⁵⁸ Gaiani, for example, argued that the *muḍāraba* was distinct from its pre-Islamic proto-type on the grounds that the liberty enjoyed by the parties in drawing up its terms would have been greater due to the absence of the *ribā* injunction.⁵⁹ The point being that it is the prohibition of *ribā* which is responsible for the nature of the *muḍāraba*. Medieval canonists also recognised that to make the agent liable for a loss in the principal was tantamount to usury.⁶⁰ Udovitch, in arguing that the Islamic *muḍāraba* was nothing other than a reflection of custom, has belied his own thesis as to the origins of the *commenda*. Had the *muḍāraba* been a reflection of customary practice with no religious basis, why then did the *fiqh* not Islamicise the Jewish *'isqa* or the Byzantine *chreokoinonia*, or does he mean to suggest that Jewish and Byzantine merchants were not trading according to these but rather according to the *muḍāraba*, only that it failed to register in their respective legal works. This is highly unlikely, and in fact ignores the role that law plays in determining the social and economic norms of practice.

⁵⁸ Schacht, however, claims that it is a circumvent. This, at best, is an oversight on his behalf, and disregarding his choice of words, the important point to be noted is his recognition of it being contradistinct to usury. See his *Introduction*, 157. Although functionally they may be similar, what is critical is their essence and form. This distinction was noted by the economic Historian Postan in his discussion of the European partnership forms of *societas* and *commenda*: 'Medieval *societas* was in substance as well as in form a true partnership of service or finance. It may well have been used to facilitate loans on interest, but it did so by changing the nature of the loan and assimilating it to partnership not only in form but also in essence. It may have been employed for purposes of maritime insurance, and certain types of Italian *commenda*, in which one partner bore « the advantage » of the whole capital, lent themselves easily to such use. But here again the insurance transaction was a contract of partnership in essence as well as in form.' See Michael M. Postan, "Partnership in English Medieval Commerce," in *Studi in Onore di Armando Sapori* (Milan: Instituto Editoriale Cisalpino, 1957), 523.

⁵⁹ Gaiani, *The Moslem Qirād*, 83.

⁶⁰ The Franciscan canonist and theologian Alexander of Alexandria in his *De Usuris*, argued that the investor was legitimately entitled to a share in the profit due to his retaining ownership of the capital and hence the liability for its loss, See Pryor, *The Commenda Contract*, 17-8.

The success of the *muḍāraba* is not in the jurists bending it to meet the needs of commerce, but conversely, in its uncompromising juridical nature; variable distributions of liability are simply not accommodated as opposed to its Jewish and Byzantine analogues. This uncompromising nature is based squarely on the twin foundations of the usury prohibition and the association of profit to liability. It is indeed surprising that Udovitch should have missed the critical link between the nature of the *muḍāraba* and the *ribā* prohibition, as he himself explains the absence of usurious transactions in the Geniza as being due to the fact ‘that the economic function which interest-bearing loans fulfilled was adequately served by a variety of other licit contracts’.⁶¹ Foremost among these licit alternatives, as his own research and that of Goitein has demonstrated, was the *muḍāraba*.

As the contract moved into Europe from the East, it quickly displaced the usurious sea loan in vogue at the time.⁶² Similarly Goitein has recorded that the number of Jewish traders using the *‘isqa* in the eleventh-twelfth century decreased, as they had opted for, what they described as, the *qirād al-gōyīm*; mutual loan according to Muslim law.⁶³ These facts stand as a witness to the *muḍāraba* being an alternative to usury and also to the dynamic nature of the so-called customary practice. What this confirms is that there was no international customary merchant law which transcended religio-legal prescription. That trade practices varied between the various civilisations is clear from their specific legal treatments of partnership forms, and to deny that the custom of Muslim traders was related to the specific religious trade requirements of Islamic jurisprudence is unfounded in view of the relationship of these practices to the prohibition of *ribā*.

⁶¹ Udovitch, *Commercial Techniques*, 61.

⁶² Frederick C. Lane, *Venice and History*, the collected papers of Frederick C. Lane edited by a committee of colleagues and former students (Baltimore: Johns Hopkins Press, 1966), 59-62.

⁶³ Goitein, *Commercial and Family Partnerships*, 318.

Earlier we noted that Udovitch had pointed out that the unique aspect of the *muḍāraba* and the *commenda* which singled them out, is that the liability is borne singularly by the investor. In an earlier paper, I have shown how the Ḥanafī jurists have made liability the *sine qua non* of legitimate entitlement to profit, based upon the prophetic dictum *al-kharāj bī al-ḍamān*.⁶⁴ This demonstrates that the concern of these jurists was not simply to avoid usury, but also to articulate legitimate forms of enterprise organisation. In a detailed two-part work on business organisation Nyazee has shown how these religiously based notions are used by the Ḥanafīs to generate a myriad of partnership forms, such as *ʿinān*, *mufāwada*, *abdān* and *wujūh*, and the way a language of liability is used to write these contracts, allowing their manipulation and modification to suit a variety of commercial needs.⁶⁵ Udovitch and Çizakça have noted that all of these forms were found to exist in historical practice and as such they represented an entire system of credit and commerce articulated by the jurists and practiced by the merchants.⁶⁶ The widespread usage of these commercial institutions in the Muslim lands has been demonstrated in recent research, from Malaca in the east, to Sudan and West Africa.⁶⁷ These institutions, which were explicated in the early eighth century, survived throughout the

⁶⁴ Muhammed Imran Ismail, "Theories of Profit and a Juristic Understanding of Legitimate Entitlement to Profit," *Review of Islamic Economics* 11, no. 2 (2007): 55-69.

⁶⁵ Imran Ahsan Khan Nyazee, *Islamic Law of Business Organization: Partnerships* (Islamabad: Islamic Research Institute and International Institute of Islamic Thought, 1999); idem, *Islamic Law of Business Organization: Corporations* (Islamabad: Islamic Research Institute and International Institute of Islamic Thought, 1998).

⁶⁶ Abraham L. Udovitch, "Reflections on the Institutions of Credit and Banking in the Medieval Islamic Near East," *Studia Islamica*, 41 (1975): 13; idem, Bankers without Banks; Commerce, Banking and Society in the Islamic World of the Middle Ages," in *The Dawn of Modern Banking* (New Haven and London: Yale University Press, 1979), 264; Murat Çizakça, *A Comparative Evolution of Business Partnerships: The Islamic World & Europe, with Specific References to the Ottoman Archives* (Leiden: Brill, 1996), 65-85.

⁶⁷ M.A.P. Meilink-Roelofs, *Asian trade and European influence in the Indonesian Archipelago between 1500 and about 1630* (The Hague: Nijhoff, 1962), 48-52; Marie Perinbaum, "The Julas in Western Sudanese History: Long-Distance Traders and Developers of Resources," in *West African Culture Dynamics: Archaeological and Historical Perspectives*, ed. B. K. Swartz Jr. and Raymond E. Dumett (The Hague: Mouton Publishers, 1980), 465-66; Terence Walz, "Trading in the Sudan in the Sixteenth Century," *Annales Islamologiques* 15 (1979): 221-24.

medieval period and extended throughout the Ottoman lands where records show their vibrancy up to the early Twentieth century.⁶⁸

It is clear then, that the commercial institutions of the Muslim world were not simple eighth century customary techniques Islamicised, had they been so they would have been surpassed by newer forms of commercial enterprise, as the Jewish *'isqa* and Byzantine *chreokoinonia* had been. They were rather the product of a dynamic legal system, which took the religious concerns of usury and liability and produced a multitude of financial instruments and commercial institutions. This allowed credit and commerce to successfully function and develop unabated by religious strictures.⁶⁹ Islamic commercial law was hence not a 'dead letter' nor was it a veiled expression of customary practices, it was in the final analysis, a practical and vibrant system which was, both in its origins and development, Islamic.

4.1.3 The *Ḥiyal* as a *Modus Vivendi*

Both Hurgonje and Goldziher had made vague references to the *ḥiyal*, but no serious attention had been paid to their precise role in Islamic jurisprudence. It was their student, Joseph Schacht who took up the study of the *ḥiyal*, editing and publishing four treatises on the subject.⁷⁰ Together with a number of articles, Schacht fervently proposed the *ḥiyal* as the holy

⁶⁸ Haim Gerber, "The Muslim Law of Partnerships in Ottoman Court Records," *Studia Islamica* 53 (1981): 109-119; Çizakça, *A Comparative Evolution*, 66-77; Ghislaine Lydon, "Contracting Caravans: Partnership and Profit in Nineteenth- and Early Twentieth-Century Trans-Saharan Trade," *Journal of Global History* 3 (2008): 96-113.

⁶⁹ Compare this with the comments of Khan, who meekly concedes that: 'Society cannot do without taking loans ... [and] loans cannot be had without paying interest. History shows us that the experience of every age and every country is the same. Thus the precept of the Mohammedan law that all loans shall be free is impracticable.' see Mir Siadat Ali Khan, "The Mohammedan Laws against Usury and How They Are Evaded," *Journal of Comparative Legislation and International Law* 3rd Ser. 11, no. 4 (1929): 239.

⁷⁰ 1) Muḥammad ibn al-Ḥasan al-Shaybānī, *al-Makhārīj fī al-Ḥiyal*, ed. Joseph Schacht (*Das kitāb al-maḥārīg fil-ḥijal des Muḥammad ibn al-Ḥasan aš-Šhaybānī. In Zwei Rezensionen.* (Hildesheim: Georg Olms Verlagsbuchhandlung, 1968).

2) Abū Bakr Muḥammad ibn Aḥmad al-Sarakhsī, *Kitāb al-Ḥiyal min al-Mabsūt*, printed together with the previous publication.

3) Abū Bakr Aḥmad ibn 'Amru al-Shaybānī al-Khaṣṣāf, *Kitāb al-Ḥiyal wa al-Makhārīj*, ed. Joseph Schacht (*Das Kitāb al-ḥiyal wa al-maḥārīg*), (Hildesheim: Georg Olms Verlagsbuchhandlung, 1968).

grail of the theory–practice conundrum.⁷¹ The importance he gave to the *ḥiyal* can be observed not only in his continual reference to them, but also in his criticism of his peers who failed to appreciate their importance.⁷² He described the *ḥiyal* as ‘a *modus vivendi* between theory and practice: the maximum that custom could concede, and the minimum ... that the theory had to demand’.⁷³ The term, *modus vivendi* means a way of accommodating two conflicting entities, and its usage by Schacht implies that the *ḥiyal* were not a part of Islamic law, but rather exogenous tools used to solve a conflict between the two discordant spheres of theory and practice.⁷⁴ Indeed Schacht himself cautions against a clear division of theory and practice but rather suggests that they are areas of:

interaction and mutual interference, a relationship in which the theory showed a great assimilating power, the power of imposing its spiritual ascendancy even when it could not control the material conditions. This asserted itself, not only in the *ḥiyal* and in the *shurūṭ* but ... [also] in numerous other ways.⁷⁵

Schacht’s claim that the *ḥiyal* act as a *modus vivendi* necessitates that the substantive material of the *ḥiyal* genre be distinct and even perhaps be discordant with the theory as propounded in its authoritative expression, i.e. in the epitomes, commentaries and glosses. This makes it

4) Mahmūd ibn al-Ḥasan al-Qazwini, *Kitāb al-Ḥiyal fī al-Fiqh*, ed. Joseph Schacht (*Das Kitāb al-ḥiial fīl-fiqh*). (Hannover: Orient-Buchhandlung Heinz Lafaire, 1924).

⁷¹ Schacht was recognised by some Orientalists as a specialist in the *ḥiyal*. See H. Lammens, “*al-Ḥiyal wa al-Makhārij*,” *al-Machriq* 29 (1931): 643.

⁷² On the following; F. I. Schechter, “A Study in Comparative Trade Morals and Control,” *Virginia Law Review* 19 (1933), he remarks ‘competent, except for the omission of *ḥiyal*. See his *Introduction*, 284. Also in a review of N. Coulson’s *A History of Islamic Law*, he remarks ‘in this passage concerning legal practice, I cannot help finding the treatment of *ḥiyal* or legal devices superficial.’ J. Schacht, “Modernism and Traditionalism in a History of Islamic Law,” *Middle Eastern Studies* 1, no. 4 (1965): 399.

⁷³ Schacht, *Introduction*, 80. That Schacht was working to corroborate Hurgonje’s thesis becomes apparent when we note that a very similar comment was made by the latter in his discussion on the issue of theory and practice. That Schacht used the very same terms in relation to the *ḥiyal* is itself telling. Hurgonje stated that ‘We see then that there exists a middle way between the theory which demands the maximum, and practice which is all too often content with the minimum.’ Hurgonje, *Selected Works*, 289.

⁷⁴ The Oxford English Dictionary gives the following definition: A way of living; esp. a working arrangement between contending parties, which enables them to coexist peacefully pending the settlement of those matters in dispute. The following pertinent example of its usage is also presented: To have, then, two fundamental principles at once... is impossible; either one must be retained and the other discarded, or else a *modus vivendi* must be found and a separate function assigned to each.

⁷⁵ Schacht, *Introduction*, 84.

critical then, to locate the precise role of the genre vis-à-vis the theory. To do this, an example of Schacht's framework as understood and used by the Orientalists will be examined, with regard to a specific *ḥīla*.

The *ḥīla* is mentioned by al-Shaybānī regarding partnerships based upon goods, as opposed to money. According to Ḥanafī jurisprudence partnerships are to be based upon either *dirhams* or *dīnārs*. The reason for this is to ensure that there should be no ambiguity as to the precise value of the investment capital. A partnership based upon goods, would mean that at the time of contracting the partnership, the monetary contribution of the investors would remain unknown, because the investment value, according to the Ḥanafīs, relates to the value of the goods and not to the goods themselves. If goods themselves are given as capital then once they have been sold for profit, the amount of profit would need to be distributed according to the preagreed ratio. To calculate the profit requires the partners to estimate the original value of the goods, and subtract this from the total amount received. This may, however lead to disputes regarding the original value of the goods and for this reason the Ḥanafīs disallow it.

al-Shaybānī, in his treatise, is asked by the interlocutor about a partnership of goods between two men, one of whom has goods worth 5000 *dirhams* and the other 1000 *dirhams*. At first he replies with the standard answer that a partnership with goods as the capital is not allowed.⁷⁶ The interlocutor then asks him for a *ḥīla*: al-Shaybānī proposes that the first partner should purchase $\frac{5}{6}$ of his partner's goods in return for $\frac{1}{6}$ of his own; thereby effecting a co-ownership in the capital of the partnership with the first partner owning $\frac{5}{6}$ of the total capital and the second owning $\frac{1}{6}$.⁷⁷

⁷⁶ 'Lā yajūz al-shirka bī al-'urūd', al-Shaybānī, *al-Makhārīj*, 58.

⁷⁷ Ibid. The purpose of this *ḥīla* is to allow the traders to sell their goods as part of a partnership. According to the standard rules, a partnership can only be formed with money as this allows each trader to know his exact contribution to the partnership and allows them to apportion the profits accordingly. If two traders wish to form a

According to Schacht's thesis, al-Shaybānī's answer is contrary to the theory of Ḥanafī doctrine and hence this *ḥīla* is used as an intermediary to negotiate between Ḥanafī theory and actual commercial practice. Udovitch argues along these very lines: '[T]he enforcement of a ban on investments in the form of goods and merchandise would have constituted a severe handicap', and implies that the theory had to be sacrificed for customary practices.⁷⁸ Udovitch, however, goes one step further than Schacht and claims that the assimilation of legal stratagems into the body of Ḥanafī doctrine was so complete that this *ḥīla* would find its way into later legal literature⁷⁹ and in some works it even appears without noting that it is a *ḥīla*.⁸⁰ This appears to be a compelling corroboration of Schacht's thesis; hence the theory is not only violated by the *ḥīla* from the very outset, but the *ḥīla* finds its way into the body of the *madhhab*'s official substantive doctrine and is furthermore disguised as normal doctrine with its provenance in the *ḥīla* literature conveniently overlooked.

What underpins the assertion of both Schacht and subsequently Udovitch, is the depiction of the *ḥiyal* as a *modus vivendi*, i.e. a body of practical doctrines which are distinct to the theory and which act to bring the theory in line with practice. Udovitch's claim of diachronic assimilation of the *ḥiyal* into the theory is based upon this very premise. What has not been researched by both of these authors though, is the relation of these *ḥiyal* to the actual body of

partnership with goods as their capital they are prohibited from doing so as the respective value of their goods is undetermined and hence when the goods are sold this may lead to a problem in determining the profit due to each trader. The solution proffered in this *ḥīla* is for the traders to put their goods into a co-ownership in which both traders agree that they own a fixed proportion of the total goods, but no particular good in particular. The co-ownership of the goods means that the ratios of the profit, which accrues from the trade in the co-owned goods, will follow the ratios of their ownership. In the example given by al-Shaybānī, the traders own goods with different values (i.e. of 5000 *dirhams* and of 1000 *dirhams*) and hence when they put their goods into the co-ownership, the first trader acquires $\frac{5}{6}$ of the total capital and the second $\frac{1}{6}$. This means that when some, or all, of the goods are sold, the money they receive is automatically distributed according to the preagreed ratios, thereby pre-empting the possibility of a dispute.

⁷⁸ Udovitch, *Partnership and Profit*, 62.

⁷⁹ Here he makes reference to al-Kāsānī's *Badā'i' al-Ṣanā'i'*, written approximately four centuries after al-Shaybānī's treatise. See *ibid*, 63-64.

⁸⁰ 'So complete was the assimilation of this legal fiction into the body of Ḥanafī law that in several codes it is given without the designation of *ḥīla* and appears as an accepted feature of positive law.' Here he makes reference to al-Sarakhsī's *al-Mabsūṭ* written approximately three centuries after al-Shaybānī's treatise. See *ibid*, 64.

the theory in its primary exposition. For the specific example mentioned above, this would entail checking whether the *ḥīla* being proffered by al-Shaybānī is present in his own works on Ḥanafī *fiqh* which represent the bedrock of the *madhhab*'s theory or doctrine. An examination of the published works of al-Shaybānī seems to vindicate Udovitch and Schacht's assertion as this specific *ḥīla* is not mentioned in any of his works. The largest of al-Shaybānī's work the *Kitāb al-Aṣl*, also known as the *al-Mabsūṭ*, in its printed form is an abridgement of the actual manuscript and represents only a fraction of the complete work.⁸¹ This may well explain the absence of the *ḥīla* from the printed work and so recourse must necessarily be made to the original manuscript. Having checked the original manuscript in the chapter on *muḍāraba*, which is notably absent from the printed edition, I found that this *ḥīla* is mentioned, although the shares are mentioned as halves and not sixths.⁸² Additionally, and more importantly, is that the solution is mentioned, not as a *ḥīla*, but as normative doctrine:

'If the capital of one of them is *dirhams* and the capital of the other is merchandise, then there will be between them neither a partnership of *mufāwāḍa* nor a partnership of *'inān*. [But] if he sells half of his merchandise for half of his *dirhams* and they both take possession and form either a partnership of *mufāwāḍa* or a partnership of *'inān* that would be permissible. And all merchandise, [be it] from real estate, animals, goods, or textiles are equivalent, and likewise gold ore and silver ore and jewellery of gold or silver, they are in the status of merchandise in this [context] and no partnership is allowed in any of this.[374a] Partnership is not permitted except with *dirhams* specifically or with *dinārs* specifically, however if each one of them purchases half of his partners capital with half of his

⁸¹ al-Shaybānī's *Kitāb al-Aṣl* is printed in 5 volumes totalling approximately 2251 pages of sparsely printed text. According to al-Kawtharī a manuscript he came across consisted of six volumes each consisting of five hundred pages, totalling three thousand pages of manuscript which are generally crammed with text. The manuscript used by this author consists of approximately 1000 folios which are comparatively speaking, quite large. See Muḥammad Zāhid ibn al-Ḥasan al-Kawtharī, *Bulūgh al-Amānī fī Sīra al-Imām Muḥammad ibn al-Ḥasan al-Shaybānī* (Cairo: al-Maktaba al-Azhariyya li al-Turāth, 1998), 62-3.

⁸² The absence of this *ḥīla* from the printed works of al-Shaybānī is not, however, an excuse for Udovitch, as he himself, makes reference to the manuscript edition of the *Kitāb al-Aṣl* and in particular to the *Kitāb al-Muḍāraba* from where this *ḥīla* emanates. See his *Partnership and Profit*, 270.

partners capital and they both take possession then their partnership will be *mufāwada* if they so wish or if they wish *‘inān*.⁸³

This raises serious questions regarding both Schacht’s framework and Udovitch’s subsequent assertions. If the *ḥīla* is mentioned in the literature which definitively represents the most authoritative statement of Ḥanafī jurisprudence, what sense does it make to speak of a *modus vivendi*, when in fact the *ḥīla* is part and parcel of the normative doctrine. Additionally, Udovitch’s assertion of diachronic assimilation of the *ḥiyal* from that genre into the normative works, also collapses, and in fact, the reverse appears to be the case. Whereas Udovitch had talked of the *ḥīla* appellation disappearing in later works, it appears that the provenance of the *ḥīla* is located, not in a distinct genre, but rather in the authoritative doctrine and without being designated as a *ḥīla*. This is then subsequently appropriated by the *ḥiyal* genre and later authors are then free to identify the *ḥīla* with either source. Udovitch’s own quotes support this assertion, as it is the earlier al-Sarakhsi who drops the *ḥīla* designation and the later al-Kāsānī who adopts it, which in terms of Udovitch’s claims of diachronic assimilation, represents an anachronism. From this preliminary examination, Schacht’s framework does not correlate to the actual relationship of the *ḥiyal* genre and the normative doctrines as demonstrated. This leads us to inquire into the *ḥiyal* genre itself, its provenance, its contents and its purpose. In the next section we will begin this quest by looking at the *ḥiyal* treatise attributed to al-Shaybānī.

4.2 *The Kitāb al-Ḥiyal*

In his historical account of the *ḥiyal*, Ibn Taymiyya posits that the first time that *ḥiyal* were issued as *fatāwā* or taught and acted upon and their legality assented to, was in the early-

⁸³ Muḥammad ibn al-Ḥasan al-Shaybānī, *Kitāb al-Aṣl*, MS 664, Fayd Allah Efendi, Millat KutupKhane, Istanbul, folios 373b-374a.

middle second century AH, corresponding to the end of the era of the minor Successors (*ṣiḡhār al-Tābi‘īn*).⁸⁴ The response of the successor jurists to those *ḥiyal* is recorded; Ayyūb al-Sakhtiyānī, for example, remarked that ‘they deceive God as though they are deceiving a child, had they committed the act overtly it would have been, in my view, less [of a crime]’.⁸⁵ Interestingly Abū Ḥanīfa is reported to have given the verdict that a jurisconsult who teaches such *ḥiyal* should be interdicted.⁸⁶ It is also in this time period that the first treatise on the *ḥiyal* was authored. The Kufan *qāḍī* Sharīk ibn ‘Abdullah is the earliest scholar to have made a reference to the *Kitāb al-Ḥiyal*, saying that it is a ‘book of deception’.⁸⁷ His comments can be taken as historical testimony for the book’s existence and his death in 177 AH, can therefore be regarded as the *terminus ad quem* for the authorship of the *Kitāb al-Ḥiyal*.⁸⁸ Sharīk was not alone in his comments regarding the *Kitāb al-Ḥiyal*, other prominent jurists also condemned the work:

- When it was said to ‘Abdullah ibn Mubārak (d.181 AH) that the author of the *Kitāb al-Ḥiyal* could have been Satan’, he replied that such a person would have been more evil than Satan.⁸⁹ In another narration he said that not only was the author a disbeliever but also anyone who judged according to it, or heard its contents and approved of it or helped to spread its contents.⁹⁰

⁸⁴ Ibn Taymiyya, *Bayān al-Dalīl*, 79, 81.

⁸⁵ Ibid, 23.

⁸⁶ Abū Ḥanīfa is reported to have said that interdiction is invalid for any mature sane free individual except in three cases: an ignorant doctor, an impudent jurisconsult (*al-muftī al-mājin*) who teaches people *ḥiyal* and *makhārīj* and a bankrupt hirer. The first, it is reasoned, corrupts the body, the second, religion and the third, people’s wealth. See Abū Bakr Aḥmad ibn ‘Umar al-Khaṣṣāf, *Sharḥ Adab al-Qāḍī* (commentary by ‘Umar ibn ‘Abd al-‘Azīz Ḥusām al-Dīn) (Beirut: Dār al-Kutub al-‘Ilmiyya, 1994), 237.

⁸⁷ Ibn Taymiyya, *Bayān al-Dalīl*, 23. See his mention in Abū ‘Abdullah Ḥusayn ibn ‘Alī al-Ṣaymarī, *Akhbār Abī Ḥanīfa wa Aṣḥābiḥī* (Beirut: ‘Ālam al-Kutub, 1985), 139-142.

⁸⁸ For his biography see Taqī al-Dīn ibn ‘Abd al-Qādir al-Tamīmī al-Dārī, *al-Ṭabaqāt al-Saniyya fī Tarājim al-Ḥanafīyya* ed. ‘Abd al-Fattāḥ Muḥammad al-Ḥulw (Riyadh: Dār al-Rifā‘ī, 1989), vol. 4, 67-71. ‘Abd al-Qādir ibn Abī al-Wafā’ al-Qurashī, *al-Jawāhir al-Muḍī‘a, fī Ṭabaqāt al-Ḥanafīyya* (Beirut: Dār al-Kutub al-‘Ilmiyya, 2005), 167-168. Nurit Tsafrir classifies him as a semi-Ḥanafī, see her *The History of An Islamic School of Law: The Early Spread of Hanafism* (Cambridge MS: ILSP Harvard Law School, 2004) 3, 12, 14.

⁸⁹ See Abū Bakr Aḥmad ibn ‘Alī al-Khatīb al-Baghdadī, *Tarikh Baghdād aw Madīnat al-Islām* (Cairo: Maktaba Khānjī, 1931), vol. 13, 403.

⁹⁰ See Ibn Taymiyya, *Bayān al-Dalīl*, 82.

- The Baṣran traditionist and grammarian al-Naḍr ibn Shumayl (d.203/4 AH)⁹¹ remarked that: ‘In the book of *ḥiyal* there is such and such a verdict, all of which are disbelief.’⁹²
- Aḥmad ibn Ḥanbal declared that whoever had the book of *ḥiyal* in his house and gave verdicts according to it was a disbeliever.⁹³
- The Ḥanafī judge, Hafṣ ibn Ghiyāth, regarded the book of *ḥiyal* as a book of iniquity (*fujūr*).⁹⁴

The degree of animosity portrayed in these statements is very severe, and reflects not only the degree of opposition to the *ḥiyal*, but more critically, the nature of the *ḥiyal* they had encountered in the *Kitāb al-Ḥiyal*. Some of the specific *ḥiyal* advocated in that work have been mentioned in the historical accounts, and include the following:

- A woman requests from her husband a separation (*khulʿ*) but he refuses, she is then advised that she should apostatise from Islam which would automatically mean that that her marriage is annulled. Thereafter she should reaffirm her faith.⁹⁵

⁹¹ He was the Judge of Merv, a traditionist and grammarian with a good opinion Abū Ḥanīfa, See Aḥmad ibn Muḥammad al-Naḍīb, *al-Madḥhab al-Ḥanafī* (Riyadh: Maktabat al-Rushd, 2001), vol. 1, 58. For his biography, see Abū ‘Abbās Shams al-Dīn Aḥmad ibn Muḥammad ibn Abī Bakr ibn Khallikān, *Wafayāt al-A’yān wa Anbā’ Abnā’ al-Zamān* (Cairo: Maktaba al-Nahda al-Miṣriyya, 1949), vol. 5, 33-38.

⁹² al-Khatīb, *Tarīkh*, vol. 13, 403.

⁹³ Abū al-Ḥusayn Muḥammad ibn Muḥammad ibn al-Ḥusayn ibn Abī Ya’lā, *Ṭabaqāt al-ḥanābila* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1997), vol.1, 207.

⁹⁴ Ibid, 83. Hafṣ was a student of Abū Ḥanīfa and served as a judge in Kūfa and was hence familiar with the work of *ḥiyal* circulating at the time. See Tsafirir, *The History of an Islamic School of Law*, 3, 23-4.

⁹⁵ al-Khatīb, *Tarīkh*, vol. 13, 403-4, Ibn Taymiyya, *Bayān al-Dalīl*, 82. This specific *ḥīla* has been condemned in the Ḥanafī works and Ibn Samā’a has reported from Abū Yūsuf that if a woman should use this *ḥīla*, outwardly uttering words of unbelief while in her heart holding onto her faith, then she would be separated from her husband and regarded as a disbeliever (*mushrika*). See Sa’īd ibn ‘Alī, *Jannat al-Aḥkām*, 217. A more recent example of how such *ḥiyal* can be deployed was their use in British India. An alarming rise in the number of female apostates also coincided with an increase in missionary activity; it seems that Christian missionaries working in India exploited this ruling and began advising Muslim women who wanted to separate from their husbands to become Christians. In response to this situation the Indian Ḥanafī jurist Ashraf ‘Alī Thanvī penned a treatise to explain that the *ḥīla* of apostasy would not permit the woman to marry a different husband even after her return to the faith. See Muhammad Khalid Masud, “Apostasy and Judicial Separation in British India,” in *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick and David S. Powers (Cambridge Mass: Harvard University Press, 1996), 193-203; Fareeha Khan, “Tafwīḍ al-Ṭalāq: Transferring the Right of Divorce to the Wife,” *The Muslim World* 99, no. 3 (2009): 502-520; Ashraf ‘Alī Thanvī, “*al-Ḥīla al-Nājiya li al-Ḥalīla al-‘Ajiza*,” in *Ḥīla Nājiya Ya’nī Aurato kā Haq-i Tansīkh-i Nikāh* (Karachi: Dār al-Ishā’at, 1987), 19-83.

- A man took an oath that in no way would he divorce his wife, thereafter a huge sum of money was offered to him to break his oath, a muftī then told him, a possible solution (i.e. a *ḥīla*) was for him to kiss his mother-in-law. Such an act would immediately annul the marriage based upon the rules of marriageable relations.⁹⁶

These *ḥiyal* are egregious in the extreme and certainly justify the condemnation of the jurists who opposed them. According to Ibn al-Shumayl there were over three hundred of these repugnant *ḥiyal* in the *Kitāb al-Ḥiyal*, all of which he regarded as disbelief.⁹⁷

4.2.1 al-Shaybānī and the *Kitāb al-Ḥiyal*

In this same time period, the school of Abu Ḥanīfa was gaining ground in many areas of the Islamic world and it was at this time that his illustrious student, Muḥammad ibn al-Ḥasan al-Shaybānī was composing the literary canon of the school. His six books; *al-Aṣl* (also known as *al-Mabsūṭ*), *al-Jāmiʿ al-Kabīr*, *al-Jamiʿ al-Ṣaghīr*, *al-Siyar al-Kabīr*, *al-Siyar al-Ṣaghīr* and *al-Ziyādāt*, are known as the *ẓāhir al-riwāya* and represent the accepted canon of the School, and its most authoritative statement.⁹⁸ From amongst his works, a small treatise on the *ḥiyal* was also being transmitted by his Bukhāran Student Abū Ḥafṣ al-Kabīr. The appearance of al-Shaybānī's treatise precisely at the historical moment when the *ḥiyal* were gathering notoriety, led many later jurists, such as Ibn Baṭṭa⁹⁹ and al-Khaṭīb¹⁰⁰, to assume (and openly

⁹⁶ Ibid, 83.

⁹⁷ Ibn Taymiyya, *Bayān al-Dalīl*, 82.

⁹⁸ See Ibn ʿĀbidīn, *Sharh ʿUqūd Rasm al-Muftī*, 16.

⁹⁹ Ibn Baṭṭa narrated comments which were allegedly made by Aḥmad ibn Ḥanbal explicitly indicting Abū Ḥanīfa and his students for their role in the *ḥiyal*. Ibn Taymiyya has also narrated these statements from Aḥmad, although significantly, without reference to Abū Ḥanīfa, but rather more generally to some people from the *ahl al-raʾi*. See Ibn Baṭṭa, *Ibtāl al-Ḥiyal*, 119-121; Ibn Taymiyya, *Bayān al-Dalīl*, 82.

¹⁰⁰ al-Khaṭīb al-Baghdādī also attempted to record negative statements of the earlier jurists with specific reference to Abū Ḥanīfa. The statements of ʿAbdullah ibn Mubārak regarding the infidelity of the *kitāb al-ḥiyal*, mentioned earlier, were recorded by al-Khaṭīb as referring explicitly to a work by Abū Ḥanīfa. al-Khaṭīb's specific mentioning of Abū Ḥanīfa, is undoubtedly an (other) attempt to malign the Ḥanafis. Elsewhere in his work al-Khaṭīb has gathered a plethora of unfounded narrations targeting the Ḥanafis in general and Abū Ḥanīfa in particular, which only confirm his evident School bias. What is significant, however, is his attempt to indict Abū Ḥanīfa in the early *ḥiyal* controversy. al-Khaṭīb actually authored his own work on the *ḥiyal*, and he may well have been distancing himself, and his School, from the more controversial *ḥiyal*, by imputing them to the

allege) that the Ḥanafīs were the provocateurs of the condemned *ḥiyal*. This assumption needs to be explored and challenged and the provenance and precise nature of al-Shaybānī's treatise examined.

The works of al-Shaybānī were transmitted from him by his students and as mentioned earlier, one of them, namely Abū Ḥafṣ was also transmitting a book of *ḥiyal*. Other students, however rejected that al-Shaybānī had authored such a work and claimed it to be an aspersion on the *madhhab*. al-Jūzajānī reportedly said:

Whosoever says that Muḥammad authored a book [which] he called *al-Ḥiyal*, do not believe him, and [as for] what is in the hands of the people, it is only [a work] composed by the copyists of Baghdad ... Indeed the ignorant attribute that to our scholars as an insult, for how can it be conceived that Muḥammad could entitle anything from his works with this name and thereby give support to the ignorant in what they fabricate [against us].¹⁰¹

In addition to al-Jūzajānī's rejection of the work, Muḥammad ibn Samā'a, another transmitter of al-Shaybānī's works, reported that al-Shaybānī himself denied the work as belonging to his literary corpus, declaring it to be a false ascription.¹⁰²

al-Sarakhsī, however, corroborates the opinion of Abū Ḥafṣ and accepts that al-Shaybānī did author a treatise on the *ḥiyal*, because, he says, rulings which provide an exit strategy from sins are acceptable to the majority of scholars.¹⁰³ He does not, however, account for the opinion of al-Jūzajānī who is not only cognizant of the text, but clearly rejects it, nor does he

eponym of the rival School. See al-Khaṭīb al-Baghdādī, *Tārīkh*, vol.13, 403; Muḥammad Zāhid al-Kawtharī, *Ta'nīb al-Khaṭīb 'alā mā Sāqahū fī Tarjīmat Abī Ḥanīfa min al-Akādhib* (Cairo: al-Maktab al-Azhar li al-Turāth, 2006); al-Baḥārī, *al-Ḥiyal fī al-Sharī'a al-Islāmiyya*, 294-98; Fedwa Malti Douglas, "Controversy and Its Effects in the Biographical Tradition of Al-Khaṭīb Al-Baghdādī," *Studia Islamica* 46, 121-22, 125; Eerik Dickinson, "Aḥmad B. Al-Ṣalt and His Biography of Abū Ḥanīfa," *Journal of the American Oriental Society* 116, no. 3 (1996): 413-417.

¹⁰¹ al-Sarakhsī, *al-Mabsūṭ*, vol. 30, 228-9. al-Sarakhsī, *Kitāb al-Ḥiyal*, 87; Sa'īd ibn 'Alī, *Jannat al-Aḥkām*, 24-25.

¹⁰² Abū 'Abdullah Muḥammad ibn Aḥmad ibn 'Uthmān al-Dhahabī, *Manāqib al-Imām Abī Ḥanīfa wa Ṣāḥibayh: Abī Yūsuf wa Muḥammad ibn al-Ḥasan* (Hyderabad: Lajna Iḥyā al-Ma'ārif al-Nu'māniyya, nd.), 53-54. For his biography see al-Qurashī, *al-Jawāhir al-Muḍī'a*, 332-333.

¹⁰³ al-Sarakhsī, *al-Mabsūṭ*, vol.30, 228-9.

discuss the narration from Ibn Samā'a that al-Shaybānī, himself, decried the book as ascriptitious. In attempting to reconcile between these two conflicting opinions, Abū Zahra proffers an alternative historical account for the treatise. In his biography of Abū Ḥanīfa, he asserts that the text was, as al-Jūzajānī says, composed by the copyists of Baghdad. However, in order to verify the material they had gathered, they submitted it to Abū Ḥafṣ who confirmed that its contents conformed to Ḥanafī doctrine and were consonant with the very material which he himself was transmitting. Abū Ḥafṣ' confirmation of the material meant that the copyists' work could now be narrated with his authorisation.¹⁰⁴ Abū Zahra, himself, admits that this account is only partially persuasive. The reason, perhaps, is that he fails to account for al-Jūzajānī's repulsion to the work. The latter, who was clearly aware of the treatise, attributed it to the copyists, not for the lack of an authentic narration, but rather to distance it from the *madhhab* and also to disparage its scholarly credibility.

A contemporary of Abū Zahra, Muḥammad Zāhid al-Kawtharī, tried to accommodate both opinions and suggested that the opposing statements of al-Shaybānī's students actually apply to two different works. The work which is known as al-Shaybānī's treatise on *ḥiyal* is indeed narrated by Abū Ḥafṣ. The material in this treatise reflects the strategies (*makhārij*) deployed in the School to alleviate unnecessary hardships or to find alternatives using legitimate means in conformity with the purposes of the law (*ḥikmat al-tashrī*).¹⁰⁵ What al-Jūzajānī is referring to is a different work altogether; this he proffers was a work which the copyists had put together containing *ḥiyal* which operate contrary to the purposes of the law.¹⁰⁶ This explanation is highly plausible as the book which was collectively condemned was noted for containing over three hundred egregious *ḥiyal*. And although not all these *ḥiyal* are known,

¹⁰⁴ Muḥammad Abū Zahra, *Abū Ḥanīfa: Ḥayātuhū wa 'Aṣruhū – Ārā'uhū wa Fiqhuhū* (Cairo: Dār al-Fikr al-'Arabī, 1947), 419.

¹⁰⁵ Muḥammad Zāhid al-Kawtharī, *Husn al-Taḳāḍī fī Sīrat al-Imām Abī Yūsuf al-Qāḍī* (Cairo: al-Maktaba al-Azhariyya lī al-Turāth, 2002), 70-1.

¹⁰⁶ *Ibid*, 70.

those that are, some of which are mentioned earlier, are not present in any Ḥanafī *ḥiyal* works, but rather are patently rejected and their users condemned.

4.2.2 The *Kitāb al-Ḥiyal* as the *Kitāb al-Makhārīj*

Although al-Kawtharī's explanation of two different works is acceptable, it still implies that al-Jūzajānī was oblivious of al-Shaybānī's real work. al-Kawtharī tries to explain this by recalling that because Abū Ḥafṣ and al-Jūzajānī spent different times of their lives with al-Shaybānī, it is not necessary that both should have received the same works from him. Indeed al-Jūzajānī narrated the *al-Siyar al-Kabīr*, the last of al-Shaybānī's major works, which Abū Ḥafṣ did not, due to the latter's early return to Bukhāra.¹⁰⁷ This, however, implies that it was Abū Ḥafṣ who returned to his native land before al-Jūzajānī, and if Abū Ḥafṣ had heard the book of *ḥiyal* from al-Shaybānī then it was clearly in existence while al-Jūzajānī was studying with al-Shaybānī. Considering this together with the fact that al-Jūzajānī was aware of the Baghdad copyists work on the egregious *ḥiyal*, which had clearly caused a stir in the scholarly community, it is unlikely that he would have been unaware of an earlier work by al-Shaybānī on the same topic.

In the *al-Fatāwā al-Hindiyya* a *ḥīla* is referenced to '*Ḥiyal al-Aṣl*', and the author notes that there is difference between the narration of Abū Ḥafṣ and that of al-Jūzajānī.¹⁰⁸ This seems to imply that both Abū Ḥafṣ and al-Jūzajānī were transmitting a work known as *Ḥiyal al-Aṣl* and that the *ḥiyal* work was part and parcel of al-Shaybānī's *al-Aṣl*. This, *Ḥiyal al-Aṣl* is not a reference to the actual treatise narrated by Abū Ḥafṣ as we note that Ibn Māza, in his expansive doxographical compendium, quotes from both Abū Ḥafṣ' and al-Jūzajānī's

¹⁰⁷ al-Kawtharī, *Husn al-Taḳāḍī*, 70-1.

¹⁰⁸ See Niẓām al-Dīn and a group of Indian scholars, *al-Fatāwā al-Ālamgīriyya* (also known as *al-Fatāwā al-Hindiyya*), (Queta: Maktaba Rashīdiyya, 1983), vol. 6, 407.

narrations of *Ḥiyal al-Aṣl*,¹⁰⁹ and additionally refers to another work which he calls ‘*The al-Ḥiyal attributed to Muḥammad*’.¹¹⁰ The latter is no doubt the *ḥiyal* treatise as an individual text transmitted distinctly from the *al-Aṣl*. This implies that although al-Jūzajānī was unaware of the individual *ḥiyal* treatise, he was narrating a portion of al-Shaybānī’s *al-Aṣl* which contained some *ḥiyal*. The question that needs to be addressed is whether there are any substantial differences between the individual treatise and the *Ḥiyal al-Aṣl*.

Having compared al-Shaybānī’s *ḥiyal* treatise with the corresponding portion of *al-Aṣl*, it can be concluded that the substantive content of the two are the same, although in the treatise there is an additional chapter regarding *ḥiyal* in gifts.¹¹¹ In the treatise the order of the chapters has been altered, but what is more significant however, is that in the *al-Aṣl* the word *ḥiyal* is only sparsely employed: Whereas in the treatise the interlocutor asks for a *ḥīla*, in the *al-Aṣl* he asks for a way (*wajh*) or a sound and trustworthy method (*thiqa*).¹¹² These are words which clearly express the notion of an exit i.e. a *makhraj*, and correspond to the Ḥanafī view, as demonstrated in the previous chapter, of the *ḥiyal* as *makhārij*. In fact, it would not be surprising if the word *ḥiyal* was not employed at all in al-Shaybānī’s original and the few times in which it now occurs in the *al-Aṣl*, may be regarded as posthumous accretions premised on the acceptance of the later *ḥiyal* treatises and the increased subsequent usage of the term itself. This means that al-Jūzajānī was narrating solutions which were referred to using the terms *wajh* or *thiqa* and not using the word *ḥīla*.

al-Jūzajānī narrations of the *Ḥiyal al-Aṣl*, therefore, refer to the chapters of *al-Aṣl* which deal with *makhārij*. It will be recalled that al-Jūzajānī’s consternation was partly due to the use of

¹⁰⁹ Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 21, 175-76, 240.

¹¹⁰ ‘*al-Ḥiyal al-manṣūb ilā Muḥammad*’ i.e. al-Shaybānī. See *ibid*, vol. 21, 242, 251.

¹¹¹ See Appendix one for a comparative list of the chapters.

¹¹² See Appendix two for a comparative list of the usage of the terms in the two works.

the word *ḥiyal* in the title of the treatise as mentioned explicitly in the quote given by al-Sarakhsī. The only *Kitāb al-Ḥiyal* al-Jūzajānī was aware of, was that of the Baghdād copyists, and together with the fact that al-Shaybānī, himself, rejected that he had authored that work, explains al-Jūzajānī's antipathy to the idea that al-Shaybānī had authored a *Kitāb al-Ḥiyal*. This then raises the question of just who was responsible for the individual treatise on the *al-Ḥiyal* which is attributed to al-Shaybānī and which purposely replaces the words *wajh* and *thiqa* with *ḥīla*.

4.2.3 The Authorship of al-Shaybānī's *Kitāb al-Ḥiyal*

That the egregious *Kitāb al-Ḥiyal* was attributed to the Ḥanafīs should be understood in relation to the early growth of the Schools of Islamic law. In the early stages, the Ḥanafī jurists did not represent a consolidated school in the sense that all of their students were not constrained to their specific juridical tradition. Many scholars, who therefore studied under the Ḥanafī masters, did not necessarily deem themselves bound to a tradition, but rather retained a considerable degree of independence. Ibn Taymiyya has alluded to this very point, in his attempt to absolve Abū Ḥanīfa of the more controversial *ḥiyal*.¹¹³ It may well have been that the protagonists of the early reprehensible *ḥiyal* had indeed studied jurisprudence from Abū Ḥanīfa or from one of his many students. In response, it appears that leading authorities within the Ḥanafī School began to set down an official position on what types of *ḥiyal* were acceptable to ultimately delimit the juridical remit of the genre.

Ibn Quṭlūbughā records in his bibliography *Tāj al-Tarājim* that al-Shaybānī's student, Mūsā ibn Naṣr wrote a work entitled *al-Makhārij*, which Ibn Quṭlūbughā describes as a novel work

¹¹³ Ibn Taymiyya, *Bayān al-Dalīl*, 85-6.

within the genre.¹¹⁴ In addition to this work, the grandson of Abū Ḥanīfa, Ismāʿīl ibn Ḥammād is also reported to have written a work on the *ḥiyal*. The jurists Ibn Abī ʿImrān and Qāsim ibn Maʿn appear to mention it in a rather disparaging way, indicating that some of his *ḥiyal* may have been unacceptable.¹¹⁵ This means that in addition to the work of the Baghdad copyists, three other treatises were circulating in Iraq; Ismāʿīl ibn Ḥammād's, Mūsā ibn Naṣr's and the one attributed to al-Shaybānī narrated by Abū Ḥafṣ. Out of these three, only the latter has survived.¹¹⁶

It may be that Abū Ḥafṣ, noting the various works being authored by his contemporaries, decided to restrict himself to the *makhārīj* chapter of *al-Aṣl*, rearranging the chapters and incorporating a single additional chapter on gifts. Most significantly the word *ḥiyal* was introduced into the text in place of the synonyms, *wajh* and *thiqa*. This would provide an authoritative explication of the Ḥanafī *ḥiyal* and limit the scope of the genre to the normative doctrines. He could justifiably transmit the work on behalf of his teacher as the substantive contents originated from al-Shaybānī's works. He also avoided any controversial novelties which meant that his treatise outstripped that of his contemporaries. If Abū Ḥafṣ is indeed the hand behind al-Shaybānī's treatise, it explains why al-Jūzajānī would have been oblivious to

¹¹⁴ *ʿBadīʿ fī bābiḥī*, see Zayn al-Dīn Abū al-ʿAdl Qāsim ibn Quṭlūbugha, *Tāj al-Tarājim* (Beirut: Dār al-Maʿmūn li al-Turāth, 1992), 258-259.

¹¹⁵ Ibn Abī ʿImrān mentions his work in the context of Ibn Samāʿa's narration of al-Shaybānī rejecting that he had authored a *Kitāb al-Ḥiyal*. Ibn Abī ʿImrān follows up this narration by saying that Ismāʿīl was the actual author of the treatise. Ismāʿīl's contemporary the Ḥanafī Kūfān judge Qāsim ibn Maʿn also appears to indict him when describing his work of *ḥiyal* as an iniquitous work. If Ismāʿīl indeed had authored a work for which he was rebuked, is it then possible that he was responsible for the egregious *Kitāb al-Ḥiyal* mentioned earlier. From his biography we see that he died in his youth and his date of death is given as 212AH. The term for youth in Arabic, *shābb*, is normally reserved for those less than forty years old. The earliest that his date of birth can be ascribed to is, therefore, 171 AH. The *terminus ad quem* for the egregious *Kitāb al-Ḥiyal*, it will be recalled, was 177 AH, effectively ruling Ismāʿīl out as its possible author. See al-Dhahabī, *Manāqib al-Imām Abī Ḥanīfa*, 53-4; Ibn Taymiyya, *Bayān al-Dalīl*, 83; al-Qurashī, *al-Jawāhir al-Mūḍīʿa*, 99-100. Here he mentions that Ismāʿīl studied *fiqh* under Abū Yūsuf, this seems unlikely given that the latter died in 182. In other biographical works Abū Yūsuf is omitted as a teacher. His other teachers, which are agreed upon are, his father Ḥammād, al-Ḥasan ibn Ziyād al-Luʿluʾī and also the same al-Qāsim ibn Maʿn mentioned above.

¹¹⁶ In the *Kitāb al-Fihrist* of Ibn Nadīm, works on the *ḥiyal* are recorded only for al-Shaybānī and al-Khaṣṣāf. Ibn Nadīm *Kitāb al-Fihrist*, ed. Gustav Flügel (Leipzig: F.C.W. Vogel, 1872), 204, 206.

it, as he died seventeen years before Abū Ḥafṣ, and the work may therefore have been ‘authored’ after his demise.

4.3 *Ḥiyal* in the Other Schools

Having noted the early beginnings of the *ḥiyal* genre, we will now assess its reception in the other Schools. In the earlier chapters on *ribā*, the juridical methodologies of the four Schools played an important role in determining the specific approach of each School to the *ribā* prohibition. Similarly in their approach to the question of the *ḥiyal*, their responses are a reflection of their differing legal methodologies.

4.3.1 The Shāfi‘īs and the *Ḥiyal*

The Shāfi‘ī School shares with the Ḥanafīs certain juridical features which perhaps predispose them to accepting the utility of certain *ḥiyal*. Like the Ḥanafīs, the Shāfi‘īs do not take intentions into consideration when judging the permissibility of contracts; the controversial *‘īna* contract, for example, was thus upheld by Shāfi‘ī himself, even though he was known for his opposition to the *ḥiyal*.¹¹⁷ The opposition of the Shāfi‘īs, like the Ḥanafīs was to the egregious *ḥiyal* and hence, like the latter, they allowed the *ḥiyal* which they considered to be *makhārīj*. This is attested to by the various *ḥiyal* works produced by them.

Abū Bakr al-Ṣayrāfi (d.330 AH), it appears, was the first Shāfi‘ī to author a treatise on the *ḥiyal*. With the genre having gained a degree of acceptability there would have been perhaps little opposition to his work.¹¹⁸ The next work was written by Abū al-Ḥasan al-Surāqqa (d.410

¹¹⁷ Ḥusayn Khalaf al-Jabūrī, “*al-Ḥiyal wa Mawqif al-Fuqahā’ minhā*,” Majallat Kulliyat al-Dirāsāt al-Islāmiyya 5 (1973): 133-34, (Baghdad, Maṭba‘a al-‘Ānī, offprint).

¹¹⁸ al-Khaṣṣāf had written his work in the middle of the third century, which means that as a genre, the *ḥiyal* would have been fairly well established in the Ḥanafī tradition.

AH), followed by the well known work of Abū Ḥātim al-Qazwīnī (d.440 AH).¹¹⁹ This latter work is the only *ḥiyal* work published in the Shāfi'ī School and unlike the Ḥanafīs, one does not find chapters on *ḥiyal* in their *fatāwā* works which makes al-Qazwīnī's work a valuable reference for assessing their approach to the *ḥiyal*. Following al-Qazwīnī's treatise, al-Khaṭīb is alleged to have written a large work on the *ḥiyal* in three volumes. And finally Zayn al-Dīn al-Munāwī, a Cairene jurist is recorded as having written a work entitled *Bulūgh al-Amal bi-Ma'rifat al-Alghāz wa al-Ḥiyal*.¹²⁰ The Shāfi'īs were then keen protagonists of the *ḥiyal*, although their *ḥiyal*, like the Ḥanafīs, were not the controversial type. The *ʿīna* contract, which is a standard Shafi'ī opinion, is not incorporated into al-Qazwīnī's work, although in the other Schools, this contract is generally considered to be the foremost *ḥīla* employed to circumvent the usury prohibition.

4.3.2 The Mālikīs and the *Ḥiyal*

The Mālikīs are generally assumed to be opponents of the *ḥiyal* and their juridical methodology which embraces the concept of *sadd al-dharī'a* clearly does not support their conceptual basis. However a recent study by Satoe Horii has shown that, although the Mālikīs do not use the word *ḥiyal* in their juridical works, in some cases, the solutions they present are similar to those put forward by the Ḥanafīs as *ḥiyal*.¹²¹ In her article Horii concludes that: 'The Medinese jurists did not totally reject *ḥiyal*, but rather evaluated them according to their own perspectives'.¹²² To substantiate this conclusion she provides six examples of solutions

¹¹⁹ al-Qazwīnī's treatise, like al-Shaybānī's and al-Khaṣṣāf's, was also edited and published by Schacht. Abū Ḥātim Maḥmūd ibn al-Ḥasan al-Qazwīnī, *Kitāb al-Ḥiyal*, ed. Joseph Schacht (Hannover: Orient-Buchhandlung Heinz Lafaire, 1924).

¹²⁰ For the details of these works, see Sulaymān ibn 'Abdullah al-'Umayr, introduction to *Ibtāl al-Ḥiyal*, by Abū 'Abdullah 'Ubayd Allah ibn Muḥammad ibn Baṭṭa (Beirut: Mu'assasat al-Risāla, 1996), 41-43.

¹²¹ Satoe Horii, "Reconsideration of Legal Devices (*Ḥiyal*) in Islamic Jurisprudence: the Ḥanafīs and their "Exits" (*Makhārij*)," *Islamic Law and Society* 9, no. 3 (2002): 312-357.

¹²² *Ibid*, 348.

proposed by the Mālikīs, for certain juridical problems, which are either the same as, or very similar to, those proposed by the Ḥanafīs.¹²³

The six examples relate to: 1) *khul'*, 2) claims against joint guarantors, 3) *muḍāraba* with goods, 4) sale of unripe grain or fruit before harvesting or picking, 5) marriage stipulations in favour of the wife, and 6) sale of a slave so that he may be manumitted.¹²⁴ Now it is clear that the Mālikīs did not call their solutions *ḥiyal*, they merely wrote them as answers to questions based upon their juridical method. This, however, is the critical point, because what it shows is that the *ḥiyal* given by the Ḥanafīs were not exceptional or external to the norms of the *fiqh*, rather they were solutions which in many cases agreed with those of the other Schools. The difference being that the Ḥanafīs identified them as a specific type and jotted them down in their *ḥiyal* manuals.

Another important aspect of Horii's study is in regard to the *ḥiyal* on which the Mālikīs differed with the Ḥanafīs. One example which is relevant here relates to the purchase of a part of the estate by its executor (*waṣī*). According to al-Khaṣṣaf if the executor of an estate wants to purchase a part of it, he should sell the property to a third party and then repurchase it from him. Now, although Mālik does not permit the executor to purchase a part of the estate, Horii mentions a case where he did permit it. Ibn al-Qāsim argues that this exception was a concession (*rukḥṣa*) due to the difficulty the executor was facing in selling the estate. From which, Horii then concludes that: 'Mālik also taught a *ḥīla* that he considered was necessary under the circumstances'.¹²⁵ This perhaps is not an accurate assessment, as Mālik himself, nor his student, identify this as a *ḥīla*. But what it does show is that whereas the Mālikīs opted for a simple concession when circumstances dictated, the Ḥanafīs opted to use a *ḥīla*. These

¹²³ Ibid, 348-357.

¹²⁴ Ibid, 352-6.

¹²⁵ Ibid, 352.

juridical methodologies were noted in our previous treatment of *ribā*; whereas the other Schools (and the Mālikīs in particular) permitted concessions to the *ribā* injunction, the Ḥanafīs preferred to uphold the letter of the law and develop solutions through them.

What is critical though, is that both methodologies in this example, and in the previous ones, arrived at the same solution. In another recent study the author Būshīsh also notes that most of the jurists, including the Ḥanbalīs and the Mālikīs, have often given solutions which agree with the notion of the *ḥiyal* without however expressly designating them as such.¹²⁶

4.3.3 The Ḥanbalīs and the *Ḥiyal*

The resolute stance of Aḥmad ibn Ḥanbal against the *ḥiyal* has already been mentioned. At the same time, however, his leniency towards certain *ḥiyal* has also been recorded. In one instance, for example, while he was sitting with a certain al-Marwazī, someone came to his door to inquire after him, although al-Marwazī was trying to avoid him. In response, Aḥmad placed his finger in his palm and replied ‘al-Marwazī is not here’.¹²⁷ This is a straightforward use of equivocal speech and typical of the way it is used in the *ḥiyal*. Outwardly, Aḥmad did not speak an untruth although what he intended in his speech was clearly not what the listener would have understood. On another occasion he was asked about a man who swore an oath that his wife stood repudiated if he did not have intercourse with her during the daytime of Ramaḍān. Breaking the fast through intercourse carries a heavy expiation. Worse than this, however, is the divorce of his wife, should he not fulfil his oath. Aḥmad advises him that he should undertake a journey and fulfil his oath during that time; the reason being that he will

¹²⁶ Būshīsh, *al-Ḥiyal al-Fiqhiyya*, 43,178.

¹²⁷ Ibn al-Qayyim, *Igāthat al-Lahfān*, 301.

be excused from fasting due to his journey.¹²⁸ This *ḥīla* allowed the man to fulfil his oath, without having to give the expiation, and also to retain his wife.

Some later Ḥanbalīs also accepted these types of *ḥiyal*; Abū al-Khaṭṭāb (d.510 AH), included some *ḥiyal* at the end of his chapter on divorce, suggesting various techniques on how to absolve oneself from an oath.¹²⁹ Najm al-Dīn al-Ṭūfī reports that later Ḥanbalīs censured him for it.¹³⁰ Ibn al-Qayyim, however, openly concedes that there is no *madhhab* which does not condone many *ḥiyal*.¹³¹ In his own works there are a plethora of *ḥiyal* which he personally sanctioned, as mentioned in the previous chapter. Ibn Taymiyya also reported that not only were there Ḥanbalīs advocating the *ḥiyal* for oaths, but also *ḥiyal* which Aḥmad had explicitly condemned. Here he mentions, *inter alia*, the marriage of the validator, *nikāh al-taḥlīl* and various *ḥiyal* of *ribā*.¹³² He also mentions that some Ḥanbalīs had given a *ḥīla* to circumvent the injunction on hunting and fishing for a pilgrim in the state of *iḥrām*. They suggested that if the pilgrim were to set up a fishing net before entering into the *iḥrām*, the fish subsequently caught would be permissible to eat, despite the fact that they are caught after the person has entered into the *iḥrām*. What is so remarkable about this ruling is that it looks suspiciously like what the Jews had done in violation of their Sabbath.¹³³

¹²⁸ Ibid.

¹²⁹ Abu al-Khaṭṭāb Maḥfūz ibn Aḥmad al-Kalwadhānī, *al-Hidāya* (Kuwait: Geras, 2004), 444-450. al-Khaṭṭāb was the student of Qāḍī Abū Ya‘lā, and more notably a student of the Ḥanafī Judge Abū ‘Abdullah Muḥammad ibn ‘Alī al-Dāmighānī. Although Ephrat asserts that studying with Ḥanafī judges was a necessary precondition for eleventh century Ḥanbalī jurists wishing to enter the law profession, al-Khaṭṭāb would more likely have been drawn to al-Dāmighānī due to his epistemic stature, as attested to by al-Khaṭṭāb’s teacher Abū Ya‘lā. al-Dāmighānī, although a Ḥanafī master, was also well versed in Shāfi‘ī *fiqh*. See ‘Abd al-Laṭīf Hamīm and Māhir Yāsīn al-Faḥl, “al-Kalwadhānī wa *Kitābuhū al-Hidāya*,” as an introduction to al-Kalwadhānī, *al-Hidāya*, 10; Daphna Ephrat, “*Madhhab* and *Madrasa* in Eleventh-century Baghdad,” in Bearman *et al.*, *The Islamic School of Law: Evolution, Devolution and Progress* (Cambridge MA: ILSP Harvard Law School, 2005), 86-7, al-Qurashī, *Jawāhir al-Muqḍī’a*, 355-56.

¹³⁰ Najm al-Dīn Abū al-Rabī‘ Sulaymān ibn ‘Umar al-Ṭūfī, *Sharḥ Mukhtaṣar al-Rawḍa* (Saudi Arabia: Ministry of Islamic Affairs, Endowments, Propagation and Guidance, 1998), vol. 3, 214. For his biography, see, Zayn al-Dīn Abū al-Faraj ‘Abd al-Raḥmān ibn Rajab, *al-Dhayl ‘alā Ṭabaqāt al-Ḥanābila*. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1997), vol. 1, 97-106.

¹³¹ Ibn al-Qayyim, *Igāthāt al-Lahfān*, 301.

¹³² Ibn Taymiyya, *Bayān al-Dalīl*, 86.

¹³³ Ibn Taymiyya, *Bayān al-Dalīl*, 32.

The presence of *ḥiyal* in the Ḥanbalī School, may well be surprising, in fairness however, more than any other School they were perhaps the most vocal in their opposition to the more controversial *ḥiyal*. And indeed it is from this School that specific treatises emerged to refute the *ḥiyal*. Ibn Baṭṭa's (d.387 AH) work, which has already been mentioned, clearly proved popular within the School as works bearing the same title were subsequently authored by *qāḍī* Abū Ya' lā (d.458 AH) and al-Ṭūfī (d.716 AH). Another Ḥanbalī Abd al-Raḥmān ibn Ibrāhīm ibn Uthmān wrote a specific treatise dealing with the *ḥiyal* of *ribā*.¹³⁴ Shortly after which, the reformers Ibn Taymiyya and Ibn al-Qayyim also wrote works against the *ḥiyal*, although their approach was far more nuanced.

In summary, we can conclude that after the first work of *ḥiyal* was composed by the copyists of Baghdad, the Ḥanafīs responded by authoring their own works, which gave an accurate representation of what the School considered to be the remit, purpose and substantive nature of acceptable *ḥiyal*. The purpose of their works was both to prevent future Ḥanafī scholars straying beyond the legitimate scope of the genre and also to differentiate between those *ḥiyal* which had a degree of textual legitimacy and those which were flagrant violations of the sacred law. Having established the normative utility of the former type, we see that the other Schools began to permit them, although without necessarily designating them as *ḥiyal*. The Mālikīs, who have been shown to proffer certain *ḥiyal*, do not however identify them as such, whereas the Ḥanbalīs, are not averse to using the term when they do take advantage of them. The Shāfī'īs, who have a similar juridical outlook to the Ḥanafīs, not surprisingly take up the genre and author several works along similar lines to the Ḥanafīs.

¹³⁴ The title of the treatise is given as, "*al-Radd 'alā man Tamassak bi-Madhhabay Imāmayn Abī Ḥanīfa wa al-Shāfī 'ī fī Istibāḥat al-Ribā bi-al-Ḥiyal*," in Köse, *Hile-i Şer'iyye*, 235-255.

4.4 The Controversial *Ḥiyal*

The earliest work of *ḥiyal* put out by the Baghdad copyists was reported to be filled with egregious *ḥiyal*. These *ḥiyal* were unanimously rejected by all scholars and their proponents condemned. The Ḥanafī and Shāfi‘ī *ḥiyal* works are, as mentioned earlier, free from these types of *ḥiyal*. This was a well known fact amongst the jurists and such *ḥiyal* were not a part of the *ḥiyal* genre at all. There are, however, a number of controversial *ḥiyal* which are central to the *ḥiyal* polemic and do appear to have been overtly advocated by leading Ḥanafī jurists. There are five main *ḥiyal* which sit at the heart of the *ḥiyal* polemic:

1. *Bay‘ al-‘īna* – double-sale
2. *Bay‘ al-wafā’* – sale with a right of redemption
3. *Zakāt* – alms-tax
4. *Shuf‘a* – pre-emption
5. *Taḥlīl* – marriage of an intermediary validator

The first two *ḥiyal* relate to *ribā* and will be dealt with in detail in the next chapter. The remaining three will be discussed in the context of their opponents’ arguments. With regard to *zakāt* and *shuf‘a*, reference will be made to al-Bukhārī’s *Kitāb al-Ḥiyal* as he mentioned both the *ḥiyal* attributed to the Ḥanafīs and the traditions which are relevant to the polemic. As for the issue of *taḥlīl*, the polemic of Ibn Taymiyya, whose entire treatise was focused upon this specific *ḥīla*, will provide the opposing views.

4.4.1 *Zakāt* – Alms-tax

In his *Kitāb al-Ḥiyal* in the section on *zakāt*, al-Bukhārī records the following ḥadīth: ‘Distinct [assets] should not be combined nor should joint [assets] be separated for fear of the

alms [due on them]’.¹³⁵ This ḥadīth is crucial to al-Bukhārī’s argument against the *ḥiyal* which are used to avoid paying the *zakāt*. It constitutes an explicit prohibition from the Prophet (pbuh) against manipulating one’s wealth to avoid paying the *zakāt*. After mentioning this ḥadīth, al-Bukhārī goes on to quote another four aḥādīth, mentioning repeatedly the opinion of ‘some people’ who allow someone to avoid paying the *zakāt* by dispensing with enough of his wealth prior to the completion of the year. The ‘some people’ mentioned here, clearly an elliptical reference to the Ḥanafīs.

Zakāt only becomes due after a certain level of wealth is acquired (*niṣāb*) and one full year passes over this amount. If, however, prior to the completion of the year, someone’s wealth decreases below the *niṣāb*, then he is absolved from its payment. The *ḥīla* being objected to by al-Bukhārī, is when an individual, purposely disposes of some of his wealth on the eve of the year, solely to avoid paying the tax. According to the ‘some people’ he quotes, a person who uses such a trick with the intention of evading the alms-tax, will nevertheless be absolved from paying *zakāt* on his wealth.

There are two points which need to be explored here: the first is to examine the exact opinion of the Ḥanafīs in regard to this stratagem, and the second is to note its occurrence in the works of the *ḥiyal*. With regard to the first aspect, it must be borne in mind that the disagreement between al-Bukhārī and the Ḥanafīs is regarding the use of such stratagems prior to the completion of the year and not after it. Once the year has been completed it is clear that the *zakāt* is due and must be paid. The stratagem here pertains to the owner’s actions prior to the completion of the year. The jurists, however, are in agreement that an owner may dispose of his wealth freely at any time he wishes even if he causes it to decrease below the level of the

¹³⁵ ‘*Lā yujma‘ bayna mutafarriq wa lā yufarraḡ bayna mujtami‘ khashyat al-ṣadaqa*’. al-Bukhārī, *Ṣaḥīḥ*, vol. 3, 1405, (ḥadīth no. 7041).

niṣāb. If this occurs prior to the completion of a year then consequently no *zakāt* on his remaining wealth will be due. The point of contention here, is when an owner disposes of his wealth prior to the completion of the year, for the sole purpose of circumventing his *zakāt* liability. This stratagem gives rise to two questions: First, what is the *sharīʿa* ruling regarding the person's intention, and second, what is its consequent impact on the obligation to pay the *zakāt*. As regards this latter question, it is clear that the different juridical methodologies of the jurists will determine the outcome of this question. We hence find, that both the Ḥanafīs and the Shāfiʿīs rule that *zakāt* will not be due because intention plays no role in evaluating the legal cause. The fact that his wealth is less than the *niṣāb* is the only determining factor and the persons intention to evade the *zakāt* is not taken into consideration as he is deemed similar to a person who disposed of some of his wealth without intending to evade the *zakāt*, but yet resulted in him owning less than the *niṣāb*. The two cases are hence deemed to be legally indistinguishable. For those jurists who take the owner's intentions into consideration, the *zakāt* must be paid. Although they recognise that the wealth is less than the *niṣāb*, they disregard this in light of the motives which led it to be so. The Mālikīs, Ḥanbalīs and traditionists are all of this opinion.¹³⁶

The other question relates to the *sharīʿa* ruling of the intention itself. The Shāfiʿīs, distancing themselves from al-Bukhārī's criticism, point out that, even though they do not give any legal effect to intentions and motives, they do regard the intention itself as blameworthy.¹³⁷ Likewise, al-Sarakhsī also reports that al-Shaybānī regarded such an intention as reprehensible (*makrūh*); *zakāt* being an act of worship he considered it inappropriate for a believer to avoid it. In al-Khaṣṣāf's prolegomena he makes it abundantly clear that to dispose of ones wealth with the intention of evading ones *zakāt* liability is reprehensible. He also

¹³⁶ Maḥmūd, *al-Ittijahāt al-Fiqhiyya*, 40.

¹³⁷ al-Ghunaymī, *Kashf al-Iltibās*, 85.

stresses, as mentioned in the previous chapter, that although the intention of evasion itself is held to be reprehensible this does not mean that the legal effect of his actions are interdicted. This means that the *zakāt* will not be due on his wealth as he does not possess the *nisāb*. al-Khaṣṣāf goes on to say that one who does this should fear that he may be regarded as a sinner, as the Qur'ān has warned against intending harm to others, and by evading *zakāt* (or *shuf'a*) one is causing harm to those who would have been its rightful recipients.¹³⁸

As opposed to the dominant opinion of the School, Abū Yūsuf is reported to have seen no harm in this *ḥīla* and considered it similar to cases of pre-emption and other *ḥiyal*.¹³⁹ The Azharite Abū Zahra notes, however, that this opinion of Abū Yūsuf is referenced by al-Sarakhsī to a work attributed to Abū Yūsuf known as *al-Amālī*. Such works are not as probative as the *ẓāhir al-riwāya* and hence their authority within the School is only secondary.¹⁴⁰ Abū Zahra's doubt over the accuracy of this narration maybe corroborated by the fact that Abū Yūsuf himself, in his *Kitāb al-Kharāj* when commenting on the *ḥadīth* prohibiting evasion of the alms-tax, says:

‘It is not permissible for man who believes in Allah and the last day to refrain from [paying] alms or to remove it from his ownership to the ownership of another in order to separate it and by that annul the alms [due] on it; [the intent being] that each one of them have [an amount] upon which *zakāt* is not obligated. No one should employ *ḥiyal* to annul the alms in any way [whatsoever].’¹⁴¹

That spurious narrations were circulating attributing *ḥiyal* to the Ḥanafīs is not unknown; there even appears to have been one attributing tacit approval of a *ḥīla* to avoid *zakāt* to al-

¹³⁸ al-Khaṣṣāf, *Kitāb al-Khaṣṣāf*, 5, 9.

¹³⁹ al-Sarakhsī, *al-Mabsūṭ*, vol. 1, book 2, 224.

¹⁴⁰ Abū Zahra, *Abū Ḥanīfā*, 433, n.1.

¹⁴¹ See Maḥmūd, *al-Ittijāhāt al-Fiqhiyya*, 39-40. I have been unable to locate this quote in the *Kitāb al-Kharāj* and have hence cited it from this work.

Shaybānī. The narration, however, is from an unknown reporter and contradicts the more reliable position known from him, as mentioned earlier.¹⁴²

Having dealt with the substance of the *ḥīla*, what remains, is to examine its relation to the genre. In the three early works on the *ḥiyal* by al-Shaybānī, al-Khaṣṣāf and al-Sarakhsī, neither al-Shaybānī nor al-Sarakhsī composed a chapter on *zakāt* as opposed to al-Khaṣṣāf. In his chapter on *zakāt* he discusses the following five *ḥiyal*:

1. how to give *zakāt* to a debtor as a reduction in the debt;
2. the same as 1. but if there are partners in the debt;
3. how to give a burial shroud as *zakāt*;
4. whether one can consider maintenance (*nafaqa*) of ones close relatives as *zakāt*;
5. and whether *zakāt* can be given to build a mosque.

His answers to these questions are standard juridical responses and nothing regarding the evasion of *zakāt* is even remotely mentioned.¹⁴³ What transpires then, is that the single *ḥīla* which is objected to by al-Bukhārī is not mentioned in any of the early works on *ḥiyal*. This is not surprising given that its veracity in the School is tentative to say the least. There is no narration from Abū Ḥanīfa which even discusses it; al-Shaybānī has expressed his disapproval of it, as has Abū Yūsuf; and the reports which suggest their support for it, are either from obscure or secondary sources.

What is established though, is that under their general juridical framework, like the Shāfi'īs, intentions and motives do not play a role in determining legal effects and it this fact which is at the heart of the polemic. al-Khaṣṣāf is acutely aware that their juridical position on

¹⁴² See al-Kawtharī's annotation on *Bayān Zaghl al-ʿIlm*, by Shams al-Dīn Abū ʿAbdullah Muḥammad ibn Aḥmad al-Dhahabī (Damascus: Maṭbaʿa al-Tawfīq, 1347 AH), 14, n.1; al-Baḥārī, *al-Ḥiyal fī al-Sharīʿa al-Islāmiyya*, 298.

¹⁴³ al-Khaṣṣāf, *Kitāb al-Ḥiyal*, 103-4; also see the remarks of Abū Zahra in his work, *Abū Ḥanīfa*, 422-3.

intentions makes them susceptible to the charge of allowing such *ḥiyal*. He hence clarifies the position of the Ḥanafīs vis-à-vis the *ḥīla* used to evade the *zakāt*, while also defending their stance on intentions. What is also significant is that he does this in his prolegomena and not in his actual substantive chapters. This is important in that it shows that al-Khaṣṣāf was not merely defending the charge against a specific *ḥīla*, but rather, that he was making a more general point. By doing so, he recognises in a wider sense, that the juridical methodology which gives rise to and embraces the *ḥiyal*, may also be exploited for illicit purposes. He therefore sets out, from the beginning, to defend the School's methodology while also censuring those with improper motives.

4.4.2 *Shuf'a* – Pre-emption

The right of pre-emption allows certain individuals the first right of purchase which the seller is mandated to uphold. Just who is given pre-emptory rights, however, is a matter disputed among the jurists. al-Bukhārī presents two aḥādīth in his chapter on *shuf'a* in the *Kitāb al-Ḥiyal*; one which negates the neighbour's right of pre-emption and the second which apparently supports it. Although the Schools of law agree that co-owners have pre-emptory rights, only the Ḥanafīs grant the same right to the neighbours of a property. al-Bukhārī's criticises the Ḥanafīs for uniquely affirming this right and then subsequently devising various *ḥiyal* to circumvent it. He mentions three *ḥiyal* which are proffered in the Ḥanafī works on the *ḥiyal* and follows them, repeatedly by the ḥadīth which the Ḥanafīs themselves use as proof to grant the neighbour the right of pre-emption. This serves to highlight a contradiction in their approach and indeed following the final example, al-Bukhārī, makes the forthright remark: 'thus they permitted this deception amongst the Muslims'.¹⁴⁴

¹⁴⁴ al-Bukhārī, *Ṣaḥīḥ*, vol 3, 1411.

al-Bukhārī has mentioned three different *ḥiyal* in his compendium and all three are also mentioned in the work of al-Shaybānī and al-Khaṣṣāf. These, in basic terms, are as follows:

1. The buyer should first purchase a small portion of the house and then later on purchase the rest; once he becomes a partner in the property his right of pre-emption succeeds that of the neighbour and hence alienates him from purchasing the property. The neighbour would technically have a right of pre-emption in the original small share purchased, although in view of it being insignificant, he is unlikely to claim it.
2. The seller should give the house as a gift to the buyer, marking off its boundaries and handing it over to him. In response the buyer should give him a gift of money, corresponding to, what otherwise would have been, the price. Clearly pre-emptive rights do not operate in gifts and hence the neighbour loses his right. The only caveat is that the gift contract cannot stipulate the return gift, otherwise, it becomes a *hiba bi sharṭ al-ʿiwāḍ*, a gift with a stipulated countervalue.¹⁴⁵ This is tantamount to a contract of sale and the neighbour would hence be granted his pre-emptory rights.¹⁴⁶
3. The sale should be fixed at 20,000 *dirhams*, although the house is only worth 10,000. The high price dissuades the neighbour from claiming his right, while the buyer actually only pays 9999 *dirhams* and one *dīnār*; the one *dīnār* replaces the 10,001 *dirhams* remaining.¹⁴⁷

All three *ḥiyal* are mentioned in the chapter of *shufʿa* in both al-Shaybānī's and al-Khaṣṣāf's treatises.¹⁴⁸ Although these *ḥiyal* are in al-Shaybānī's work, they are presented through a series of questions posed by an interlocutor. Most probably it is al-Shaybānī who is asking about them and Abū Yūsuf who is answering. The latter is specifically mentioned periodically

¹⁴⁵ This is discussed in chapter 1.

¹⁴⁶ ʿAlāʾ al-Dīn Abū Bakr ibn Masʿūd al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ* (Beirut: Dār al-Maʿrifā, 2000), vol. 5, 18. (All subsequent references to al-Kāsānī's *Badāʾiʿ* will refer to this edition).

¹⁴⁷ We have already discussed why the Ḥanafīs permit this contract in chapter two.

¹⁴⁸ al-Shaybānī, *al-Makhārīj*, 80-1, al-Khaṣṣāf, *Kitāb al-Ḥiyal*, 200-1, the latter reproduces these verbatim from the former.

in the text as supporting certain *ḥiyal*. That these *ḥiyal* are endorsed in the Ḥanafī School is unquestionable, as later texts reproduce them as standard *ḥiyal*.¹⁴⁹ They even find their way into the works of the Shāfi‘ī Abū Ḥātim al-Qazwīnī and the Ḥanbalī, Ibn al-Qayyim.¹⁵⁰

It is well recorded by the Ḥanafī School that al-Shaybānī, himself, regarded the use of *ḥiyal* to preclude pre-emptory rights as severely reprehensible.¹⁵¹ Despite that, the Ḥanafī School in general appears to have opted for Abū Yūsuf’s opinion, who endorses them. In al-Shaybānī’s treatise, Abū Yūsuf argues that the seller only undertakes such *ḥiyal* to prevent himself from oppressing the neighbour by denying him his right. So by preventing the right from coming into existence he saves himself from doing an injustice to the latter. Another explanation given is that at the heart of all commutative exchange lies the wilful consent of the owner to part with his property. In a situation where the owner has an aversion to the neighbour, or perceives some harm which may result from such a sale, either to himself or to his other neighbours, his consent to the sale may not be given wholeheartedly. In order to evade this scenario, these *ḥiyal* are permitted. In fact, the chapter on *shuf‘a* opens with a question posed by al-Shaybānī; the terms in which it is framed seem to express this viewpoint:

I said: What is your opinion [regarding] a man who wants to buy a house and he fears that the neighbour may take it by *shuf‘a*, and he [the buyer] dislikes to prevent him from that and [thereby] oppress him [but, on the other hand, he also] dislikes to give him the house. [In both scenarios] something which he dislikes will happen to him. Do you have a *ḥīla* in that [situation]?

It is in response to this dilemma that Abū Yūsuf gives his answers. The Ḥanafīs go on to differentiate between *ḥiyal* deployed to prevent the right of pre-emption from occurring, and

¹⁴⁹ al-Kāsānī, *Badā‘i*, vol. 5, 54—6.

¹⁵⁰ Although not in regard to a neighbour’s pre-emptory rights, as the Shāfi‘īs and Ḥanbalīs don’t grant him any, but rather in relation to either the rights of the partner, or to avoid a neighbour claiming such a right in a Ḥanafī court. See al-Qazwīnī, *Kitāb al-Ḥiyal fī al-Fiqh*, 14-16; Ibn al-Qayyim, *I‘lām al-Muwaqqi‘in*, 698.

¹⁵¹ al-Sarakhsī, *al-Mabsūt*, vol. 1, book 2, 224; Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 11, 107.

those which are used after the right has been established.¹⁵² Some jurists further restricted the permission to situations where the neighbour is regarded as a profligate (*fāsiq*) who may cause harm to others.¹⁵³ What is clear is that the framework of the Ḥanafis is premised upon a distinct teleological concern for the rights of both the owner and the neighbour, although in their juridical formulations, they clearly give preponderance to the former against the latter. This is not surprising as the rights of the former are unanimously agreed upon by the jurists, whereas the latter are only upheld by the Ḥanafis.

4.4.3 *Tahlīl* – Marriage of the Validator

Islamic law does not permit a triple divorcee to remarry her husband unless and until she marries another husband. Once the marriage is consummated, if she is subsequently divorced by her new husband, then following the completion of her waiting period (*‘idda*), she is permitted to remarry her first husband. What Islamic law does not permit, however, is for the second marriage to be performed solely to permit the remarriage of the first, a practice known as *tahlīl*. If the first husband arranges this with the second husband as a strategy to remarry his previous wife, then he is designated as the *muḥallal lahū* while the latter is called the *muḥallil*, the validator. Both of these have been cursed in the Prophetic *ḥadīth*: ‘*La ‘ana Allah al-muḥallil wa al-muḥallal lahū*’.¹⁵⁴

The practice of *tahlīl* is the focus of Ibn Taymiyya’s polemic against the *ḥiyal*. The jurists unanimously condemn those who engage in this practice, although they differ regarding how they interpret its application in the legal sphere. Much of Ibn Taymiyya’s work, as he himself declares, is focused on demonstrating that the practice of *tahlīl* is forbidden and that the

¹⁵² al-Khaṣṣāf, *Kitāb al-Ḥiyal*, 81. Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 21, 263.

¹⁵³ Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 11, 107. The author cites this opinion from the renowned, although no longer extant, *Fatāwā al-Faḍlī*.

¹⁵⁴ Reported in Abū Dawūd, Ibn Mājah and al-Tirmidhī who graded it as a good sound *ḥadīth* (*ḥaṣan ṣaḥīḥ*), see Būshīsh, *al-Ḥiyal al-Fiqhiyya*, 91, n. 2.

resulting marriages, of both the validator and the former husband, are invalid. This is so, irrespective of whether they openly declare their intentions or not, and whether their agreement precedes the contract or is included in it.¹⁵⁵

Ibn Taymiyya, however, concedes early on that the scholars have differed in this regard, the Ḥanafīs, not unexpectedly, are among those who differ with his own views. He also mentions that the Successor jurist Sālim ibn ‘Abdullah ibn ‘Umar, allowed the validator to marry the divorcee with the intention of divorcing her and hence permitting her remarriage to her former husband, but only on condition that the validator do so unilaterally, i.e. not under instruction from the other parties, and also that he keep his intention secret throughout.¹⁵⁶ He quotes other early jurists, such as the Madinese Rabī‘a, Yaḥyā ibn Sa‘īd and Abū Zinād, and surprisingly Dawūd ibn ‘Alī the founder of the Zāhirī School, all in agreement with the opinion of Sālim.¹⁵⁷

What is at the heart of the issue of *taḥlīl* is whether intentions and stipulations (*shurūṭ*) are considered to affect the validity of contracts. As can be noted from our previous discussions, this is a recurring theme and a major cause of difference in the substantive rules. For the Ḥanafīs, like the Shāfi‘īs, the unexpressed intention has little, or no, role to play in determining the validity of the contract, and hence if *taḥlīl* occurs by the planning of any of the parties and they conceal their intention, then the contract will be valid. Similarly, stipulations to the marriage contracts are generally held to be invalid, the Ḥanafīs uphold the marriage contract while invalidating the stipulations.¹⁵⁸ If, however, they stipulate *taḥlīl* as the purpose of the marriage, then the Ḥanafī authorities differ: Abū Ḥanīfa and Zufar regard the

¹⁵⁵ Ibn Taymiyya, *Bayān al-Dalīl*, 20.

¹⁵⁶ Ibid, 18.

¹⁵⁷ Ibid, 19.

¹⁵⁸ As al-Shaybānī states: ‘All marriages with invalid stipulations are permitted; the conditions are void [whereas] the marriage [contract] is upheld.’ al-Shaybānī, *Hujja*, vol. 3, 221.

marriages as valid, although they regard it as severely reprehensible; Abū Yūsuf, regards the marriage of the validator as void and hence the divorcee is not permitted to remarry her former spouse; al-Shaybānī upholds the marriage of the validator but does not permit the divorcee to marry her former spouse.¹⁵⁹ Although the doctrine of the Ḥanafīs is not a *ḥīla*, it is clear that it may well be seen to be so. Ibn Taymiyya, in his refutation of the *taḥlīl* claims that it can be refuted by showing that all *ḥiyal* are invalid; the assumption being that the former evidently belongs taxonomically to the latter.¹⁶⁰ This is reinforced when we observe the frequency with which it occurs in the Ḥanafī works on *ḥiyal*. Although what exactly the Ḥanafīs discuss in regard to *taḥlīl* and it being a *ḥīla* needs to be examined further.

There are two basic types of reference to *taḥlīl* in the *ḥiyal* works; firstly there is a simple presentation of the doctrine of the school, as in the works of al-Shaybānī and al-Sarakhsī, and secondly in the remainder of the works where the standard doctrine is not mentioned, but an actual *ḥīla* for *taḥlīl* is. al-Shaybānī's treatment is interesting in that he only quotes his own opinion; the interlocutor asks him the rule if a divorcee or her former husband approaches a man asking him to marry her for the purpose of *taḥlīl*. al-Shaybānī responds that if they make such a proposition then she will not be permitted to marry her former husband.¹⁶¹ Beyond this no other statements are made regarding *taḥlīl*. This, itself is informative of the genre and rebuffs the assertion that the genre deviates from the substantive doctrine and serves to legalise what is actually practiced through stratagems. On the contrary, al-Shaybānī upholds his own opinion, and even though the opinion of his teacher may facilitate their goal, it is not mentioned. al-Sarakhsī's work on the *ḥiyal* does little more than mention the doctrines of the

¹⁵⁹ al-Kāsānī, *Badā'i*, vol. 3, 294; Ibn Māza, *al-Muḥīṭ*, vol. 3, 180-1.

¹⁶⁰ Ibn Taymiyya, *Bayān al-Dalīl*, 20.

¹⁶¹ al-Shaybānī, *al-Makhārīj*, 55.

three authorities together with the fact that they all regard stipulations for *tahlīl* as severely reprehensible.¹⁶²

The other works do not mention the standard doctrine on *tahlīl* although they do offer an actual *ḥīla* for a divorcee. al-Khaṣṣāf,¹⁶³ Abū Layth,¹⁶⁴ Saʿīd ibn ʿAlī,¹⁶⁵ and Zāhīr al-Dīn¹⁶⁶ all advise the divorcee to give money to a trustworthy person who agrees to buy a servant and marry him to the divorcee. Once the new couple have consummated their marriage, the owner gives the servant to the divorcee as a gift, and because ownership and marriage cannot be combined, the woman is immediately released from the marriage and free to marry her former husband. In another two works, *al-Fatāwā al-Sirājiyya* and *al-Fatāwā al-Hindiyya* the *ḥīla* given involves the divorcee marrying her new spouse on the condition that he issue her with a conditional divorce which is effected by the consummation of their marriage.¹⁶⁷

None of these *ḥiyal*, however, involves the condemned form of involving a validator in a marriage which all three parties stage merely for the purpose of *tahlīl*. Additionally, neither does the first husband nor the intermediate have an active involvement such that their intentions are relevant. As for the intention of the woman to remarry her former husband, then it specifically was not condemned in a prophetic *ḥadīth* in which a woman made it known to the Prophet (pbuh) that she wished to return to her former husband. For all of these reasons, we find Ibn al-Qayyim, not only defending this *ḥīla*, but additionally claiming that the Ḥanbalīs uphold the remarriage of a divorcee who uses it. He also adds that this is the opinion

¹⁶² al-Sarakhsī, *Kitāb al-Ḥiyal*, 114-5.

¹⁶³ al-Khaṣṣāf, *Kitāb al-Ḥiyal*, 93-4.

¹⁶⁴ Abū Layth Naṣr ibn Muḥammad ibn Ibrāhīm al-Samarqandī's *ʿUyūn al-Masāʾil fī Furūʿ al-Ḥanaḥiyya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1998), 211.

¹⁶⁵ Saʿīd ibn ʿAlī al-Samarqandī, *Jannat al-Aḥkām*, 211.

¹⁶⁶ Abū al-Faṭḥ Zāhīr al-Dīn ʿAbd al-Rashīd's *al-Fatāwā al-Walwāliyya* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2003), vol. 5, 429. The *ḥīla* given here differs slightly in that the servant is procured by the former husband.

¹⁶⁷ ʿAlī ibn ʿUthmān al-ʿUshī al-Farghānī's *al-Fatāwā al-Sirājiyya* (Karachi: Madrasa Fāṭima al-Zahrā, nd.), 545; Niẓām al-Dīn, *al-Fatāwā al-Hindiyya*, vol. 6, 448-9. The previous *ḥīla* is also mentioned in the *al-Fatāwā al-Hindiyya*, not in the chapter on *ḥiyal* but in the chapter on divorce. See Ibid, vol. 1, 508-9.

of the Successor jurist ‘Aṭā’ as well as, Mālik, and Shāfi‘ī, in fact, he says, he knows of none who oppose it.¹⁶⁸ Finally, we can also note that al-Shāṭibī asserts that the intention behind this *tahlīl* is the reconciliation of the estranged husband and wife. According to his yardstick of the preponderant *maṣlaḥa*, he therefore finds it to be in conformity with the *maqāṣid*.¹⁶⁹

To conclude, it is important to note that the *ḥiyal* works do not condone *tahlīl* in the sense of the former husband getting together with the validator and his previous wife and performing a marriage in which the marriage ends after a given time. In this sense there is no egregious violation of the law, but rather, one finds in the later Ḥanafī works a *ḥīla* which is generally accepted by all the jurists and which conforms to the *maqāṣid* of the Sharī‘a. Another point to consider is why al-Shaybānī should include his rejection of *tahlīl* in his *ḥiyal* work. To answer this we can recall our earlier assessment regarding the initial purpose of this treatise and the genre itself, which suggested that they were meant not only to present valid *ḥiyal* according to the substantive doctrines of the school, but also to set a standard with which to measure the *ḥiyal*. By rejecting the *tahlīl*, al-Shaybānī, is clearly setting that limit and frustrating those who seek to abuse the *ḥiyal*.

4.5 Contents of the *Ḥiyal* Genre

Having discussed the controversial *ḥiyal*, we need to assess the remaining general contents of the *ḥiyal* genre. To do this, the following aspects will be examined:

1. The relationship of the contents of the genre to the School’s normative doctrine.
2. The importance of maintaining systematic consistency between the *ḥiyal* formulations and the normative doctrine.

¹⁶⁸ Ibn al-Qayyim, *I‘lām al-Muwaqqi‘in*, 739. According to al-Būṭī, Ibn al-Qayyim, by endorsing this and other *ḥiyal* of *tahlīl* contradicts the very juridical premises upon which his anti-*ḥiyal* polemic is based. See Muḥammad Sa‘īd Ramaḍān al-Būṭī, *Dawābiṭ al-Maṣlaḥa fī al-Sharī‘a al-Islāmiyya* (Damascus: Dār al-Fikr, 2009), 332-34.

¹⁶⁹ al-Shāṭibī, *al-Muwāfaqāt*, 452.

3. The endogenous view of the authors of the *ḥiyal* treatises.

4.5.1 The Genre and the Normative Doctrine

The main question to be answered here is does the substantive content of the *ḥiyal* genre deviate from the standard doctrines of the School. It was Schacht's assertion that the genre served as a *modus vivendi* between theory and practice. We have previously discussed the terms, theory and practice, and noted that Udovitch's claim, of the *ḥiyal* originating in the genre and subsequently finding their way into the theoretical works, is inaccurate. One specific example was discussed which highlighted the inconsistencies in the approach of the Orientalists in trying to substantiate Schacht's thesis. We will now look at further examples within the genre to further assess the claim that the genre was written to reflect actual practice and hence differed from the School's substantive doctrine.

The *al-Muḥīṭ al-Burhānī*, an expansive doxographical compendium, contains a large chapter on the *ḥiyal* in which the author analyses the *ḥiyal* from a number of sources and presents the critical opinion of various Hanafī authorities on them.¹⁷⁰ The comments made by the author on the *ḥiyal* give us an accurate portrayal of the relationship between the *ḥiyal* genre and al-Shaybānī's works. In relation to a large number of *ḥiyal* the author mentions their source which either contains the *ḥīla* exactly as its being quoted or the principles upon which the *ḥīla* is built. The author ascribes numerous *ḥiyal* to the following sources:

- *al-Aṣl*¹⁷¹

¹⁷⁰ A complete edition of this work was first published in 2004; earlier published editions of this work were incomplete and crucially lacked the chapter on *ḥiyal*. Regarding these previous editions, and a general description of this unique work, see Murteza Bedir, "Bukharan Hanafism and the Mashayikh: An Analysis through the Law of Waqf as Expounded by Burhan al-Shari'a al-Bukhari (d.616/1219)," in *Studies in Islamic Law: A Festschrift for Colin Imber*, ed. Andreas Christmann and Robert Gleave, Journal of Semitic Studies Supplement 23 (Oxford: OUP, 2007), 6, n. 29, 1-8, 19-21.

¹⁷¹ See for example, *al-Muḥīṭ al-Burhānī*, vol. 21, 80, 111, 115, 118, 123, 129-131, 135, 138, 150, 153, 170, 176, 256, 315, 328.

- *al-Jāmi‘ al-Kabīr*¹⁷²
- *al-Jāmi‘ al-Ṣaghīr*¹⁷³
- *al-Siyar al-Kabīr*¹⁷⁴
- *al-Ziyādāt*¹⁷⁵

In addition to these works he also makes a number of references to al-Shaybānī’s works which are known as the *nawādir*.¹⁷⁶ Through these references it becomes apparent that the norm of the *ḥiyal* was for them to emanate from the most authoritative sources. This becomes clear when the author remarks in one instance that a certain *ḥīla* is not from al-Shaybānī’s works and then compares it to the standard doctrine and shows that it is at odds with the latter and concludes that it is not a sound *ḥīla*.¹⁷⁷

Horii also inquired into the provenance of the *ḥiyal*.¹⁷⁸ She discusses five *ḥiyal* in considerable detail, explaining their occurrence in the various *ḥiyal* texts and also locating them in the original Ḥanafī *corpus juris*. For this purpose she uses four texts written by the earliest authorities; Abū Yūsuf’s *Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*; al-Shaybānī’s *al-Aṣl*, *al-Jāmi‘ al-Kabīr* and *al-Jāmi‘ al-Ṣaghīr*.¹⁷⁹ The first *ḥīla* she discusses will be mentioned here as an example of her method and the conclusions she draws. The *ḥīla* relates to the difference between the rules of guaranty (*kafāla*) and debt transfer (*ḥawāla*).¹⁸⁰ The Ḥanafīs rule that in a *kafāla* agreement the creditor has recourse to both the debtor and the guarantor,

¹⁷² Ibid, vol. 21, 111, 124, 133, 142, 143, 156, 170, 195, 235.

¹⁷³ Ibid, vol. 21, 189, 200.

¹⁷⁴ Ibid, vol. 21, 174.

¹⁷⁵ Ibid, vol. 21, 173, 237 340. He mentions in one instance that al-Khaṣṣāf uses a case from *al-Ziyādāt* as an analogical substrate for his *ḥīla*; ibid, vol. 21, 237.

¹⁷⁶ These are works which were narrated by only one, or a small number of narrators. See Ibn ‘Ābidīn, *Sharḥ Rasm ‘Uqūd al-Muḥīṭ*, 16-17. For Ibn Māza’s references to these works, see *al-Muḥīṭ al-Burhānī*, vol. 21, 73, 117, 184, 200, 203, 217.

¹⁷⁷ See ibid, vol. 21, 122.

¹⁷⁸ Horii’s work is the result of her PhD thesis *Die gesetzlichen Umgehungen im islamischen Recht (ḥiyal) unter besonderer Berücksichtigung des Ḥanafiten Sa‘īd b. ‘Alī as-Samarqandī (gest. 12.Jhdt.)* (Berlin: Klaus Schwarz Verlag, 2001). She later published an article based upon her earlier thesis to which will subsequently refer.

¹⁷⁹ Horii, *Reconsideration of Legal Devices*, 332.

¹⁸⁰ Nicholas H. D. Foster, “The Islamic Law of Guarantees,” *Arab Law Quarterly* 16, no. 2 (2001): 133-57.

whereas in *ḥawāla*, he only has recourse to the guarantor. Ibn Abī Laylā, the Kufan judge and contemporary of Abū Ḥanīfa, however, was of the opinion that in both cases the creditor would only have recourse to the guarantor. Abū Yūsuf, who studied under both jurists, remarks in his *Ikhtilāf* that if the debtor and guarantor stand as guarantee for one another, then the creditor has recourse to both and that this solution is acceptable to all the jurists. This means that a creditor making a *kafāla* agreement can ensure that according to both jurists he will have the right to pursue his right from both the debtor and the guarantor. Abū Yūsuf's solution to the problem is later incorporated into al-Shaybānī's *al-Makhārīj*.¹⁸¹ Horii is also quick to point out that the Mālikīs suggest a similar *ḥīla*, although without naming it as such.¹⁸²

Horii then goes on to examine four other *ḥiyal*, whilst also locating their original sources:

- 1) A *ḥīla* for the marriage dissolution of a minor is found *al-Jāmi' al-Ṣaghīr*.
- 2) A *ḥīla* for *istibrā'*¹⁸³ is in *al-Aṣl*;
- 3) A *ḥīla* for pre-emption is in *al-Jāmi' al-Kabīr*;
- 4) A *ḥīla* for the alms-tax is in *al-Aṣl*.¹⁸⁴

She also points out that the first *ḥīla* is also found to exist in the Mālikī School.¹⁸⁵ The implications of her results are that the substantive doctrine is a major source for the *ḥiyal* and that the need for such exits was dealt with by the earliest authorities, although they themselves never identified them as *ḥiyal*. This applies both to the Ḥanafīs and to the Mālikīs. It is only subsequently that the Ḥanafī authors appropriated these solutions from the original sources and included them in their *ḥiyal* works.

¹⁸¹ Ibid, 332-3, 353.

¹⁸² Ibid, 333, 353.

¹⁸³ This is a procedure which requires that the purchaser of a female slave not have intercourse with her, until he determines that she is not pregnant, normally by the occurrence of her menstrual period.

¹⁸⁴ Horii, *Reconsideration of Legal Devices*, 331-43.

¹⁸⁵ Ibid, 335, 353.

Another researcher Ṣāliḥ Būshīsh asserted that the differences surrounding the *ḥiyal* were due to the jurists not clarifying what they meant by the term *ḥiyal*.¹⁸⁶ He therefore put forward the following definition:

‘It is an intention to effect the change of a rule to another through a means, [which], in principle, is legal.’¹⁸⁷

His definition was meant to capture the notion of *ḥiyal* as *makhārij* and therefore limit the discourse to the non-egregious type. He used this definition to investigate the genre and assess its contents. What he found was that the *ḥiyal* did not always correspond to his definition; in fact, many of the so-called *ḥiyal* in the work of al-Shaybānī were nothing but the application of the standard doctrine.¹⁸⁸ These, he claimed, were mere *fatwas* and were not to be considered as *ḥiyal* in the technical sense. To explain why they should have been included in the genre, he put forward two reasons; firstly he suggested that al-Shaybānī did not have an established definition for the *ḥiyal* and secondly because al-Shaybānī considered that to effect a specific Sharī‘a rule by enacting its cause, was itself a *ḥīla*.¹⁸⁹ This latitude in al-Shaybānī’s understanding of the *ḥiyal*, he argues, caused later scholars to assert the normative nature of the *ḥiyal*.¹⁹⁰ Although Būshīsh regards this understanding of the *ḥiyal* as rather profuse, it only underscores what has already been demonstrated here, namely that for the Ḥanafīs, the *ḥiyal* were part and parcel of their normal doctrine and were not considered to be a demarcated external field.

¹⁸⁶ Būshīsh, *al-Ḥiyal al-fiqhiyya*, 287;

¹⁸⁷ ‘*Qaṣd al-tawaṣṣul ilā taḥwīl al-ḥukm li-ākhar bi-wāsiṭa mashrū‘a fī al-aṣl*’. See Ibid, 215-29.

¹⁸⁸ Būshīsh, *al-Ḥiyal al-fiqhiyya*, 168, 217, 248-9, 251-2. For a similar observation, see Ḥāb Aḥmad Sulaymān, *al-Ḥiyal wa Atharuhā fī al-Aḥwāl al-Shakhsiyya* (np: Dār al-Nafā‘is, 2005), 252.

¹⁸⁹ ‘*Annahū i ‘tabara tarattub al-musabbabāt ‘alā asbābihā min bāb al-ḥiyal*’, see ibid, 251-2.

¹⁹⁰ From the examples he gives, it is clear that he is referring to al-Sarakhsī’s paradigm. See ibid, 252.

4.5.2 Maintaining Systematic Consistency

If the *ḥiyal* are indeed extracted from al-Shaybānī's normative doctrine, and not simple tricks to allow covert violations of the law, this should be reflected in the systematic consistency between the genre and his works. This means that the principles and juridical norms which underpin the normative doctrine should equally apply to the *ḥiyal* genre. When we examine the *ḥiyal* works this is precisely what is observed. al-Shaybānī, for example, is asked regarding the application of a *ḥīla* which he has mentioned previously, to another situation where the agent wishes to lower the price of an item prior to the seller taking possession of it. In response al-Shaybānī explicates the differing views of Abū Ḥanīfa and Abū Yūsuf on the legality of an agent lowering the price prior to possession, and concludes by saying that the *ḥīla* which he previously suggested can be applied only according to Abū Yūsuf, as it is in line with his principles and not according to Abū Ḥanīfa. Similarly, a *ḥīla* mentioned by al-Sarakhsī related to *muḍāraba*, is judged to be according to the principles of Abū Ḥanīfa and Abū Yūsuf specifically; in order to accommodate the opinion of al-Shaybānī, he suggests a different *ḥīla*.¹⁹¹ A more pertinent example, however, is al-Sarakhsī's rejection of a *ḥīla* suggested by al-Khaṣṣāf. al-Sarakhsī examines the *ḥīla* and discusses its juridical basis at length. al-Sarakhsī notes that the *ḥīla* is constructed upon a principle which is specific to al-Khaṣṣāf, and is therefore not in accordance with the accepted principles of the School.¹⁹²

In the *al-Muḥīṭ al-Burhānī* the same critical attitude is also demonstrated, both in the concern for systematic consistency and in the critical rejection of those *ḥiyal* which fail to meet with

¹⁹¹ al-Sarakhsī, *Kitāb al-ḥiyal*, 129.

¹⁹² The principle being referred to is highly technical and for that reason, it is all the more persuasive. The essence of the principle is explicated by al-Sarakhsī: 'It is his opinion (i.e. al-Khaṣṣāf's) that to intend specification (*takhṣīs*) of what is established from the necessary import of speech (*muqtaḍā al-kalām*), is correct; because the necessary import, according to him, is equivalent to the articulated (*manṣūṣ*), such that it has generality (*ʿumūm*) and therefore to intend its specification is permissible. ... However, what is correct in the School, is that the necessary import has no generality and that the intention of specification in what is established by necessary import, is not correct'. See *ibid*, 112.

the accepted principles. Like al-Sarakhsī, Ibn Māza points out those *ḥiyal* which are correct according to the principles of some, but not all, of the early Ḥanafī authorities: A *ḥīla* may thus be valid according to the principles of Abū Yūsuf but not according to al-Shaybānī,¹⁹³ or vice versa,¹⁹⁴ or even valid according to both Abū Yūsuf and al-Shaybānī but not according to Abū Ḥanīfa.¹⁹⁵ Additionally, he reproduces the judicious insights of al-Ḥalwānī, some of which may have been gleaned from the latter's commentary on al-Khaṣṣāf's *ḥiyal* treatise. al-Ḥalwānī critically analyses the *ḥiyal* and expresses his doubt about a number of *ḥiyal* when they do not conform with the accepted principles or standards of the School, or when their remit is not accurately circumscribed.¹⁹⁶ He also points out those which contradict the *al-Mabsūṭ*, i.e. al-Shaybānī's *al-Aṣl*, thereby reinforcing the norm that the *ḥiyal* must be based squarely on the most authoritative sources.¹⁹⁷

4.5.2.1 The *Ḥiyal* and Juristic Differences

Another type of *ḥīlal* which demonstrates the authors concern for upholding the systematic consistency of the jurists, are those which serve to overcome their differences of opinion. The purpose of these *ḥiyal* is to protect the rights of the parties to a contract should the incumbent judge be from another *madhhab*, or even from the same *madhhab*, but hold an opinion which may threaten the basis of a transaction or contract. A good example of this, is the *ḥīla* mentioned earlier regarding the difference of opinion between the Ḥanafīs and Ibn Abī Laylā. The *ḥīla* in this case originates as a point mentioned in an earlier work of comparative *fiqh*, and subsequently finds itself included into the genre. The importance of avoiding juristic

¹⁹³ See, for example, *al-Muḥīṭ al-Burhānī*, vol. 21, 82, 186-87.

¹⁹⁴ Ibid, vol. 21, 200.

¹⁹⁵ Ibid, vol. 21, 204, 205. In one case al-Ḥalwānī suggests that a particular *ḥīla* is valid according to Abū Ḥanīfa, but not according to al-shaybānī, and that the opinion of Abū Yūsuf is unclear (*muḍṭarīb*). Another commentator on al-Khaṣṣāf's work, Khwāharzāda, however, disagrees and suggests that it is valid according to Abū Yūsuf as well (p.289).

¹⁹⁶ See for example, ibid, vol. 21, 92, 136, 140, 148-49, 210, 332.

¹⁹⁷ See, for example, ibid, vol. 21, 96, 230, 315.

difference is not the sole concern of the Ḥanafīs, and as mentioned earlier the Mālikīs also suggest a similar *ḥīla*.

These types of *ḥiyal* occur frequently in al-Khaṣṣāf treatise. al-Khaṣṣāf, a renowned judge of Baghdad, would have been aware of the differences amongst the judges and the impact it would have on the acceptability of contracts. Many of his *ḥiyal* are thus prefaced with the clarification, either from himself or the interlocutor, that it will be valid according to the opinion of the Ḥanafīs and also according to the other jurists.¹⁹⁸ In some cases al-Khaṣṣāf's *ḥiyal* are to avoid differences amongst the Ḥanafīs. In one example al-Khaṣṣāf agrees with Abu Yūsuf's rule on a point of law, but acknowledges that others may disagree, he thus presents a *ḥīla* to accommodate for the difference.¹⁹⁹ In another example it is Abū Ḥanīfa opinion which is accommodated,²⁰⁰ while in another, the disagreement is between Abū Yūsuf and Zufar.²⁰¹ In the work of al-Sarakhsī, one example relates to the difference of opinion being between al-Shaybānī and his two teachers Abū Ḥanīfa and Abū Yūsuf,²⁰² and in another between the Ḥanafīs and the other jurists.²⁰³ Similar *ḥiyal* can also be noted in the *al-Muḥīṭ al-Burhānī*.²⁰⁴

What is also interesting to note here, is that the purpose of the *ḥīla* is to maintain one's legal rights as determined by the *madhhab*, despite the personal opinions of the incumbent judge. We have already observed the use of such *ḥiyal* by Ibn al-Qayyim who suggests various *ḥiyal* to prevent the Ḥanafī rules of *shuf'a* applying. This phenomenon is also witnessed in the area of *shurūṭ* where Schacht's protégé Wakin, notes that one of the major concerns of the notaries

¹⁹⁸ As a representative sample, see al-Khaṣṣāf, *Kitāb al-ḥiyal*, 108-114

¹⁹⁹ Ibid, 107.

²⁰⁰ Ibid, 112.

²⁰¹ Ibid, 114.

²⁰² al-Sarakhsī, *Kitāb al-ḥiyal*, 110

²⁰³ Ibid, 109.

²⁰⁴ See, for example, *al-Muḥīṭ al-Burhānī*, vol. 21, 87, 147-48, 175-76, 179, 289, 347, 351.

when writing legal documents, was to frame the contract in such a way that the rights of the contracting parties would be upheld, irrespective of the *madhhab* of the judge:

[I]f the contract were disputed before a qadi who followed the opinion of one scholar or school, while a single clause or element in the document was an expression of another opinion, the qadi might declare the entire contract invalid. A model contract had to be valid in all schools simply because business itself cut across the borders of all schools.²⁰⁵

Despite Wakin subscribing to Schacht's thesis of a cleft between theory and practice, the very premise which underpins this statement belies that theory. The very fact that contracts could be drawn up to satisfy the juridical differences of scholars from different Schools, operating in distant regions, was ultimately based upon the certain knowledge that each scholar would be judging according to a specific doctrine.²⁰⁶ The practical works on the *ḥiyal* and *shurūṭ*, *pace* Schacht, therefore testify to the predictability of the judicial systems in applying Islamic law according to the theoretical works of the jurists.²⁰⁷ It is this very predictability which allowed the jurists to produce solutions in the form of *ḥiyal* or notarial documents. That solutions were needed to deal with the differences among the jurists was inevitable due to the normative juridical pluralism that characterised the Islamic legal system.

²⁰⁵ Jeanette A. Wakin, *The function of Documents in Islamic Law: The Chapters on Sales from Ṭaḥāwī's Kitāb al-Shurūṭ al-Kabīr* (New York: SUNY Press, 1972), 32-4.

²⁰⁶ Wakin herself admits this while desperately trying to maintain Schacht's thesis: 'The emphasis on the validity of the contract, the care for being legally correct shows how closely the Sharī'a was followed, at least in its details. This of course made documents potentially effective instruments for carrying out legal evasions.' See Jeanette Wakin, "Written Documents in Islamic Law," in *Actas: IV Congresso de Estudos Árabes Islâmicos* (Leiden: E. J. Brill, 1971), 350, n. 11.

²⁰⁷ Hallaq who researched into the relation of the *shurūṭ* manuals and their relation to doctrine and practice concluded that: [W]e are, I believe, justified in maintaining that the *underlying assumption* guiding our research should be that between legal doctrine and judicial practice there existed not only a state of congruity but also a complex dialectical relationship that sustained this congruity. It is this assumption that we should continue to adopt until the contrary is proven. To put it differently, the previous scholarly assumption that *as a rule* a wide gap existed between legal doctrine and judicial practice is no longer tenable. Common sense and a substantial body of historical evidence speak against continued adherence to such assumptions. Wael B. Hallaq, "Model *Shurūṭ* Works and the Dialectic of Doctrine and Practice," *Islamic Law and Society* 2, no. 2 (1995): 109-134

4.5.3 The Endogenous View

While presenting an analysis on the *ḥiyal* works, it is important to take note of the articulated positions of the *ḥiyal* authors themselves. These endogenous views are important, not as sole determinants of the substantive contents of their works, but rather as testimonies to the internal viewpoints and methodologies which the authors subscribe to. These statements can be measured against the objective analysis of exogenous researchers as presented in this study. The quotes selected here pertain to the teleology of the *ḥiyal* and also to the substantive content of the genre. In relation to the former, the statement of al-Shaybānī quoted earlier, is cited by most authors and universally upheld in the School as a benchmark for assessing the validity of the *ḥiyal*. al-Shaybānī, it will be recalled, laid out clearly in his treatise that:

Whosoever uses a *ḥīla* in a matter [such that something] reprehensible enters his faith, has not used a *ḥīla*, nor is that regarded as a *ḥīla*. Indeed a *ḥīla* is only used to acquire through permissible [means] and to abandon the proscribed.²⁰⁸

al-Khaṣṣāf also makes a clear pronouncement at the outset of his treatise:

A *ḥīla* is only that by which a man extricates himself from the prohibited and exits via it to the licit. Whatever is like this or similar then there is no problem in it. What is reprehensible in that, is that a *ḥīla* should be used in someone's right [in order] to annul it, or to use a *ḥīla* in the proscribed to camouflage it, or to use a *ḥīla* in an [illicit] matter such that a doubt [regarding its reality] enters into it.²⁰⁹

In the *al-Muḥīṭ al-Burhānī*, Ibn Māza begins his work with very similar comments, as does Sa'īd ibn 'Alī the author of the *Jannat al-Aḥkam*. Both authors stress that the *ḥiyal* are not to be used to usurp someone's right or to disguise a prohibited action. Their purpose is solely to help those who need an exit to help them from falling into the prohibited or for those who want to lawfully acquire or uphold their rights.²¹⁰ These quotes make it clear that the authors were aware of the doubt regarding the *ḥiyal* raised by the accusations of their detractors. Their

²⁰⁸ al-Shaybānī, *al-Makhārīj*, 24.

²⁰⁹ al-Khaṣṣāf, *Kitāb al-Ḥiyal*, 5.

²¹⁰ See Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 21, 67; Sa'īd ibn 'Alī, *Jannat al-Aḥkām*, 26.

unequivocal statements address those precise concerns and lay down the principles to which they commit themselves in their respective works.

For a precise endogenous evaluation of the substantive contents of the *ḥiyal* genre and their relation to the authoritative works of al-Shaybānī, the following quote is taken from Saʿīd ibn ʿAlī's introduction to his *ḥiyal* treatise the *Jannat al-Aḥkām*, :

The previous Imāms; Abū Ḥanīfa, Abū Yūsuf, Muḥammad, Zufar and al-Ḥasan ibn Ziyād propounded their exits (*makhārij*) in their books without specifying them, and [hence] dispersed them in their writings without gathering them together [in a single work]. It is for this [reason] that Abū Bakr al-Iskāf said: 'The *ḥiyal* rulings are all present in *al-Mabsūṭ* (i.e. Shaybānī's *al-Aṣl*) except for one ruling and that is the *ḥīla* used to nullify the pre-emption of the partner.²¹¹

The author, having explained that the *ḥiyal* originated as *makhārij* dispersed in the works of the earliest authorities, goes on to identify his own sources and give the *raison d'être* for his treatise:

I have gathered the cases of the *ḥiyal* and concessions [relating to] worship and transactions, from the books of the earlier scholars of the religion and [also] extracted some from the *fatāwā* works of the later scholars; the jurists of the believers (May Allah be pleased with them). I have combined them in this book and arranged them into chapters to make it easier for the student to find them and for the one in urgent need to access them.²¹²

This endogenous account corresponds exactly with our preceding presentation. From this quote, four characteristics of the *ḥiyal* genre can be discerned:

1. The earliest authorities were responsible for the initial exits and hence the substantive material in the early *ḥiyal* works.
2. All of these exits can be found in al-Shaybānī's *al-Aṣl*.

²¹¹ Ibid, 22-24.

²¹² Ibid, 22-26.

3. Later scholars also provided exits in their *fatāwā* works; implying that the *ḥiyal* genre was not considered to be the primary repository for these exits, but rather a distilled secondary account.
4. The genre was for both didactic and practical purposes: In the former, the student would learn the methodological technique underpinning the exits, and in the latter, the works would provide an immediate reference for pressing exigencies.

4.6 Genre and Polemic Conclusions

The multitude of evidences presented by the opponents of the *ḥiyal* appears to make a clear case for their injunction. However, when the arguments of the protagonists are noted, what generally transpires is that their respective arguments apply to two distinct spheres, although there is, admittedly, some degree of overlap. In order to address this hermeneutical paradox, the opponents develop distinguishing taxonomies in order to accommodate the growing recognition of legitimate exits. Ibn Taymiyya, using *maṣlaḥa* and *wasā'il* as defining characteristics, seeks to differentiate those *ḥiyal* which are egregious from those which conform to the purposes of the law, which in his view, are not regarded as *ḥiyal* despite being labelled as such. Ibn al-Qayyim follows the approach of his teacher in this regard and puts forward a number of *ḥiyal* which he deems to be suitable, while also maintaining the polemic against the other *ḥiyal*.

al-Shāṭibī attempts to provide a middle sphere between the licit and illicit *ḥiyal*. This is the area of overlap, in which the discerning factor is the telos (*maqṣad*) underpinning the *ḥīla*. This trifurcation grants that the overlap is a natural consequence of normative legal pluralism, and at the minimum suggests that wherever a preponderant *maṣlaḥa* can be perceived, leeway should be granted. All of the *ḥiyal* which are the subject of the polemic fall into al-Shāṭibī's

middle category. Ibn Taymiyya, for example, focuses on the *taḥlīl* and *bayʿ al-ʿīna*, whilst also mentioning the *ḥiyal* of *zakāt* and *shufʿa*. In fact, these four *ḥiyal* are the most controversial and in order for al-Shāṭibī to give credence to his approach, he provides teleological explanations for both *taḥlīl* and *bayʿ al-ʿīna*. Although he, himself, does not subscribe to them, he does show that even these two *ḥiyal*, which are the most controversial, can be reconciled with the general purposes of the Sharīʿa. His formula of deploying the *maqāṣid* as a yardstick of differentiation has been widely accepted and utilised in the work of recent scholars and researchers.²¹³ Some researchers have used al-Shāṭibī's formula to examine *ḥiyal* beyond the limited number of controversial *ḥiyal* which tend to dominate the *ḥiyal* discourse. This provides a more balanced account of the genre as a whole as opposed to the limited focus of the polemic.²¹⁴

In the work of the Orientalists, we note that, it is these controversial *ḥiyal*, which are most frequently mentioned. Schacht, for example, refers to *bayʿ al-ʿīna*, *taḥlīl* and *shufʿa* and Coulson to *bayʿ al-ʿīna*, *waqf* and *taḥlīl*.²¹⁵ The opponents of the genre are therefore characterising the genre by its most controversial aspects.²¹⁶ It is clear that these single instances do not portray an accurate picture of the genre as a whole; but rather are a limited number of disputed exits. Some of which, like *taḥlīl* in its brazen form, are not advocated in any *ḥiyal* work. It is untenable then that these marginal examples should be the basis for

²¹³ For the wide acceptance of al-Shāṭibī's approach, see al-Būṭī, *Dawābiṭ al-Maṣlaḥa*, 304-36, Nashwat al-ʿAlwānī, *al-Ḥiyal al-Sharʿiyya bayn al-Ḥaṣr wa al-Ibāḥa* (Damascus: Iqra, 2002), 49; Sulaymān, *al-Ḥiyal wa Atharuhā fī al-Aḥwāl al-Shakhṣiyya*, 273-75; 96-109, Abū Zahra, *Abū Ḥanīfa*, 434; Ibrāhīm, *al-Ḥiyal al-Fiḥḥiyya fī al-Muʿāmalāt al-Māliyya*, 89-95. al-Baḥrī, *al-Ḥiyal fī al-Sharīʿa al-Islāmiyya*, 23-24, 324-32; Maḥmūd ʿAbd al-Raḥīm al-Dīb, *al-Ḥiyal fī al-Qānūn al-Madanī* (Alexandria: Dār al-Jāmiʿa al-Jadīda, 2008), 96-109.

²¹⁴ Būshīsh, for example, after his lengthy study of the *ḥiyal* used in the laws of personal status, affirms that he found the vast majority of the *ḥiyal* to be based upon a preponderant *maṣlaḥa* and the intention of their users to be in line with the *maqāṣid*. He therefore considered the *ḥiyal* he encountered in his study, to be legally and religiously correct. See al-Būshīsh, *al-Ḥiyal al-Fiḥḥiyya*, 131, 258.

²¹⁵ See Schacht, *Introduction*, 79, 81-2; Noel J. Coulson, *Conflicts and Tension in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), 87-90.

²¹⁶ One author has even transported the Orientalists discourse of the *ḥiyal* into the arena of constitutional law, see A. H. Kamali, "Kitāb al-Ḥiyal in the Political Philosophy of the Ummah," *Iqbal Review* 7, no. 3 (1966): 59-81.

assessing the entire genre. The Orientalists, however, have insisted on attempting to scandalise the genre through these limited examples. Schacht, who played the leading role in that process, asserts that:

This voluntary quasi-abdication of theory from practically the whole field of commercial law in favor of custom was facilitated by the sacred and inscrutable character of Islamic legal theory, which called for the observance of the letter rather than the spirit. ... The great Ḥanafī authorities Abū Yūsuf and Shaybānī, elaborated such devices and put them at the disposal of the public. One such book, which is credited to Khaṣṣāf ... enables us to discern, through the thin veil of its legally unobjectionable forms, the realities of practice in that time and place.²¹⁷

It is noteworthy that Schacht completely ignores the *maṣlaḥa* discourses in his monolithic characterisation of Islamic legal theory. For Schacht, there can be no teleological reading of the *fiqh*, as he and his mentor Hurgonje, have already determined it to be a deontology; both sacred and inscrutable. The *ḥiyal* were therefore considered by them to act as a *modus vivendi*; accommodating the sacred law to the exigencies of real life. The genre, however, as has been demonstrated, is not reflective of these polemics but rather of the endogenous account given to it by its authors. They are not a *modus vivendi*, as they reflect nothing but the normative School doctrine. What distinguishes them and justifies their compilation as a distinct genre is their functional utility as exits. The substantive content of these works is therefore typified, not by covert violations of the law, but rather by systematically consistent formulations of *ḥiyal* as *makhārij*.

²¹⁷ Joseph Schacht, "The Schools of Law and Later Developments of Jurisprudence," in *Law in the Middle East*, ed. Majid Khadduri and Herbert J. Liebesny (Washington D. C.: The Middle East Institute, 1955), 78-9.

PART THREE

THE *ḤIYAL* OF *RIBĀ'*: BETWEEN CONCESSION AND NORM

CHAPTER FIVE

THE USURY CIRCUMVENTS: *BAY' AL-WAFĀ'* AND *BAY' AL-ʿĪNA*

The assertion of the Orientalists is that interest based debt financing was a necessary part of medieval commerce, and that Muslims jurists recognized this by formulating the *hiyal* to circumvent the *ribā* prohibition. Acting as a *modus vivendi* this allowed the jurists to silently acquiesce to the demands of commercial realities whilst maintaining their religious moral authority. The *hiyal* were hence deemed to be nothing but juridical devices which sought to create a veneer of legality to the prevalent commercial practices which were in overt violation of the law. In this chapter we will assess these claims and investigate the assumptions which lie beneath them.

The principal *hiyal* which relate to the *ribā* injunction are the *bay' al-wafā'* and the *bay' al-ʿīna*. Both of these will be examined in detail and the juridical discourse regarding them will be presented. The purpose of the discussion will be to understand how the jurists understood and explained these *hiyal*. We will examine a wide range of Ḥanafī sources to determine where, when and how these *hiyal* came about, and whether the jurists were merely glossing over what were accepted usurious norms, or whether they were responding to pressing exigencies based upon the teleological principles discussed in the previous chapter.

5.1 Usury Circumvents

In this section we will deal with the main circumvents which were used to evade the prohibition of *ribā*; namely the *bay' al-ʿīna* and the *bay' al-wafā'*. The *bay' al-ʿīna* is

essentially a double-sale consisting of two consecutive transactions, which individually are sound, but ultimately combine to create the effect of a usurious loan. The Schools of law differ both in explicating its various forms and its legal ruling. The Ḥanafīs discuss a variety of double-sales in their works and only one of these is generally regarded as the *īna* transaction. They differ in this with the other Schools as we shall see. We will discuss three generic forms of the double-sale in the following order:

- 1) *īna*
- 2) *tawarruq*
- 3) *mu'āmalā*

5.1.1 *Bay' al-Īna*

There are many forms of the *bay' al-īna*, but in essence this transaction involves a buy-back sale with a pricing differential. The pricing differential is based upon one of the sales being a credit sale and the other a cash sale. The end result of both transactions is that one of the parties acquires cash in hand together with a debt for a higher amount. If one looks only at the end result it is clear that the double-sale leads to a situation analogous to a usurious loan. Again, as in our previous discussions, the approach of the different Schools is premised ultimately on their respective juridical methodologies. We will briefly explicate their views before examining the approach of the Ḥanafīs.

The prohibition for the *īna* sale has been inferred from the following ḥadīth:

‘Āliya bint Ayfa’ said: I performed the pilgrimage with Umm Muḥibba and when we entered upon ‘Ā’isha – may Allah be pleased with her – Umm Muḥibba 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 [at the time of] ‘*aṭā*’. He then intended to sell her, so I purchased her from him for 600 *dirhams* cash. She (‘Ā’isha) said: What an evil

sale and purchase; let Zayd ibn Arqam know that he has nullified his *Jihād* with the Messenger of Allah (pbuh) unless he repents.¹

What is important regarding the sale mentioned in this ḥadīth is that it is fortuitous, as opposed to a premeditated double-sale. The slave girl was sold for 800 *dirhams* on credit whereas in the buy-back sale the price was 600. The result of the sale meant that the article of sale had returned to its original owner although Zayd (ra) still had a debt of 200 *dirhams*. That Sayyida ‘Ā’isha (ra) interpreted this as a usurious transaction can be inferred for the following reasons. Firstly, the strength of her reproof indicates the transaction constituted a major sin. Secondly, in an addendum to this narration, Umm Muḥibba asks whether she may retain her capital (i.e. the slave) and forego the extra 200; ‘Ā’isha (ra) responds by reciting the verse relating to the *ribā* prohibition which permits one to retain the capital while foregoing the additional usury. Her citing of this verse implies that she (ra) viewed their buy-back contract as an infringement of the *ribā* rules.

In the discourse of the jurists this specific transaction is known by the lengthy term *shirā’ mā bā’ bi-aqall mim mā bā’ qabl naqd al-thaman*, which means to repurchase for less than the original sale price, prior to receiving payment. Most of the jurists regard this transaction as a form of *‘īna* although the Ḥanafīs technically do not.

5.1.1.1 *Bay‘ al-‘Īna* and the Mālikīs

The Mālikīs regard this tradition as a corroboration of the jurisprudential tool of blocking the means (*sadd al-dharā’i’*). As mentioned earlier, it is clear from the ḥadīth, that the buy-back sale was fortuitous which precludes an accusation of unlawful intent. If neither of the parties intended to engage in a usurious transaction, then the only reason it should be prohibited is because it is considered to be a means to usury and hence it must be blocked. al-Qurṭubī states

¹ al-Ṣan‘ānī, *al-Muṣannaḥ*, vol. 8, 184-85 (ḥadīth no. 14812, 14813).

that the transaction in its outward form is permissible, but, because it leads one to fall into the unlawful it is hence prohibited. The Mālikīs, he says, are opposed by the majority of the jurists who argue that legal rules must be premised only on the outward form of a transaction and not upon suspicion or conjecture. His response is that the Mālikī opinion is based upon *sadd al-dharā'i'*. The ruling of 'Ā'isha (ra) in the above mentioned ḥadīth, is therefore used to prove the legitimacy of both this jurisprudential technique and its application to contracts which may lead to usury.²

What is important to understanding the Mālikī approach, is the jurisprudential basis of their understanding of the term *ribā*. As discussed in chapter one, the Mālikīs were noted for taking the position that the term *ribā* in the Qur'ān is *'āmm* and hence refers to a specific transaction which is premised upon a debt which demands an increase over the principal. The *īna* transaction is clearly not such a transaction and hence it cannot be regarded as *ribā*. The Mālikīs, however, show that because it leads to analogous results it can be prohibited based upon the principle of *sadd al-dharā'i'*.

The Mālikīs consider this transaction (as mentioned in the ḥadīth) to be the archetype of what they call *buyū' al-ājāl*. *Buyū' al-ājāl* literally means credit sales, although what the Mālikīs are discussing are double-sales which begin with a credit sale and are then followed by a buy-back sale. Under this rubric, they present a plethora of different possible forms depending on the form of the buy-back sale. The variants relate either to the price in the buy-back and/ or whether it is a credit sale and if so its duration. In general, nine different forms are discussed, out of which, two are prohibited. What is surprising, is that they allow the original seller to repurchase at a lower price if he does so using a credit sale in which the payment is due at the

² al-Qurṭubī, *Aḥkām al-Qur'ān*, vol. 3, 359.

same time of the original sale. Although this will lead to a disparity in the prices they allow it because there is no time lag connected to the extra time. al-Shaybānī, although concurring with most of their rulings on the nine forms, specifically objects to this one. He argues that the disparity in prices represents an undue excess (*faḍl*) since the article ultimately returns to the original owner.³

The Ḥanafī approach will be discussed later on, but for now, what can be noted is that for the Mālikīs, whether there is an excess or not, is not the point because in essence this transaction is not *ribā* and its prohibition is based upon a suspicion (*tuhma*) that it could lead to actual *ribā*. The latter is principally characterised by a time delay with an increase in the debt. If it is clear that there is no time delay, then whether there is an excess or not is immaterial as it cannot lead to *ribā* and hence the *sadd al-dharā‘i‘* principle need not be invoked.

5.1.1.2 *Bay‘ al-‘Īna* and the Shāfi‘īs

In our previous discussions we have noted that the Shāfi‘īs do not take intent into consideration and give their legal rulings based only upon the outward conformity of contracts to the law. al-Shāfi‘ī, himself, articulates this:

The principle of my approach is that every transaction which is outwardly sound, I do not invalidate [either] due to suspicion or the customary practices of the two parties; [rather] I permit them [based upon] the soundness of their outward [form]. I [do, however] dislike any intention which, if it were made apparent, would invalidate the sale’.⁴

³ al-Shaybānī, *al-Ḥujja*, vol. 2, 746-754.

⁴ al-Shāfi‘ī, *Kitāb al-Umm*, vol. 3, 90.

The transaction mentioned in the ḥadīth is hence upheld, not only due to its being analogically consistent with their general approach, but also, becomes al-Shāfi'ī deems the ḥadīth mentioned earlier, to be weak.⁵

Although Shāfi'ī regards the ḥadīth as weak, he gives a number of other important arguments for upholding the sale. Firstly, he argues that even if the ḥadīth were sound, it does not necessarily oppose his ruling due to the fact that Zayd ibn Arqam is also a Companion of the Prophet (pbuh), and the very fact that he engaged in this transaction can be taken to mean that in his opinion it was a permissible transaction. al-Shāfi'ī, therefore regards this as a genuine difference of opinion between two Companions. This must be judged according to the rules of jurisprudential preference, which, he argues, demand that the opinion which is closest to analogy is upheld.⁶ He demonstrates the analogical consistency of his view using the following four points:

1. If the second sale had been made to someone else it would have been unanimously permitted.
2. If the resale had been for the original price, or for a higher price, it would also be unanimously upheld.
3. If the second sale was annulled then it would not affect the first sale and the debt would still be due and the item in the hands of the initial buyer. This, he avers, demonstrates that the two contracts are independent of each other.

He also deals with the problem of the suspicion which the transaction entails, and says that there is less suspicion in the owner than there is in you, i.e. the interlocutor. By this, he means that the jurist himself should be wary of preventing a person from repurchasing an item he

⁵ al-Shāfi'ī argues that it is weak because one of the narrators is unknown. See *ibid*, vol. 3, 47-48. The editor, however, notes that the narrator is not unknown and this *ḥadīth* was accepted by a number of jurists and traditionists. See *ibid*, vol. 3, 48, n. 1.

⁶ *Ibid*, vol. 3, 95.

regrets having sold, even if the repurchase price is higher than the original. The jurist should remember that trade has been permitted outright and only *ribā* prohibited, and this transaction, he argues, is not *ribā*.⁷

al-Shāfi'ī's first argument is crucial as it shows that he regards the sale of the article to its original owner as similar to its sale to a third party. The sale to third person is known as *tawarruq* and it is clear from al-Shāfi'ī's argument that he permits both *īna* and *tawarruq*. In fact, al-Shāfi'ī's approach is the most analogically consistent; he makes no exceptions to his rules based upon arbitrary suspicions or customs. He even goes so far as to explicitly reject that customs, or promises which precede or follow a transaction, should impact the legality of any transactions.⁸ Having said this though, it should be noted that some later Shāfi'īs found it difficult to uphold this strict application; Abū Ishāq al-Isfrāyīnī and Abū Muḥammad both said that if it became an individuals habitual practice then the second sale would be regarded as a condition of the first, and hence both sales would become invalid.⁹

What is crucial to understanding al-Shāfi'ī's approach is to understand the difference between the judicial and religious realms, reflected in the parlance of the jurists as *qaḍā'* and *diyāna*. For al-Shāfi'ī the law is based upon the outward forms of contracts, it is not for the judge to pursue the intents of the parties or to annul their contracts based upon his suspicions or possible outcomes which it may or may not lead to. The contract in question, namely *īna* is nothing but a name given to two sale contracts performed between two people for the same article. al-Shāfi'ī argues that had the first sale been a cash sale and the subsequent second sale occurred sometime in the future, nobody would question its legitimacy, and how could they?

⁷ Ibid, vol. 3, 95.

⁸ '*Laysa li-al-āda allatī i-tādahā ma'n yuḥill shay' wa lā yaḥarrimuhū wa kadhālika al-maw'id in kān qabl al-āqd aw ba'dahā*'. See ibid, vol. 3, 48.

⁹ Abū Zakariyya Yaḥyā ibn Sharaf al-Nawawī, *Rawḍa al-Ṭālibīn* (Beirut: Dār al-Kutub al-Ilmiyya, 2000), vol. 3, 86.

To suggest that articles cannot be bought back by at any time in the future by the original owner would be ludicrous. The *‘īna* is hence nothing but two transactions which lead to a result which is perceived to be similar to *ribā*.

Although his detractors would argue that *‘īna* can be a *ḥīla* for *ribā*, what al-Shāfi‘ī is arguing, is that it is not necessarily so. In fact, in the ḥadīth mentioned above, it is clear that the consecutive transactions occurred fortuitously and were not pre-planned; how then could there be an accusation of this transaction being a *ḥīla*. For al-Shāfi‘ī, accusations, suspicions and possibilities do not determine the law, as they are nothing but subjective and arbitrary judgments. Law, is rather, the application of objective legal science to concrete facts and realities. al-Shāfi‘ī is also not alone in permitting *bay al-‘īna*; the Zāhirīs also permit it, as do the Ibādīs, a branch of the puritan Khawārij.¹⁰ These jurists are noted for their strict adherence to the texts and its literal interpretation. Upholding *bay‘ al-‘īna* was not, therefore, based upon commercial needs and the usage of *ḥiyal*, but was rather a consequence of these jurists’ specific legal methodology.

5.1.1.3 *Bay‘ al-‘īna* and the Ḥanbalīs

The transaction mentioned in the above ḥadīth is stated by Ibn Qudāma to be the *‘īna* transaction and like the Mālikīs, he argues for its prohibition on the grounds that it leads to *ribā*.¹¹ What is significant in Ibn Qudāma’s presentation is that he mentions that according to the School’s eponym Aḥmad, *‘īna* was the practice of a merchant to sell his goods only on credit and not on cash. Ibn Qudāma quotes him as saying that ‘I dislike for a man that his trade should not be [anything] other than *‘īna* and [that] he does not sell for cash’. Ibn

¹⁰ Ersilia Francesca, “Religious Observance and Market Law in Medieval Islam. The Controversial Application of the Prohibition of Usury According to some Ibādī Sources,” *Revue des Mondes Musulmans et de la Méditerranée* 99-100 (2002): 199-200, n.9.

¹¹ Ibn Qudāma, *al-Mughnī*, vol. 4, 256-57.

Qudāma is quick to point out that credit sales *per se* are unanimously permitted and what is disliked is for a merchant to restrict himself to credit sales while refusing to sell for cash.¹²

It is not unusual that Aḥmad should have had a different understanding of the term *ʿīna*. In the ḥadīth compendium of Ibn Abī Shayba, we find that a number of Successor jurists also differed as to its precise meaning which led to a number of different rulings being issued in regard to its validity. This varies from holding it to be a mere credit sale to the double-sale mentioned in the ḥadīth.¹³ Although different interpretations are given to the form the *ʿīna* transaction might take, what is common to all of them is that it supplies a person with immediate cash through a sale transaction which ultimately leaves him with a larger debt.¹⁴ This is the case in an ordinary credit sale, in that credit sales are generally more expensive than cash sales. So a person in need of immediate cash, may purchase an item on credit, say for £100, and then proceed to sell it on the market for, say, £80. The credit sale is thus used to provide him with cash, although the amount he receives is less than the debt he incurs. Although this latter technique would later acquire the technical name *tawarruq*, in the early period such terminological differentiations were ostensibly absent.

Ibn Qudāma then goes on to discuss the scenario of a double-sale in which a cash sale occurs first followed by a buy-back credit sale with an increase in the price. It is evident that this is

¹² Ibid, vol. 4, 257.

¹³ See the chapters relating to the concessions and pledges used in *al-ʿīna*, in Ibn Abī Shayba, *al-Muṣannaḥ*, vol. 4, 455-56.

¹⁴ The practice of buying on credit and selling for cash on the market, as a way of raising immediate funds was a common practice in medieval Europe. To the avoid suspicion of the use of a double-sale as a cover for usury this was a more subtle alternative. Postan notes with regard to the double-sales that: If a fictitious sale of this kind could easily be distinguished from a legitimate commercial bargain, it had to be but slightly modified to become absolutely indistinguishable from a genuine sale. How could anybody detect the real nature of similar transactions when they are carried out by three parties instead of two, when goods were brought on credit from one man and sold for cash to another? The raising of funds by means of a three-cornered sale was common in this country and abroad. It was employed by Bruges, Leiden, and other continental towns, and by English kings, notably Edward III, in their transaction with wool'. See M. M. Postan, *Medieval Trade and Finance* (Cambridge: CUP, 1973), 11-12.

the reverse of the transaction mentioned in the ḥadīth. Ibn Qudāma notes that this transaction resembles the *‘īna* transaction, although, he says, it is possible that it could be permissible even if it is resold for a higher price. He argues that if it is based upon a pre-agreement, or is used as a *ḥīla*, then it is prohibited, otherwise a transaction like this may also occur fortuitously. Such a coincidence is not sufficient to render it impermissible as the principal rule of sale is permissibility.¹⁵ It is noteworthy that he differentiates between this case and the former, even though they are very similar and lead to similar results; the former, he argues, is prohibited based upon the ḥadīth and also because it is more likely to lead to *ribā* as opposed to the latter.

5.1.1.4 *Bay‘ al-‘Īna* and the Ḥanafīs

The Ḥanafīs, like the Ḥanbalīs, differentiate between the two transactions, i.e. the one mentioned in the ḥadīth and its converse. The first transaction, mentioned in the ḥadīth, is generally not referred to as *‘īna* but rather by the longer formula *‘shirā‘ mā bā‘ bi-aqall mim mā bā‘’*. The second transaction, in which a cash sale precedes the credit sale, is what they refer to as *‘īna*. For the Ḥanafīs this differentiation is not based upon one transaction being a greater means to *ribā* than the other, but because for them, the first transaction is considered to be actual *ribā* whereas the second is not. The second transaction is hence known as *‘īna* because it is not actual *ribā*, but a transaction which stands in lieu of it.

The Ḥanafīs argument is that in the ḥadīth, the first sale is a credit sale and the second sale occurs while the original buyer is still in debt. If there is a price differential, this means that even though the article of sale returns to the owner, the original buyer ends up with a larger debt in lieu of a smaller amount of cash. In the case of the ḥadīth the slave was sold on credit

¹⁵ Ibn Qudāma, *al-Mughnī*, vol. 4, 257-8.

for 800 *dirhams* and then repurchased for 600 *dirhams* cash. Once the slave has been returned, the result is that the original buyer owes 800 *dirhams* in the future, while acquiring 600 *dirhams* cash. The Ḥanafīs say that based upon *maqāṣṣa*, restitution of debts, the debt obligations of both parties meet and cancel each other out with an excess left over.¹⁶ This is explained by the fact that in the second sale, before the price is delivered it is considered to be a debt, and hence the transaction is viewed as a debt of 800 *dirhams* in lieu of a debt for 600 *dirhams*. This excess is *riba* according to the Ḥanafī definition of the term, irrespective of the fact that the debts do not fall at the same time.

As we discussed in chapter two, *ribā* was originally an ambiguous term (*mujmal*) which was subsequently defined according to the Qur'ān and the Sunna. al-Jaṣṣāṣ, after explicating the meaning of *ribā*, mentions that from the meanings of *ribā* intended by the Qur'ānic verse is the *shirā' mā bā' bi-aqall mim mā bā'* transaction. After quoting the ḥadīth mentioned above, he infers from 'Ā'isha's (ra) recital of the verse of *ribā*, that this transaction is actual *ribā*. He also quotes the Madīnan jurist Sa'īd ibn Musayyab's saying that this sale is *ribā*. He concludes that the judgements of 'Ā'isha (ra) and Ibn Musayyab both indicate that this transaction results directly in the *ribā* prohibited in the Qur'ān.¹⁷ The transaction is thus prohibited not because it leads to *ribā*, but because it actually is *ribā*.

The *īna* transaction, as discussed by the Ḥanafīs, is the converse of the double-sale mentioned in the ḥadīth, and hence begins with a cash sale followed by a buy-back sale on credit. Clearly there is no question of debt restitution as there is no existing debt at the time of the second sale. For this reason the Ḥanafīs do not declare *bay' al-īna* to be a *ribā* transaction, although it is clear that the outcome is not so dissimilar. If, for example, X sells a

¹⁶ al-Kāṣānī, *Badā'ī'*, vol. 5, 326.

¹⁷ al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, vol. 2, 175-6.

car to Y for £1000 cash, then immediately buys it back for £1500 on credit; it is clear that the article of sale returns to its original owner, X. The outcome is that X receives £1000 cash from Y, while incurring a debt of £1500. The Ḥanafīs also mention an alternative form of *al-ʿīna* for a person who has no item to sell. This form of *ʿīna* is similar to the transaction mentioned in the ḥadīth in that the first sale is a credit sale. However because of the injunction mentioned in the ḥadīth, the buyer sells the item at a lower price to a third party, who then sells it to the original owner at that same lower price.¹⁸ Again the outcome is that the article returns to the original owner whereas the buyer has incurred a debt larger than the amount of cash he has received.

Like the Shāfiʿīs the Ḥanafīs do not annul contracts based upon suspicions or possible outcomes, as it is possible that such eventualities may occur coincidentally as part of normal business practice. Although it is also possible that this arrangement can be used as a *ḥīla* to evade the *ribā* proscription, the contract cannot be invalidated merely on that basis. Nor do the Ḥanafīs subscribe to the doctrine of *sadd al-dharāʾiʿ* by which they could pre-emptively prohibit it. This should mean that, like the Shāfiʿīs, they too uphold the validity of the transaction irrespective of its possible misuse. Abū Ḥanīfa, however, held the contract to be reprehensible as did his student al-Shaybānī. The latter's following statement accurately reflects his sentiments: This sale [weighs] in my heart like the mountains; [it is truly] blameworthy; contrived by the consumers of *ribā*.¹⁹

¹⁸ Kamāl al-Dīn Muḥammad ibn ʿAbd al-Wāhid al-Sīwāsī ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr* (Riyadh: Dār ʿĀlam al-Kutub, 2003), vol. 5, 424-5.

¹⁹ Ibid, vol. 5, 425.

The contemporary Damascene jurist al-Zuḥaylī, regards Abū Ḥanīfa as having violated his principles in censuring this transaction.²⁰ He contrasts this with al-Shāfi‘ī who staunchly abides by his principles and upholds the ‘īna sale.²¹ The Ḥanafīs however claim that ‘īna is an exception to the general principles. They justify this by alluding to a specific mention of ‘īna in a Prophetic *ḥadīth* which forewarns the Muslims about this transaction.²² The general principles are hence sacrificed in favour of this specific textual indication.

Abū Yūsuf however, is reported to have not only regarded ‘īna as valid, but also as a commendable act due to it being a means for the poor to escape from *ribā*. He argued in favour of it due to its being practiced by a number of Companions.²³ Just what Abū Yūsuf is referring to as ‘īna will be discussed later on, but an important point which can be gleaned from his argument is that he identifies the purpose behind the sale as an exit for the poor; a reason which ultimately may contribute to its justification. In the renowned Hanafī textbook *al-Hidāya*, the author al-Marghīnānī also alludes to this fact when he states that ‘īna is reprehensible as it implies a reluctance by the creditor to grant a gratuitous loan and also because it is essentially premised upon a censurable miserliness.²⁴ Although the author apparently takes a different stance to Abū Yūsuf, what is crucially important is the rationale which underpins their respective opinions. They both reason based upon the relationship between the use of ‘īna and its Islamic replacement, the gratuitous loan.

²⁰ He explains that Abū Ḥanīfa left his principle and made his judgement using the principle known as *istiḥsān* and based upon the *ḥadīth* cited earlier. al-Zuḥaylī, *al-Fiqh al-Islāmī*, vol. 5, 3455.

²¹ al-Zuḥaylī, however, later on rejects al-Shāfi‘ī’s opinion as it fails to account for the indications of custom and usage. See *ibid*, vol. 5, 3456-7.

²² See Ibn Taymiyya *Bayān al-Dalīl*, 44-455, n.1.

²³ See Fakhr al-Dīn Ḥasan ibn Maṣṣūr al-Ūjandī, *Fatāwā Qādī Khān* printed on the margins of vols. 1-3 of Nizām al-Dīn and a group of Indian scholars, *al-Fatāwā al-‘Ālamgīriyya* (also known as *al-Fatāwā al-Hindiyya*) (Queta: Maktaba Rashīdiyya, 1983), vol. 2, 279-280.

²⁴ Burhān al-Dīn ‘Alī ibn Abī Bakr ibn ‘Abd al-Jalīl al-Marghīnānī, *al-Hidāya* (Pakistan: al-Miṣbāḥ, nd), vol. 2 123.

5.1.2 *Tawarruq*

Tawarruq is not the name of a group of transactions between two people, as *ʿīna* is, but rather, the name of two transactions made by one individual with two different parties. The first transaction is a credit sale, subsequently followed, by a cash sale. A person who requires £1000 in cash, for example, purchases an item for £1200 with payment due in six months. However, because purchases on credit generally have a higher price, the immediate cash value of the item is only £1000. The purchaser then takes this item to the market and tries to sell it for as much as possible. The result is that the purchaser will acquire the cash he needs in the short term, although in the long term, he will have to pay the debt which is inevitably more than the cash he has acquired.

The term *tawarruq* is used almost exclusively by the Ḥanbalīs, whereas the other Schools mention this transaction merely with reference to its form and often in connection with *ʿīna*.²⁵ The Schools differ regarding its permissibility as one would expect from their differing legal methodologies. The Shāfiʿīs, self-evidently, permit *tawarruq* and in fact, it is mentioned as an argument to justify *ʿīna*; hence, both are permissible according to them and this agrees with their principles. The Mālikīs, who rely on the principle of *sadd al-dharāʿi*, regard it as reprehensible due to the possibility that it could lead to *ribā*.²⁶ The Ḥanbalīs permit it in the main, *pace* Ibn Taymiyya, who regards it as similar to *ʿīna*.²⁷ Ibn Taymiyya argues that the rationale underpinning the *ribā* prohibition is not only present in this transaction, but the latter also carries an additional encumbrance. This requires the borrower to buy an item solely for the purpose of selling it at a loss; the Sharīʿa, he avers, does not prohibit a minor harm and

²⁵ Aḥmad Saʿīd Hawwā, *Ṣuwar al-Taḥāyul ʿalā al-Ribā wa Ḥukmuhā fī al-Sharīʿa al-Islāmiyya* (Beirut: Dār ibn Ḥazm, 2007), 140; Aḥmad Fahd al-Rashīdī, *ʿAmaliyyāt al-Tawarruq wa Taṭbīqātuhā al-Iqtisādiyya fī al-Maṣārīf al-Islāmiyya* (Amman, Dār al-Nafāʿis, 2005), 19-21.

²⁶ Some Mālikīs, such as Ibn Juzayy, appear to have permitted it. See Hawwā, *Ṣuwar al-Taḥāyul*, 143-4; Aḥmad Fahd, al-Rashīdī, *ʿAmaliyyāt al-Tawarruq*, 65-6.

²⁷ Ibn Taymiyya, *Kitāb al-Ikhtiyārāt al-Fiqhiyya*, 75, where he narrates that it is prohibited according to Aḥmad.

permit a greater one.²⁸ He also argues that the victims of *īna* are the poor who are compelled into the transaction in order to meet their living expenses. The avarice of the wealthy prevents them from giving the poor gratuitous loans and hence the poor have no alternative. He supports this assertion by quoting a Prophetic ḥadīth which prohibits the sale of those under compulsion.²⁹ The poor, who find themselves in such circumstances, must not therefore be compelled into transactions which are detrimental in the long term and any such transactions are a priori annulled.

The Ḥanafīs unanimously uphold the permissibility of *tawarruq*. Although they do not mention it by name, they do refer to it; either in their discussions on '*shirā' mā bā' bi-aqall mim mā bā'*',³⁰ or with regard to *īna*. The Ḥanafīs, however, do not give blanket approval to this contract as it is evident that, although both *īna* and *tawarruq* may occur coincidentally, they may also be pre-planned. As Ibn Taymiyya previously mentioned, these contracts are usually the result of compelling circumstances, which the poor are forced into when charitable loans are not forthcoming. *Tawarruq* may therefore be the result of a situation in which a needy person is refused a gratuitous loan and instead offered a credit sale with an inflated price. The Ḥanafī jurist Ibn al-Humām rules that if the trader's refusal to furnish a gratuitous loan is based upon his greed for material gain then the transaction is reprehensible. Alternatively if the trader has a valid excuse for not giving the loan, then his offer to sell on credit is regarded as merely inappropriate (*khilāf al-awlā*).³¹

Ibn 'Ābidīn reports that Ibn al-Humām's verdict was corroborated by a number of later authoritative authors. He also adds that the ottoman Shaykh al-Islām Abū Sa'ūd interpreted

²⁸ Ibn al-Qayyim, *Ilām al-Muwaqq'īn*, 578.

²⁹ Ibn Taymiyya, *Bayān al-Dalīl*, 49.

³⁰ al-Sarakhsī, *al-Mabsūṭ*, vol. 7, part 1, 143-4.

³¹ Ibn al-Humām, *Sharḥ Faṭḥ al-Qadīr*, vol. 5, 425.

Abū Yūsuf's opinion on the permissibility of *al-ʿīna* as referring to *tawarruq*.³² This is not surprising given that, as mentioned earlier, the term *ʿīna* had not acquired a highly specific meaning in the early period of Islamic jurisprudence, but was rather used loosely to refer to a range of sales transactions. At that early stage, it was not *tawarruq* that was used by the jurists to refer to credit sales but *ʿīna*. Abū Saʿūd may well be correct then, to say that Abū Yūsuf's opinion of permissibility refers to *tawarruq* and not to *al-ʿīna*, in its later technical sense.

5.1.3 *Muʿāmala*

The *muʿāmala* transaction is important to this study as it was referred to extensively in the Ottoman cash *waqf* controversy. The difficulty with the *muʿāmala* is in attempting to define exactly what it refers to. The term is used mainly by the Ḥanafīs and al-Khaṣṣāf, it appears, is the earliest source in which it is mentioned. In his *ḥiyal* treatise, the *muʿāmala* refers to three different transactions: 1) *ʿīna*, 2) sale with a loan and 3) sale with a promise of resale.³³ Schacht, who edited al-Khaṣṣāf's treatise, dismisses the term as a euphemism for *ʿīna*.³⁴ The contemporary Syrian jurist Muṣṭafā al-Zarqā, using the work of Ibn ʿĀbidīn, however, identifies it as a transaction consisting of a sale with a loan: 'to buy something of little value for a high price in lieu of a loan from the seller'.³⁵ al-Zarqā regards this as a straight forward *ḥīla* for *ribā*. In a more recent work, Aḥmad Ḥawwā attempts to account for its variant forms, by suggesting that *muʿāmala* has a dual usage; in general it refers to all *ḥiyal* used to avoid *ribā* and more specifically it refers to a 'sale with a loan'.³⁶ This latter meaning concurs with that given by al-Zarqā. We will examine the Ḥanafī doctrine on transactions combining a sale

³² Muḥammad Amīn ibn ʿĀbidīn, *Radd al-Muḥtār ʿalā al-Durr al-Mukhtār Sharḥ Tanwīr al-Aḥṣār* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2003), vol. 7, 613-4.

³³ al-Khaṣṣāf, *Kitāb al-Ḥiyal*, 6-7.

³⁴ Schacht, *Introduction*, 79.

³⁵ Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal al-Fiqhī al-ʿĀmm* (Damascus: Dār al-Qalam, 2004), vol. 1, 220.

³⁶ Ḥawwā, *Ṣuwar al-Taḥāyul*, 277.

with a loan, and then return to assess the meaning of the term *mu'āmala* and its juridical significance.

5.1.3.1 Sale with a Loan

There are two basic forms of a 'sale with a loan', depending on which of the two precedes the other:

1. A sale followed by a loan; an article worth £20 is sold for £40 on credit and the seller also gives the buyer a loan of £60. The buyer thus incurs a debt of £100 and acquires £60 cash and an item which can be sold for £20, thus giving him £80 in total.
2. A loan is given to the buyer followed by a sale; essentially the same as the previous transaction except that the loan precedes the sale.

With regard to the second form in which the loan precedes the sale, the Ḥanafī ruling is that if the sale is a condition of the loan, then it is reprehensible as it violates the maxim that 'any loan which brings a benefit is *ribā*'.³⁷ If, however, it is not a condition then it is regarded by al-Karkhī as permissible. al-Khaṣṣāf, however, disliked it, and al-Ḥalwānī went one step further and prohibited it.³⁸ Although al-Karkhī's opinion was generally upheld, this difference of opinion amongst the jurists reflects their dual concern of prohibiting transactions based upon mere suspicion or doubt, which may actually occur fortuitously, and of upholding the legal maxim prohibiting any benefit accruing from a loan.

The first transaction differs from the second in that the sale precedes the loan. In real terms, however, there is little difference in the final outcome and many of the Ḥanafīs hence give it the same ruling and deem it to be reprehensible. Three scholars, however, allowed this transaction; Muḥammad ibn Salama, al-Khaṣṣāf and al-Ḥalwānī. Ibn Salama argued that this

³⁷ *Kull qarḍ jarra manf'a fahuwa ribā.*

³⁸ Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 10, 351; Niẓām, *al-Fatāwā al-Hindiyya*, vol. 3, 203-4.

transaction was not a loan bringing a benefit but rather a sale bringing a benefit, namely a loan.³⁹ Other scholars, detecting the possibility that this could be abused, ruled that if both transactions took place at once, i.e. at the same time and place, then it would be reprehensible. If, however, they occurred at separate instances, i.e. fortuitously, then there was no harm.⁴⁰

5.1.3.2 The *Mu'āmalā* Transaction

It has already been mentioned that this term was used liberally in the Ḥanafī texts, although some authors have linked it to the specific form of a 'sale with a loan'. Schacht believed it to be a euphemism for *ʿīna* perhaps due to the similar widespread use of *ʿīna* to refer to all transactions used as a *ḥīla* for *ribā*. The term *mu'āmalā*, however, was also used in reference to the *bay' al-wafā'*.⁴¹ And bearing in mind that the Ḥanafīs refer to only one type of double-sale as *ʿīna*, it is clear that, for them, *mu'āmalā* is not merely an aesthetic synonym for *ʿīna*. Ibn ʿĀbidīn notes that the *bay' al-wafā'* is similar to other transactions under the *mu'āmalā* rubric in that a profit is made from a debt.⁴²

In all, the term *mu'āmalā* represents an ambiguous term, by which a person in need of a loan conveys to a lender that he is willing to engage in a transaction which will allow the lender to profit from the loan. In juridical terms this means that at the point of sale, the buyer and the seller have not made reference to a prohibited transaction, or to *ʿīna*, even though they intend to proceed with that very same transaction, or a similar one. However, for the Ḥanafīs, it is important for their systematic consistency that at the time of the contract no condition can be made in the contract which binds the other party to the second transaction as this violates their rules on contractual stipulations and would render it prohibited. Using specific names of

³⁹ Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 10, 352.

⁴⁰ Ibid, vol. 10, 352; Nizām, *al-Fatāwā al-Hindiyya*, vol. 3, 204.

⁴¹ al-ʿUshī, *al-Fatāwā al-Sirājiyya*, 349; Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 7, 545.

⁴² Ibn ʿĀbidīn, *Radd al-Muḥtār*, vol. 7, 535.

contracts is tantamount to imposing the conditions that accompany that type of contract. Thus by using this ambiguous term they avoid this infraction, but also ensure that the parties to the contract are not legally bound in the first sale to engage in the second.

Now, it may be that although the parties do not mention the second sale as a condition of the first, it is highly likely that they have agreed to it, prior to the transaction. This becomes patently obvious, as the jurists, themselves, acknowledge in regard to the *mu'āmala* that a needy person who requests the transaction offers to give the creditor a profit through the sale. al-Khaṣṣāf, for example, mentions someone who says to a trader: 'I need goods worth 100 *dīnārs* and I will profit you in that by 50 *dīnārs*'.⁴³ This being the case, is it realistic to expect that the parties would understand the legal subtlety in distinguishing between an explicit contractual stipulation and a mutual understanding outside the contract.

In al-Khaṣṣāf's work it appears that this distinction was only too well understood. Consider the following example: a person wants to borrow 100 *dīnārs* and repay 150 *dīnārs*, but he only owns a slave with a value of 20 *dīnārs*. The *mu'āmala* transaction in this situation would be that he should sell this slave to the lender for 100 *dīnārs* cash and then buy it back from him for 150 *dīnārs* on credit. In this way, the slave returns to him and he acquires 100 *dīnārs* cash, while he owes the creditor 150 *dīnārs*. In this procedure it appears that the slave is merely an intermediary vehicle for the sale transaction and irrelevant to the final outcome.

However, a question posed to the author suggests the sales were genuine and not mere fronts: 'What if the lender does not feel secure that should he make the first sale, thereby acquiring the slave (worth twenty *dīnārs*) for a price of 100 *dīnārs* and then be left with him'. This

⁴³ al-Khaṣṣāf, *Kitāb al-Ḥiyal*, 6.

means that the seller may walk away with the 100 *dīnārs* without performing the second half of the transaction. al-Khaṣṣāf's response is that the lender should buy the slave from its owner for less than twenty *dīnārs* and then resell it to him for thirty. If the transaction is done in this way, even if the seller walks away without performing the second transaction, the creditor will not have lost out as his purchase reflects the price he paid. al-Khaṣṣāf suggests that he perform this transaction five times if the seller wants to acquire the 100 *dīnārs* cash. The interlocutor then asks him whether he considers this to be licit, to which he replies 'as long as it is not an agreement (*muwāḍa'a*)'.⁴⁴

These questions by the interlocutor are crucially important, not only in shedding light on the realities of these transactions, but also on how they were dealt with by the judges. It is clear from al-Khaṣṣāf's answer that the creditor had no legal recourse should the seller renege on the second transaction. This would have been understood by all the parties concerned and is the very cause of both the question and also for a solution which does not, and cannot, guarantee that this will not occur. This reality also explains the use of an ambiguous term like *mu'āmalā*, whose lexical meaning implies nothing more than a bilateral interaction. By using this term the parties did not commit themselves to a specific transaction. In fact, the term *mu'āmalā* in the works of jurisprudence is used to refer to a type of sharecropping, otherwise known as *musāqā'a*.⁴⁵ Its use in these *ḥiyal* transactions is therefore to avoid the use of the word *ʿīna* or another term linked exclusively to a specific *ḥīla*, as this would mean that the contract would be legally enforceable as a whole. As a whole, however, it would be held invalid and prohibited a priori. The *mu'āmalā* transaction is thus an ambiguous term which allows those in need to acquire immediate funds through the use of a double-sale. The use of this term means that the parties are not committed to both transactions legally, although without a doubt this

⁴⁴ Ibid, 6

⁴⁵ See, for example, al-Kāṣānī, *Badā'i*, vol. 6, 289.

was the intention of the parties concerned and would have occurred more often than not. For the Ḥanafīs, this term allows them to maintain their systematic consistency whilst also providing a solution for those in need.

5.1.4 Conclusions Regarding Double-Sales

Having examined the three main generic forms of the double-sale, we will summarise the results to aid our discussions regarding these transactions later on. Regarding *ʿīna*, we noted that the form of *ʿīna* which the other Schools took as their archetype was discussed by the Ḥanafīs under the heading *ʿshirā mā bā' bi-aqall mim mā bā'*. They ruled that this transaction was outright *ribā* as it caused an excess without a countervalue which according to their definition was the actual *ribā* prohibited in the Qur'ān and the *Sunna*. The reverse of this sale which is the actual meaning of *ʿīna* for the Ḥanafīs, was ruled to be prohibitively disliked and reprehensible.

With regards to *tawarruq*, the Ḥanafīs permit this outright as a fortuitous transaction. If, however, the transaction is instigated by the refusal of the seller to provide a gratuitous loan, then this transaction is also disliked unless the seller has a mitigating circumstance for not supplying the loan. In this scenario the seller's offer to make a credit transaction is still regarded as inappropriate, as ultimately he is seen to be exploiting the situation of an individual in dire need by offering him a credit sale at an inflated price.

Finally, the *mu'āmalā* transaction is a general term used to designate any double-sale used to profit from a debt. In its more specific usage it refers to a 'sale with a loan'. The Ḥanafīs regard it as reprehensible if the loan precedes the sale. If, however, the sale precedes the loan, three Ḥanafī authorities permit the transaction, although the majority do not. The ruling of

permissibility is further qualified by some scholars to apply to a situation when the contracts occur on separate, but consecutive occasions, i.e. fortuitously, as opposed to both transactions being conducted in one meeting (*majlis*).

5.1.5 *Bay‘ al-Wafā’*

The *bay‘ al-wafā’* is a sale in which the buyer gives the seller a promise to resell the former his property at the sale price when he acquires the necessary funds to buy it back. Although this is a sale transaction, it can also be interpreted as an antichretic pledge. Antichretic loans are those in which the interest on a loan is paid through a grant of usufruct. If property is given in lieu of a loan, the interest on the loan is taken by either benefiting directly from the property or by renting it out. It has been suggested that in ancient Babylonia the antichretic loan combined with the pledge to form the antichretic pledge.⁴⁶ This meant that the loan generated interest and was also secured in case of default. Interest bearing loans were legally permitted in ancient Mesopotamia and this contract was not therefore a subterfuge for interest, but rather, an alternative method of taking the interest on a loan.

The *bay‘ al-wafā’* resembles the antichretic pledge in terms of its ultimate results and this is the source of the controversy which surrounds it. A person, who sells his house for £1000 only to repurchase it later on for a £1000, may well be viewed as someone who has borrowed a sum of money only to pay it back later on. Ownership of the sale item does not, in reality, transfer to the buyer, as his purpose is to hold it as security and also to benefit from it. Islamic law permits the taking of pledges *per se*, but does not permit the lender to exploit the pledge for his own gain as this can be viewed as a benefit on a loan. In the ensuing jurists’ debates, those who view the *bay‘ al-wafā’* as a pledge deem it to be a usurious transaction, whereas

⁴⁶ Aaron Skaist, *The Old Babylonian Loan Contract* (Jerusalem, Bar-Ilan University, 1994), 220-5.

those who view it as a genuine sale uphold the right of the buyer to benefit from his purchase. However, even for the latter scholars, the question arises as to how they permit the seller to make the original sale conditional on a resale. We have already seen in chapter two that the Ḥanafīs do not permit contracts with conditions which result in a tangible benefit for one of the parties, as it is considered to be a form of *ribā*.

The jurists differed extensively regarding the *bay' al-wafā'* both in regards to its legal ruling and its juridical interpretation. This can be observed in the nine different opinions on the *bay' al-wafā'* presented by the Crimean jurist Ibn al-Bazzāz in his *fatāwā* work.⁴⁷ These opinions revolve around three main approaches:

1. Those who deem it to be a pledge (*rahn*), in which case the sale is regarded as a subterfuge for *ribā*.
2. Those who regard it as a sale, but also demand that its validity rests upon its conformity with the requirements of a valid sale contract.
3. Those who say the sale may be regarded as a composite of a pledge and a sale. This means that different aspects of the transactions are judged according to either of these two categories.

Category one represents those who oppose the *bay' al-wafā'* and do not permit it, whereas categories two and three represents those who uphold the sale but differ as to its juridical structure. In category two, the method is to make those who conduct the sale conform to the standard Ḥanafī sale doctrine. The approach in category three, alternatively, is to create a novel hybrid structure which allows the judiciary to uphold the contract as it is and allot the necessary rights and duties of the parties as they themselves had envisioned.

⁴⁷ Muḥammad ibn Muḥammad ibn Shihāb ibn al-Bazzāz, *al-Fatāwā al-Bazzāziyya*, printed on the margins of vols. 3-6 of Nizām al-Dīn and a group of Indian scholars, *al-Fatāwā al-Ālamgīriyya* (also known as *al-Fatāwā al-Hindiyya*) (Queta: Maktaba Rashīdiyya, 1983), vol. 6, 124.

In the next section we will attempt to explain the difference of opinion of the Ḥanafī jurists regarding these two transactions, i.e. *al-mu‘āmalā* and *bay‘ al-wafā‘*. This will be done by presenting an analytical model which will account for their usage and the dynamic tension between the *ḥiyal*, commercial practice and social exigency.

5.2 The *Ḥiyal* Dynamic: Commercial Practice and Social Exigency

Schacht claimed that although Muslims were mindful of violating the prohibition of *ribā* ‘there was an imperative demand for the giving and taking of interest in commercial life. In order to satisfy this need and at the same time observe the letter of the *ribā* prohibition, a number of devices were developed.’⁴⁸ He goes on to discuss the *‘īna*, as an example, and concludes his discussion with the following:

The giving and taking of interest corresponded indeed with a requirement of commercial practice, but a requirement that the Koran, and Islamic law after it, had explicitly and positively banned. The legal devices represented a *modus vivendi* between theory and practice: the maximum that custom could concede, and the minimum (that is to say, formal acknowledgement) that the theory had to demand.⁴⁹

Schacht together with other Orientalists claim that Islamic commercial law is a reflection of customary practice and where practice disagrees with Islamic law, the *ḥiyal* are used to justify and permit the practice thereby accommodating it to the dictates of the theory.⁵⁰ We have already discussed the problem of identifying just what is meant by the theory and practice of Islamic law. What needs to be discussed now is the precise role of interest in an economy and what Islamic law proffers as its alternative. We will note how these alternatives were taken up in Islamic history and the role of the *ḥiyal* vis-à-vis these alternatives.

⁴⁸ Schacht, *Introduction*, 79.

⁴⁹ *Ibid*, 80.

⁵⁰ Udovitch, *Partnership and Profit*, 11-12; Jerome N. D. Anderson and Norman J. Coulson, “Islamic Law in Contemporary Cultural Change,” *Saeculum* 18 (1967): 35.

5.2.1 Interest and its Alternatives

Schacht's assertion is that interest is a necessary facet of commercial life and that Islamic law either had nothing to offer in its place, or whatever it did have to offer was not taken up by medieval merchants. This assertion is incorrect in a number of aspects. The first and most important point to note is that interest bearing loans can be functionally divided into two categories; those which serve commercial purposes and those which are for personal use. In the former category, merchants avail themselves of these loans for the provision of capital, whereas in the latter, the poor and needy members of society make use of interest bearing loans to provide themselves with immediate funds in times of dire need. These two general categories are distinct both in their dynamics and in the alternatives which Islamic law has provided.

In commercial practice, Islamic law has prescribed that trading be conducted on the basis of a division of risk. Interest bearing loans guarantee for the lender that his money will be returned whatever the outcome of the business venture and hence represents a risk-free return on capital. In lieu of the loan, the lender is given a return in the form of interest payments. In financial theory it is well known that the expected return of a risk-free interest bearing loan is lower than the return on an equity investment which entails risk.⁵¹ Islamic law mandates that investment be based on equity and not upon debt, and that the partners share in both the risk and the rewards. This philosophy is embodied in various partnership forms endorsed and prescribed by Islamic law. The most important of which are the *muḍāraba* and *shirka* contracts, known as *commenda* and partnership respectively. We have already discussed the importance of the *commenda* contract earlier with respect to its presence in Europe and how

⁵¹ Peter Howells and Keith Bain; *Financial Markets and Institutions*, 4th ed. (Harlow: Pearson Education, 2004), 35-36.

its juridical structure stands in stark contrast to usurious loans. What remains to be examined is the economic dynamic between the *commenda* and interest bearing loans.

Besides their commercial utility, interest bearing loans are also used to provide funds for the poor in times of dire need. Islamic law, however, proscribes such loans and as an alternative advocates the gratuitous loan, *qard ḥasan*. This loan is made without any expectation of an increase in the capital lent and is an act of charity; a philanthropic gesture in which the lender seeks his reward with God and not in a short-term temporal gain. The poor and needy are clearly open to exploitation from usurers and moneylenders and in this regard the gratuitous loan is seen as an alternative which suffices the short term needs of the poorer members of society.

5.2.2 The Analytical Model

In order to explain the dynamics of interest vis-à-vis its alternatives, we will use the model of Tag el Din propounded in his article on the elimination of *ribā* as a method of poverty alleviation.⁵² In his article, Tag el Din argues that the elimination of *ribā* is premised upon the simultaneous promotion of an *irfāq* (philanthropic) sector. He justifies this claim based upon a verse of the Holy Qur'ān which specifically declares that the former will be deprived of all blessings whereas the latter will be made to increase.⁵³ He goes on to argue that the prohibition of *ribā* would have little meaning in an economy which is strictly utilitarianist. His proposition is that in order for poverty alleviation to be effected by the *ribā* prohibition, there must be an *irfāq* sector into which funds can flow once the prohibition comes into effect. Islamic economies are hence urged to develop an *irfāq* sector in order to create an economic

⁵² Seif el Din I. Tag el Din, "The Elimination of *Ribā*: A Measure Truly Dedicated to Poverty Alleviation," in *Islamic Economic Institutions and the Elimination of Poverty*, ed. Munawar Iqbal (Leicester: The Islamic Foundation, 2002).

⁵³ Ibid, 187-9.

climate in which a *ribā* prohibition would be capable of achieving a change in the levels of poverty. What underpins his theory is the premise that:

Since there are competing alternative uses for any scarce resource, the financing of the *irfāq* sector must be met by shifting resources away from alternative uses[;] ... away from strictly utilitarianist dealings to strictly non-utilitarianist dealings. That is, from *ribā* transactions in money markets, to the financing of pressing human needs in the *irfāq* sector.⁵⁴

According to this model, when surplus wealth is given out as a usurious loan, the latter is an alternative use of capital. This means that when the *ribā* prohibition comes into effect, it results in a decrease in the alternative uses for surplus capital, which inevitably leads to an increase in the contributions flowing into the *irfāq* sector. He suggests that in the presence of an *irfāq* sector, holders of surplus funds would automatically understand this.⁵⁵

Although Tag el Din's article is aimed at developing an Islamic economy using an *irfāq* sector, it can be used analytically to understand the dynamics of the *ḥiyal* and their place in the social and commercial landscapes of the past. There are two main aspects of this model which are relevant to our work: 1) The notion of competing alternative economic uses and 2) the relationship of the *irfāq* sector to the *ribā* prohibition. Tag el Din did not discuss *ribā* in its commercial usage as his main focus was on promoting the *irfāq* sector as an alternative system. We will examine the dynamics of *ribā* with regard to both sectors; the commercial and the philanthropic, and discern the role of the *ḥiyal* within them.

5.2.3 The Commercial Sector

It has already been mentioned that the Islamic alternative to the use of *ribā* in the commercial sector is equity finance in the form of *commenda* contracts and partnerships. In chapter four,

⁵⁴ Ibid, 196.

⁵⁵ Ibid, 196-7.

we mentioned the work of a number of researchers in the field who had noted the widespread use of these contracts throughout Islamic history and even their impact on neighbouring Europe. The purpose of our previous demonstration was to establish that Islamic commercial law was not a ‘dead letter’ as suggested by some Orientalists, but rather, a dynamic reality by which trade was conducted for centuries. In this section we will note the impact of this sector on the prevalence of usury.

The analytical model suggests that there are competing alternative uses for surplus funds and in the commercial context, the competition would have been for investors (holders of surplus capital) to either give out usurious loans or to engage in *commenda* contracts or partnerships. Our assertion is that the presence of these latter alternatives, which secured a higher return than interest bearing loans (as per financial theory), was sufficient to render usurious loans in commercial life obsolete. This can be substantiated by observing the historical record of trade, not only in the Muslim lands, but also in Europe, where usurious loans were equally anathema.

In the work of Udovitch and Goitein, both researchers noted the conspicuous absence of any documents recording usurious contracts.⁵⁶ Udovitch mentions the possibility that *hiyal* may have been used to evade the prohibition but contends that this option was not exercised because:

numerous other commercial techniques were available which played the same role as interest-bearing loans and so made the significant use of loans unnecessary. ... More importantly because these alternate

⁵⁶ S. D. Goitein, *A Mediterranean Society*, vol. 1, 250-62. (ch. 3); Abraham L. Udovitch, “Bankers without Banks: Commerce, Banking and Society in the Islamic World of the Middle Ages,” in *The Dawn of Modern Banking*, selected papers delivered at a conference held at UCLA September 23-25 1977 (New Haven and London: Yale University Press, 1979), 257.

forms of investment and credit were a socially more congenial and effective means of economic connection, they were preferred over loans.⁵⁷

The results of Udovitch and Goitein’s work are explicit on the point that usury was made obsolete for both religious and economic reasons. In religious terms, usury was prohibited and would have weighed heavy on the conscience of those who indulged in it, especially when there were licit alternatives. These alternatives were not only extremely popular but more crucially, they also had an economic advantage in terms of the revenue they generated.

In chapter four we noted the similarity of the *muḍāraba* with the European *commenda*, and it was proposed by numerous authors that the latter was based upon the former. It is no surprise then to find that as the *commenda* made headway into Europe it would compete with the usurious sea loan as an ‘alternative use’. The economic historian Frederic Lane writes that in Venice the *commenda* was in use in the tenth century, although it was unfamiliar to the Roman lawyers.⁵⁸ He reports that according to surviving documentary contracts; this contract ‘almost completely displaced’ the usurious sea loan.⁵⁹ In Genoa a similar result is shown where the *commenda* contract rose in prevalence from twenty two percent to ninety one percent at the beginning of thirteenth century.⁶⁰ Lane completes his article with what appears to be a corroboration of the model being presented by Tag el Din:

When we inquire concerning the effect of the usury doctrine on economic growth, the most important question is whether it discouraged the kind of loans to consumers which were unproductive socially. To the extent that it did so, the doctrine created pressure on men possessed of liquid wealth to find some other way in which to make their wealth yield income. It thus encouraged the flow of capital into

⁵⁷ Ibid, 258; idem, *Commercial Techniques in Early Medieval Islamic Trade*, 61-2.

⁵⁸ Frederic C. Lane, *Venice and History*, the collected papers of Frederic C. Lane edited by a committee of colleagues and former students (Baltimore: John Hopkins Press, 1966), 58.

⁵⁹ Ibid, 59.

⁶⁰ Ibid, 62.

commerce. It is logical to conclude then that the usury doctrine in so far as it was effective stimulated economic growth.⁶¹

Loan suggests that the usury prohibition resulted in investors turning away from usurious loans to the needy and towards its 'competing alternative uses' as suggested by Tag el Din. In this situation though, the investors turned not to the *irfāq* sector, but rather to the commercial sector and the alternative licit forms of financial investment.

Previously it was shown that Islamic commercial law was the established framework for commercial enterprise throughout Islamic history. In this section, it has additionally been shown that usury was not evidenced in the documentary record. Its absence is based upon both the religious prohibition and the dynamic of competing alternative uses. These alternatives were able to triumph over the use of usury in commerce as they were religiously conscionable and economically superior. This is the opposite of what Schacht and his ilk suggested. For Schacht, interest was a necessity of commercial practice to which the jurists would inevitably succumb, a phenomenon actualised in the *hiyal*.⁶² On the contrary though, what has been shown is that usury was not a necessary component of commerce and with the appropriate alternatives it could realistically be replaced and rendered obsolete. This was

⁶¹ Ibid, 67-8. In another article where he examines the economic situation in medieval Venice, he states that: 'Venetian businessmen and the Venetian courts regarded usury as an abuse of practices which were normally used legitimately to collect a going rate of return. This conception may be regarded as a joint product of the church's teaching and of other factors bearing on economic life. The importance in this connection of the church's teaching does not lie chiefly in their effect on legal forms, since the changes in the forms of commercial credit are best explained by other economic conditions. But among these other economic conditions one of the most influential was the increasing volume of funds seeking investment in commerce, and this demand for commercial investment is itself to be explained in part by the condemnation of usury. The usury doctrine's chief influence was thus indirect. As soon as any appreciable amount of liquid capital was accumulated in the hands of the retired merchants, widows, or institutions, they sought ways of making their wealth yield income.' See Frederic C. Lane, "Investment and Usury in Medieval Venice," *Explorations in Entrepreneurial History* ser. 2, vol. 2, no. 1 (1964): 11.

⁶² Nicholas Ray, noting the implications of Goitein's research where interest bearing loans were regarded as being of little consequence, states that: The question of the economic role of the *hiyal*, and of interest-bearing loans in general, though difficult to answer, is of utmost importance for the comparative study of economic history in medieval Europe and the Near East.' See Nicholas Dyan Ray, "The Medieval Islamic System of Credit and Banking: Legal and Historical Considerations," *Arab Law Quarterly* 12, no. 1 (1997): 59.

observed both in the Islamic world and in the Italian city states, who, it appears, borrowed the licit alternatives from their eastern neighbours.

5.2.4 The *Irfāq* Sector

Having shown that the *ḥiyal* of *ribā* did not have a utility in the commercial sector, we will now try to show that the jurists' discourse regarding the *ḥiyal* and usury were in regard to the *irfāq* sector. We have already mentioned the views of Abū Yūsuf regarding the *ʿīna* transaction and how he regarded it as a virtue. It is clear that the virtue lies in the fact that a person in need has no other source of funds and whoever allows him to purchase goods on credit provides him with a temporary reprieve from his difficulty. The author of *al-Hidāya*, al-Marghīnānī also makes it clear that the reason that *ʿīna* is reprehensible is that it shows an aversion to charity. The reasoning of both of these scholars is critical as it bears testimony to the context of their opinions. Clearly, the central concern of these jurists was not the use of this *ḥīla* in commercial transactions, but rather as a substitute for what should have been charitable loans.

Scholars from the other schools also made similar observations; Ibn Taymiyya, for example, noted that the majority of *ʿīna* transactions are made by individuals who are compelled by their circumstances and use them to meet their basic living costs.⁶³ The tenth century Yemeni Shāfiʿī jurist Ibn Ziyād also mentions his contemporaneous local situation in which the rich refused to offer gratuitous loans except with an increase on their capital.⁶⁴ This was achieved through a transaction known as the *bay' al-ʿuhda*, which was very similar to the *bay' al-wafā'*. This transaction had become very common at that time and was the subject of much

⁶³ Ibn Taymiyya, *Bayān al-Dalīl*, 49.

⁶⁴ ʿAbd al-Raḥmān ibn Muḥammad Bāʿ Alawī, *Ghāyat Talkhīṣ al-Murād min Fatāwā Ibn Ziyād*, printed together with *Bughyat al-Mustarshidīn*, by idem, 3rd ed. (Beirut: Dār al-Kutub al-ʿIlmiyya, 2005), 469.

debate in the Shāfi'ī School.⁶⁵ Ibn Ziyād mentions a number of other similar transactions and opines that they are all acceptable as long as they fulfil the formal criteria of a valid sale. This, he says, will not be considered *ribā*.

He then goes on to discuss the situation when a person in dire need is refused an interest-free loan but instead is offered a usurious loan. If the needy person takes the loan, Ibn Ziyād warns him that he will still be sinful because there are alternative ways of paying the extra amount to the lender using legally valid forms.⁶⁶ In essence, Ibn Ziyād is giving the exact formula being suggested here, namely that the *ḥiyal* are justified when they are used as exits by those in dire circumstances to avoid falling into *ribā*. It is patently clear that he draws a line of distinction between these *ḥiyal* and actual *ribā*. In fact, the latter cannot be sanctioned in any circumstance due to the availability of these *ḥiyal*. This point by Ibn Ziyād is critically important against those who would argue that the *ḥiyal* are tantamount to overt *ribā*. Ibn Ziyād has given a juridical verdict which delineates between the two, and later on, we will also see that the historical trajectories of both are not the same.

These statements of the various scholars collectively demonstrate, together with our previous presentation, that the *ḥiyal* discourse relating to *ribā* was solely in relation to the *irfāq* sector as opposed to the commercial sector.

5.2.5 The *Ḥiyal* and the *Irfāq* Sector

According to the model of Tag el Din, the prohibition of *ribā* would lead to the channelling of funds to competing alternative uses. This, he avers, would lead to an increase in charitable

⁶⁵ Linda Boxberger, "Avoiding *Ribā*: Credit and Custodianship in Nineteenth- and early-Twentieth Century Ḥaḍramawt," *Islamic Law and Society* 5, no. 2 (1998): 196-200.

⁶⁶ Bā' Alawī, *Ghāyat Talkhīṣ*, 469-70.

loans as long as an *irfāq* sector exists and the economy is not purely utilitarian. Having examined the dynamic between commercial practice and *ribā*, we now need to consider the dynamic between charitable loans and *ribā*. As stated previously, although Tag el Din's model is a prescription for the future design of an Islamic economy, we can use it analytically here to examine the past. In the past, however, the existence of the *irfāq* sector can be assumed. If this is the case, then the question arises as to why there was a need for these *hiyal* in the first place. We will examine two scenarios in which these *hiyal* were known to have been used and examine the historical socio-economic conditions which influenced their justification and usage. The first scenario relates to the city of Balkh where the 'sale with a loan' transaction was known to have been advocated. The second example relates to Transoxania where the *bay' al-wafā'* gained prominence.

5.2.5.1 The *Mu'āmalā* in Balkh

It has already been mentioned that Muḥammad Ibn Salama was one of the three Ḥanafī authorities who permitted the *mu'āmalā* transaction of a 'sale with a loan'. The sale transaction involves the selling of an item on credit for a higher price than it is worth, together with a loan. Thus X, for example, sells an article for £40 on credit to Y, although the item has a market value of only £20. Together with this sale he also gives him a £60 loan. The result is that Y owes X a total of £100, while having acquired £60 cash and an item worth £20. Ibn Salama is reported to have permitted this transaction. What is also interesting is that he is also reported to have rebuked his contemporary market traders saying that the *ʿīna* transaction forewarned in the Prophetic tradition was better than most of their transactions.⁶⁷ The other scholars of Balkh, although they did not agree with Ibn Salamah on the permissibility of a

⁶⁷ See Ibn Māza, *al-Muḥīṭ al-Burhānī*, vol. 7, 139.

‘sale with a loan’, also expressed similar sentiments regarding the trade practices in the markets of Balkh.⁶⁸

The comments of these scholars are important as they allow us to view the contemporary market conditions and also inform us of the attitude of the incumbent political rulers vis-à-vis the implementation of Islamic law. In Balkh, it is evident that the rulers had little or no interest in regulating the market and hence transactions violating the law were common. A second aspect of Balkh we can note is regarding the distribution of *zakāt*. Some scholars of Balkh had ruled that because the rulers who were collecting the *zakāt* were not distributing it to its needy recipients that individuals should give their *zakāt* for a second time.⁶⁹ This shows us that the needy were being neglected by the state and even the alms-tax which should have contributed to ameliorating their condition was not forthcoming. In such a situation the poor would have faced heavy exploitation at the hands of the usurers. Ibn Salama may well have justified his opinion in allowing this transaction in order to prevent the neediest falling prey to the usurers and their exploitative rates. This would also have allowed them to avoid the sin of *ribā*, as the transaction does not technically fall under its rubric.

This short analysis, although certainly not comprehensive, allows us to develop Tag el Din’s analytical model and incorporate some other factors. There are two key aspects that can be noted: 1) the role of *zakāt* in the *irfāq* sector and 2) the significant impact of the ruling authorities’ attitude in enforcing the prohibition of *ribā*. With regard to the former, that *zakāt* has a role to play in the *irfāq* sector is self-evident although it is an important additional factor to keep in mind in our ensuing discussions. The second point is more important and represents

⁶⁸ See al-Ūzjandī, *Fatāwā Qāḍī Khān*, vol. 2, 279.

⁶⁹ Muḥammad Maḥrūs ‘Abd al-Laṭīf al-Mudarris, *Mashāyikh Balkh min al-Ḥanafīyya wamā Infaradū bihī min al-Masā’il al-Fiqhiyya* (Baghdad: al-Dār al-‘Arabiyya, 1977), vol. 1, 388-9; Normal Calder, “Exploring God’s Law: Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī on *zakāt*,” in Toll, *Law and the Islamic World*, 67-70.

the crux of the issue. Both points will be borne in mind as we now take up the discussion on the *bay‘ al-wafā’*.

5.2.5.2 The *Bay‘ al-Wafā’* in Transoxania

Both al-Zarqā and Ḥawwā have noted that the *bay‘ al-wafā’* transaction appeared in the fifth century in Transoxania, although Ḥawwā also give references to its generic form, as a sale with a condition of repurchase, in earlier works.⁷⁰ These earlier references are important in that they show that the transaction itself was known and present from the earliest periods. His first reference is to the ḥadīth compendium of Ibn Abī Shayba, where a question regarding such a sale is put to the Successor jurist Ibrāhīm al-Nakhā‘ī (d. 96). In another reference a similar question is posed to Aḥmad (d. 241). This shows that the generic form of the transaction was known and perhaps in use, although it certainly was not widespread.

As we have already said the *bay‘ al-wafā’* is nothing other than an antichretic pledge, which was an alternative means of granting an interest bearing loan in use since the Babylonian period. Its use was also recorded in Sassanian Iran, where interest was also permitted.⁷¹ This transaction would have been present in many regions of the world where Islamic rule would subsequently come to apply and it is not unexpected that some people may have continued to use it. It is clear that it was not widespread as no detailed treatment was given to it in the early works of Islamic jurisprudence. In Transoxania, however, the usage of this transaction appears to have increased and it was here that it acquired its sobriquet as the *bay‘ al-wafā’*.

The first scholars to address this transaction belong to the fifth century and not surprisingly to the lands of Transoxania. The sources all agree that three of the leading scholars took a firm

⁷⁰ al-Zarqā, *al-Madkhal al-Fiqhī al-‘Āmm*, vol. 1, 232; Ḥawwā, *Ṣuwar al-Taḥāyul*, 182-3.

⁷¹ Jamshed K. Choksy, “Loan and Sales Contracts in Ancient and Early Medieval Iran,” *Indo-Iranian Journal* 31, no.3 (1998): 202, 204-5, 209.

stance against the *bay' al-wafā'*. The chief judge of Bukhāra, 'Alī al-Sughdī, the Samarqandī judge, al-Ḥasan al-Māturīdī and the jurisconsult, Abū Shujā', all regarded this sale as a pledge.⁷² This meant that the buyer could not benefit from the pledge without the express permission of the seller. Also, because it was in reality a pledge and not a sale, this meant that the buyer was liable for the benefits which accrued to the pledge and also that the buyer would necessarily have to return the pledge once the debt was paid. al-Samarqandī relates that these scholars regarded this sale as a *hīla* for *ribā* and that at the time nobody challenged them in their verdict.⁷³ These three scholars were contemporaries of the middle-late fifth century AH. The next generation of scholars, however, differed in their analysis and began the attempt to accommodate this transaction within the Ḥanafī juridical framework.

The *al-Fatāwā al-Sirājiyya* records a certain Qāḍī al-Isbījābī who regarded the *bay' al-wafā'* to be valid and held that the promise of resale had to be fulfilled.⁷⁴ In the juristic literature used in this work, al-Isbījābī was the earliest authority found to have permitted the *bay' al-wafā'*. There are two scholars who relate to this time period who are designated as al-Isbījābī; 1) Shaykh al-Islam 'Alī (d. 535 AH), a scholar from Samarqand who was recognized as a leading authority,⁷⁵ and 2) al-Qāḍī Abū Naṣr Aḥmad ibn Maṣṣūr who replaced Abū Shujā' as the School's jurisconsult in Samarqand and who was also a judge.⁷⁶ The first of these has not been mentioned as a judge in the biographical literature and hence the second may tentatively be taken to be the scholar mentioned in the *al-Fatāwā al-Sirājiyya*. This means that in the late

⁷² See Abū al-Ḥasan 'Alī ibn al-Ḥusayn, *al-Nuṭaf fī al-Fatāwā* (Beirut: Dār al-Kutub al-'Ilmiyya, 1996), 296-7, where the author opposes all of the *hiyal* pertaining to *ribā*; Ṭāhir ibn 'Abd al-Rashīd al-Bukhārī, *Khulāṣat al-Fatāwā* (Quetta, Maktaba Rashīdiyya, nd.), 49; Nāṣir al-Dīn Abū al-Qāsim Muḥammad ibn Yūsuf al-Ḥusaynī al-Samarqandī's, *al-Multaqaṭ fī al-Fatāwā al-Ḥanafīyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 2000), 226-7.

⁷³ Although he does say that some young 'weak' scholars did oppose them. Ibid.

⁷⁴ al-Ūshī, *al-Fatāwā al-Sirājiyya*, 349.

⁷⁵ He was the teacher of al-Marghīnānī the author of *al-Hidāya*. See al-Qurashī, *al-Jawāhir al-Muḍī'a*, 241.

⁷⁶ Najm al-Dīn al-Nasafī, *al-Qand fī Dhikr 'Ulamā' Samarqand* (Tehran: Mīrāth Maktūb, 1999), 702.

fifth or early sixth century the scholars of Samarqand were now ruling in favour of the *bay' al-wafā'*.

Following this ruling the Scholars of Bukhārā also followed suit and as the discourse develops, the question became how to accommodate this transaction into the juridical framework. The foremost authority who addressed this subject was the renowned Qaḍī Khān, a judge of Bukhārā and a scholar known for his juridical noesis (*fiqh al-naḥs*). Qaḍī Khān applied the strict rules of sale to the *bay' al-wafā'* and ruled that if the parties mentioned any of the following three points, then the sale would be invalid:

1. That the resale is a contractual stipulation of the first sale,
2. that the sale was a *bay' al-wafā'*,
3. that it was a permissible sale (*bay' jā'iz*), implying thereby that it was non-binding.

The only valid way for the sale to be effected was if the resale was mentioned, not in the contract, but as a separate promise. This promise, he goes on to say, is binding. He justifies this with reference to a maxim which renders promises binding based upon the needs of people.⁷⁷

Apart from Qaḍī Khān, other Transoxanian scholars also upheld the *bay' al-wafā'*; some using his technique others suggesting alternative methods. The main thrust for recognising this transaction appears to have been the need to protect the poor. In order to secure a loan they were being asked to provide their properties as security.⁷⁸ Although the reality of the transaction was a pledge, it was conducted as a sale to avoid the charge of *ribā*. The jurists, who were reluctant to recognise this transaction, did so to ensure that the properties would

⁷⁷ al-Ūzjandī, *Fatāwā Qaḍī Khān*, vol. 2, 165.

⁷⁸ Even in the present era, the nature of this contract remains the same, see 'Abd al-Salām Dhunī, *al-Hiyal: al-Mahzūr minhā wa al-Mashrū'* (Cairo: Maṭba'a Miṣr, 1946), 155-56; Aḥmad Safar, *al-Ta'mīnāt al-'Ayniyya: al-Rahn al-'Aqārī wa al-Bay' bi al-Wafā'*, *al-Ta'mīn al-'Aqārī - Ḥuqūq al-Imtiyāz* (Beirut: np. 2003), 116-18.

ultimately be returned to their owners. The juridical framework recorded by Ibn Māza clearly seems to indicate this. He mentions that some Samaraqandī jurists regarded that the transaction be treated as a sale from the perspective of the buyer (or lender) and as a pledge from the perspective of the seller. This would allow the buyer to benefit from the pledge, but because it was considered a pledge for the seller, he would not be permitted to sell it, or for his heirs to inherit it, and whenever the seller come to him with the original amount, he would necessarily have to accept it and return the property to its owner. In their defence the Samarqandīs said that this was done for the needs of the people who depended on the wealth of others and to prevent them from falling into *ribā*.⁷⁹

In permitting this *ḥīla* the Samarqandī jurists and Qāḍī Khān did so in reference to the needs of the people. The maxim which underpins their legal ruling allows the jurists to regard the promise of redemption as legally binding. This maxim is clearly an exception to the Ḥanafī systematic structure, as other texts make it clear that promises are not legally binding.⁸⁰ These jurists were aware that this was not a normative maxim by the fact that it begins with the particle '*qad*', meaning sometimes. The maxim thus reads: sometimes promises are made binding due to peoples' needs.⁸¹ The question that this raises is whether this constitutes an infraction of the systematic rules or not. This question is vitally important, as the *ḥiyal*, in their capacity as *makhārij* and not concessions, are premised upon their systematic consistency with the normative doctrine. It is by virtue of their congruity with the standard doctrines that they acquire their status as normative exits. What we have, in this situation,

⁷⁹ Ibn Māza, *al-Muḥīt al-Burhānī*, vol. 10, 369-70.

⁸⁰ al-Sarakhsī quotes al-Ḥākim al-Shahīd as saying that the '*istiṣnā'*' contract is regarded as a *muwā'ada* i.e. a mutual promise, as a proof that it is a non-binding contract. al-Kāsānī also makes the dichotomous statement that *istiṣnā'* is a *muwā'ada* and not a sale contract. See *al-Mabsūṭ*, vol. 6, part 12, 122-3; al-Kāsānī, *Badā'i'*, vol. 5, 5.

⁸¹ '*Qad tuj'al al-mawā'id lāzima li-ḥājat al-nās*'. See al-Ūzjandī, *Fatāwā Qāḍī Khān*, vol. 2, 165.

however, is the use of a maxim which appears to be a concession from the systematic requirements.

In our earlier explication of the application of the *ribā* rules into the various branches of commercial law, we noted that the Ḥanafīs put the requirements of the *ribā* doctrine at the forefront of their concerns. In regard to contractual stipulations, *shurūṭ*, they make it the *sine qua non* of determining contractual validity. Now, it may well be argued, that a promise is not equivalent to a stipulation, and in this regard, we can recall that al-Shāfi'ī, who takes full regard of explicit mentioned stipulations, disregards promises either prior to, or immediately following, a sales transaction. Additionally, Mufti Taqi Usmani, a leading jurist in Islamic finance, has attempted to demonstrate substantive juridical differences between a promise and a stipulation.⁸² However, it must also be recalled that, unlike the Shāfi'īs, the Ḥanafīs do regard accepted customs as tantamount to contractual stipulations, despite the fact that the former are not articulated at all, neither prior to the contract, nor after its conclusion. This means that a promise, although not quite a stipulation, cannot escape the systematic rules as they, at a minimum, constitute more than an unexpressed custom.

The purpose of drawing this conclusion is vital for circumscribing the juridical remit of this *ḥīla*. Unlike the *makhārij* which have a normative role in jurisprudence, the *bay' al-wafā'* represents an infraction of the systematic rules and henceforth, cannot be regarded as a normative exit i.e. a *makhraj*. Rather it is to be regarded as a concession (*rukḥṣa*) in the form of a *ḥīla*, whose legal validity is limited to the extent of its function as a final resort in saving one from falling into *ribā*. *Rukḥṣas*, unlike the *makhārij*, are transitory in nature, and have no

⁸² Usmani, *An Introduction to Islamic Finance*, 87-89.

legal utility beyond the dire need which occasions their use. Such *hiyal* cannot, and are not intended to, form the normative basis of an Islamic economy.

5.2.5.3 *Bay' al-wafā'*, the Jurists and the rulers of Transoxania

The question that needs to be addressed now is what factors led to the widespread use of this *hīla* for *ribā* and how can it be explained in terms of the analytical model suggested earlier. What is key to the analytical model is the political and economic climate of the time and to discern what specific changes occurred at that time which may have occasioned the need for this transaction. The most significant change that occurred, relative to the time period in question, was a change in the ruling dynasty. Transoxania had been under the semiautonomous rule of the Persian Sāmānids since the late third century, with Bukhārā serving as their capital.⁸³ The Sāmānids were devout Muslims and as supporters of Sunni Islam they actively spread the faith amongst their northern Turkish neighbours in the central Asian steppe.⁸⁴ The Sāmānids' rule, however, was contested by the neighbouring power of the Qarakhānids. The Qarakhānids were Turkish and had only recently converted to Islam. The head of their western Khanate Satuk Boghra Khān (d. 344 AH) became a Muslim at the invitation of a jurist.⁸⁵ The historian Ibn al-Athīr relates that later on, in the year 349 AH, 200,000 'tents of the Turks' also converted to Islam.⁸⁶ At the end of the fourth century in 389 AH the Qarakhānids defeated the Sāmānids and occupied their Transoxanian territories. Although the earlier Qarakhānids were noted for their strict piety, their Islamic credentials dissipated later on, as their relationship with the resident scholars worsened.

⁸³ The Sāmānids had been in Transoxania as governors since the beginning of the third century although under the authority of the Ṭāhirid governors of Khurasān. In 287/900 the Sāmānid Ismā'īl defeated the Ṭāhirid 'Amr ibn Layth at Balkh and was recognised by the 'Abbāsīd caliph as the sole ruler of Transoxania and Khurasan. See Richard N. Frye, "The Sāmānids," in *The Cambridge History of Iran. Vol. 4: The Period from the Arab Invasion to the Saljuqs*, ed. Richard N. Frye (Cambridge: Cambridge University Press, 1975), 136-8.

⁸⁴ Ibid, 153; D. G. Tor, "The Islamization of Central Asia in the Sāmānid Era and the Reshaping of the Muslim World," *Bulletin of the School of Oriental and African Studies* 72, no. 2 (2009): 279-99.

⁸⁵ Peter B. Golden, "The Karakhanids and early Islam," in *The Cambridge History of Early Inner Asia*, ed. Denis Sinor (Cambridge: Cambridge University Press, 1990), 357.

⁸⁶ Ibid, 357-8; *ET*², s.v. Ilek-Khans or Karakhānids.

In 461 AH the Qarakhānid ruler executed the juridical authority Ismā'īl al-Ṣaffār for 'exhorting the Khān to observe the ordinances of religion and eschew forbidden things.'⁸⁷ Additionally, in the life of al-Sarakhsī (d. 490 AH) we read that he was thrown into a well by a local governor for a ruling he issued. He spent such a long time there that he dictated his *magnum opus*, *al-Mabsūṭ* to his students who gathered around him and compiled his lectures. al-Sarakhsī, himself, makes reference to the rulers of his age and regards them as tyrants who took the wealth of the people illicitly and did not spend the *zakāt* on those whom deserved it.⁸⁸ The conflict between the leading scholars and the Qarakhānid rulers reached a peak and the former appealed to the Seljuk ruler Malikshāh to intervene. In 482 AH the Seljuks marched into Transoxania and deposed the Qarakhānid incumbent Aḥmad Khān, and reduced the region to a vassal state.⁸⁹ The leader of the jurists at this time was Ibrāhīm al-Ṣaffār (son of Ismā'īl who had been killed by the Qarakhānid ruler), who, in all probability, was responsible for the plea to the Seljuks. The biographical literature portrays him, like his father, as a fearless upholder of religious norms.⁹⁰ The arrival of the Seljuks may appear to have been a victory for Ibrāhīm and his religious cause. This, however, was not to be the case; the son of Malikshāh, Sanjar visited Transoxania in 495 AH and deposed Ibrāhīm as the imām of Bukhāra and replaced him with 'Abd al-'Azīz ibn Māza.

This then is the political history of the time which corresponds to the juridical discourse regarding the *bay' al-wafā'*. The Qarakhānids took control of Transoxania in 389 AH and would have brought with them a large number of new Muslims and non-Muslims, such as Uighurs and Turks. The Qarakhānid rulers of the eastern Khanate were not Muslims, and Turks, Mongols and Uighurs would have travelled freely between the two halves of the

⁸⁷ *EF*², s.v. Ṣadr.

⁸⁸ al-Sarakhsī, *al-Mabsūṭ*, vol. 1, part 2, 241; Calder, *Exploring God's Law*, 70.

⁸⁹ Golden, *The Karakhanids and early Islam*, 367.

⁹⁰ See al-Qurashī, *al-Jawāhir al-Muḍī'a*, 27.

Khanate. A mass migration of these peoples into Transoxania would have meant the arrival of a host of un-Islamic trade practices. It was approximately sixty years after the arrival of the Qarakhānids into Transoxania, when the three jurists who opposed the *bay' al-wafā'* took their stance. It is clear that it was in this time that the *hīla* had become widespread. The Scholars who spoke against it would have witnessed its rise and perfusion. Their objections, however, would have been ignored by the ruling authorities who were in conflict with the scholars and who, it seems, were not concerned with upholding the law. al-Sarakhsī also makes it clear that they were not distributing the *zakāt* and hence the needs of the poorest members of society were not being accommodated.

This account corresponds with the dynamic analytical model proposed earlier. What is being observed is that the law is not being upheld and hence illicit transactions which are only ever on the margins of the economy begin to come to the foreground. The apathy of the rulers emboldens the perpetrators and others to exploit the situation. On the other hand, the poor are not only unable to access charitable loans as the greed for usurious gain remains unchecked, but are also denied their legitimate entitlement to the proceeds of the *zakāt*. To save the poor from getting into *ribā* transactions the scholars give them recourse to the *hiyal*. Qāḍī Khān, who was one of the leading authorities who permitted the *hiyal*, wrote an entire chapter in his *Fatāwā* work dealing with the *hiyal* for escaping from *ribā*. This is a significant point, in that, although most of the jurists discussed the *bay' al-wafā'* as a single phenomenon, this jurist recognized that there was an underlying problem which was causing people to enter into this transaction. His chapter thus provides multiple *hiyal* for escaping from *ribā*.

What is perhaps more telling though, is that before getting into the actual *hiyal* he mentions a number of other issues which indicate the state of the market place at his time:

- The rules regarding purchases made with money acquired through illicit means and whether the food purchased with such food is permissible or not.
- The situation when a ruler buys something and pays for it with money taken unjustly from the people, the jurists, he says, dislike that anyone should partake in their food to serve as a rebuke to them for their oppression.
- If an investor makes a *commenda* with a trader ignorant of the Shar'īa rules, the profit is licit for the investor as long as he does not have certain knowledge that the trade was illicit.
- In response to the question, is it necessary for a customer to ask the trader whether his goods are licit or not, he says that it depends on the time and the place; if the majority of the trading activity in a specific market place is licit then there is no need to ask, whereas if the opposite is true and the market place is dominated by illicit trade then one should observe precaution and enquire about the legality of the goods.
- In regard to a person who passes away and his wealth is from illicit sources, he says that the inheritors should search for its rightful owners and return it to them otherwise if they can not be traced it should be given in charity.⁹¹

Although some of these are standard issues mentioned in other works, the fact that the author has brought them together under a single heading indicates that he was addressing a number of contemporary problems all linked to a serious decline in the morality underpinning the local trade practices. It is clear that he regarded the prevalence of *ribā* as the major cause of the problem as that is the title heading and ultimately what he hopes to help the masses avoid.

⁹¹ *'Faṣl fī-mā yakūn firār 'an al-ribā'*, *Fatāwā Qāḍī Khān*, vol. 2, 278-9.

Why there should have been such a dramatic change in that specific time period can be understood by noting the impact of demographic change on the norms of trade practices. A very pertinent example which demonstrates this precise phenomenon can be observed following the Mongol invasions of Central Asia. Large numbers of Mongols and Uighurs arrived with the invading armies and settled in Central Asia, bringing with them their usurious practices. In the chronicles of the Persian historian Rashīd al-Dīn, he notes the effect of these immigrants and the rise in usurious practices and the use of the *ḥiyal*.⁹² What this historian also notes is that together with usury, a whole host of additional corrupt economic practices were on the rise. At the point that the situation becomes critical to the functioning of the state, the ruler Maḥmūd Ghazān addresses these practices in an attempt to restore the Islamic trade norms.⁹³ Rashīd al-Dīn reports Ghazān's analysis of the situation and its remedy, saying that he

'realized that [the basic ingredient in] all of these types of corruption [was] the giving and taking of interest and that [once] he [had] prohibited [this], he would at one and the same time be both reasserting the Prophet's law and bringing [humanity] back to the Divine Guidance and away from the precipice of eternal perdition, while [ever so many] varied and great disorders would be averted in the future through the blessings accruing from the prohibition of usury.'⁹⁴

⁹² The historian notes that: 'One of the disorders arising out of the [paying] of usury was ... that those persons who were giving out money for interest at [that time] were for the most part Mongols and Uighurs, and these had the means to enforce their claims.... The outcome of the matter was that the wretches [were] unable to pay back the Mongols and Uighurs and remained caught up in the hapless condition of being their bondmen together with their wives and children – and it was only through the fortunate circumstances [that] the Emperor of Islām ... [is a just monarch] that vile practice of debt-slavery has been removed [as a threat to] the people of Islām.' See A.P. Martinez, "Third Portion of the History of Ġāzān Xān in Rašīdu 'D-Dīn's Ta'rīx-e Mubarak-e Ġāzānī. Comprising Narratives and Documents Relating to the Agrarian-Fiscal, Financial, and Monetary, Judiciary, Military, Religious and Other Reforms Instituted by Ġāzān Xān Together with Some Notes on His Personal Qualities and Character. Part Two: The Twentieth, Twenty-First, and Twenty-Sixth Sections Concerning Standards and Weights and the Prohibition of Interest and Dishonest Credit Transactions, Especially those Involving the State or its Ministers, Together with Ġāzān Xān's Decree on Standards, Weights and Measures," *Archivum Eurasiae Medii Aevi* 8 (1994): 171.

⁹³ Ibid, 178.

⁹⁴ Additions to the text in the square brackets are from the translator and the italics in his translation have been removed. See *ibid*, 177-78.

As mentioned earlier, an important aspect of the analytical model is the role of the political authorities in upholding the religious norms of trade and preventing the spread of usury even among its non-Muslim citizenry. That Ghazān was forced to take this action, indicates the point at which the utility of the *hiyal* are exhausted. At this point an alternative course must be sought which restores the commercial and philanthropic norms as prescribed by Islam and abolishes the exploitative practices that can so easily spread. Following Ghāzān's decree the situation is reported to have changed markedly from the previous corrupt and usurious norms, such that Rashīd al-Dīn wrote: 'how shall those persons who [are born] hereafter and have not seen them even be able to even imagine the benefits of this single decree.'⁹⁵

5.3 The Teleology of the *Hiyal*

According to the model proposed by Tag el Din there exists a dynamic relationship between usury, Islamic law and charity. Tag el Din's model proposes that as the prohibition of *ribā* is applied to an economy, the funds previously allotted to usurious loans, will be diverted to alternative competing uses. An Islamic economy should hence create an *irfāq* sector to absorb these funds once the prohibition takes effect. In Tag el Din's account there are three factors which are considered; 1) the application of the law, 2) the use of usurious contracts, and 3) the *irfāq* sector. In our presentation we have expanded the model to demonstrate that the Islamic forms of equity investment are also an important alternative use and that an additional component of the *irfāq* sector is the correct distribution of the *zakāt*.

In an ideal Islamic economy, this model suggests that once the prohibition of *ribā* comes into effect, the funds previously set aside for it, would look for alternative uses. These would exist

⁹⁵ Ibid, 182. He goes onto mention that immediately following the decree, some people attempted to use the *hiyal* again, and so Ghāzān issued a further decree saying that unless the practice was completely abandoned, he would prevent the creditors from not only claiming the interest, but also the principal (p.182-83).

in two domains; 1) equity investments such as *muḍāraba* and *shirka*, and 2) the *irfāq* sector. The *irfāq* sector would be established through the collection and distribution of *zakāt* and by an extensive *waqf* system. Once *ribā* has been eliminated, a portion of the funds would go into the equity investments and a portion would go into the *irfāq* sector. This model has been used analytically to understand the use of the *ḥiyal* in two distinct regions and periods in Islamic history. The purpose of applying this model was to observe the variables within the dynamic of the analytical model and to therefore delineate the role of the *ḥiyal* within the model. The first important point we noted was that the investment sector was viable throughout Islamic history in the form of *commenda* and partnerships. Schacht had posited that it was the inadequacy of Islamic commercial law which premised the utility of the *ḥiyal*. This was shown to be completely unfounded and contradicted by the documentary record as explicated in subsequent research. The necessary implication is that the *ḥiyal* were invoked for their utility in the *irfāq* sector and not in commerce.

In order to appreciate how this had occurred, the other variables in the dynamic were noted. In both areas where these *ḥiyal* had been permitted, Balkh and Transoxania, there appeared to be a distinct lack of enforcement of Islamic commercial law. We also noted that in both areas the *zakāt* was not being distributed to the rightful and most needy recipients, and hence the *irfāq* sector would have been severely undermined. The neediest members of society, who would normally have relied upon institutions such as *zakāt* and charitable loans, would have found neither forthcoming. The apathy of the rulers meant that usurers, mainly non-muslims, would have stepped in to exploit the situation. The jurists therefore permitted these *ḥiyal* to prevent the poor from falling into *ribā* and the hands of the usurers.

This, then, is the underlying teleology of the *hiyal* of *ribā* and can be added to the model of Tag el Din to enhance its scope. The benefit of explicating this teleology is that it can serve to both delimit the remit of the *hiyal* and also confine their utility to the *irfāq* sector. What is also critical to recall is that the *hiyal* of *ribā* are not to be regarded as normative *makhārij*. This is because the former do not uphold the systematic consistency which is vital to the Ḥanafī juridical superstructures, whereas the latter do. The result is that their usage in these situations is in the capacity of a transitory concession. Concessions to Islamic prohibitions are justified only in the most desperate circumstances and their juridical utility is strictly limited to the causes which occasion them.

CHAPTER SIX

THE CASH *WAQF* IN THE OTTOMAN EMPIRE

The *waqf* is a religious philanthropic institution which played a crucial role in the provision of public facilities in pre-modern Muslim societies. An abundance of research now exists on most facets of the *waqf*; from its legal structure, social role, key benefactors and beneficiaries, to its ultimate demise at the behest of colonialist imperatives.¹ What concerns us in this chapter is to examine a specific form of the *waqf* in which the endowment was in the form of cash and which became popular in the Ottoman Empire. The cash *waqf* was a novel institution and its method of revenue generation is what is most relevant here. Benefactors using this type of *waqf* had, in the main, specified that the capital was to be employed in profit generating transactions with a stipulated percentage return on the initial capital. Receiving a percentage return on the capital is more akin to usury than to equity investments. In the latter, the norm is for the investor to stipulate a proportion of the profit, and not the capital. More significant than this though, is that the capital was not given on the basis of equity, but rather as a debt, and therefore liability was devolved to the borrower, while the capital of the *waqf* was assured. It is no wonder, then, that the cash *waqf* caused a controversy among the Ottoman jurists, occasioning both critical and apologetic tracts.

In this chapter we will give a brief introduction to the *waqf* as a legal structure and discuss the jurists' views regarding the validity of endowing movables and cash. We will then explore the Ottoman polemic regarding this institution, noting its contemporaneous usage and spread in the Ottoman lands. The specific modes of profit generation which it employed will be dealt

¹ Miriam Hoexter, "Waqf Studies in the Twentieth-Century: The State of the Art," *Journal of the Economic and Social History of the Orient* 41, no. 4 (1988): 474-495.

with in the context of our preceding presentations regarding the *hiyal*. From this, we can assess the view of the Ottoman jurists vis-à-vis the *hiyal* and also the reality of their application and its subsequent socio-economic impact. The cash *waqf* was a novel institution and both, its reception into the law and the methods which were used to accommodate it, are important in the contemporary discourse on the *hiyal* and their modern day usage in the Islamic financial landscape.

6.1 The *Waqf*

Although the *waqf* was a hugely popular institution, its early acceptance by the jurists was not easily secured. A number of jurists were concerned about the impact of the *waqf* on the inheritance laws. Property sequestered in perpetuity would clearly deny the inheritors their rightful share and facilitate attempts to circumvent their rights. Certain ḥadīths are quoted to substantiate this position, which explicitly mention that there can be no sequestration of property which impinges on the mandated inheritance share allowance.² The Kufan Judge Shurayḥ is reported to have said that the Prophet Muḥammad (pbuh) came to sell sequestered property.³ The implication of this last point being that any property sequestered for charitable, or otherwise purposes, remains the property of its owner and hence he may sell it or give it away and upon his death it will be part of his estate. This clearly violates the very notion of the *waqf* which is premised upon the property being put into perpetual inalienability and its revenue dedicated towards some charitable end.

Abū Ḥanīfa hence held the opinion that if someone endowed his property, he was still considered to be its owner and following his demise, the property would go to his heirs.

² ‘*Lā ḥabs ‘an farā’id Allāh*’; see al-Kāsānī, *Badā’i*, vol. 6, 346-7.

³ ‘*Jā’a Muḥammad bi-bay’ al-ḥabīs*’; see al-Kāsānī, *Badā’i*, vol. 6, 346-7; Peter Hennigan, *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Ḥanaḥ Legal Discourse* (Leiden: Brill, 2004), intro xvii-xx.

Although there were a number of *waqf* precedents, he explained these away through alternative legal forms. He therefore regarded the *waqf* as a vow (*nadhr*), in which an owner obliges himself to give away the income of a *waqf* in charity, but retains full ownership of the thing endowed. Precedents in which the *waqfs* operated beyond the lives of their owners were explained as charitable bequests, whereby the owner bequests that the income from some of his property be given to specific recipients.⁴ This meant that the *waqf*, just as in a bequest, was limited to a maximum of one third of the deceased's estate. The crux of Abū Ḥanīfa's position is that he denied the founder of a *waqf* the ability to make it legally binding (*lāzim*). In the Ḥanafī juridical works, Abū Ḥanafī is thus regarded to have held the *waqf* to be merely permissible (*jā'iz*) though not legally binding.

Abū Ḥanīfa did, however, say that if a judge gave a verdict on a specific *waqf* that it was legally binding, then according to him it would be so. Therefore, if an individual wished to have his *waqf* made legally binding, he could do so by raising it to a judge and have him rule that the *waqf* was permanently sequestered. This opinion is based upon the principle that a judge's ruling on an issue in which the jurists have a difference of opinion (*al-mujtahad fīh*), settles the dispute and establishes one opinion.⁵ Although this is an accepted general principle, its application in specific instances, such as the cash *waqf*, may yet cause controversy.

The majority of jurists, however, disagreed with Abū Ḥanīfa's views and upheld the right of the individual to create a legally-binding *waqf*. This was based on certain traditions and also a large number of precedents which reported the endowments of the Companions and the Successors.⁶ From the students of Abū Ḥanīfa, Zufar agreed with the Imām, whereas Abū

⁴ al-Kāsānī, *Badā'i*, vol. 6, 346; al-Sarakhsī, *al-Mabsūt*, vol. 6, book 12, 34; Abū Bakr Aḥmad ibn 'Amr al-Khaṣṣāf, *Aḥkām al-Awqāf* (Beirut: Dar al-Kutub al-'Ilmiyya, 1999), 93-4.

⁵ Muḥammad Abū Zahra, *Muḥāḍarāt fī al-Waqf* (np.: Maṭba'a Aḥmad 'Alī Mukhayyar, 1959), 47.

⁶ See, for example, al-Khaṣṣāf, *Aḥkām al-Awqāf*, 5-17.

Yūsuf and al-Shaybānī disagreed and took the opinion of the majority. Later on al-Ṭaḥāwī would note in his epitome that it was the opinions of Abū Yūsuf that were to be relied upon.⁷

6.2 The *Waqf* of Movable

One of the conditions for a valid *waqf* is that it should be endowed perpetually (*ta'bid*) and hence *waqfs* which are endowed for a specific period are not recognized. The whole purpose of the *waqf* is for it to be a form of continuous charity (*ṣadaqa jāriya*), providing its benefactor with a source of heavenly reward after his death. As a result, *waqfs*, generally speaking, consisted of properties whose rental income was distributed to the recipients as an act of charity. Properties or land, were considered as ideal candidates for the basis of perpetual philanthropy. al-Kāsānī hence says that it is due to the condition of perpetuity that a *waqf* of movables is not permitted.⁸

There are, however, some exceptions to this rule; both Abū Yūsuf and al-Shaybānī allow the *waqf* of weapons and horses due to reports that the Companions (ra) had done so. Abū Yūsuf also allows movables when they are endowed as adjuncts to immovables, so farming tools and animals may be endowed together with farm land. al-Shaybānī, who agrees with Abū Yūsuf on that point, also permits the *waqf* of a movable if there is an established practice of endowing specific items, amongst people (*ta'āmul al-nās*).⁹ Abū Yūsuf disagrees with al-Shaybānī on this point as the rules of analogy cannot be suspended, according to him, unless a tradition supports the exception. al-Shaybānī's argues that analogy is often disregarded due to an established practice, such as in the contract of manufacture (*istiṣnā'*) and hence the *waqf* of

⁷ 'al-Qawl fī ḥādḥā kullihī 'indānā kamā qāla Abū Yūsuf', al-Ṭaḥāwī, *Mukhtaṣar*, 136-7.

⁸ al-Kāsānī, *Badā'i'*, vol. 6, 349.

⁹ al-Marghīnānī, *al-Hidāya*, vol. 1, 639-40; al-Kāsānī, *Badā'i'*, vol. 6, 349. For a detailed presentation of the opinion of a great number of Ḥanafī authors on this subject, see A. al-Ma'mūn Suhrawardī, "The *Waqf* of Moveables," *Journal of the Royal Asiatic Society of Bengal* n.s. 7 (1911): 323-430.

movables maybe permitted merely due to its widespread practice. al-Shaybānī's argument is important as it plays a critical role in the Ottoman cash *waqf* polemic.

Although there is some disagreement regarding movables in general, Abū Ḥanīfa, Abū Yūsuf and al-Shaybānī all agree that the *waqf* of cash is not permissible. Another student of Abū Ḥanīfa, Zufar is, however, reported to have permitted the endowment of *dirhams*, food and all other items sold by weight and volume. He advised that the *dirhams* should be invested in a *muḍāraba*; the profits are given to the beneficiaries and the original capital reinvested.¹⁰ By suggesting this formula, in which the capital is recycled in subsequent investments, both a semblance of perpetuity is achieved and the beneficiaries receive a continuous income.

The other schools of law have also mentioned the issue of the cash *waqfs* in their works and there appears to have been a difference of opinion within the various schools.¹¹ The cash *waqf* was not significantly employed prior to its Ottoman usage and its mention in the jurists work would have been more theoretical than practical. As a practice, the cash *waqf* was insignificant if not obsolete in comparison to the dominant mode of *waqf* in the medieval Muslim world, that of *waqf* of property. It is only in the Ottoman lands that the cash *waqf* began to compete with its more traditional rival, and it was there that the controversy began.

6.3 The Cash *Waqf* in the Ottoman Empire

The major cities of the Ottoman Empire such as Istanbul and Edirne, which were previously under the dominion of Christian rulers, were subsequently imbued with Islamic culture

¹⁰ See Ibn Māza, vol. 8, 503-4; Burhān al-Dīn Ibrāhīm ibn Mūsā ibn Abī Bakr al-Ṭarābulusī, *al-Is'āf fī Aḥkām al-Awqāf* (Beirut: Dār al-Rā'id al-'Arabī, 1981), 26.

¹¹ Maḥmūd Aḥmad Abū Layl, "Waqf al-Nuqūd fī al-Fiqh al-Islāmī," *Majallat al-Sharī'a wa al-Qānūn* 12 (1999): 33-36.

through the medium of the *waqf*.¹² In the Balkans, the role of the *waqf* was even greater: researchers have noted that not only did the Ottomans built over a hundred new cities in the Balkans, but also that this was achieved through the use of the *waqf*.¹³ In fact, of all the cities in present-day Bosnia-Herzegovina over 80 percent were built in the sixteenth century through the *awqāf* system.¹⁴ The capital of Bosnia, Sarajevo, which was created and developed by numerous *waqfs*, became one of the largest cities in the Balkan Peninsula.¹⁵ From Thessaly in Greece to Plevne in Bulgaria, the same model was deployed: *waqfs* were established which provided a variety of public amenities, such as a mosque, a *madrassa*, a soup kitchen, a traveler's lodge, a market place with shops and stalls, public bridges and footpaths, libraries and public baths.¹⁶ In fact, it can confidently be claimed that the *waqf* system represented nothing less than the public policy of the Ottomans in the Balkans.¹⁷

The earliest recorded cash *waqf* in the documentary *waqf* record of the Ottoman Empire occurs in the city of Edirne in 1423.¹⁸ Edirne is a city in the easternmost part of the Balkan Peninsula and it was in the Balkans that the cash *waqf* would find its most extensive use and support. The first recorded cash *waqf* consisted of 10,000 akçe which was dedicated to the

¹² 'It can safely be said that the reconstruction process of Ottoman Istanbul depended essentially on the Islamic institutions of *waqf* and *'imāret*', Halil İnalcık, "Istanbul: An Islamic City," *Journal of Islamic Studies* 1 (1990): 11.

¹³ Muḥammad M. al-Arna'ūt, "*Dawr al-Waqf fī Nashū' al-Mudun al-Jadīda fī al-Būsna (Sarāyīfū Namūdḥaj)*," *Awqāf* 8 (2005): 51.

¹⁴ Hatidž Čar-dnda, "Mostar: A Legacy of Islamic Culture and Civilization," in *Proceedings of the Second International Symposium on Islamic Civilisation in the Balkans* (Istanbul: IRCICA, 2006), 175.

¹⁵ al-Arna'ūt, *Dawr al-Waqf*, 51; İlhan Şahin, "The Story of the Emergence of a Balkan City: Sarayova," in *Proceedings of the International Symposium on Islamic Civilisation in the Balkans*, ed. Rama M. Z. Keilani and Svetlana Todorova, (Istanbul: IRCICA, 2002), 114.

¹⁶ Levent Kayapınar, "The Charitable Foundations of the Family of Turhan Bey who Conquered Thessaly Region in Greece in the 15th – 16th Centuries," in *Proceedings of the Second International Symposium*, 155-9; Ayşe Kayapınar, "The Gazi Mihaloğulları *Waqfs* in Northern Bulgaria (15th-16th Centuries)," in *ibid*, 169-71.

¹⁷ Said Amir Arjomand, "Philanthropy, the Law, and Public Policy in the Islamic World before the Modern Era," in *Philanthropy in the World's Traditions*, ed. Warren F. Ilchman, Stanley N. Katz and Edward L. Queen II (Bloomington, Indiana: Indiana University Press, 1998), 125-6.

¹⁸ Muḥammad M. al-Arna'ūt, "*Taṭawwur Waqf al-Nuqūd fī Bilād al-Balqān*," in *idem*, *Dirāsāt fī al-Tārīkh al-Ḥadārī li-l-Islām fī al-Balqān* (Dubai: Markaz Jum'a al-Mājid li al-Thaqāfa wa al-Turāth and Mu'assasa al-Tamīmī li al-Baḥth al-'Ilmī wa al-Ma'lūmāt, 1996), 33; Jon E. Mandaville, "Usurious Piety: The Cash *Waqf* Controversy in the Ottoman Empire," *International Journal of Middle East Studies* 10, no. 3 (1979): 290.

payment of three Qur'ān reciters. The founder stipulated that the money should be used with a return of ten percent. In 1442 another cash *waqf* in Edirne is recorded; this time with an endowment capital of thirty thousand akçe and again with a stipulated rate of return of ten percent.¹⁹ al-Arna'ūt reports that over the succeeding centuries the volume of investment increased into the hundreds of thousands and by the sixteenth century into the millions.²⁰ The *waqf* madrasa complex of Ghazi Khusraw-bek in Sarajevo, for example, consisted of a number of estates each containing houses, shops, gardens, but also, and more importantly the *waqf* held seven hundred thousand akçes. The *waqf* document (*waqfiyya*) stipulates that four hundred thousand was to be used to build the *madrasa* according to the prescriptions contained therein and to purchase books for its library. The remaining three hundred thousand akçes was to be used to generate profit (*istirbāḥ*) on a ratio of 1 to 10, i.e. 10 percent over a year. The founder mentions that the money should be invested in a legitimate way (*naḥj shar'ī*) free from any doubt of usury and in which there was no possibility of loss.²¹

Cash *waqfs* not only increased in their capital, but also in their usage throughout the Balkans as reflected in the quantity being registered.²² Constantinople, which was conquered by the Ottomans in 1453, saw its first cash *waqf* in 1465, following which it rapidly grew in popularity.²³ In the archives for the year 1546, the records show that almost forty percent of all *waqfs* in Istanbul were cash *waqfs*.²⁴ Mandaville plotted the growth of these *waqfs* and noted that there was a particular increase in their number which coincided with the

¹⁹ al-Arna'ūt, *Taṭawwur Waqf al-Nuqūd fī Bilād al-Balqān*, 33; Mandaville, *Usurious Piety*, 290.

²⁰ al-Arna'ūt, *Taṭawwur Waqf al-Nuqūd fī Bilād al-Balqān*, 33-4.

²¹ 'Yu 'āmal 'alā naḥj shar'ī ... lā yashūb fīhī shā'iba al-ribā wa lā yataṭarraḡ ilayhi al-ḡayā', See Muḥammad al-Arna'ūt, "Waqfiyya Madrasa al-Ghāzī Khusrūbik fī Sarāyīfū," *Awqāf* 13 (2007): 119.

²² Tahsin Özcan, "The Role of the Cash Foundations in the Construction and Development of Balkan Cities," in *Proceedings of the Second International Symposium*, 199; Arna'ūt, *Taṭawwur Waqf al-Nuqūd fī Bilād al-Balqān*, 40-48.

²³ al-Arna'ūt, *Taṭawwur Waqf al-Nuqūd fī Bilād al-Balqān*, 34.

²⁴ Hayashi Kayoko, "The *Vakıf* Institution in 16th-Century Istanbul: An Analysis of the *Vakıf* Survey Register of 1546," *Memoirs of the Research Department of the Toyo Bunko* 50 (1992): 98-100; Gabriel Baer, "Women and Waqf: An Analysis of the Istanbul *Tahrîr* of 1546," *Asian and African Studies* 17 (1983): 12.

appointment of Abū al-Sa‘ūd, initially as the *qāḍī* of Istanbul and subsequently as the military judge (*kadiasker*) of the Balkans (Rumeli).²⁵ What is equally interesting in Mandaville’s graph is that the number of cash *waqfs* decreased when Abū al-Sa‘ūd’s opponent to the cash *waqf*, Çivizade, was appointed to the post of chief jurisconsult (shaykh al-Islam) and declined further still when he was dismissed from this post and reassigned to the military judgeship of the Balkans.²⁶ This period of decline marked the outset of the cash *waqf* controversy between these two judges as will be discussed shortly. Prior to that, we will examine the actual nature of the cash *waqf* and how it operated.

6.3.1 The Cash *Waqf* and its *Modus Operandi*

It has already been mentioned that the only scholar to have permitted the cash *waqf* from the Ḥanafīs was Zufar. When asked how it would operate, he recommended that the capital be invested in a *muḍāraba* contract: The accruing profits are given to the designated recipients, while the original capital is reinvested to generate further profits. In this manner the capital will serve, in theory, to perpetually provide a source of income for the beneficiaries. In practice, however, it is clear that a limited amount of capital would face considerable risk and would be liable to decrease, if not lost completely. The notion of perpetuity (*ta’bīd*) being a condition *sine qua non* of the *waqf* meant that the cash *waqf* was not even seriously considered as a viable form throughout most of Islamic history. It is not surprising then that its inauguration into the *waqf* landscape was accompanied by significant changes in its *modus*

²⁵ Mandaville, *Usurious Piety*, 291. Mandaville has unfortunately, although self-evidently, mislabelled his graph; the graph of the cash *waqf* has been marked as non-cash, and vice versa. His subsequent discussion, however, makes this patently clear when he discusses their relative quantities. See *ibid*, 292.

²⁶ *Ibid*, 291. The influence of the jurists on social practice was also been noted in Egypt, where one author reports that: ‘It is a fact that shortly after the *fatwā* of the Muftī of the Egyptian Republic was published, the issuance of the number of investment certificates increased by 25%.’ See Dirk Debeaussaert, “Traditionalism and Modernism in Some Recent Interpretations of *Ribā*,” in *Humanisme, Science & Religion*, ed. P. Naster, J. Ries and A. Van Tongerloo (Brussels: The Belgian Society of Oriental Studies, 1993), 147.

operandi which would attempt to alleviate the risks involved and give it a realistic claim to perpetuity.

Two aspects were introduced into the cash *waqf*'s operative procedure; firstly the capital was not given on *muḍāraba* but rather on contracts stipulating a fixed percentage return, and secondly the founding documents often stipulated that the money was not to be given without security, either in the form of a pledge or a reputable guarantor. In the *waqfiyya* of the Sarajevo *madrassa* complex established by Khusraw bek, all of these elements can be seen. It has already been mentioned that the *waqfiyya* stipulated that the cash was to be given out on the basis of an annual return of ten percent. It also states that the money should be invested based upon a robust pledge (*al-rahn al-qawī*) and/or a wealthy guarantor.²⁷ The *waqfiyya* goes one step further and identifies the type of clientele the manager should invest his funds in; traders, artisans, and farmers are specifically mentioned and amongst them, those who are wealthy, trustworthy and well-known for their good dealings are to be preferred. It also proscribes that the cash be given to governors, rulers, *madrassa* teachers, judges, army personnel, tax farmers, corrupt and iniquitous individuals, all government personnel, and anyone who is suspected of fraud and greed from whatever profession they may be.²⁸ Suceko, in his study of the cash *waqfs* of Sarajevo, concludes that the main form of security taken was in the form of personal guarantors as opposed to pledges of real estate, and that loans given without any form of security were a rarity.²⁹

²⁷ al-Arna'ūt, *Waqfiyya Madrasa al-Ghāzī Khusrūbik*, 119.

²⁸ Ibid, 119-20.

²⁹ Avdo Suceko, *Les Credits de Vakoufs a Sarajevo* (Sarajevo: Orijenalni Institut u Sarajevu, 1966). Translated into Arabic as "*Waqf al-Nuqūd fī Sarāyīfū*," in *Dirāsāt fī Waqf al-Nuqūd: Maḥūm Muḡhāyir li-al-ribā fī al-Mujtama' al-'Uthmānī*, co-authored by Mohamed Arnaout, Avdo Suceko and John E. Mandville (Zaghwān, Tunisia: Mu'assasat al-Tamīmī li al-Baḥth al-'Ilmī wa al-Ma'lūmāt, 2001), 53.

Çizakaça, investigating the cash *waqfs* of Bursa over a 268 year time span (1555-1823), examined the longevity of these institutions and found that approximately twenty percent of the cash *waqfs* lasted for more than a century (148 out of 761). A study by Barkan showed that in a period of less than forty years, over seventy one percent of cash *waqfs* had disappeared from the register.³⁰ In order to assess their relative perpetuity however, these results need to be compared with the longevity of real estate *waqfs*. Çizakaça is unable to provide comparative figures, but does suggest that real estate *waqfs* were not as stable as previously assumed; the loss of property rights over long periods of time being the greatest impediment to their existence.³¹ What Çizakaça's research does, however, show is that some degree of success was achieved in achieving perpetuity, which may be attributable to the changes effected in the *modus operandi* of the cash *waqfs*.

The question of perpetuity aside, the main questions relevant to our study are to examine two main aspects of the cash *waqf*; firstly its users, both the clientele and the beneficiaries and secondly its method of revenue generation.

6.3.2 The Cash *Waqf's* Clientele and Beneficiaries

It has already been mentioned that the Balkan *waqf* documents strictly stipulated the target clientele for the money of the *waqf*. An important group amongst them was the merchants. In the Venetian state archives a document has been examined which contains a register of Bosnian merchant debtors owing money to individuals as well as to cash *waqfs*.³² Notably, one of the *waqfs* mentioned as a leading creditor to the merchants is the very same *madrasa*

³⁰ See Kayoko, *The Vakıf Institution in 16th-Century Istanbul*, 100.

³¹ Murat Çizakaça, "Cash *Waqfs* of Bursa, 1555-1823," *Journal of the Economic and Social History of the Orient* 38, no. 3 (1995): 317-20.

³² Suraiya Faruqi, "Bosnian Merchants in the Adriatic," *International Journal of Turkish Studies* 10, no. 1-2 (2004): 226-8.

complex of khusraw bek mentioned earlier.³³ This shows just how well the intentions of the founders and their *waqfiyyas* corresponded to the realia of local social and economic praxis. The economic impact of these *waqfs* in creating a vibrant economy through the extension of credit to merchants was a crucial factor in the growth of the Balkan cities. Suceska notes that the three hundred thousand *dirhams* cash *waqf* of the *madrasa* of Khusraw Bek in the local currency would amount to 1.2 million akçes, representing a staggering amount of available credit to the nascent business community. This *waqf*, he suggests, was tantamount to small bank.³⁴

These results in the Balkans however differ to those observed in the Anatolian city of Bursa. There Çizakaça noted that the magnitude of the loans given was ‘modest’ and that only 0.75 percent of people had taken more than one loan. From these facts he concluded that the borrowers were consumers as opposed to entrepreneurs.³⁵ This was corroborated by his research into the financing of the silk trade where he observed that the silk trade made almost negligible use of the cash *waqfs* as a source of commercial finance.³⁶ The difference between the Balkan and Anatolian practices needs to be explained. Çizakaça suggests that his results may need to be qualified by the findings in the Venetian archives even though his results have been corroborated by a similar study he, himself, mentions of the cash *waqfs* of Istanbul.³⁷

Faroghi, however, proffers an alternative explanation: Knowing that the normative mode of commercial investment finance was the *muḍāraba*, she asserts that due to the inherent dangers

³³ Ibid, 233-4.

³⁴ Suceska, *Waqf al-Nuqūd fī Sarāyīfū*, 41.

³⁵ Murat Çizakaça, *A History of Philanthropic Foundation: The Islamic World from the Seventh Century to the Present* (Istanbul: Boğaziçi University Press, 2000), 48.

³⁶ Murat Çizakaça, “Financing Silk Trade in the Ottoman Empire, 16th-18th Centuries,” in *La Seta in Europa secc. XIII-XX* ed. S Cavaciocchi (Prato: Istituto Internazionale di Storia Economica, 1993), 711-723, cited in *ibid*, 49.

³⁷ Murat Çizakaça, *Ottoman Cash Waqfs Revisited: The Case of the Bursa 1555-1823* (Manchester Foundation for Science and Civilisation, 2004), 18 [article online]; available from <http://www.muslimheritage.com/uploads/cashwaqfs.pdf>; Internet; last accessed 06 May 2010.

of trading with the Venetians in the Adriatic, a model of mutual risk sharing would have meant that private owners of capital would not have been forthcoming:

Therefore Sarajevo traders doing business in Venice seem to have had trouble finding people willing to enter into *mudârabes*, for the latter would have had to sustain the loss in case the capital came to grief through no fault of the travelling partner. Thus traders were reduced to finding the necessary cash under conditions relatively disadvantageous to themselves, and borrow from pious foundations'.³⁸

Faroghi's explanation accords with what other researchers have already shown regarding the vitality of the Islamic forms of partnerships throughout the Ottoman period. There would therefore have been little need for interest based finance in Anatolia, especially when the terms of the *muḍāraba* were in the merchants' favour, as mentioned by Faroghi. In conclusion it can be said, then, that the situation in Anatolia differed from that in the Balkans; in the former money was given for consumption purposes whereas in the latter the funds were targeted for commercial use.

Having discussed the clientele of the cash *waqf*, the main beneficiaries also need to be identified. Many of the *waqfiyyas* clearly stipulate their intended recipients. We have already seen how the first cash *waqf* set up in Edirne was for the purpose of paying three Qur'ân reciters. This was not an uncommon phenomenon and one which reveals the intention behind these *waqfs*.³⁹ In fact in many instances the main beneficiary of the cash *waqfs* was the local mosque, or a school/*madrassa* or a dervish lodge.⁴⁰ In a detailed analysis of the Bursa court records Çizakaça has recorded numerous other recipients, including, inter alia, buying food for the poor, relieving the tax burden, provision of water and other social services. Çizakaça

³⁸ Faroghi, *Bosnian Merchants*, 238-9.

³⁹ Čar-drnda, *Mostar: A Legacy of Islamic Culture*, 183.

⁴⁰ Özcan, *The Role of the Cash Foundations*, 199. One recipient was paid to recite the Mathnavi of Rûmî!

asserts that ‘it goes without saying that the entire cash *waqf* institution had a religious significance.’⁴¹

The question that this raises is what was the need for the cash *waqf* and what distinct purpose did it serve. Faroqhi has attempted to explain the growth and popularity of the cash *waqf* in Istanbul by the fact that within the city walls there would have been little real estate available for those wishing to make a pious endowment. She substantiates this by noting that the women of Istanbul formed a sizeable percentage of those making *waqfs*, while they would have had relatively less real estate than their male counterparts and hence they turned instead to endowing cash, jewellery or other movables.⁴² This is confirmed in a study by Baer in which he has shown that in the city of Edirne one third of all the cash *waqfs* were endowed by women.⁴³ The relevant point to note, however, is the pious motives of the founders; those unable to endow property for charitable causes turned instead to movables, cash, jewellery, books etc.⁴⁴ A good example of such pietist motivations is the cash *waqfs* established by two sufi women with considerable capital to support Naqshbandī sufi lodges.⁴⁵

But what is most striking about these cash *waqfs* is the point noted by Suceca that the income of these *waqfs* was never added to the capital base in order to expand it.⁴⁶ This meant that these charitable foundations maintained their religious identities over and above their functions as providers of credit. This contrasts sharply with the European analogue of the cash *waqf* known as the *Monte di Pietà*.

⁴¹ Murat Çizakça, “Changing Values and the Contribution of the Cash Endowments (*Awqâf al-Nuqûd*) to the Social Life in Ottoman Bursa, 1585-1823,” in *Le Waqf dans le Monde Musulman Contemporain (XIX^e-XX^e Siècles)*, ed. Faruk Bilici (Istanbul: Institut Français d’Etudes Anatoliennes, 1994), 69.

⁴² Faroqhi, *Bosnian Merchants*, 229-30.

⁴³ Baer, *Women and Waqf*, 12-13.

⁴⁴ *Ibid.*

⁴⁵ Dina Le Gall, *A Culture of Sufism: Naqshbandīs in Ottoman World 1450–1700* (New York: SUNY Press, 2005), 62.

⁴⁶ Suceca, *Waqf al-Nuqûd fî Sarāyîfû*, 53.

6.3.3 The Cash *Waqf* and the *Monte di Pietà*

The *monte di pietà* have been described as ‘charitable civic pawnshops offering loans against pawns at low interest rates’.⁴⁷ Franciscan friars had proposed the setting up of these institutions as a way of curbing the usurious practices of the Jews. The first *monte di pietà* was established in Perugia in 1462, only shortly after the first cash *waqf*.⁴⁸ There are important differences between the system of charitable foundations found in Christianity and the system of *awqāf* of the Muslims, which are ultimately traceable to their respective theologies.⁴⁹ What is of concern here is how the development of this institution differed markedly from that of the cash *waqf*.

The cash *waqf* was essentially the philanthropic gesture of an individual, it did not seek to provide a specific service to society, but rather blended into the general system of *waqfs*. Additionally, the cash *waqf* did not seek to expand its capital nor did it attempt to co-ordinate its creditor activities with other cash *waqfs* to provide large amounts of credit for commercial requirements. Most critically though the cash *waqf*, being the act of an individual, was restricted to the endowed capital it began with. The *monte di pietà* differed in a number of ways to the cash *waqf*; firstly, the act of endowment was not that of an individual but an act of the commune; a collective act by the corporative medieval Italian city state. The capital which formed the basis of the *monte di pietà* was sourced from public and charitable sources, in some cases the Jews were ordered to provide interest free loans to enable the establishment of

⁴⁷ Carol Bresnahan Menning, “The Monte’s ‘Monte’: The Early Supporters of Florence’s Monte di Pietà,” *The Sixteenth Century Journal* 23, no. 4 (1992): 661.

⁴⁸ Ariel Toaff, “Jews Franciscans, and the First *Monti di Pietà* in Italy (1462–1500),” in *Friars and Jews in the Middle Ages and Renaissance*, ed. Steven J. Michael and Susan E. Myers (Leiden: Brill, 2004), 239. Çizakaça mentions a German institution which emerged in 1388 and which incorporated a cash endowment. As such it preceded both institutions discussed here and may have been similar to them or even a possible precursor. See Murat Çizakaça, “Awqaf in History and its Implications for Modern Islamic Economies,” *Islamic Economic Studies* 6, no. 1 (1998): 53.

⁴⁹ See William R. Jones, “Pious Endowments in Medieval Christianity and Islam,” *Diogenes* 109 (1980): 23–36; P. W. Duff, “The Charitable Foundations of Byzantium,” in *Cambridge Legal Essays: Written in Honour of and Presented to Doctor Bond, Professor Buckland and Professor Kenny* (Cambridge: W. Heffer & Sons Ltd, 1926), 83–99.

a *monte*.⁵⁰ The *monte* also differed in that it loaned out money on a moderate interest rate, as opposed to the *hiyal* employed by the cash *waqf*. Church legislation in the Fourth Lateran Council of 1215 had been moving towards defining a moderate permissible rate of interest as opposed to an excessive rate.⁵¹ Effectively, this institution was to provide loans at interest in medieval Christian societies which had hitherto been completely anathema.

The *monte* spread rapidly throughout Italy perhaps due to its receiving successive papal approval.⁵² Its popularity meant that the limited funds provided in its initial set up were insufficient and in the mid sixteenth century it was permitted to accept deposits and pay interest to those depositors.⁵³ This was a huge step forward in the financial landscape of medieval Europe; the *monte* was an institution which was taking deposits and paying interest to the deposit holders and then giving out the funds on interest bearing loans at a higher rate. Critically, the *monte* was at this time lending to businessmen and not only to the poor as originally envisaged.⁵⁴ Discussing the role of the *monte* vis-à-vis the Church's usury doctrine Noonan writes that:

The acceptance of charitable lending institutions leads to the acceptance of noncharitable lending institutions ... In this way, by the acceptance of the *mons pietatis*, professional lending becomes

⁵⁰ Toaff, *Jews, Franciscans, and the First Monti*, 241.

⁵¹ Charles Dalli, "Beyond Charity: The Evolution of Credit as Charity in Malta, 1400-1800," in *Prestare ai poveri. Il Credito su Pegno e i Monti Di Pietà in Area Mediterranea (Secoli XV-XIX)*, ed. Paulo Avallone (Napoli: Consiglio Nazionale delle Ricerche, Istituto di Studi sulle Società del Mediterraneo, 2007), 203.

⁵² John T. Noonan, Jr., *The Scholastic Analysis of Usury* (Cambridge MS.: HUP, 1957), 295.

⁵³ 'In June 1533 the Senate of Forty-Eight, seeking a way to help the monte di pietà recover its financial stability, passed a law allowing the monte to accept deposits on which it would pay interest of 5 percent. ... Although the implementation of this change was delayed, its eventual impact on the monte di pietà was revolutionary. ... [T]he plan to attract capital by paying interest on deposits worked. By the time the account books for the years 1542-45 closed, deposits at interest had begun to flood into the institution.' See Carol Bresnahan Menning, *Charity and State in Late Renaissance Italy: The Monte Di Pietà of Florence* (Ithaca NY: Cornell University Press, 1993), 140-42; idem, *The Monte's 'Monte'*, 672; Noonan, *The Scholastic Analysis of Usury*, 303.

⁵⁴ In the words of Henri Pirenne 'Originally charitable institutions, they have at length become simple credit institutions'. Quoted in Madeleine Ferrière, "The "Mont de Piété" of Avignon: From Charitable Credit to Popular Credit (1610-1790)," in *Prestare ai poveri* ed. Avallone, 167.

accepted... While formally maintaining the usury prohibition, they seem to have left no limit to the possible gain on a loan licit in practice'.⁵⁵

The *monte* was remarkably similar in some of its functions to a modern Bank and indeed has been posited as its medieval precursor.⁵⁶

Many authors have questioned why the cash *waqf* did not follow the evolutionary trajectory of the *monte* and lead to the development of an indigenous Muslim bank.⁵⁷ There appear to be two critical points of difference between the two institutions; the first relates to its juridical structure, the *monte* had a corporate structure, a juridical personality of its own, whereas the cash *waqf* was bound by its founding document and did not have a legal personality independent of the *waqfiyya*. The second major difference relates to the Church's sanctioning of a lower interest rate.⁵⁸ This point however needs to be examined further as the widespread use of the *hiyal* with the cash *waqf* caused many observers to think that interest was a normative aspect of the Ottoman Economy.

6.3.4 The Cash *Waqf* and the *Hiyal*

The issue which needs to be examined now is how the capital of the cash *waqf* was invested. It has already been mentioned that Zufar had originally envisioned that the capital should be invested in *muḍāraba* contracts. This prescription, as we shall see, was not the model adopted in the Ottoman Empire. al-Arna'ūt presents the stipulations of twenty three *waqfiyyas* from the Balkan cash *waqfs*; of these eighteen specify the rate of return on the capital according to

⁵⁵ Noonan, *The Scholastic Analysis of Usury*, 309-10.

⁵⁶ 'Many Scholars have seen the importance of Italian Monti di Pietà as lying in their role as the forerunners of modern banks, bridging the gap between the medieval moneychanger and the modern full-service bank.' See Menning, *The Monte's 'Monte'*, 661; idem, *Charity and State*, 7-8, 86-87, 258-60; Noonan, *The Scholastic Analysis of Usury*, 305.

⁵⁷ Timur Kuran, "The Provision of Public Goods under Islamic Law: Origins Impact, and Limitations of the Waqf System," *Law and Society Review* 35, no. 4 (2001): 874-5.

⁵⁸ Murat Çizakça, "Cross-Cultural Borrowing and Comparative Evolution of Institutions between Islamic World and the West," p.10, [article online]; available from <http://www.mcizakca.com/publications.htm>, Internet; last accessed 06 May 2010.

which it must be invested. Twelve of these stipulate a ten percent return and the remainder oscillate between eleven and fifteen percent.⁵⁹ Çizakaça investigated the possibility that these stipulations were for contracts of *muḍāraba* without a guaranteed fixed rate of return on the capital. His results however showed that the return on the vast majority (1559 out of 1663) of the cash *waqfs* was between nine and twelve percent. From this he concluded that ‘although the financial instruments utilized by the cash *waqfs* were considered to be legal and approved by the courts, these constant ratios strongly suggest that an economic interest prevailed’.⁶⁰ By economic interest Çizakaça attempts to separate it from judicial interest, the former being through methods i.e. *hiyal* approved by the jurists, with the latter representing overt usurious contracts. Suceska’s work on the cash *waqfs* of Sarajevo also reveals that the returns on the capital were extremely constant and thus indicative of the use of *hiyal* under the rubric of *mu‘āmala shar‘iyya*, as opposed to *muḍāraba*.⁶¹

We have already discussed the meaning of the term *mu‘āmala* in the previous chapter and how it is used in a general sense to refer to the *hiyal* used to circumvent the *ribā* prohibition and more specifically to refer to a ‘sale with a loan’. The ambiguous nature of this term was a crucial aspect of its juridical utility. In the context of the cash *waqf* the *hiyal* which predominated were the *bay‘ al-wafā‘*, *bay‘ al-istighlāl* and ‘sale with a loan’.⁶² The *bay‘ al-istighlāl* differs from the *bay‘ al-wafā‘* in that in the latter the property is purchased and the buyer benefits from it until the debt is repaid, whereas in the former the purchaser leases the property back to the original owner and the rent he receives represents his profit.⁶³ The ‘sale with a loan’ was also used extensively; the court records show that loans given by the cash

⁵⁹ al-Arna’ūt, *Taṭawwur Waqf al-Nuqūd fī Bilād al-Balqān*, 40-48.

⁶⁰ Çizakaça, *Cash Waqfs of Bursa*, 325-331.

⁶¹ Suceska, *Waqf al-Nuqūd fī Sarāyīfū*, 42-45.

⁶² Suceska, *Waqf al-Nuqūd fī Sarāyīfū*, 55-63.

⁶³ Ibid; 55; Foster, *The Islamic Law of Real Security*, 147-48; Haim Gerber, *Economy and Society in an Ottoman City: Bursa, 1600-1700* (Jerusalem: The Hebrew University, 1988), 128-9.

waqfs were accompanied by sales of nominal items, such as wool, cloth or honey. These clearly do not equate in pecuniary value to the amount added to the debt, although more crucially, they do represent a fraction of the loan, which is generally ten percent.⁶⁴ A loan, for example, of 3600 is accompanied by a sale of honey at a cost of 360.⁶⁵ In another case a loan of 5333 is made together with the sale of cloth for 667, i.e. eight percent of the total.⁶⁶

From the abundant documentary record, it is evident that the use of these *hiyal* was the norm for investing the capital of the Ottoman cash *waqfs*. What, then, was the response of the Ottoman jurists to this phenomenon and how did they view the increasing popularity of the cash *waqf*. In the middle of the sixteenth century, as these *waqfs* were spreading through the Balkans and subsequently in to Anatolia, a controversy erupted among the Ottoman jurists which brought into question the very validity of the cash *waqfs*.

6.3.5 The Cash *Waqf* as a Novel Institution

The cash *waqf* controversy is instructive in a number of ways. Firstly, the cash *waqf* was a novel institution in the history of Islamic philanthropy; its treatment demanded from the scholars a very critical response and what has been seen by some as an act of *ijtihād*.⁶⁷ The polemic is therefore a witness to the reaction of the jurists to the twin concerns of religious morality and social exigency. Secondly, the polemic also reveals the view of the Ottoman jurists regarding the *modus operandi* of the cash *waqf* and their views regarding the *hiyal* and its actual practice. Our presentation will focus on these two aspects; we will note how the jurists integrated the cash *waqf* into the existing juridical framework and the debate which this

⁶⁴ Suceska, *Waqf al-Nuqūd fī Sarāyīfū*, 58-63; Gerber, *Economy and Society*, 129-30.

⁶⁵ Ibid, 58, document 1.

⁶⁶ Ibid, 58, document 2.

⁶⁷ Hallaq presented the cash *waqf* controversy as an example of *ijtihād*, in which the jurists employed legal reasoning based upon both scripture and analogy. See Wael B. Hallaq, "Was the Gate of Ijtihad Closed?" *International Journal of Middle East Studies* 16, no. 1 (1984): 31.

generated, and their reaction to, and understanding of, the *hiyal*. The controversy of the cash *waqf* will show us how the jurists built their respective arguments and how they understood their historic role in the development of the School's doctrine.

6.3.6 The Cash *Waqf* Controversy

Mandaville, in his seminal article on the cash *waqf* controversy, informs us that sometime between 1545 and 1547 a legal ruling was issued by the Military Judge (*qāḍī'asker*) of Rumeli, Çivizade, declaring that the practice of the cash *waqf* was illegal.⁶⁸ Çivizade later suffered an unprecedented dismissal from the post of shaykh al-Islām, which led some to believe that it was his stance against the cash *waqf* which was responsible for his downfall.⁶⁹ This assertion, however, has been rejected although his influence on the cash *waqf* is recorded. In the graph presented by Mandaville there is a correlation between his time in office, his dismissal and his later *fatwā* to the number of cash *waqfs* established in Istanbul. During his period of office there appears to have been a decline in the number of cash *waqfs* established, whereas in 1543, two years after Çivizade's dismissal, a sudden rise is observed. With the issuing of his opposing *fatwā* as military justice of Rumeli, the numbers of cash *waqf* again decline.

Following his dismissal, Çivizade retired from issuing rulings and returned to an academic post in one of the prestigious *madrasas* of Istanbul. His retirement was, however, short-lived

⁶⁸ Mandaville, *Usurious Piety*, 297.

⁶⁹ Pixley had argued that it was Çivizade's opposition to the cash *waqf* which had led to his dismissal. Mandaville, however, questioned Pixley's assertion and argued that Çivizade's dismissal was for other reasons. This was corroborated by Repp, who citing Çivizade's contemporary historian Lutfi Paşa, attributed his dismissal to a position the shaykh al-Islām took in a matter of ritual purification. Other authors have suggested that although his dismissal may have been occasioned by a specific juristic opinion he held, it may also have been influenced by his antagonistic views on the sufi Ibn 'Arabī. See Michael M. Pixley, "The Development and Role of the Şeyhülislam in Early Ottoman History," *Journal of the American Oriental Society* 96, no. 1 (1976): 94; Mandaville, *Usurious Piety*, 297, n. 30; Richard C. Repp, "Qānūn and Sharī'a in the Ottoman Context," in *Islamic Law: Social and Historical Contexts*, ed. Aziz al-Azmeh (London: Routledge, 1988), 135-6; Has, *A Study of Ibrāhīm al-Ḥalabī*, 103-6.

and not long after, in 1545, he returned to the judiciary as the Military Judge of Rumeli.⁷⁰ In the Balkans the cash *waqf* was far more prominent than in Anatolia, and it was here that Çivizade would issue his *fatwā* declaring the cash *waqf* an illicit practice. Sulayman the great, the contemporary Ottoman sultan, agreed with his ruling and give a decree banning it.⁷¹ This was despite the fact that the incumbent shaykh al-Islam Abū al-Sa‘ūd had not only given a *fatwā* permitting it, but had also composed a lengthy treatise defending the practice and demonstrating its legal validity in the Ḥanafī School.⁷² In response to Abū al-Sa‘ūd’s treatise, Çivizade wrote a response in Turkish, questioning the jurisprudential basis of Abū al-Sa‘ūd’s arguments. Çivizade, however, died shortly afterwards in 1547 just as the controversy was heating up and in 1548 the Ottoman sultan reversed his decision and permitted the cash *waqf* once again.⁷³

The sultan, in overturning his decree, may have been influenced by the letters of Bali Efendi, a sufi of the Khalwatī order. Bali Efendi wrote a number of letters directly to Sultan Sulayman urging him to reverse his decision. His arguments are critical in understanding the nature of the controversy. Bali Efendi was based in Sofia and was well aware of the role the cash *waqfs* had played in urbanizing the Balkan Peninsula and it was from this vantage point that he laid out his objections to the prohibition:

Since the conquest of Rumeli, for nearly three hundred years, it has been practiced, by order of the padişahs and the general agreement of the scholars. ... I plead to my padişah; let an order be given that will cut through the doubts. This waqf supports the activities of the Friday services. If it were lost Friday would have no direction, the preacher and the prayer caller would be lost. Friday prayers would be abandoned.⁷⁴

⁷⁰ See his biographical entry in Tāshkubrāzāda, *al-Shaqā’iq al-Nu‘māniyya fī ‘Ulamā’ al-Dawla al-‘Uthmāniyya* (Beirut: Dār al-kitāb al-‘Arabī, 1975), 265-66; Repp, *Qānūn and Sharī‘a*, 139.

⁷¹ Colin Imber, *Ebu’s-su‘ud: The Islamic Legal Tradition* (Stanford: Stanford University Press, 1997), 144.

⁷² Mandaville, *Usurious Piety*, 298.

⁷³ Imber, *Ebu’s-su‘ud*, 144.

⁷⁴ Cited in Mandaville, *Usurious Piety*, 301-2.

Bali Effendi's arguments were not merely with regard to the role the cash *waqfs* had played in the Balkans but more critically, with the consequences of the sultan's decree prohibiting them:

Faithful brothers! Certain hospice complexes (*'imaretler*) in Rumeli, certain schools and most of the mosques there are based on the cash waqf. It was decided that they all be horse stables, and it won't be easy to rebuild them. The watercourses of the cities and towns are all cash waqf based. It has been decided to dry them up. For long, new mosques, hospices, schools, and other good works have been built; now few are started. In how many places have the people given up the everyday practice of religion!⁷⁵

Çivizade had been the Military Judge of Rumeli for only a short period when he issued his verdict against the cash *waqfs*. His previous appointment had been as the Military Judge of Anatolia where the cash *waqf* had not played, and did not play, such a crucial role and as a result he may well have been unfamiliar with the importance of the cash *waqf* in Balkan society. Bali Efendi thus pressed his vantage point 'Ah if Çivizade Efendi had known how Islam was settled in Rumeli, then he would have known whether or not cash waqfs were wrong!'⁷⁶ Bali Efendi's letters were not strict juridical arguments but rather an appeal to the sultan to maintain the status quo, which had proved to be successful up to that time. In his letters he admits that he speaks not through 'analogy or individual reason' but rather through the 'sense of the sharī'a', asserting that the divine law had no other purpose than to grant ease from the exigencies of the time.⁷⁷

The Sultan, in his subsequent decree, supports his reversal by mentioning that a number of previous and incumbent Military Judges, together with the incumbent Shaykh al-Islam Abū al-Sa'ūd and a number of other leading jurists had all united in their opposition to Çivizade. He thus ruled that: 'In matters such as this, there is no harm in acting on the basis of a weak

⁷⁵ Ibid, 302-3.

⁷⁶ Ibid, 304.

⁷⁷ Ibid, 302.

authority'.⁷⁸ Çivizade did not, however, respond to these developments as he had passed away before the subsequent decree was issued and it appeared that the controversy, without its central figure, would now abate. This, however, was not to be the case as Muḥammad al-Birgivī would take up the challenge and over a period of twenty years would compose no less than five treatises arguing against the legality of the cash *waqfs*.⁷⁹ al-Birgivī was a skilful jurist and easily capable of matching the arguments adduced by Abū al-Saʿūd in his earlier treatise and it is to these jurisprudential arguments that we will now turn.

6.3.7 The Legal Debate

There are two aspects to the legal debate regarding the cash *waqf*; the first relates to its legality as an institution and the second to its *modus operandi*. The first issue is thus a discussion of the soundness (*ṣiḥḥa*) and irrevocability (*luzūm*) of the cash *waqf*, and the second relates to the use of the *muʿāmalā* contract to generate its profit. Both aspects of the debate will be presented below.

6.3.7.1 The Legality of the Cash *Waqf*

It was mentioned earlier that a *waqf* of movables were generally not permitted and that Abū Yūsuf and al-Shaybānī had allowed exceptions to this rule. The former had limited those exceptions to those mentioned either in traditions or to movables that served as adjuncts to larger immovable *waqfs*. al-Shaybānī in addition to these exceptions also permitted cases where there existed an established practice amongst people (*taʿāmul al-nās*) for endowing specific items. This concept of referring to *taʿāmul* was crucial to the protagonists of the cash

⁷⁸ Repp, *Qānūn and Sharīʿa*, 140. For the adoption of other weaker opinions, see Rudolph Peters, "What does it mean to be an Official Madhhab? Hanafism and the Ottoman Empire," in *The Islamic School of Law*, 151-54; Uriel Heyd, "Some Aspects of the Ottoman Fetvā," *Bulletin of the School of Oriental and African Studies* 32, no. 1 (1969): 56.

⁷⁹ Mandaville, *Usurious Piety*, 305.

waqf.⁸⁰ It should also be recalled that apart from these two authorities, there is an opinion attributed to Zufar which explicitly permits the cash *waqf*. Zufar was one of the leading jurists in the circle of Abū Ḥanīfa and his opinion was certainly held in high esteem, although not on a par with the opinions of Abū Yūsuf and al-Shaybānī.⁸¹ In justifying the cash *waqf*, the Ottoman jurists would thus use a two-pronged approach: The opinion of Zufar would be cited due its explicit sanction of the cash *waqf*, but in recognition of his lower ranking in the epistemic hierarchy they would also use the opinion of al-Shaybānī and argue that endowing cash was a widespread phenomenon in the Ottoman lands and thus constituted an instance of *ta'āmul al-nās*.

Mullā Khusraw, a renowned Ottoman jurist and Shaykh al-Islām between 1472-3 and 1480,⁸² authored an important textbook of Ḥanafī jurisprudence known as the *Durar al-Ḥukkam*; a commentary on his earlier *Ghurur al-Aḥkām*. In this work Mullā Khusraw dealt with the cash *waqf* although not in detail and limited himself to the two arguments mentioned above, i.e. the opinion of Zufar and al-Shaybānī's concept of *ta'āmul*.⁸³ Later on, Mullā Khusraw's student Akhīzāda also gave the same summary justification for the cash *waqf*.⁸⁴ This was, in fact, the standard treatment of the cash *waqf* by the Ottoman jurists and signalled their approval of the

⁸⁰ The Ottoman's had also used *ta'āmul* to justify the *waqf* of ships, see Eugenia Kermeli, "Vakfs Consisting of Shares in Ships: *Hüccets* from the Saint John the Theologos Monastery on Patmos," in *The Kapudan Pasha: His Office and his Domain*, ed. Elizabeth Zachariadou (Rethymnon, Crete: Crete University Press, 2002), 218-20: Haim Gerber, "The Waqf Institution in Early Ottoman Edirne," *Asian and African Studies* 17 (1983): 35-6.

⁸¹ Muḥammad Amīn ibn 'Ābidīn, "Sharḥ al-Manẓūma al-Musammā bi-'Uqūd Rasm al-Muftī," in idem, *Majmū'a Rasā'il Ibn 'Ābidīn* (Beirut: Iḥyā' al-Turāth al-'Arabī, nd.), 25-26. Also see Brannon M. Wheeler, *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Ḥanafī Scholarship* (New York: SUNY Press, 1996), 141-145.

⁸² Mandaville has given the duration of his tenure as 1460-1480 (in *Usurious Piety*, 295). Initially, however, Mullā Khusraw served as a judge and not as the jurisconsult of Istanbul, it was only after his return to Istanbul that he was appointed to the post of Muftī. See Ṭāshkubrāzāda, *al-Shaqā'iq*, 70-72; A. Kevin Reinhart, "Mollā Ḥüsrev: Ottoman Jurist and *usūlī*," in *Studies in Islamic Law: A Festschrift for Colin Imber*, ed. Andreas Christmann and Robert Gleave. (Oxford: Oxford University Press, 2007, Journal of Semitic Studies Supplement 23), 250-51.

⁸³ Mandaville, *Usurious Piety*, 295-96.

⁸⁴ Ibid, 296.

practice. With the onset of the polemic, however, the argument would become far more detailed.

6.3.7.1.1 Çivizade's Attack on the Cash *Waqf*

With the onset of the polemic these two arguments were directly attacked. Çivizade rejected that cash came under the rubric of movables (*manqūl*) such that *ta'āmul* could even apply to it. al-Shaybānī's granting an exception based upon *ta'āmul* was for movables, and money was not including under the rubric of movables.⁸⁵ With regards to Zufar's opinion, two points were adduced to oppose it; first was the evident fact of Zufar being a lower ranking authority and hence his opinion was not to be taken when the other authorities had expressly limited the scope of the *waqf* of movables, and second, as mentioned earlier, Zufar, like Abū Ḥanafī, did not regard the *waqf* as binding, and hence, even if Zufar's opinion was taken, it would only permit a non-binding cash *waqf* and not a perpetual one, as was the contemporary practice.⁸⁶

This last point by Çivizade was important in that it essentially charged the opinion permitting the cash *waqf* of being an amalgam of inharmonious opinions. The authority (Zufar) who permitted the cash *waqf* did not regard the *waqf* as binding, whereas the authorities (Abū Yūsuf and al-Shaybānī) who regarded the *waqf* as binding had opposed the cash *waqf*. This lead to the charge of *talfīq*, which implied that the practice of a binding cash *waqf* was an eclectic composite which did not accord, in its entirety, with the opinion of any single authority. The charge of *talfīq* was not merely an academic point in the juristic polemic it was more crucially linked to the everyday practice of the cash *waqf*.

⁸⁵ Ibid, 300-301.

⁸⁶ Ibid; Repp, *Qānūn and Sharī'a*, 139.

Previously it was mentioned that Abū Ḥanīfa allowed a *waqf* to be established in perpetuity if an individual judge confirmed it as such. This meant that in order for an endower to ensure that his *waqf* could not be challenged later by someone using Abū Ḥanīfa's opinion of *waqfs* being non-binding, the endower should have someone legally challenge him in regard to the *waqf*. The *waqf* will then be raised to a judge who would rule according to Abū Yūsuf and al-Shaybānī's opinion, thus settling the matter once and for all. This method was part of both the jurists' own formulas and the judicial reality.⁸⁷ What underpinned this method was the notion that in areas of *ijtihād* a judge had the right to take a position from the various different opinions and give judgment accordingly.

In the case of the cash *waqf* the practice involved two judgments; the first was to rule in favour of its soundness based upon the opinion of Zufar and secondly, to rule that it was binding according to the opinion of Abū Yūsuf and al-Shaybānī. The problem with this process is that the judge, as opposed to giving a single judgment based upon a specific position of an earlier authority, was in this instance taking opinions from both sides and combining them to give a result which neither side fully endorsed. According to the theory of juristic hierarchies this would require the judge to be a *mujtahid* such that the composite would not be viewed as an act of *talfīq*, but rather as an expression of his own creative opinion. The protagonists of the cash *waqf*, however, wanted to avoid the idea that the novel institution was a product of their own juristic exertion, they preferred, rather, to present it as a manifestation of a widespread regional practice.

⁸⁷ See Isogai Ken'ichi, "A Commentary on the Closing Formula Found in the Central Asian Waqf Documents," in *Persian Documents: Social History of Iran and Turan in the fifteenth and nineteenth centuries*, ed. Kondo Nobuaki (London: RoutledgeCurzon, 2003), 3-10.

6.3.7.1.2 Abū Sa‘ūd’s Defence

Abū al-Sa‘ūd begins his treatise by laying down the Ḥanafī doctrine of the *waqf* of movables and then moves on directly to the issue of the cash *waqf*.⁸⁸ It is clear from the outset that he intends to take the position of al-Shaybānī which permits a *waqf* of movables subject to *ta‘āmul*. Firstly, he quotes some authoritative texts from the Ḥanafī School which permitted the cash *waqf* outright without mentioning the condition of *ta‘āmul*.⁸⁹ He commends, however, that these opinions be interpreted in light of al-Shaybānī’s principle of *ta‘āmul* while also acknowledging that outright permissibility has been attributed to Zufar.⁹⁰ He then mentions that al-Bukhārī narrates an opinion from the Successor jurist Ibn Shihāb al-Zuhrī in which he permits the cash *waqf*. After this short introduction he asserts that the clearest way forward is to take the opinion of al-Shaybānī in order to facilitate the process of creating the *waqfs* for the judges and to make their recording and governing straightforward.⁹¹

It is clear that Abū al-Sa‘ūd wants to avoid the charge of *talfīq* and hence steers clear of invoking Zufar’s opinion as an authoritative source. In the ensuing pages he goes on to show how the opinion of al-Shaybānī has held sway throughout the Ḥanafī juristic tradition and how it has been applied in disparate regions. His purpose is thus two-fold: To present al-Shaybānī’s doctrine as the dominant opinion in the major Ḥanafī legal texts and secondly, to demonstrate how *ta‘āmul*, as a critical factor, was invoked in disparate regions to justify the *waqf* of various movables.⁹² He also attempts to show that the term ‘movables’ is a general term encompassing all items without restriction. His purpose is to subsume cash under the category of movables and show that this is an acceptable interpretation of al-Shaybānī’s

⁸⁸ Abū al-Sa‘ūd Muḥammad ibn Muḥammad ibn Muṣṭafā al-‘Imādī, *Risāla fī Jawāz Waqf al-Nuqūd*, ed. Abū al-Ashbāl Ṣaghīr Aḥmad Shāghif (Beirut: Dār Ibn Ḥazm, 1997), 17-19.

⁸⁹ Ibid, 19-20. He refers to the *al-Fatāwā al-Bazzāziyya* and the *Fatāwā al-Qunya*.

⁹⁰ Ibid, 20.

⁹¹ Ibid, 22.

⁹² Ibid, 25-29.

doctrine. To do this he quotes various rulings from the *fatāwā* literature which show the jurists using the word movables to refer to cash or employing the latter as an example of the former.⁹³

More critical, however, is his attempt to show that there is no meaningful difference between cash and other movables. The contention he faces here is that the *waqf* is understood to be the sequestration of an essence and the donation of its accruing benefits.⁹⁴ In a cash *waqf*, the essence of the *waqf* itself must be employed in order to realise any benefits, which means that a cash *waqf* has no corporal existence. Abū al-Sa‘ūd, demonstrates his juristic capabilities here, and dives into the Ḥanafī legal tradition to show how the capital of the cash *waqf* may be considered a perpetual essence. In our earlier presentation of *ribā* it was noted that the Ḥanafīs took the view that a monetary loan is designated theoretically, as a return *in specie* although in reality it is a debt. This fact is used by Abū al-Sa‘ūd to argue that although the capital of a cash *waqf* is used *in specie*, it could also be regarded as being returned *in specie*, and theoretically speaking, the specific capital of the *waqf* acquires a perpetuity.⁹⁵

The next problem Abū al-Sa‘ūd has to contend with is the fact that many of the Ḥanafī legal texts explicitly prohibit the cash *waqf* with some going so far as to claim a consensus of the jurists in this regard.⁹⁶ Abū al-Sa‘ūd, however, is unperturbed and maintains his stance by interpreting this merely as a ruling given in the absence of an established practice. For Abū al-Sa‘ūd, al-Shaybānī’s principle takes precedence in interpreting the jurists’ rulings. He justifies

⁹³ Ibid, 29-30.

⁹⁴ *Habs al-aṣl wa al-taṣadduq bi al-manfa‘a*.

⁹⁵ Ibid, 30-31.

⁹⁶ Ibid, 33-4.

this by asserting that similar absolute rulings were previously given regarding the *waqf* of animals, only to be later qualified by *ta'āmul*.⁹⁷

Abū al-Sa'ūd then sets out to answer the argument that the *ta'āmul* which sanctions a departure from analogy is that which is recognised by a master jurist, a *mujtahid*. He, therefore, clarifies that *ta'āmul* itself 'is a perceptible phenomenon in which there is no doubt regarding its existence nor does anyone waver in recognising it and [thus] it is not dependant upon the opinion and acceptance of a *mujtahid*.'⁹⁸ It is he surmises: 'The agreement of the majority and their concurrence in relation to a specific practice.'⁹⁹ Abū al-Sa'ūd does not want to claim that his opinion is an act of *ijtihād* or that he is a *mujtahid* and hence his attempt to argue that the opinion he is defending contains no novelty in terms of its legal structure, but only in so far as it is a reflection of an established regional practice which deserves to be recognised by the Sharī'a.

Having spent a good portion of his treatise establishing the legality of the cash *waqf* based upon *ta'āmul*, Abū al-Sa'ūd then turns to the other vital issue of irrevocability (*luzūm*). Having argued for al-Shaybānī's opinion as the basis for legality Abū al-Sa'ūd has avoided the charge of *talfīq*, as al-Shaybānī together with Abū Yūsuf both ruled that a *waqf* would be binding immediately upon its legal formation. To avoid the difference of opinion within the School, Abū al-Sa'ūd suggests that the endower raise the case to a judge who can then give a verdict using the opinion of al-Shaybānī. In this way the issue of those who oppose the soundness of the cash *waqf* and its irrevocability will be settled.¹⁰⁰

⁹⁷ Ibid, 35-37.

⁹⁸ Ibid, 43.

⁹⁹ 'al-Ta'āruf 'ibāra 'an ittifāq al-jamhūr wa iṣṭilāḥihim 'alā ta'āfī amr min al-umūr'. Abū al-Sa'ūd uses the word *ta'āruf* as a synonym for *ta'āmul*. See ibid, 45.

¹⁰⁰ Ibid, 50.

Although Abū al-Sa‘ūd’s opinion makes good sense and would facilitate the process of making a cash *waqf*, it must be recalled that although he was the chief jurisconsult, his opinion was nothing more than that. Judges were free to take any opinion they preferred and were not bound by the preferences of the incumbent muftī. The Sultan, himself, when issuing his decree also mentioned the permissibility of using the opinion of Zufar when the situation demanded. Judges of the empire had both historically and contemporarily used the opinion of Zufar and would indeed continue to do so.¹⁰¹ The challenge for Abū al-Sa‘ūd was thus, not only to proffer his own legal solutions, but also to account for the past and contemporary practice of the Ottoman judiciary. He thus sets out to show how the cash *waqf* can be made binding using the opinion of Zufar. The procedure is the same as before, in that it is raised to the judge who gives a verdict making it legally valid. Once the verdict that it is valid has been issued, it is raised again to the judge by the endower challenging the manager over its irrevocability. The judge then rules according to the opinion of Abū Yūsuf and al-Shaybānī and it becomes binding.¹⁰²

Abū al-Sa‘ūd is not unaware of the charge of *talfīq* and sets out the contention in that regard. As mentioned earlier, the main problem is that the judge is combining two opinions which are incongruous to each other. Abū al-Sa‘ūd avoids this charge by claiming that the judge does not combine two opposing opinions, but rather, that he issues two consecutive verdicts which are separate and unrelated. His main argument is that when the judge makes his verdict of validity according to the opinion of Zufar, the legality it effects is one which is accepted by all.¹⁰³ This is due to the principle that the judge’s verdict creates a legal fact (*res judicata*). This fact is then accepted as so and becomes the basis for legal effects. Abū al-Sa‘ūd argues that when the second verdict according to the opinion of Abū Yūsuf and al-Shaybānī is given,

¹⁰¹ ‘Abd al-Ḥalīm, *Ḥāshiyat al-Durar ‘alā al-Ghurar* (Istanbul: Dar Sa‘ādat, 1311 AH), vol. 1, 433-4.

¹⁰² Ibid, 50-52.

¹⁰³ Ibid, 54.

it is on the basis of the *waqf*'s legality established through the judge's ruling and not the opinion of Zufar.¹⁰⁴ The resulting composite is thus not between the opinion of Zufar and the opinion of Abū Yūsuf and al-Shaybānī, but rather between the latter two and the legal fact created by the judge.

Throughout Abu al-Sa'ūd's treatise one can see that he presents his arguments, not as a *mujtahid* setting forth a new doctrine, but rather, as a jurist clarifying the meanings found in earlier authoritative works and working them into a coherent framework which ultimately embraces the novel institution he is seeking to defend. In his defence, one can see that he is attempting to align his work with the normative Ḥanafī doctrine and avoid charges of *talfīq* or *ijtihād*. This gives us an inside view of the methodology of the later Ḥanafī jurists. Abu al-Sa'ūd's arguments show us not only that a specific methodology was used, but more crucially that, as a leading representative of the Ottoman Ḥanafī establishment, he was sensitive to the methodology he employed.

6.3.7.1.3 al-Birgivī takes up the Challenge

Abū Sa'ūd's leading opponent after the demise of Çivizade was Muḥammad al-Birgivī; a preacher and law professor who avoided a career in the judiciary.¹⁰⁵ al-Birgivī wrote five treatises in total arguing against the cash *waqf*. His polemic went to the heart of Abū Sa'ūd's treatise and attempted to extirpate the very core of his Abū Sa'ūd's foundation. al-Birgivī focused his refutation around two main themes; firstly, a highly nuanced exposition of *ta'āmul* and secondly, the issue of *talfīq*. al-Birgivī begins the discussion of *ta'āmul* by locating it within the hierarchy of probative legal sources. The jurisprudentially recognized *ta'āmul* for which a departure from analogy is sanctioned and regarded as a cause for *istiḥsān*,

¹⁰⁴ Ibid.

¹⁰⁵ 'Awnī İlkhān, "Shakhṣiyyāt Islāmiyya: Muḥammad Efendī al-Birgivī," in *İmam Birgivî*, ed. Mehmet Şeker (Ankara: Türkiye Diyanet Vakfı Yayınları, 1994), 128-30.

he enunciates, is based upon consensus; either actual or tacit.¹⁰⁶ This, he argues, is because the sources of the sacred law are four without exception as stated in the *uṣūl al-fīqh*.¹⁰⁷ This means that no other source can be countenanced unless it is rooted in one of the four agreed upon sources. *Ta'āmul* is hence a type of *ijmā'*, which itself is specific to the *mujtahidīn*. This interpretation is mandated by the *uṣūl* and hence can not be obfuscated; rather, he proffers, any statements in relation to *ta'āmul* must be interpreted in such a way that they conform to this viewpoint.¹⁰⁸ Therefore, the *ta'āmul* which al-Shaybānī intends, he argues, is the practice which occurred between the prophetic era and al-Shaybānī's time.

In order to demonstrate that his interpretation of *ta'āmul* concurs with the earlier Ḥanafī masters he takes up the standard example of *istiṣnā'* (contract of manufacture). This contract is generally validated based upon *ta'āmul* even though it goes against analogy. al-Birgivī then presents various statements of the jurists who explain the nature of the *ta'āmul* underpinning *istiṣnā'*. He quotes for example the author of *al-Hidāya* who states that *istiṣnā'* is permitted due to an *istiḥsān* which is based on the established consensus (*al-ijmā' al-thābit*) of an existing practice (*ta'āmul*).¹⁰⁹ The commentator of *al-Hidāya*, Ibn al-Humām explicates this further saying that the *ta'āmul* is based upon an unopposed 'consensus by praxis' (*al-ijmā' al-'amalī*), from the time of the Prophet (pbuh) to the present day.¹¹⁰

al-Birgivī then goes on to try to explain the various probative examples of *ta'āmul* in the works of the jurists. As Abu al-Sa'ūd had earlier shown, the principle of *ta'āmul* had been invoked throughout Ḥanafī legal history to justify the *waqf* of different movables, such as

¹⁰⁶ Muḥammad Taqī al-Dīn al-Birgivī, "*Radd Aqwāl Abī al-Sa'ūd*," on the margins of Sayyid 'Alī Zāda, *Sharḥ Shir'a al-Islām* (Beirut: Dār al-Kutub al-'Ilmiyya, nd.), 448.

¹⁰⁷ By this he means the Qur'ān, the Sunna, analogy and consensus.

¹⁰⁸ al-Birgivī, "*Radd Aqwāl Abī al-Sa'ūd*," 448.

¹⁰⁹ Ibid, 449-50.

¹¹⁰ Ibid, 450.

particular animals or certain religious books. In order to explain these instances, al-Birgivi develops a complex model to show how a particular practice came to be accepted after the era of the *mujtahidīn*. He explains that a regional practice maybe admitted through the process of *ilhāq*, which is to connect a new particular with an established principal on the condition that the two are similar in all aspects which are relevant to the ratio.¹¹¹ The practice of endowing books, for example, is permitted by *ta'āmul*. According to al-Birgivi, this means that it is appended through *ilhāq* to a principal already approved.¹¹² In this example, there already existed a practice of endowing copies of the Qur'ān in the era of the *mujtahidīn* which was accepted by consensus. Books are thus considered similar to the Qur'ān, as far as the ratio is concerned, and hence as a local practice it is validated by *ilhāq*.

al-Birgivi explains that for *ilhāq* to occur with regards to the *waqf*, three aspects are considered to be relevant to the *waqf*'s ratio:

- perpetuity of the essence (*baqā' al-'ayn*),
- a pious motive (*qurba maqṣūda*),
- a general need of the people (*ḥājat al-nās*).

The latter aspect, he elaborates, is measured using the barometer of *ta'āmul* and therefore the degree of practice reflects the extent of societal need. The jurists refer to *ta'āmul* not as a probative source, but rather because it expresses society's need for an institution, and it is this latter point which is consequential in juristic discourses. What is important to realise, however, is that all three conditions need to be met otherwise *ta'āmul* alone is not a sufficient condition.¹¹³ Having said that, it will be noticed that in the cash *waqf* two of the conditions are

¹¹¹ Ibid, 458, 464-5.

¹¹² al-Birgivi differentiates between the *ta'āmul* based upon the *ijmā'* of the *mujtahidīn* and that which occurs later on in a specific region; the former is designated as *al-ta'āruf al-kullī* and the latter as *al-ta'āruf al-khāṣṣ*. See ibid, 495-6.

¹¹³ Ibid, 456-7.

immediately met, namely that of *ta'āmul* and pious motive. What remains is the first condition of the perpetuity of the essence.

We have already seen how Abū al-Sa'ūd attempted to use Ḥanafī legal analysis to argue for the conceptual perpetuity of capital in a cash *waqf*. al-Birgivī, however, directly confronts Abū al-Sa'ūd's example and notes that it is an exceptional rule based upon necessity and is not a jurisprudential norm. In fact, as he goes on to show, there are many instances where the jurists have regarded cash as an *in specie* item, although this always refers to instances when the cash is not employed as a currency but as a chattel. What al-Birgivī is demonstrating is that the Ḥanafī legal tradition has already dealt with this possible question and that Abū al-Sa'ūd is therefore mistaken in his application of an exceptional rule to the cash *waqf*.¹¹⁴ Effectively, al-Birgivī is arguing that to apply the notion of *ta'āmul* to the cash *waqf* is unjustified and goes against the principles of the Ḥanafī School. By grounding his arguments in precise quotes from the works of the earlier Ḥanafī jurists, he justifies his nuanced articulation of *ta'āmul* and denies Abū al-Sa'ūd the very principle upon which he sought to vindicate the practice. With al-Shaybānī's principle of *ta'āmul* removed from the discourse the only avenue left for permitting the cash *waqf* is the opinion of Zufar; this however leads to the charge of *talfīq*.

al-Birgivī quickly moves on to deal with the position of Zufar and how it is being utilised by the judges to create the cash *waqf*. He points out, as mentioned earlier, that if the opinion of Zufar becomes the basis for the legal validity of the cash *waqf* and the opinion of Abū Yūsuf and al-Shaybānī is used to effect the irrevocability, then the combined effect is to create a

¹¹⁴ Ibid, 467-9.

third unprecedented opinion.¹¹⁵ He rejects Abū al-Sa‘ūd’s argument that the judge makes two successive rulings which are independent of each other and argues that when the judge makes the first ruling permitting the cash *waqf* on the basis of the Zufar’s opinion, his ruling necessarily includes Zufar’s viewpoint on irrevocability, otherwise the judge would be ruling that the cash *waqf* is valid irrespective of irrevocability; and that is an opinion which no one holds.¹¹⁶ This means that Zufar’s opinion on irrevocability becomes an integral part of the initial ruling, and implicitly contradicts the subsequent ruling. He also questions the way the principle of using a judges ruling to override difference of opinion, is used, and argues that this principle only applies to differences of opinion among the Companions and Successors, and there is no difference of opinion is among them in regards to the cash *waqf*.¹¹⁷

al-Birgivī’s treatise is a sustained analysis with a plethora of arguments dealing with all of Abū al-Sa‘ūd’s arguments, both major and minor. The major arguments of both jurists have been presented here as an indication of the nature of later Ḥanafī juristic discourse vis-à-vis a novel institution which demanded a response from the jurists. Although the cash *waqf* was destined to survive the polemics of its detractors, the questions raised by al-Birgivī attracted the attention of later scholars and assume a critical dimension in view of the contemporary Islamic financial landscape.

The charge of *talfīq* was clearly an important concern for the jurists who belonged to a tradition where systematic consistency was the hallmark of their School. Ibn ‘Ābidīn deals with *talfīq* in a discussion regarding the combination of a cash *waqf* with a personal *waqf*.¹¹⁸

¹¹⁵ ‘*Iḥdāth qawl thālith*’, see *ibid*, 533.

¹¹⁶ *Ibid* 545-6, 552-3.

¹¹⁷ *Ibid*, 530.

¹¹⁸ Muḥammad Amīn ibn ‘Ābidīn, *al-‘Uqūd al-Durriyya fī Tanqīḥ al-Fatāwā al-Hāmidīyya* (Quetta: Maktaba Ḥabībīyya, nd.) vol. 1, 111. For a modern proposal for such a *waqf*, see ‘Abd al-Raḥmān Ḥābīl, “*Waqf al-Nuqūd al-Ahlī wa Aḥammiyyatuhū li al-‘Amal al-Maṣrifī al-Islāmī*,” *Awqāf* 9 (2005): 148-55.

This, he says, is a composite ruling (*ḥukm mulaffaq*) and the scholars have differed on the issue of *talfīq*. He refers to Ibn Quṭlūbughā who said that a composite ruling is not be legally effected and also related that *talfīq* is prohibited by consensus. Ibn ‘Ābidīn also cites, through a number of works, from the *Fatāwā* al-Shilbī whose author permits *talfīq*, although his source is none other than Abū al-Sa‘ūd. Ibn ‘Ābidīn offers a solution to these opposing viewpoints and suggests that the prohibited type of *talfīq* relates to selecting opinions from across the different *madhāhib*, whereas the permitted type is when it is limited to combining opinions from within a particular School.¹¹⁹ Methodologically this makes sense as it ensures some degree of systematic consistency and prevents egregious eclecticism. However, even with this approach, the degree of difference within a School can be significant such that selecting opinions even within a particular School can challenge juridical consistency if left unrestricted.¹²⁰

6.3.7.2 The Cash *Waqf* and the use of the *Mu‘āmalā*

The cash *waqf*, which began in the Balkans, soon spread to Anatolia and with it came an increase in the usage of the *ma‘āmalā* contract. The Ottoman *fatāwā* literature endorsed the use of the *mu‘āmalā*, and the Sultan set a maximum profit limit initially of five percent and then later on of fifteen percent.¹²¹ This official endorsement of the use of the *mu‘āmalā* with a maximum limit on the percentage return was viewed positively in the sense that it restricted the degree of exploitation possible through this contract, but it also had the effect of granting it official sanction. This legal recognition was an endorsement which would only see its use proliferate. Studies on the use of such contracts have demonstrated that throughout the

¹¹⁹ Ibn ‘Ābidīn, *al-‘Uqūd al-Durriya*, vol. 1, 111.

¹²⁰ For a discussion on *talfīq* see Birgit Krawietz, “Cut and Paste in Legal Rules: Designing Islamic Norms with *Talfīq*,” *Die Welt des Islams* n.s. 42, no. 1 (2002) 3-15.

¹²¹ Ibn ‘Ābidīn, *Radd al-Muhtār*, vol. 7, 397; Neş’et Çağatay, “Ribā and Interest Concept and Banking in the Ottoman Empire,” *Studia Islamica* 32 (1970): 61, 62-64. Çağatay cites the *Fatāwā* ‘Alī Efendi, the *Fatāwā Fayḍiyya* and the *Bahjat al-Fatāwā*; Imber, *Ebu’s-su‘ud*, 145-6. Imber cites from the *fatāwā* of Abu al-Sa‘ūd.

Turkish Ottoman lands the use of the *mu'āmalā* was widespread.¹²² From the works of the Ottoman jurists the validity of this contract seemed to be unquestioned.¹²³

In Mandaville's account of the cash *waqf* controversy, the first person to mention the spread of usury as a problem of the cash *waqf*, is al-Birgivi.¹²⁴ This, however, is contradicted by Çivizade's contemporary biographer al-Kafawī who quotes him as saying: Whoever undertakes the administration of *awqāf* not knowing the principles of the legal transactions (*al-mu'āmalā al-shar'iyya*), nor complying with the requirements thereof, leads to the opening of the gates of usury.¹²⁵ This means that right from the outset of the controversy the problem of usury was a point of concern for the jurists. What is noteworthy is that Abū al-Sa'ūd does not mention the use of the *mu'āmalā* at all in his defence of the cash *waqf* and also that Çivizade, although highlighting the problem of usury, accepts the *mu'āmalā* as the norm which needs to be adhered to. Indeed in Çivizade's argument it appears that his main complaint was of people not knowing how to use this contract correctly which lead them to forming usurious contracts. The *mu'āmalā* contract itself was not called into question. In the polemic of al-Birgivi, however, he challenges this status quo and calls the prevailing practices into question.

al-Birgivi presents three problems with the usage of the *mu'āmalā*; firstly, he says that the ignorant do not understand how to use this contract as per its explication in the *fatāwā* books; secondly, and more egregious than the first, are the iniquitous who care little for they way

¹²² Ronald C. Jennings, "Loans and Credit in Early 17th Century Ottoman Judicial Records," *Journal of the Economic and Social History of the Orient* 16, no. 2/3 (1973): 183-191; Gerber, *Economy and Society in an Ottoman City*, 131-147.

¹²³ Haim Gerber, *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective* (New York: SUNY Press, 1994): 100-7.

¹²⁴ Mandaville, *Usurious Piety*, 305.

¹²⁵ Repp, *Qānūn and Sharī'a*, 139.

they make their profit such that they dispense with the *hiyal* and engage directly in *ribā*.¹²⁶ These first two points are argued much in the same fashion as Çivizade, in that they apparently endorse the use of the *mu'āmalā* as the normative alternative to *ribā*; taking the prescriptions of the earlier *fatāwā* books almost as positive legal norms. al-Birgivi, being a critical reformer however, mentions without hesitation that the use of these contracts is reprehensible. He points out that according to the Ḥanafī texts the capital of the cash *waqf* should be invested in *muḍāraba* contracts, but that in his time, people profit from the capital using the *īna* contract. This contract, he says, was censured by the Prophet (pbuh) and also explicitly denounced by the scholars who warned people: ‘beware of the *īna* for surely it is accursed’.¹²⁷ In another work al-Birgivi mentions various leading Ḥanafī authorities who opposed the *īna*; al-Zayla‘ī and al-Bābartī and the authors of *al-Hidāya* and *al-Kāfī*.¹²⁸ al-Birgivi’s plea is that these *hiyal* are not permitted outright, but rather, that they are reprehensible and their permissibility is limited; a viewpoint which accords with the teleology discerned earlier on in this study.

al-Birgivi was not alone in his viewpoints; an anonymous manuscript in the Esad Efendi library written as a part of the cash *waqf* polemic, mentions the arguments of both Çivizade and al-Birgivi and critically notes that: ‘in our age the *bay‘ al-īna* has spread throughout the land and to all people’.¹²⁹ The author also exposes the tension between the authorities quoted by al-Birgivi, who regarded the *īna* as reprehensible, and Qāḍī Khān who allowed this transaction as a means of avoiding *ribā*. He, however, concludes that Qāḍī Khān’s opinion is stronger, albeit with the caveat that an extortionate profit should not be allowed in order to

¹²⁶ al-Birgivi, *Radd Aqwāl Abī al-Sa‘ūd*, 569.

¹²⁷ This is a pun on the Arabic word: ‘*Iyyākum wa al-īna fa-innahā la īna*’, see *ibid*, 567.

¹²⁸ Muḥammad ibn Bīr ‘Alī al-Birgivi, *Inqādh al-Hālikīn min Ittikhādh al-Qur‘ān Hirfa* (Damascus: Dār al-Qalam, 2005), 109. Also printed on the margins of *Sharḥ Shir‘at al-Islām*, 167.

¹²⁹ Anonymous, *İhvanü’s-Safadan: Risale fi Beyan Vakfün-Nukud*, MS 003636/1, Esad Efendi, Istanbul, folio 204a.

protect the poor. He then goes on to explain why this should be the case: ‘Most of those who are afflicted by [this contract] are none other than the poor and they are compelled [by their circumstances] into [buying] recklessly at high prices. Perhaps for this [reason] a sultanic proscription was issued.’¹³⁰ The author goes on to say that the Ottoman muftīs have ruled that those who go beyond the limits set by the Sultan will be severely punished and the additional amounts will be returned even if the borrowers had freely consented to the extra amount.¹³¹

This comment on the contemporary conditions and usage of the *ma‘āmala* are crucial in understanding the nature of the debate occurring between the Ottoman jurists. What is clear is that the teleology of the *hiyal* is still being invoked although its increasing usage has become a cause of concern for the jurists. This introduces an important factor into the dynamic of the model of the *hiyal* and suggests that the teleology which permits their usage must be balanced against both their increasing usage and their adoption as a normative method of finance for the poor.

6.4 The Cash *Waqf* in the Arab Lands

In his seminal article, Mandaville asserted that the cash *waqf* was an ‘extraordinarily popular form in much of Anatolia and Rumeli ... [but] that it rarely if ever was carried out anywhere in the Islamic world before them or in many parts thereafter.’¹³² In his conclusion he also notes that it was used insignificantly in the Arab lands.¹³³ This assertion however was challenged by Çizakaça who claims that the cash *waqf* did indeed spread to the Arab lands and even further. Çizakaça attempts to show that cash *waqfs* existed in Syria, Egypt, Sudan,

¹³⁰ Ibid, 205b.

¹³¹ Ibid.

¹³² Mandaville, *Usurious Piety*, 289.

¹³³ Ibid, 308.

Iran, Iraq, India, Pakistan and also in the Malay world and in Singapore.¹³⁴ When examining Çizakaça's references, however, it is clear that these developments are not a result, or continuation, of the Ottoman cash *waqf* practice, but rather independent developments. In his references for Egypt, for example, what the authors are referring to is the *waqf* of joint-stock companies and not cash *waqf* per se.¹³⁵ Similarly with regards to India and Pakistan, the discussion is primarily related to the *waqf* of shares in joint-stock companies.¹³⁶ In fact, almost all of the countries mentioned by Çizakaça reflect the situation in the early twentieth century and are not related in anyway to the Ottoman practice.¹³⁷

The only place where the practice can realistically be claimed to have spread to, is the Levant (*bilād al-Shām*) and it is here where Çizakaça's reference actually stands up to scrutiny. Çizakaça refers to the work of Bruce Masters who demonstrates from the sixteenth century Ottoman court records the presence of numerous cash *waqfs*.¹³⁸ Masters also notes that these *waqfs* differed from their pre-Ottoman counterparts in their unabashed mentioning of a chargeable profit rate.¹³⁹ In addition to the presence of the cash *waqf* in Aleppo, al-Arna'ūt

¹³⁴ Çizakaça, *A History of Philanthropic Foundations*, 27-28.

¹³⁵ Ibid, 27,-28 n.4. The pertinent references being G. Baer, *Studies in the Social History of Modern Egypt* (Chicago: UCP, 1969), 80; idem, *A History of Landownership in Modern Egypt* (London: Oxford University Press, 1962), 153. Later on in his work Çizakaça does give a reference for actual cash *waqfs* (p.58) in Egypt citing Doris Behrens-Abouseif, *Egypt's Adjustment to Ottoman Rule: Institutions, Waqf and Architecture in Cairo (16th and 17th Centuries)* (Leiden: Brill, 1994), 158. Behrens-Abouseif, however, does not mention cash *waqfs* explicitly, but rather, refers to 'cash sums' which were dedicated for religious purposes and recorded in the Ottoman account. The 'cash sums' she refers to are not *waqfs*, but rather government expenditures as is clear from the source she cites: See Stanford J. Shaw, *The Financial and Administrative Organization and Development of Ottoman Egypt 1517-1798* (Princeton, New Jersey: Princeton University Press, 1962), 231-35.

¹³⁶ Çizakaça, *A History of Philanthropic Foundations*, 62-66.

¹³⁷ The dates Çizakaça gives for the decrees permitting these so-called cash *waqfs* are indicative: India and Pakistan (1913), Iran (1986), Iraq (1907), (p.28). His sources for the Malay world relate to a bill issued by the Government in 1905. See Moshe Yegar, *Islam and Islamic Institutions in British Malaya: Policies and Implementation* (Jerusalem: The Magnes Press, 1979), 206-7.

¹³⁸ Bruce Masters, *The Origins of Western Economic Dominance in the Middle East: Mercantilism and the Islamic Economy in Aleppo, 1600-1750* (New York: New York University Press, 1988), 162. Also see Heghnar Zeitlian Watenpaugh, *The Image of an Ottoman City: Imperial Architecture and Urban Experience in Aleppo in the 16th and 17th Centuries* (Leiden: Brill, 2004), 115-17.

¹³⁹ Ibid.

has also noted their presence in Jerusalem.¹⁴⁰ The question that needs to be asked, however, is whether their presence in these two cities justifies the conclusion that the cash *waqf* spread throughout the Arab lands.

Aleppo lies in the northernmost part of Syria virtually at the periphery of what the Ottomans called ‘Arabistān. Naturally, and more than any other Arabian city, it would have been influenced by Ottoman contemporary practice and perhaps facilitated by the number of non-Arabs from the Turkish lands who had settled there.¹⁴¹ Further south, in the cities of Hama and Homs, a study of *waqfs* in the sixteenth century showed no cash *waqfs* present.¹⁴² Additionally, Ibn ‘Ābidīn states that the cash *waqf* is a practice of the Turkish lands (*bilād al-rūm*) as opposed to our lands; presumably referring to the Levant in general or perhaps Damascus in particular.¹⁴³ Their large presence in the city of Jerusalem is therefore surprising and according to al-Arna’ūt, their presence here is more significant than their presence in Aleppo.¹⁴⁴ al-Arna’ūt’s detailed studies of the *waqf* records in Jerusalem reveal the true nature of the spread of the cash *waqf* in the Arab lands.

al-Arna’ūt notes that it is no coincidence that the arrival of the cash *waqf* into Jerusalem occurred at the same time as an influx of Turkish officials arrived to staff the new Ottoman administration. In fact, the first cash *waqf* recorded was endowed by the District Governor Farūkh Bek and subsequent cash *waqfs* are also noted to be connected to Turks. Cash *waqfs* continued to increase in number until they represented almost half of all the *waqfs* of

¹⁴⁰ Muḥammad M. al-Arna’ūt, “*Dalālāt Zuhūr Waqf al-Nuqūd fī al-Quds khilāl al-Ḥukm al-‘Uthmānī*,” *Awqāf* 9 (2005): 39; idem, “*Tatawwur Waqf al-Nuqūd fī al-‘Aṣr al-‘Uthmānī*,” *Dirāsāt* 20, n.1 (1993): 356-63.

¹⁴¹ Bruce Masters, “Ottoman Policies toward Syria in the 17th and 18th Centuries,” in *The Syrian Land in the 18th and 19th Century: The Common and the Specific in the Historical Experience* ed. Thomas Philipp (Stuttgart: Franz Steiner Verlag, 1992) 14.

¹⁴² Mehmet İpşirli, “A Preliminary Study of the Public Waqfs of Hama and Homs in the XVI Century,” *Studies on Turkish-Arab Relations Annual* 1 (1986): 122-23.

¹⁴³ Ibn ‘Ābidīn, *Radd al-Muḥtār*, vol. 6, 557.

¹⁴⁴ al-Arna’ūt, *Dalālāt Zuhūr Waqf al-Nuqūd fī al-Quds*, 39.

Jerusalem.¹⁴⁵ He also notes that from among the female endowers, all but one, were Turks.¹⁴⁶ What is more interesting is the fact that after two centuries of growth, the cash *waqf* almost disappears from Jerusalem as local Arab families begin to rise to prominence, signalling the demise of the Turkish hold on local institutions. al-Arna'ūt concludes from his study that the absence and presence of the cash *waqf* in Jerusalem is demonstrably linked to the arrival and subsequent demise of the Turkish Ḥanafīs.¹⁴⁷ That the cash *waqf* did not take hold amongst the indigenous Arabs and was not continued after the demise of the Turks, suggests that Mandaville was justified in his conclusion that the cash *waqf* was a singularly Turkish phenomenon.

6.5 The Use of the *Mu'āmalā*

It is clear from the preceding presentation that the cash *waqf* began in the Balkans and then subsequently spread into Anatolia. In the Arab lands its usage was limited and contingent on the presence of the Turks. The question to be addressed now is to why the institution arose in the first place and the conditions which justified the use of the *ḥiyāl*. When discussing the Ottoman's in the Balkans, it must always be remembered that the Ottomans were conquering Byzantine territory where the norms and customs were those of the Orthodox Church as opposed to the Catholic Church. Additionally, the Muslims who lived in the Balkans were a minority and the process of conversion to Islam was a slow one.¹⁴⁸ The first cash *waqf*, it will be recalled, was established in Edirne in 1423, a city which belonged to a district in which the percentage of Muslims was between twenty five and fifty in the year 1525.¹⁴⁹ Not only were the Muslims in a minority in the Balkans, but it must also be noted that the doctrine of usury

¹⁴⁵ Ibid, 40-41.

¹⁴⁶ Ibid, 45.

¹⁴⁷ Ibid, 45.

¹⁴⁸ Anton Minkov, *Conversion to Islam in the Balkans: Kısve Bahası Petitions and Ottoman Social Life, 1670-1730* (Leiden: Brill, 2004), 37-63.

¹⁴⁹ Ibid, 43, Map 2.

was not applied by the Orthodox in the same manner as it was by the Catholics. The Orthodox Church was not as dogmatic as the Catholic Church in its opposition to usury and in some countries Orthodox clerics and monasteries openly engaged in usurious practices.¹⁵⁰ In Byzantine lands, the interest rate was generally observed to be 11.11 percent from the thirteenth century until the period of the Ottoman conquest.¹⁵¹ This meant that the Muslims living in the Balkans would have found themselves in an environment where usury was a norm and not a peripheral activity. In addition, recent converts would have maintained many of their previous customary practices and their usurious practices may well have been couched in the *hiyal* which would have allowed them to function much as before. This can be observed most clearly in the tradition of loaning the money of orphans out on interest.¹⁵² The Orthodox Church made a clear exemption from the usury laws for the wealth of an orphan and later on we find that in the Balkans this tradition was also continued by some Muslims.¹⁵³

What is clear though, is that these *hiyal* were not used for self-enrichment, but rather for charitable ends and it is perhaps this fact, more than any other, which justified to the Ottomans their continued usage. As has already been mentioned the profit generated by the use of the *mu'āmalā* was used to pay for a variety of pious endeavours. This often included aid for the poor in paying the various taxes levied upon them.¹⁵⁴ Guilds would also lend out surplus capital using the *mu'āmalā* contract, using the profit generated to help the poor pay their taxes.¹⁵⁵ Gabriel Baer, in his study on Turkish guilds reported that their capital was often

¹⁵⁰ H. W. Dewey, "Old Russia's Struggle with Usury," *Oxford Slavonic Papers* n.s. 18 (1985): 35-36.

¹⁵¹ Demetrios Gofas, "The Byzantine Law of Interest," in *The Economic History of Byzantium: From the Seventh through the Fifteenth Century* ed. Angeliki E. Laiou (Washington, D.C.: Dumbarton Oaks, 2002), 1102.

¹⁵² Ibid, 1101; A. P. Khazhdan and Ann Wharton Epstein, *Change in Byzantine Culture in the Eleventh and Twelfth Centuries* (Berkeley: University of California Press, 1985), 21-22.

¹⁵³ Faroqhi, *Bosnian Merchants*, 228, 239. Bruce Masters, *The Origins of Western Economic Dominance in the Middle East*, 163.

¹⁵⁴ Faroqhi, *Bosnian Merchants*, 231; Bruce Masters, *The Origins of Western Economic Dominance in the Middle East*, 162.

¹⁵⁵ Eunjeong Yi, *Guild Dynamics in Seventeenth-Century Istanbul: Fluidity and Leverage* (Leiden: Brill, 2004), 160-62; Suraiya Faroqhi, *Making a Living in the Ottoman Lands 1480 to 1820* (Istanbul: Isis Press, 1995), 105-6.

lent to members of the guild. The rate of return, charged at one percent, was assigned to charitable causes, such as distributing food, aiding the sick and paying funeral costs, and also to religious causes such as Qur'ān recitation.¹⁵⁶

Historians and Ottomanists reporting on the usage of the *ḥiyal* do not differentiate between the use of these *ḥiyal* and the overt practice of usury.¹⁵⁷ It is evident, however, that this was not the view of the Ottomans and this can be seen both in terms of their usage of the *ḥiyal* and in the jurists' discussions regarding them. The jurists make a strict delineation between contracts where the *mu'āmalā* has been practiced properly and contracts in which they are neglected. In the *al-Fatāwā al-Khayriyya* a question is posed regarding a man who dies owing money to a *waqf* which, although is recorded as using a *mu'āmalā* with a profit, was actually devoid of any specific recognized *ḥīla*. al-Ramlī answers that the manager of the *waqf* can not claim anything above the capital as it is usury pure and simple.¹⁵⁸ Gerber also found a similar approach in the works of the Turkish jurists:

Several *fetvas* reveal that because the sale was not a real one, people had the tendency to skip some semi-ceremonial parts of the sale that were obligatory according to Islamic law – for example, the actual physical handing over and receiving of the object sold. A number of *fetvas* reveal that in the eyes of the *muftis* such omissions invalidated the entire transaction, thereby also showing that the exact letter of the law, not just or even the mainly social relations behind it, was crucially important for them.¹⁵⁹

In addition to the differentiation made by the jurists, the overwhelming charitable nature of the usage of these contracts suggests that Turkish Muslims were conscious of the limited role and validity of these transactions. That they were averse to engage in usurious trade can be

¹⁵⁶ Gabriel Baer, "The Administrative, Economic and Social Functions of the Turkish Guilds," *International Journal of Middle East Studies* 1, no. 1 (1970): 45. Also, see idem, "The Waqf as a Prop for the Social System (Sixteenth-Twentieth Centuries)," *Islamic Law and Society* 4, no. 3 (1997): 285.

¹⁵⁷ Çağatay, *Ribā and Interest Concept and Banking in the Ottoman Empire*, 61-64.

¹⁵⁸ Khayr al-Dīn al-Ramlī, *al-Fatāwā al-Khayriyya*, on the margins of *al-Uqūd al-Duriyya*, vol. 1, 378.

¹⁵⁹ Gerber, *State, Society and Law in Islam*, 104-5; citing the *Fatāwā 'Alī Efendī* in the endnotes (p. 205, n.77-8).

observed by that fact that the central usurious trade of money lending was completely dominated by Jews, Greeks and Armenians.¹⁶⁰

As was mentioned in the previous chapter, the enforceable promise underpinning the *bay' al-waḥḍā'* represented an infraction of the Ḥanafī systematic juridical structure. The legal recognition afforded by the Ottoman's to the *ḥiyal* of *ribā*, equally represents, if not more so, an infraction of the *ribā* rules. The consequence of this infraction, it will be recalled, is that the *ḥīla* loses its normativity and becomes concessionary. The latter have a highly restricted juridical remit and must be prevented from becoming a norm. The Ottoman's use of the *ḥiyal* therefore, signifies an extension of the original justification of the *ḥiyal*. As a historical example of the widespread usage of the *ḥiyal*, many lessons can be learnt from both its economic and social repercussions and also from its attendant legal discourse.

6.6 Conclusion: The Tension between Concession and Norm

The Ottoman practice of the cash *waqf* utilising the *mu'āmalā* is instructive in a number of ways and can be used to develop the analytical model discussed in the previous chapter. Their usage of the *ḥiyal* was not only far more extensive than in previous eras, but was also officially endorsed through a decree of the Sultan and the *fatāwās* of the leading Ottoman

¹⁶⁰ Yavuz Cezar, "The Role of the *Sarrafs* in Ottoman Finance and Economy in the Eighteenth and Nineteenth Centuries," in *Frontiers of Ottoman Studies: State, Province and the West*, ed. Colin Imber and Keiko Kiyotaki (London: I.B. Tauris, 2005), vol. 1, 62, 64-65; Şevket Pamuk, "The Evolution of Financial Institutions in the Ottoman Empire, 1600-1914," *Financial History Review* 11, no. 1 (2004): 21-25. Rodinson notes that: 'usurious loans became the speciality of the Jews of Morocco and elsewhere, of the Greeks and other foreigners in modern Egypt, of Hindu merchants of the *banya* caste in India'. See his, *Islam and Capitalism*, 38. For the dominance of Hindu money lenders in India, see S. S. Thorburn, *Musalman and Money Lenders in the Punjab* (Delhi: Mittal Publications, 1983/4), vii, 38-39, 58. Irfan Habib also notes that: 'by and large, throughout medieval times, professional usury remained the occupation of persons who claimed to be the descendents of the ancient usurers (the Vaiśya caste). A well organised Hindu caste was in existence that was thought to be the same as the ancient Indian Vaiśyas. It bore a different name, however, ... [and] members of this caste who engaged in usury were known as *sāhūs*, *sāhukārs* and *manhājans*, the names still persisting today.' See his "Usury in Medieval India," *Comparative Studies in Society and History* 6, no. 4 (1964): 411-412. For the Hindu caste-based approach to usury, see R. S. Sharma, "Usury in Early Mediaeval India (A.D. 400-1200)," *Comparative Studies in Society and History* 8, no. 1 (1965): 56-77.

jurists. These factors are critical in understanding the usage and subsequent growth of the *hiyal*. The justification for the use of these *hiyal* with the capital of the cash *waqf* in the Balkans would have been clear; Muslims were a minority and in need of funds both for consumption and productive purposes. The cash *waqf* fulfilled that need together with the fact that it provided funds whose additional return did not enrich the lender, but was rather spent on further charitable causes.

The Sultanic decree limiting the amount of return that could be stipulated was intended to restrict the abuse of the *mu'āmala* contract and prevent usurers from camouflaging their exploitative practices. Although the government took an active role in preventing the spread of usury, its endorsement of the cash *waqf* and its *modus operandi* conceded that the usage of the *hiyal* was an acceptable norm within the Ottoman lands. Inalcik, for example, reports that although in the *waqf* documents and *hisba* records the profit rate never exceeded ten percent, some individuals did make contracts on a twenty five to fifty percent profit-rate.¹⁶¹ Even more egregious than these high rates was the practice of compound profits, known as *murābaḥat al-murābaḥa*.¹⁶² This, it is assumed, was the *hiyal* equivalent of compound interest, whereby the dues from one *murābaḥa* were subjected to another *murābaḥa* in lieu of deferring the payment. In response to these excesses, the Sultan would personally expose such cases and order the local authorities to punish the perpetrators. But what this really demonstrates is that the increased usage of the *hiyal* in the long term is counterproductive and ultimately that it contradicts the very telos which presupposes them. The proliferation of their use, thus led to the subsequent reaction of the Ottoman jurists to the institution as a whole. Both Çivizade and al-Birgivi blamed the cash *waqf* for opening the door to usury. Evidently the jurists'

¹⁶¹ Halil Inalcik, "Capital Formation in the Ottoman Empire," *Journal of Economic History* 29, no. 1 (1969): 139.

¹⁶² Zouhair Ghazzal, *The Grammars of Adjudication: The Economics of Judicial Decision Making in fin-de siècle Ottoman Beirut and Damascus* (Beirut: Institut Français du Proche-Orient, 2007), 584-86.

prescriptions for the use of the *hiyal* was interpreted by some people as a mere name changing exercise and led to people stipulating a fixed return without going through the actual procedure of the *hiyal*.

The Sultanic decree also meant that in non-Turkish lands the courts would have to uphold the usage of these *hiyal* despite there being little or no reception of the cash *waqf* as a practice there. Rafeq notes that in Hama in particular and in Syria in general, loans recorded in the Shari'a courts were always interest free. The Ottoman decree permitting the use of the *hiyal* up to a maximum rate was therefore a point of contention between local jurists and their new rulers.¹⁶³ When the Ottoman decree came into force the Syrian judges would absolve themselves in their court rulings by stating that it was a 'requirement of the Sultanic decree which entailed that ten should be[come] eleven and a half' (i.e. fifteen percent).¹⁶⁴ The Sultan's decree meant that the *hiyal* were now recognised in the legal system. This inevitably resulted in an increase in the usage of these transactions in Syria, and is reflected in the contemporary court records.¹⁶⁵

The Sultanic decree together with the Ottoman jurists' approval thus played a crucial role in establishing the use of the *hiyal* as an acceptable norm. Although it may have been justified in the Balkans where the Muslims were a minority and had little prospect of attracting business investors or charitable loans, this was not the case in the central Ottoman and Arab lands. The *hiyal* were initially justified based upon their usage with the capital of the cash *waqf*, where it was evident that self-enrichment could not take place. This charitable bent to the institution

¹⁶³ Abdul-Karim Rafeq, "The Syrian 'Ulamā, Ottoman Law and Islamic Shari'a," *Turcica* 26 (1994): 13-15.

¹⁶⁴ *Ibid*, 17.

¹⁶⁵ See Abdul-Karim Rafeq, "Making a Living or Making a Fortune in Ottoman Syria," in *Money, Land and Trade: An Economic History of the Muslim Mediterranean*, ed. Nelly Hannan (London: I.B. Tauris, 2002), 109-115. Note the late appearance of these transactions in the late Eighteenth century (1794); *idem*, "City and Countryside in a Traditional Setting: The case of Damascus in the First Quarter of the Eighteenth Century," in Philipp, *The Syrian Land*, 323-329.

may well have been a justifying factor, although one which was absent from later uses of the *hiyal*. This development represents the critical dilemma which the *hiyal* create: at what point does their concessionary nature become an exploited norm.

Part of Ibn al-Qayyim's critique against the *hiyal* was that they produce the same results as the overt practice they seek to evade. This notion, of the *hiyal* of *ribā* replicating the socio-economic repercussions of a usurious economy, can be used as a useful benchmark for delimiting the remit of the *hiyal*. The first observation to be made, and which perhaps justifies their usage is that they do not equate to the overt practice of usury. The European experiment of permitting *monte di pietà* to lend money using low interest rates created a norm of usurious lending which ultimately led to the creation of the European Banking industries. The Ottoman practice did not evolve along a similar trajectory. Although the *hiyal* may replicate the effect of these transactions it does not remove the moral reproof of even the slightest amount of usury. And although a few individuals may exploit the *hiyal* to openly engage in usury, Çizakaça makes the point that 'it was one thing for an individual entrepreneur to disregard the law and quite another for an institution that violated the law to emerge'.¹⁶⁶ Usurious institutions were hence anathema to the Ottoman financial landscape as opposed to the trends developing in contemporaneous Europe. The second observation which counters their use is their increased uptake as they become an established norm. This produces the kind of debt proliferation that is common to usurious economies and precisely what the Islamic prohibition of *ribā* seeks to avoid. Mandaville, for example, notes that indebtedness to the cash *waqf* was commonplace and in the Balkan city of Monastir, the records show that of the 176 villages in the judicial district, 90 were collectively in debt to cash *waqfs*.¹⁶⁷

¹⁶⁶ Çizakaça, *Cross-cultural Borrowing*, 10.

¹⁶⁷ Mandaville, *Usurious Piety*, 307, n.60.

The validity of the *hiyal* should therefore, at best, only be regarded as ephemeral, and additionally be contingent on the efforts of both jurists and political authorities to provide solutions for changing the very environment which permits their use. The *hiyal* should thus be viewed as a self-limiting institution as opposed to a self-perpetuating one. As a self-perpetuating institution, the *hiyal*, once legally sanctioned become an economic norm embedded in the financial landscape. In the long term, economic conditions analogous to a usury-based economy begin to emerge. Although not totally mimicking the latter, serious negative consequences are observed. Alternatively, as a self-limiting institution, the *hiyal* are granted limited official transitory sanction as concessions and not as normative exits. This concessionary nature demands that concurrent to their contingent legitimacy, alternative solutions are actively sought. These alternatives seek to restore the Islamic philanthropic and commercial norms and ultimately annul the justification for the usage of the *hiyal*. The teleology of the *hiyal*, as originally envisaged by the original proponents of the *hiyal*, necessitates that the model to be adopted is the latter and not the former.

CONCLUSION

This inquiry set out to establish a framework for the *hiyal* as a jurisprudential technique. The widespread use of the *hiyal* in Islamic finance requires that their legitimate remit be understood and delineated to prevent the system exploiting this technique and skewing the evolution and development of this nascent industry. In order to provide that framework, the task of this study was to enquire whether the *hiyal* were a part of the normative doctrine of its most prolific proponents, the Ḥanafīs. To answer this question, a three-pronged approach was adopted which dealt with; first, the theory of *ribā*; second, the notion of the *hiyal* as a literary phenomenon; both as a polemic and as a distinct legal genre; and third, the *hiyal* as a historical practice.

In the first part of this inquiry, we delved deeply into the Ḥanafī jurisprudential theory of *ribā* and demonstrated the degree of systematic consistency which underpinned their approach. The first point to be noted was that their hermeneutical strategy in defining the term *ribā*, sought not to differentiate between the *ribā* proscribed in the Qur'ān and that proscribed in the Sunna, but rather, to differentiate between *ribā* which could be objectively determined through the legal measures of weight and volume, and that which could not. The former is regarded as *ribā* proper and the latter as quasi-*riba* (*shubhat al-ribā*). Having elaborated their definition of *ribā*, we then observed how *ribā* impacted the various other branches of commercial law. What transpires is that the Ḥanafīs paid high regard for the systematic application of their concept of *ribā* in all branches of the law. The reason why *ribā* was so influential was perhaps due to their understanding that its prohibition was not a distinct exception to the permissibility to trade, but rather, a specific manifestation of the normative requirement of contractual equality, the *wujūb al-mumāthala*. This norm precludes all forms

CONCLUSION

of inequity and therefore those disparities which are quantifiably discernable are categorically prohibited. The fact that *ribā* is understood as a specific manifestation of a well established norm, leads to the perfuse application of their doctrine. This notably results in their refusal to allow the possibility of any concessions to it and also in their prohibition of contracts which involve the valorisation of time.

In the second part of this inquiry we examined the *ḥiyal* as a literary phenomenon. This began with a presentation of the *ḥiyal* polemic among the Islamic jurists. The significant conclusions which were drawn from this polemic were; 1) that the juridical methodology of the jurists in relation to the role of intents and motives was responsible for the attitudes of both sides; 2) the *ḥiyal* polemic developed diachronically and its opponents began to use the *maqāṣid* to argue against the *ḥiyal* while also recognising that their definition of the *ḥiyal* related to the egregious *ḥiyal* and those which were controversial. As far as the egregious type was concerned, none of the jurists permitted them, and as for the controversial type, their role was disputed. It was left to al-Shāṭibī to confront the controversial *ḥiyal*, such as *taḥlīl* (in its non-egregious form) and *ʿīna* and suggest that even these *ḥiyal* could be underwritten by the teleology of the *maqāṣid*. At the apex, then, the polemic yielded that the vast majority of what the proponents were advocating were not *ḥiyal* proper, but more accurately, valid *makhārij*. The few *ḥiyal* which were controversial were given the benefit of the doubt as having being premised upon a valid Sharīʿa telos.

The Ḥanafīs defence of the *ḥiyal* begins with a demonstration of why the *makhārij* are a part of the normative explication of the Sharīʿa. This demonstration rests on two pillars; firstly, that the Sharīʿa does not prohibit something without providing a licit alternative, and secondly, that the jurists must provide exits to those who require them. For the Ḥanafīs,

CONCLUSION

prescribing exits, *ta'lim al-makhraj* is a juridical technique observable in the Qur'ān and the Sunna and one which the jurists should embrace in their capacity as exponents of the law. Instead of granting concessions in mitigating situations, the Ḥanafīs prefer to rely on the method of prescribing legal exits. The former represent a suspension of the substantive rules, whereas the latter a strict adherence to them. The Ḥanafīs, prefer to provide *makhārij* as opposed to concessions, although they do accept a role for the latter when all else fails. This teleological anchoring in their approach is clearly discernable in their articulation of the *hiyal* and their circumscription of its juridical remit.

Having dealt with the polemic, we then moved on to deal with the *hiyal* as a distinct legal genre. To sharpen the analysis here, we mentioned the Orientalist Joseph Schacht's claims regarding the function of the *hiyal* genre. He asserted that the *hiyal* functioned as a *modus vivendi* which allowed the jurists to appease their consciences by bringing the discordant theory of Islamic law in line with the actual social practice. This was necessary according to the Orientalists because Islamic law was not practicable; whole swathes of the law, such as commercial law were dismissed by them as a 'dead letter'. In this regard, Schacht averred that the taking of interest was a commercial necessity which the jurists themselves duly acknowledged by permitting the *hiyal*.

The various components of this theory were evaluated by challenging their central premise that Islamic commercial law was a 'dead letter' and that commerce was conducted according to customary practice as opposed to religious prescription. It was shown that the prescriptions of Islamic commercial law corresponded to the actual practice of the merchants as attested to by the documentary record. The *muḍāraba* was noted to have been used widely throughout the Muslim lands and also to have lasted upto the modern period. The success of this specific

CONCLUSION

investment form was attributed to it being both economically superiour to interest bearing loans and of course religiously conscionable. Its European analogue, the *commenda* was also noted for its impact on reducing the usage of the usurious sea loan. The *muḍārba* was also shown to be more than a Muslim customary practice, in that its very nature was determined by the *ribā* prohibition. Islamic commercial law, was thus deemed to be critically influential in enthusing Islamic investment ethics into the trade practices of Muslim (and non-Muslim) merchants.

Following this, the *Kitāb al-Ḥiyal* attributed to al-Shaybānī was examined and an attempt was made to determine its authorship. It was noted that al-Shaybānī's authorship of this work was disputed by some of his students while endorsed by others. Ultimately, their disagreement was resolved by four observations:

- The treatise attribute to al-Shaybānī was distinct from the earlier *Kitāb al-Ḥiyal* which was unanimously condemned.
- The negation of his authorship referred either to that latter work, or to the use of the word *ḥiyal* in al-Shaybānī's actual treatise.
- The treatise reflected a specific section in al-Shaybānī's *al-Aṣl* dealing with *makhārij*.
- Two of al-Shaybānī's other students also wrote works on *ḥiyal* and *makhārij*.

From these points, we inferred that the al-Shaybānī's *Kitāb al-Ḥiyal* was most probably put together by his student Abū Ḥafṣ, who restricted himself to the specific *makhārij* found in al-Shaybānī's *al-Aṣl*.

Ascertaining that the treatise is primarily based upon al-Shaybānī's chapter on *makhārij* in the *al-Aṣl* does not, however, answer the question of whether these *makhārij* were in line with the normative doctrines or not. This was ascertained through two further observations: firstly, a

CONCLUSION

large number of *hiyal* were explicitly noted by the subsequent *hiyal* authors to have been expounded in al-Shaybānī's authoritative works, the *ẓāhir al-riwāya*. This means that the *makhārij* originated in the normative doctrines and were subsequently appropriated into the distinct *hiyal* genre. Secondly, the importance given by the *hiyal* authors to maintaining systematic consistency demonstrated that the *makhārij* were consonant with the principles of the School, and where there was a juristic difference in the principles this had a corresponding impact in the *makhārij*. Strict systematic consistency is both the method of the Ḥanafīs and their justification for the exits. As solutions premised upon a systematic extension of the rules, they contrast this with the method of granting concessions, which result in a suspension of the rules. The systematic application of the rules applies throughout the various Ḥanafī *makhārij*, even in the most controversial ones relating to *taḥlīl*, *shuf'ā* and *Zakāt*. These three *hiyal* were discussed at length and the concern of the jurists to uphold their systematic consistency while also providing legitimate exits was demonstrated. It was also observed that the Ḥanafīs were aware of the possible exploitation of their doctrines, which they addressed by explicitly censuring those acting *mala fide*.

When it comes to the *hiyal* used to avoid *ribā*, these are noteworthy for their departure from the strict systematic doctrines. al-Khaṣṣāf, is perhaps the most cautious in his approach, as his *hiyal* are not legally enforceable and are therefore based upon their non-binding nature. Later, on we see that in Balkh, Ibn Salama uses a *ḥīla* which is highly disputed amongst the jurists. Eventually we arrive at the *bay' al-wafā'* in which there is a specific infraction of the systematic rules, in that the additional benefit on the loan is secured through a binding promise to effect a sale redemption. As in the *makhārij* we noted that these *hiyal* also had an underpinning teleology and that they were used solely to aid the poor in accessing immediate funds. These *hiyal* differ, however, from their *makhārij* counterparts in that they represent an

CONCLUSION

infraction of the systematic rules, and are therefore determined to be concessionary and not normative. This means that their sanction and usage must necessarily be transitory. Their remit is thus restricted to the telos which presupposes them and it is incumbent on the jurists and authorities to utilise this transitory period to deal with the political, social, and economic circumstances which occasion them.

In the final chapter, the Ottoman cash *waqf* and the controversy that surrounded its legal acceptance, was examined. Its proliferation in the Ottoman lands was observed, as was the concomitant rise in the use of the *hiyal*. This increase in usage was unjustified given the original reasons for its validity and consequentially, the detriments of its use were observed as large numbers of people fell into debt and higher rates of return were demanded. The institution of the cash *waqf* was also compared to the European *monte di pieta*. The latter was noted for lending out money at low interest rates which ultimately lead to a weakening of the moral censure of usury. They, therefore, played a critical role in the development of the European banking system, both as an institutional precursor and as a backdoor for usury to enter mainstream economic activity. Their economic and social repercussions differed to the cash *waqf*, which, although allowed the use of *hiyal* and led to an increased uptake in their usage, did not lead to the development of usurious banking institutions. The historical impact of these institutions indicates that the use of these *hiyal*, when teleologically justified, does not equate to the overt practice of a low interest rate, as ultimately the former preserves the moral censure of usury whereas the latter erodes it. This does not, however, amount to an open licence in the use of these *hiyal*, as they also ultimately lead to serious negative economic consequences in the long term. As has been witnessed, following prolonged usage these *hiyal* resulted in the usage of compound profits, higher rates of borrowing, and debt proliferation; all of which are the hallmarks of a usurious economy.

CONCLUSION

Throughout this study we have maintained that Islamic commercial law provides viable alternatives to usurious finance, and that the *hiyal* do not have a remit in this arena. The Ottoman cash *waqf*, however, did provide finance in the commercial sector, albeit limited to the Balkans. In their eyes, this may have been justified as no individual personal enrichment occurred from the revenue that this generated. The proceeds were instead spent on charitable causes. The use of these *hiyal* in Islamic finance is historically unprecedented in that Islamic financial institutions are commercial entities providing finance for both personal and commercial use. In conclusion to the final chapter, we suggested that the *hiyal* should be regarded as a self-limiting institution as opposed to a self-perpetuating institution. This conclusion, however, is challenged by the commercial nature of the Islamic finance institutions which currently benefits from the increased usage of certain *hiyal*. This self-perpetuating usage completely undermines the teleology of the *hiyal*, and although the use of the *hiyal* maybe justified in certain economic conditions, they certainly do not have a normative role in an Islamic economy.¹ It would be anathema to the original Ḥanafī exponents of the *hiyal* that such transitory concessions could form the backbone of an Islamic finance industry.

¹ Usmani, *An Introduction to Islamic Finance*, 15-24.

APPENDIX ONE

This table correlates the chapters of al-Shaybānī's *al-Makhārīj fī al-Ḥiyāl* with the corresponding *makhārīj* section of *al-Aṣl*.

<i>al-Makhārīj fī al-Ḥiyāl</i>			<i>al-Aṣl</i> Manuscript		
Ch	Chapter heading	Pg	Ch	Chapter Heading in <i>al-Aṣl</i>	Folio
1	باب الحيل في الطلاق والاستثناء	1	10	باب الوجه في الطلاق والثقة في ذلك	576b
2	باب الحيل في اجارة الدور	9	1	باب الحيل في اجارة الدور	570a
3	باب الحيل في الهبة	13	—	This chapter was not found in the ms	—
4	باب الحيل في اجارة الأرضين	19	2	باب اجارة الأرضين والثقة في ذلك	571a
5	باب الحيل في الخدمة وفضول أجورهم واجاراتهم	20	3	باب الوجه في الخدمة	571b
6	باب الحيل في الوكالة	21	4	باب الحيلة في الوكالة والثقة في ذلك	571b
		25	45	باب الوجه في الذمي يوصي إلى المسلم	585b
7	باب الصلح	26	5	باب الصلح والحيلة في ذلك	572b
8	باب الحيل في الصلح من حق على رهن أو على كفيل	32	7	باب الصلح من حق على رهن أو كفيل	574a
9	باب الحيل في البيع والشري في الدور والرقيق وغير ذلك	36	23	باب الوجه في الشري والبيع في الدور وما شبهها والثقة في ذلك	579a
		37	24	باب الوجه في بيع الدار والحرم والثقة في ذلك	579a
		38	26	باب الوجه في شري العبد نفسه من مولاه والثقة في ذلك	579b
		38	31a	باب الوجه في الأجرة (إذا أراد أن يلجأ بعضهم إلى بعض أو المرأة إلى ابنها والورثة بعضهم إلى بعض والبينة في ذلك) ¹	580a
		39	27	باب الوجه في الشراء بالشرط والثقة في ذلك	579b
		40	28	باب الوجه في الرجل (يكون له الدار ان يريد بيع أحدهما ولا يريد الأخرى والوجه في الرجل يشتري من رجل غريب) ²	579b
		41	29	باب الرجل يجعل غلة داره (في المساكين صدقة بعد موته ويكتب بذلك كتابا يجوز) ³	580a
		41	30	باب الوجه في الصلح (من دعوى في دار ادعاها رجل لنفسه أو لابنه والثقة في ذلك) ⁴	580a
		42	31b	جزء من الباب السابق (30a)	580a
		42	32	باب شري الدور وغير ذلك والثقة فيه	580a
		43	33	باب السمسار وغير ذلك والوجه فيه	580b
		43	34	باب اجارة الخدم والكرى إلى مكة والثقة في ذلك	580b
10	باب الحيل في اليمين والاستكراه	43	35	باب اكراه اللصوص والثقة فيه والرجل يحلف بالعتق	580b

¹ The additional detail in parenthesis is taken from another manuscript of the *Kitāb al-Aṣl*: MS 90, 'Āshir Efendi, Istanbul. This manuscript is not paginated.

² Ibid.

³ Ibid.

⁴ Ibid.

APPENDIX ONE

11	باب الحيل في اليمين التي تستحلف بها النساء أزواجهن	44	43	باب الأيمان التي يستحلف في النساء أزواجهن بها وغير ذلك	584a
12	باب النكاح	48	9	باب آخر في النكاح ووجه الثقة	576a
13	باب الوصي والوصية	49	44	باب الوصي والوصية والثقة في ذلك	585a
14	باب الحيل في النكاح	53	8	باب النكاح ووجه الثقة فيه	575a
15	باب الحيل في الشركة	57	11	باب وجه الثقة في الشركة في التجارة	577a
		58	12	باب شركة الرجلين في العبد ووجه الثقة في ذلك	577a
		60	13	باب في نقض الموالاة ونكاحه في ذلك	577b
16	باب الضمان والكفالة والتخرج منهما	61	14	باب الوجه في الضمان والثقة في ذلك	577b
		62	15	باب وجه شركة المفاوضة ونقضها	578a
		62	16	باب الثقة في الرجلين يكون لهما على امرأة مال	578a
		63	17	باب الوجه في الرجلين يكون لهما العبد فبإذن أحدهما في التجارة في نصيبه والثقة في ذلك	578a
		63	18	باب الوجه في اليمين في الضمان والثقة في ذلك	578a
17	باب الأيمان في الكسوة	63	19	باب الوجه في الأيمان في الكسوة واللبس	578a
18	باب الحيل في الشرى والبيع	67	20	باب الوجه في الحلف وبيع الثياب	578b
		67	21	باب الوجه في شرى الرقيق وبيعه والثقة في ذلك	578b
		68	22	باب الوجه في الرجل يحلف على أول شيء يملكه هو في المساكين	579a
19	باب المساكنة ودخول الدار	68	36	باب المساكنة ودخول الدار والوجه في ذلك	580b
		69	37	باب الدخول والوجه في ذلك والخروج والمساكنة	581b
20	باب اليمين في التقاضي	72	38	باب اليمين في التقاضي	581b
21	باب الطعام والشراب	74	39	باب الطعام والشراب	581b
22	باب المضاربة والخروج منها	76	40	باب المضاربة ووجه الثقة في ذلك	582a
23	باب الدين والحوالة	78	41	باب الدين والثقة في ذلك	582b
24	باب الشفعة	80	42	باب الوجه في الشفعة والثقة في ذلك	583a
25	باب الصلح في الجنايات	84	6	باب الصلح في الجنايات ووجه الثقة في ذلك	573b
			25	باب المساكنة ودخول الدار ⁵	579a

Table 3. A Comparison *al-Makhārij fī al-Ḥiyal* and *al-Aṣl*

The important aspects of this comparison are:

- That all but one chapter of the *al-Makhārij* is found in the *al-Aṣl*.
- The word *ḥiyal* is used in the independent treatise to replace the word *wajh* and *thiqa* in the *al-Aṣl*.
- There has been a significant rearrangement of the subject matter, and the chapter headings reduced.

⁵ This chapter heading was followed by a blank space in both mss, with a note from the scribes that the principal being copied from also had an empty space under this heading.

APPENDIX TWO

This table shows how the words *wajh* and *thiqa* have been replaced in the text of al-Shaybānī's *al-Makhārīj*.

<i>al-Aṣl</i> Manuscript			<i>al-Makhārīj fī al-Ḥiyāl</i>	
No.	Original wording	Folio	Corresponding words	Pg.
1	كيف الثقة في ذلك	570a	-	9
2	كيف الثقة له في ذلك	570b	-	9
3	هل في ذلك وجه ثقة	570b	هل في ذلك حيلة	9
4	ما الوجه في ذلك	570b	-	9
5	كيف الثقة	570b	كيف يصنع	9
6	كيف الثقة	570b	كيف يحتال	10
7	كيف الثقة في ذلك	570b	كيف يحتال	10
8	هل في ذلك وجه ثقة	570b	هل في ذلك حيلة	11
9	هل عندكم في هذا وجه ثقة	571a	هل عندكم حيلة في ...	12
10	سألت أبا حنيفة عن وجه الثقة في ذلك	571a	سألت أبا حنيفة عن الحيلة	12
11	كيف الثقة	571a	كيف الثقة	12
12	هل في ذلك وجه ثقة	571a	هل في ذلك حيلة	19
13	هل في هذا وجه ثقة	571a	هل في ذلك حيلة	19
14	هل في هذا وجه أوثق	571a	هل في هذا شيء أوثق	19
15	كيف الحيلة في ذلك	571a	كيف الحيلة في ذلك	19
16	هل في ذلك وجه ثقة	571a	هل في ذلك حيلة	19
17	كيف وجه الثقة	571b	كيف الحيلة في ذلك	21
18	هل في ذلك وجه ثقة	571b	هل في ذلك حيلة	21
19	الثقة في ذلك	571b	-	21
20	الوجه في ذلك	572a	كيف يصنع	22
21	هل في ذلك وجه يستقيم	572a	هل في ذلك حيلة	23
22	كيف يصنع	572a	كيف يصنع	23
23	الذي وصفت لك حيلة	572a	الذي وصفت لك حيلة	23
24	الوجه في ذلك والثقة	572a	الحيلة في ذلك	23
25	كيف الثقة له والوجه في ذلك	572a	كيف يصنع	24
26	وجه ثقة	572a	احتال	24
27	لم يكن الذي وصفت وجه ثقة ولا احتياط ولا حيلة	572a	لم يكن ذلك الذي وصفت حيلة	24
28	كيف الوجه في ذلك	572a	كيف يصنع	24
29	كيف يصنع	572a	كيف يصنع	25
30	كيف الوجه والثقة	572b	كيف يصنع	25
31	كيف الوجه والثقة	572b	كيف الحيلة في ذلك	25
32	أن يصنع ما ذكرت	572b	أن يصنع ما ذكرت يصنع	25
33	الوجه في ذلك	572b	كيف يصنع	25
34	كيف يصنع	572b	كيف يصنع	25
35	كيف يصنع	572b	كيف يصنع	26
36	ما صنع في ذلك	572b	ما يصنع من ذلك	26

APPENDIX TWO

37	كيف الحيلة في ذلك والثقة	572b	كيف الحيلة في ذلك	26
38	كيف الوجه والثقة	572b	كيف يستوثق	26
39	كيف الوجه والثقة في ذلك	572b	هل في ذلك حيلة	27
40	كيف التوثق في ذلك	573a	كيف التوثق في ذلك	27
41	كيف وجه الحيلة في ذلك	573a	كيف الحيلة	27
42	الحيلة في ذلك	573a	-	27
43	كيف يستوثق	573a	كيف يستوثق	28
44	الثقة في ذلك	573a	الثقة في ذلك	28
45	ما الحيلة في ذلك	573a	هل في هذا حيلة	28
46	كيف وجه الثقة	573a	كيف الحيلة	29
47	ذلك ثقة	573b	ذلك ثقة	30
48	هل عندكم في هذا وجه ثقة	573b	-	30
49	كيف وجه الثقة	573b	كيف الحيلة في ذلك	30
50	الوجه في ذلك	573b	-	30
51	هل في ذلك وجه ثقة	573b	-	30
52	هذا وجه ثقة	573b	-	30
53	ذلك ثقة	573b	-	30
54	كيف وجه الثقة	573b	كيف يستوثق	30
55	كيف يستوثق	573b	كيف يستوثق	31
56	الوجه في ذلك والثقة	573b	-	31
57	كيف وجه الثقة	573b	كيف يستوثق	31
58	وجه الثقة في ذلك	573b	-	31
59	كيف وجه الثقة	573b	كيف الثقة في ذلك والحيلة	31
60	الوجه في ذلك	573b	-	31
61	كيف وجه الثقة	574a	كيف الثقة	85
62	وجه الثقة في ذلك	574a	-	85

Table 4. The use of the word *Hīla* in *al-Aṣl* and in *al-Makhārij fī al-Ḥiyāl*

In total, 62 instances of euphemisms for *makhārij* were recorded from the beginning of the manuscript. These were then checked against the corresponding formula in the treatise. Out of the 62 instances 14 had no corresponding sentence. Their deletion was probably to keep the treatise to a minimum. From the 48 remaining formulas, 16 remained the same, and in the remaining 32 a change was observed. Out of these 32, the following words were used in place of the original:

- *hīla*, twenty times,
- *kayfa yaṣna* ‘, six times,
- *kayfa yastawthiq*, three times,

In two instances the word *thiqa* and *wajh* were dropped from the original. In fact, as can be seen from the table, the word *wajh* has been completely dropped from the treatise, and the

APPENDIX TWO

word *thiqa* kept to a minimum; four times. It is evident that the notion of the *ḥiyal* is being inscribed into the Ḥanafī juridical lexicon. Take, for example, entry number 10, where, originally, the interlocutor asks Abū Ḥanīfa for a trusted or safe way, *wajh thiqa*. In the treatise, this is rephrased as: ‘I asked Abū Ḥanīfa for a *ḥīla*’.

BIBLIOGRAPHY

Note: In preparing this bibliography, the definite particle (*al-*), *hamza* (‘) and ‘*ayn* (‘) are not considered in the alphabetic arrangement of the authors’ names.

‘Abd al-Ḥalīm. *Ḥāshiyat al-Durar ‘alā al-Ghurar*. 2 vols. Istanbul: Dar Sa‘ādat, 1311 AH.

‘Abd al-Rashīd, Abū al-Faṭḥ Ṣahīr al-Dīn. *al-Fatāwā al-Walwāliyya*. 5 vols. Beirut: Dār al-Kutub al-‘Ilmiyya, 2003.

Abdel Mohsin, Magda Ismail. *Cash Waqf: A New Financial Product*. Kuala Lumpur: Prentice Hall, 2009.

Abū Ghudda, ‘Abd al-Fattāḥ. Introduction to *Kashf al-Iltibās ‘ammā Awradahū al-Imām al-Bukhārī ‘alā ba‘ḍ al-Nās*, by ‘Abd al-Ghanī al-Ghunaymī al-Maydānī, 5-51. Aleppo: Maktab al-Maṭbū‘āt al-Islāmiyya, 1993.

Abū Layl, Maḥmūd Aḥmad. “*Waqf al-Nuqūd fī al-Fiqh al-Islāmī*.” *Majallat al-Sharī‘a wa al-Qānūn* 12 (1999): 17-63.

Abū Zahra, Muḥammad. *Abū Ḥanīfa: Ḥayātuhū wa ‘Aṣruḥū – Ārā’uhū wa Fiqhuhū*. Cairo: Dār al-Fikr al-‘Arabī, 1947.

———. *al-Milkiyya wa Naẓariyyat al-‘Aqd*. Cairo: Dār al-Fikr al-‘Arabī, 1996.

———. *Ibn Taymiyya: Ḥayātuhū wa ‘Aṣruḥū, Ārā’uhū wa Fiqhuhū*. Cairo: Dār al-Fikr al-‘Arabī, nd.

———. *Muḥāḍarāt fī al-Waqf*. np.: Maṭba‘a Aḥmad ‘Alī Mukhayyar, 1959.

Abū Zayd, ‘Abd al-‘Azīm Jalāl. *Fiqh al-Ribā*. Beirut: Mu‘assasat al-Risāla Nāshirūn, 2004.

Agmon, Iris, and Shahar, Ido. “Theme Issue: Shifting Perspectives in the Study of *Shari‘a* Courts: Methodologies and Paradigms.” *Islamic Law and Society* 15, no. 1 (2008): 1-19.

Ahmad, Abu Umar Faruq, and Hassan, M. Kabir. “The Time Value of Money Concept in Islamic Finance.” *The American Journal of Islamic Social Sciences* 23, no. 1 (2006): 66-89.

Ahmad, Ziauddin. “The Qur’ānic Theory of Ribā.” *Islamic Quarterly* 20, no. 22 (1978): 3-14.

Akgündüz, Ahmed. “Shari‘ah Courts and Shari‘ah Records: The Application of Islamic Law in the Ottoman State.” *Islamic Law and Society* 16, no. 2 (2009): 202-30.

BIBLIOGRAPHY

- ‘Alwānī, Nashwat al-. *al-Ḥiyāl al-Shar‘iyya bayn al-Ḥaẓr wa al-Ibāḥa*. Damascus: Iqra, 2002.
- Anderson, Jerome N. D., and Coulson, Norman J. “Islamic Law in Contemporary Cultural Change.” *Saeculum* 18 (1967): 13-92.
- Anderson, Michael R. “Legal Scholarship and the Politics of Islam in British India.” In *Perspectives on Islamic Law, Justice and Society*, edited by R. S. Khare, 65-91. Oxford: Rowman and Littlefield Publishers, 1999.
- Anonymous, *İhvanü’s-Safadan: Risale fi Beyan Vakfün-Nukud*. MS 003636/1, Esad Efendi, Istanbul.
- Ansari, Zafar Ishaq. “The Early Development of Islamic Law in Kûfah with Special Reference to the Works of Abû Yûsuf and Shaybânî.” PhD diss., McGill University, 1966.
- Arabi, Oussama. “Contract Stipulations (Shurut) in Islamic Law: The Ottoman Majalla and Ibn Taymiyya.” *International Journal of Middle East Studies* 30 (1998), 29-59. Reprinted in *Studies in Modern Islamic Law and Jurisprudence*, by idem. The Hague: Kluwer Law International, 2001.
- . “Intention and Method in Sanhuri’s *Fiqh*: Cause as Ulterior Motive.” *Islamic Law and Society* 4, no. 2 (1997): 200-23.
- Arjomand, Said Amir. “Philanthropy, the Law, and Public Policy in the Islamic World before the Modern Era.” In *Philanthropy in the World’s Traditions*, edited by Warren F. Ilchman, Stanley N. Katz and Edward L. Queen II, 109-32. Bloomington, Indiana: Indiana University Press, 1998.
- Arna’ût, Muḥammad M. al-. “*Waqfiyya Madrasa al-Ghāzī Khusrūbik fī Sarāyifū*.” *Awqāf* 13 (2007): 109-24.
- . “*Dalālāt Zuhūr Waqf al-Nuqūd fī al-Quds khilāl al-Ḥukm al-‘Uthmānī*.” *Awqāf* 9 (2005): 33-45.
- . “*Dawr al-Waqf fī Nashū’ al-Mudun al-Jadīda fī al-Būsna (Sarāyifū Namūdḥaj)*.” *Awqāf* 8 (2005): 47-57.
- . “*Taṭawwur Waqf al-Nuqūd fī al-‘Aṣr al-‘Uthmānī*.” *Dirāsāt* 20, no. 1 (1993): 356-63.
- . “*Taṭawwur Waqf al-Nuqūd fī Bilād al-Balqān*.” In *Dirāsāt fī al-Tārīkh al-Ḥaḍārī li-l-Islām fī al-Balqān*, by idem, 31-48. Dubai: Markaz Jum‘a al-Mājid li-al-Thaqāfa wa l-Turāth and Mu’assasa al-Tamīmī li-al-Baḥth al-‘Ilmī wa al-Ma’lūmāt, 1996.
- ‘Asqalānī, Aḥmad ibn ‘Alī ibn Ḥajar al-. *Fath al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*. 15 vols. Riyadh: Dār al-Salām, 1997.

BIBLIOGRAPHY

- ‘Ayni, Maḥmūd ibn ibn Aḥmad Badr al-Dīn al-. *‘Umdat al-Qārī Sharḥ Ṣaḥīḥ al-Bukhārī*. 24 vols. Book online available from http://www.islamport.com/isp_eBooks/srh/; Internet; last accessed 04 May 2010.
- Bā‘Alawī, ‘Abd al-Raḥmān ibn Muḥammad. *Ghāyat Talkhīṣ al-Murād min Fatāwā Ibn Ziyād*. Printed with *Bughyat al-Mustarshidīn*, by idem. 3rd ed. Beirut: Dār al-Kutub al-‘Ilmiyya, 2005.
- Baer, Gabriel. *A History of Landownership in Modern Egypt*. London: Oxford University Press, 1962.
- . *Studies in the Social History of Modern Egypt*. Chicago: UCP, 1969.
- . “The Administrative, Economic and Social Functions of the Turkish Guilds.” *International Journal of Middle East Studies* 1, no. 1 (1970): 28-50.
- . “The Waqf as a Prop for the Social System (Sixteenth-Twentieth Centuries).” *Islamic Law and Society* 4, no. 3 (1997): 264-97.
- . “Women and Waqf: An Analysis of the Istanbul *Tahrīr* of 1546.” *Asian and African Studies* 17 (1983): 9-27.
- Baḥīrī, Muḥammad ‘Abd al-Waḥhāb al-. *al-Ḥiyal fī al-Sharī‘a al-Islāmiyya wa Sharḥ mā Warad fīhā min al-Āyāt wa al-Aḥādīth*. np. Maṭba‘a al-Sa‘āda, 1974.
- Bājī Abū al-Walīd Sulaymān ibn Khalf al-. *al-Muntaqā: Sharḥ Muwaṭṭa Mālik*. 9 vols. Beirut: Dār al-Kutub al-‘Ilmiyya, 1999.
- Bälz, Kilian. *Sharia Risk? How Islamic Finance has Transformed Islamic Contract Law*. Occasional Publications 9. Cambridge MS: ILSP Harvard Law School, 2008. Available online from <http://www.law.harvard.edu/programs/ilsp/publications/occasional.php>; Internet; last accessed 02 May 2010.
- Bazdawī, Fakhr al-Islām al-. *Uṣūl*. Printed with its commentary *Kashf al-Asrār*, by ‘Alā’ al-Dīn ‘Abd al-‘Azīz ibn Aḥmad al-Bukhārī. 4 vols. Beirut: Dār al-Kitāb al-‘Arabī, 1997.
- Bedir, Murteza. “An Early Response to Shāfi‘ī: ‘Īsā b. Abān on the Prophetic Report (*Khabar*).” *Islamic Law and Society* 9, no. 3 (2002): 285-311.
- . “Bukharan Hanafism and the Mashayikh: An Analysis through the Law of Waqf as Expounded by Burhan al-Sharī‘a al-Bukhari (d.616/1219).” In *Studies in Islamic Law: A Festschrift for Colin Imber*, edited by Andreas Christmann and Robert Gleave, 1-21. *Journal of Semitic Studies*, Supplement 23. Oxford: OUP, 2007.
- Behrens-Abouseif, Doris. *Egypt’s Adjustment to Ottoman Rule: Institutions, Waqf and Architecture in Cairo (16th and 17th Centuries)*. Leiden: Brill, 1994.
- Benas, Bertram B. “The Legal Device in Jewish Law.” *Journal of Comparative Legislation and International Law* 11, no. 1 (1929): 75-80.

BIBLIOGRAPHY

- Benda, Harry J. "Christiaan Snouck Hurgronje and the Foundations of Dutch Islamic Policy in Indonesia." *The Journal of Modern History* 30, no.4 (1958): 338-47. Reprinted in *Readings on Islam in Southeast Asia*, ed. Ahmad Ibrahim, Sharon Siddique and Yasmin Hussain, 61-69. Singapore: Institute of Southeast Asian Studies, 1986.
- Bernard, Marie. "Ḥanafī Uṣūl al-Fiqh through a Manuscript of al-Ğaşşās." *Journal of the American Oriental Society* 105, no.4, (1985): 623-635.
- Bewes, S. D. Wyndham Anstis. *The Romance of the Law Merchant: Being an Introduction to the Study of International Law and Commercial Law with some Account of the Commerce and Fairs of the Middle Ages*. London: Sweet and Maxwell Ltd, 1923.
- Birgivi, Muḥammad ibn Bīr 'Alī al-. *Inqādh al-Hālikīn min Ittikhādh al-Qur'ān Hırfa*. Damascus: Dār al-Qalam, 2005. Also printed on the margins of *Sharḥ Shir'at al-Islām*, by Sayyid 'Alī Zāda. Beirut: Dār al-Kutub al-'Ilmiyya, nd.
- . "Radd Aqwāl Abī al-Sa'ūd." Printed on the margins of Sayyid 'Alī Zāda, *Sharḥ Shir'a al-Islām*. Beirut: Dār al-Kutub al-'Ilmiyya, nd.
- Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* 6th ed. (St. Paul, Minn: West Pub. Co., 1990)
- Bosworth, C. E. "The Rise of the Karāmiyyah in Khurasan." *The Muslim World* 50 (1960): 5-14.
- Boxberger, Linda. "Avoiding Ribā: Credit and Custodianship in Nineteenth- and early-Twentieth Century Ḥaḍramawt." *Islamic Law and Society* 5, no. 2 (1998): 196-213.
- Braudel, Fernand. *Civilization & Capitalism 15th-18th Century: The Wheels of Commerce*. Translated by Siân Reynolds. 2 vols. Berkley: University of California Press, 1992.
- Brugman, J. "Snouck Hurgronje's Study of Islamic Law." In *Leiden Oriental Connections 1850-1940*, edited by William Otterspeer, 82-93. Leiden: E. J. Brill, 1989.
- Bukhārī, Muḥammad ibn Ismā'īl ibn Ibrāhīm al-. *Ṣaḥīḥ al-Bukhārī*. Liechtenstein: Thesaurus Islamicus Foundation, 2000.
- Bukhārī, Ṭāhir ibn 'Abd al-Rashīd al-. *Khulāṣat al-Fatāwā*. 2 vols. Quetta, Maktaba Rashīdiyya, nd.
- Būshīsh, Ṣāliḥ ibn Ismā'īl. *al-Ḥiyal al-Fiqhiyya: Dawābiṭuhā wa Taṭbīqātuhā 'alā al-Aḥwāl al-Shakhṣiyya*. Riyadh: Maktabat al-Rushd, 2005.
- Būṭī, Muḥammad Sa'īd Ramaḍān al-. *Dawābiṭ al-Maṣlaḥa fī al-Sharī'a al-Islāmiyya*. Damascus: Dār al-Fikr, 2009.
- Çağatay, Neş'et. "Ribā and Interest Concept and Banking in the Ottoman Empire." *Studia Islamica* 32 (1970): 53-68.

BIBLIOGRAPHY

- Calder, Normal. "Exploring God's Law: Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī on *zakāt*." In *Law and the Islamic World: Past and Present*, edited by Christopher Toll and Jakob Skovgaard-Peterson, 57-73. Copenhagen: Royal Danish Academy of Science and Letters, 1995.
- . "al-Nawawī's Typology of *Muftīs* and its Significance for a General Theory of Islamic Law." *Islamic Law and Society* 3, no. 2 (1996): 137-64.
- . "The 'Uqūd rasm al-muftī of Ibn 'Ābidīn." *Bulletin of the School of Oriental and African Studies* 63, no. 2 (2000): 215-228.
- Čar-drnda, Hatidž. "Mostar: A Legacy of Islamic Culture and Civilization." In *Proceedings of the Second International Symposium on Islamic Civilisation in the Balkans*, 175-84. Istanbul: IRCICA, 2006.
- Cezar, Yavuz. "The Role of the *Sarrafs* in Ottoman Finance and Economy in the Eighteenth and Nineteenth Centuries." In *Frontiers of Ottoman Studies: State, Province and the West*, edited by Colin Imber and Keiko Kiyotaki, 61-76. London: I.B. Tauris, 2005.
- Choksy, Jamshed K. "Loan and Sales Contracts in Ancient and Early Medieval Iran." *Indo-Iranian Journal* 31, no. 3 (1998): 191-218.
- Çizakaça, Murat. "Financing Silk Trade in the Ottoman Empire, 16th-18th Centuries." In *La Seta in Europa secc. XIII-XX*, edited by S Cavaciocchi, 711-723. Prato: Istituto Internazionale di Storia Economica, 1993. Cited in *A History of Philanthropic Foundation*, by Murat Çizakaça. Istanbul: Boğaziçi University Press, 2000.
- . *A History of Philanthropic Foundation: The Islamic World from the Seventh Century to the Present*. Istanbul: Boğaziçi University Press, 2000.
- . "Awqaf in History and its Implications for Modern Islamic Economies." *Islamic Economic Studies* 6, no. 1 (1998): 43-69.
- . "Cash *Waqfs* of Bursa, 1555-1823." *Journal of the Economic and Social History of the Orient* 38, no. 3 (1995): 313-54.
- . "Changing Values and the Contribution of the Cash Endowments (*Awqâf al-Nuqûd*) to the Social Life in Ottoman Bursa, 1585-1823." In *Le Waqf dans le Monde Musulman Contemporain (XIX^e-XX^e Siecles)*, edited by Faruk Bilici, 61-70. Istanbul: Institut Français d'Etudes Anatoliennes, 1994.
- . "Cross-Cultural Borrowing and Comparative Evolution of Institutions between Islamic World and the West." Available from <http://www.mcizakca.com/publications.htm>. Internet; last accessed 06 May 2010.
- . *Ottoman Cash Waqfs Revisited: The Case of the Bursa 1555-1823*. Manchester Foundation for Science and Civilisation, 2004. Available from <http://www.muslimheritage.com/uploads/cashwaqfs.pdf>. Internet; last accessed 06 May 2010.

BIBLIOGRAPHY

- . “The Relevance of the Ottoman Cash *Waqfs* (*Awqaf al-Nuqud*) for Modern Islamic Economics.” In *The Proceedings of the Third International Conference on Islamic Economics*, edited by S.A.H. Al-Junaïd, 393-413. Kuala Lumpur: International Islamic University, 1992.
- . *A Comparative Evolution of Business Partnerships: The Islamic World & Europe, with Specific References to the Ottoman Archives*. Leiden: Brill, 1996.
- Coulson, Noel J. *Conflicts and Tension in Islamic Jurisprudence*. Chicago: The University of Chicago Press, 1969.
- Dabbūsi, Abū Zayd ‘Ubaydullah ibn ‘Umar ibn ‘Isā al-. *Taqwīm al-Adilla fī Uṣūl al-Fiqh*. Beirut: Dār al-Kutub al-‘Ilmiyya, 2001.
- Dalli, Charles. “Beyond Charity: The Evolution of Credit as Charity in Malta, 1400-1800.” In *Prestare ai poveri. Il Credito su Pegno e i Monti Di Pietà in Area Mediterranea (Secoli XV-XIX)*, edited by Paulo Avallone, 201-224. Napoli: Consiglio Nazionale delle Ricerche, Istituto di Studi sulle Società del Mediterraneo, 2007.
- Dāraqutnī, ‘Alī ibn ‘Umar al-. *Sunan al-Dāraqutnī*. 4 vols in 2. Beirut: Dār al-Kutub al-‘Ilmiyya, 2003.
- Dārī, Taqī al-Dīn ibn ‘Abd al-Qādir al-Tamīmī al-. *al-Ṭabaqāt al-Saniyya fī Tarājim al-Ḥanafīyya*. Edited by ‘Abd al-Fattāḥ Muḥammad al-Ḥulw. 4 vols. Riyadh: Dār al-Rifā‘ī, 1989.
- de Bellefonds, Y. Linant. “The Formal Sources of Islamic Law.” Translated by M. Khalid Mas‘ud. *Islamic Studies* 15, no. 3 (1976): 187-94.
- Debeaussaert, Dirk. “Traditionalism and Modernism in Some Recent Interpretations of *Ribā*.” In *Humanisme, Science & Religion*, edited by P. Naster, J. Ries and A. van Tongerloo, 133-48. Brussels: The Belgian Society of Oriental Studies, 1993.
- Dewey, H. W. “Old Russia’s Struggle with Usury.” *Oxford Slavonic Papers* n.s. 18 (1985): 31-47.
- Dhahabī, Abū ‘Abdullah Muḥammad ibn Aḥmad ibn ‘Uthmān al-. *Manāqib al-Imām Abī Ḥanīfa wa Ṣāhibayḥ: Abī Yūsuf wa Muḥammad ibn al-Ḥasan*. Hyderabad: Lajna Iḥyā al-Ma‘ārif al-Nu‘māniyya, nd.
- Dhunī, ‘Abd al-Salām. *al-Ḥiyal: al-Mahzūr minhā wa al-Mashrū‘*. Cairo: Maṭba‘a Miṣr, 1946.
- Dīb, Maḥmūd ‘Abd al-Raḥīm al-. *al-Ḥiyal fī al-Qānūn al-Madanī*. Alexandria: Dār al-Jāmi‘a al-Jadīda, 2008.
- Dickinson, Eerik. “Aḥmad B. Al-Ṣalt and His Biography of Abū Ḥanīfa.” *Journal of the American Oriental Society* 116, no. 3 (1996): 406-417.

BIBLIOGRAPHY

- Douglas, Fedwa Malti. "Controversy and Its Effects in the Biographical Tradition of Al-Khaṭīb Al-Bhaghdādī." *Studia Islamica* 46 (1977): 115-31.
- Duff, P. W. "The Charitable Foundations of Byzantium." In *Cambridge Legal Essays: Written in Honour of and Presented to Doctor Bond, Professor Buckland and Professor Kenny*, 83-99. Cambridge: W. Heffer & Sons Ltd, 1926.
- Dusūqī, Shams al-Dīn Muḥammad 'Arafa al-. *Hāshiyat al-Dusūqī 'alā al-Sharḥ al-Kabīr*. 4 vols. np: Dār Iḥyā' al-Turāth al-'Arabī, nd.
- El-Gamal, Mahmoud A. *Islamic Finance: Law, Economics, and Practice*. Cambridge: CUP, 2006.
- Encyclopedia of Islam*. 2nd edition. 12 vols. Leiden: Brill, 1960.
- Ephrat, Daphna. "Madhhab and Madrasa in Eleventh-century Baghdad." In *The Islamic School of Law: Evolution, Devolution and Progress*, edited by Peri Bearman, Rudolph Peters and Frank E. Vogel, 77-93. Cambridge MA: ILSP Harvard Law School, 2005.
- Fadel, Mohammed. "Rules, Judicial Discretion, and the Rule of Law in Naṣrid Granada: An Analysis of *al-Ḥadīqa al-mustaḥilla al-naḍra fī al-fatāwā al-ṣādira 'an 'ulamā' al-ḥaḍra*." In *Islamic Law: Theory and Practice*, edited by Robert Gleave and Eugenia Kermeli, 49-86. London: I.B.Tauris, 2001.
- . "The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*." *Islamic Law and Society* 3, no. 2 (1996): 193-233.
- Falk, Ze'ev W. *Introduction to the Jewish Law of the Second Commonwealth*. Leiden, E. J. Brill, 1972.
- Farooq, Mohammad Omar. "Stipulation of Excess in Understanding and Misunderstanding *Riba*: The Al-Jassas Link." *Arab Law Quarterly* 21, no. 4 (2007) 285-316.
- Faroghi, Suraiya. "Bosnian Merchants in the Adriatic." *International Journal of Turkish Studies* 10, no. 1-2 (2004): 225-39.
- . *Making a Living in the Ottoman Lands 1480 to 1820*. Istanbul: Isis Press, 1995.
- Felsenthal, B. "The Law of Release, as Understood and Practised in the Apostolic Age." *The Old Testament Student* 3, no. 5 (1884): 145-49.
- Ferrière, Madeleine. "The "Mont de Piété" of Avignon: From Charitable Credit to Popular Credit (1610-1790)." In *Prestare ai poveri. Il Credito su Pegno e i Monti Di Pietà in Area Mediterranea (Secoli XV-XIX)*, edited by Paulo Avallone, 157-68. Napoli: Consiglio Nazionale delle Ricerche, Istituto di Studi sulle Società del Mediterraneo, 2007.
- Foster, Nicholas H. D. "The Islamic Law of Guarantees." *Arab Law Quarterly* 16, no. 2 (2001): 133-57.

BIBLIOGRAPHY

- . “The Islamic Law of Real Security.” *Arab Law Quarterly* 15, no. 2 (2000): 131-155.
- Francesca, Ersilia. “Religious Observance and Market Law in Medieval Islam. The Controversial Application of the Prohibition of Usury According to some Ibâdî Sources.” *Revue des Mondes Musulmans et de la Méditerranée* 99-100 (2002): 191-203.
- Frye, Richard N. “The Sāmānids.” In *The Cambridge History of Iran. Vol. 4: The Period from the Arab Invasion to the Saljuqs*, edited by Richard N. Frye, 136-61. Cambridge: Cambridge University Press, 1975.
- G. Bergsträsser, *Grundzüge des Islamischen Rechts*. Edited by J. Schacht. Berlin, 1935.
- Gaiani, Alberto. “The Juridical Nature of the Moslem Qirād.” *East and West* 4, no. 2 (1953): 81-86.
- Gamoran, Hillel. *Jewish Law in Transition: How Economic Forces Overcame the Prohibition Against Lending on Interest*. New York: Hebrew Union College Press: 2008.
- Gerber, Haim. “The Muslim Law of Partnerships in Ottoman Court Records.” *Studia Islamica* 53 (1981): 109-119.
- . “The Waqf Institution in Early Ottoman Edirne.” *Asian and African Studies* 17 (1983): 29-45.
- . *Economy and Society in an Ottoman City: Bursa, 1600-1700*. Jerusalem: The Hebrew University, 1988.
- . *State, Society, and Law in Islam: Ottoman Law in Comparative Perspective*. New York: SUNY Press, 1994.
- Ghazzal, Zouhair. *The Grammars of Adjudication: The Economics of Judicial Decision Making in fin-de siècle Ottoman Beirut and Damascus*. Beirut: Institut Français du Proche-Orient, 2007.
- Gofas, Demetrios. “The Byzantine Law of Interest.” In *The Economic History of Byzantium: From the Seventh through the Fifteenth Century*, edited by Angeliki E. Laiou, vol. 3, 1095-1104. Washington, D.C.: Dumbarton Oaks, 2002.
- Goitein, S. D. “Bankers Accounts from the Eleventh Century A.D.” *Journal of the Economic and Social History of the Orient* 9, no. 1/2 (1966): 28-66.
- . “Commercial and Family Partnerships in the Countries of Medieval Islam.” *Islamic Studies* 3, no. 3 (1964): 315-337.
- . “Mediterranean Trade in the Eleventh Century: Some Facts and Problems” In *Studies in the Economic History of the Middle East: from the Rise of Islam to the Present Day*, edited by M. A. Cook, 51-62. London: Oxford University Press, 1970.

BIBLIOGRAPHY

- . “The Cairo Geniza as a Source for the History of Muslim Civilisation.” *Studia Islamica* no. 3 (1995): 75-91.
- . “The Rise of the Early Near-Eastern Bourgeoisie in Early Islamic Times.” *Journal of World History* 3 (1957): 583-604.
- . *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza. Volume 1, Economic Foundations*. Berkeley: University of California Press, 1967.
- Golden, Peter B. “The Karakhanids and early Islam.” In *The Cambridge History of Early Inner Asia*, edited by Denis Sinor, 343-70. Cambridge: Cambridge University Press, 1990.
- Goldman, Solomon. “The Legal Fiction in Jewish Law.” In *Presentation Volume to William Barron Stevenson*, edited by C. J. Mullo Weir, 54-72. Glasgow: Glasgow University Oriental Society, 1945.
- Goode, Roy. *Commercial Law*. 3rd ed. London: Penguin, 2004.
- Habib, Irfan. “Usury in Medieval India.” *Comparative Studies in Society and History* 6, no. 4 (1964): 393-419.
- Hābīl, ‘Abd al-Raḥmān. “*Waqf al-Nuqūd al-Ahlī wa Ahammiyyatuhū li al-‘Amal al-Maṣrif al-Islāmī*.” *Awqāf* 9 (2005): 147-55.
- . “Authenticity of Islamic Finance in Light of the Principle of Daman.” In *Islamic Finance: Innovation and Authenticity*, edited by S. Nazim Ali, 89-108. Cambridge Mass: Islamic Finance Project (ILSP) Harvard Law School, 2010.
- . “The Tension between Legal Values and Formalism in Contemporary Islamic Finance.” In *Integrating Islamic Finance into the Mainstream: Regulation, Standardization and Transparency*, edited by S. Nazim Ali, 109-118. Cambridge Mass: Islamic Finance Project (ILSP) Harvard Law School, 2007.
- Hallaq, Wael B. “From *Fatwās* to *Furū’*: Growth and Change in Islamic Substantive Law.” *Islamic Law and Society* 1, no.1 (1994): 17-56.
- . “Legal Reasoning in Islamic Law and the Common Law: Logic and Method.” *Cleveland State Law Review* 34, no. 1 (1985-86): 79-96.
- . “Model *Shurūṭ* Works and the Dialectic of Doctrine and Practice.” *Islamic Law and Society* 2 no. 2 (1995): 109-134.
- . “Non-Analogical Arguments in Sunni Juridical Qiyās.” *Arabica* 36, no. 3 (1989): 286-306.
- . “The Primacy of the Qur’ān in Shāṭibī’s Legal Theory.” In *Islamic Studies Presented to Charles J. Adams*, edited by Wael B. Hallaq and Donald P. Little, 65-86. Leiden: Brill, 1991.

BIBLIOGRAPHY

- . “The *Qāḍī*’s *Dīwān* (*sijill*) before the Ottomans.” *Bulletin of the School of Oriental and African Studies* 61, n. 3 (1998): 415-36.
- . “Was the Gate of Ijtihad Closed?” *International Journal of Middle East Studies* 16, no. 1 (1984): 3-41.
- . *A History of Islamic Legal Theories*. Cambridge: CUP, 1997.
- . *An Introduction to Islamic law*. Cambridge: Cambridge University Press, 2009.
- . *Sharī‘a: Theory, Practice, Transformations*. Cambridge: Cambridge University Press, 2009.
- Hamīm, ‘Abd al-Laṭīf, and al-Faḥl, Māhir Yāsīn. “al-Kalwadhānī wa *Kitābuhū al-Hidāya*.” An introduction to *al-Hidāya*, by Abu al-Khaṭṭāb Maḥfūz ibn Aḥmad al-Kalwadhānī. Kuwait: Geras, 2004.
- Has, Şükrü Selim. “A Study of Ibrāhīm al-Ḥalabī with Special Reference to the Multaqā.” PhD diss., University of Edinburgh, 1981.
- Hassan, Hussein. “Contracts in Islamic Law: The Principles of Commutative Justice and Liberality.” *Journal of Islamic Studies* 13, no. 3 (2002) 257-297.
- Ḥawwā, Aḥmad Sa‘īd. *Ṣuwar al-Taḥāyul ‘alā al-Ribā wa Ḥukmuhā fī al-Sharī‘a al-Islāmiyya*. Beirut: Dār ibn Ḥazm, 2007.
- Hegazy, Walid. “Contemporary Islamic Finance: From Socioeconomic Idealism to Pure Legalism.” *Chicago Journal of International Law* 7, no. 2 (2006-7): 581-603.
- . “Fatwas and the Fate of Islamic Finance: A Critique of the Practice of *Fatwa* in Contemporary Islamic Financial Markets.” In *Islamic Finance: Current Legal and Regulatory Issues*, edited by S. Nazim Ali, 133-49. Cambridge Mass: Islamic Finance Project (ILSP) Harvard Law School, 2005.
- Hennigan, Peter. *The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Ḥanaḫī Legal Discourse*. Leiden: Brill, 2004.
- Heyd, Uriel. “Some Aspects of the Ottoman Fetvā.” *Bulletin of the School of Oriental and African Studies* 32, no. 1 (1969): 35-56.
- Hindī, Munīr Ibrāhīm. *Shubhat al-Ribā fī Mu‘āmalāt al-Bunūk al-Taqlīdiyya wa al-Islāmiyya*. Alexandria: al-Maktab al-‘Arabī al-Ḥadīth, 2003.
- Hoexter, Miriam. “Waqf Studies in the Twentieth-Century: The State of the Art.” *Journal of the Economic and Social History of the Orient* 41, no. 4 (1988): 474-495.
- Horii, Satoe. “Reconsideration of Legal Devices (*Ḥiyal*) in Islamic Jurisprudence: the Ḥanaḫīs and their “Exits” (*Makhārij*).” *Islamic Law and Society* 9 no. 3 (2002): 312-357.

BIBLIOGRAPHY

- Howells, Peter, and Bain, Keith. *Financial Markets and Institutions*. 4th ed. Harlow: Pearson Education, 2004.
- Hugronje, C. Snouck. *Mekka in the Latter Part of the 19th Century: Daily Life, Customs and Learning: the Moslems of the East-Indian-Archipelago*. Translated by James Henry Monahan. Leiden: E. J. Brill, 1931.
- . *The Achenese*. Translated by A.W.S. O’Sullivan. 2 vols. Leiden: Brill, 1906.
- . *Selected Works of C. Snouck Hurgronje*. Edited and translated by G.-H. Bousquet and J. Schacht. Leiden: Brill, 1957.
- . “Some of my Experiences with the Muftis of Mecca.” In *Jaarverslagen* 4 (1934-1940): 2-16.
- Ibn ‘Abd al-Salām, ‘Izz al-Dīn. *Qawā’id al-Aḥkām fī Maṣāliḥ al-Anām*. Cairo; Maṭba‘ā al-Istiqāma, nd.
- Ibn Abī Shayba, Abū Bakr ‘Abdullah ibn Muḥammad. *al-Kitāb al-Muṣannaf fī al-Aḥādīth wa al-Āthār*. 9 vols. Beirut: Dār al-Kutub al-‘Ilmiyya.
- Ibn Abī Ya‘lā, Abū al-Ḥusayn Muḥammad ibn Muḥammad ibn al-Ḥusayn. *Ṭabaqāt al-Ḥanābila*. 2 vols. Beirut: Dār al-Kutub al-‘Ilmiyya, 1997.
- Ibn ‘Ābidīn, Muḥammad Amīn. “*Sharḥ al-Manzūma al-Musammā bi-‘Uqūd Rasm al-Muftī*.” In *Majmū‘a Rasā’il Ibn ‘Ābidīn*, by idem, 9-52. Beirut: Iḥyā’ al-Turāth al-‘Arabī, nd.
- . *al-‘Uqūd al-Durriyya fī Tanqīḥ al-Fatāwā al-Ḥāmidīyya*. 2 vols. Quetta: Maktaba Ḥabībīyya, nd.
- . *Radd al-Muḥtār ‘alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*. 14 vols. Beirut: Dār al-Kutub al-‘Ilmiyya, 2003.
- Ibn al-‘Arabī, Abū Bakr Muḥammad ibn ‘Abdullah. *Aḥkām al-Qur’ān*. 4 vols. Beirut: Dār al-Kutub al-‘Ilmiyya. 1984.
- Ibn al-Bazzāz, Muḥammad ibn Muḥammad ibn Shihāb. *al-Fatāwā al-Bazzāziyya*. Printed on the margins of vols. 3-6 of *al-Fatāwā al-Ālamgīriyya* (also known as *al-Fatāwā al-Hindiyya*), by Nizām al-Dīn and a group of Indian scholars. Queta: Maktaba Rashīdiyya, 1983.
- Ibn al-Humām, Kamāl al-Dīn Muḥammad ibn ‘Abd al-Wāhid al-Sīwāsī. *Sharḥ Faṭḥ al-Qadīr*. 8 vols. Riyadh: Dār ‘Ālam al-Kutub, 2003.
- Ibn Baṭṭa al-‘Ukbarī, Abū ‘Abdullah ‘Ubayd Allah ibn Muḥammad. *Ibṭāl al-Ḥiyal*. Beirut: Mu’assasat al-Risāla, 1996.
- Ibn Ibrāhīm, Muḥammad. *al-Ḥiyal al-Fiḥiyya fī al-Mu‘āmalāt al-Māliyya*. Tunis: Dār Suḥnūn; Cairo: Dār al-Salām, 2009.

BIBLIOGRAPHY

- Ibn Kathīr, Abū al-Fidā'. *al-Bidāya wa al-Nihāya*. 15 vols. in 8. Beirut: Dār al-Kutub al-'Ilmiyya, 2003.
- Ibn Khallikān, Abū 'Abbās Shams al-Dīn Aḥmad ibn Muḥammad ibn Abī Bakr. *Wafayāt al-A'yān wa Anbā' Abnā' al-Zamān*. 6 vols. Edited by Muḥyī al-Dīn 'Abd al-Ḥamīd. Cairo: Maktaba al-Nahda al-Miṣriyya, 1948.
- Ibn Māza, Burhān al-Dīn Maḥmūd ibn Ṣadr al-Sharī'a. *al-Muḥīṭ al-Burhānī li-Masā'il al-Mabsūṭ wa al-Jāmi'ayn wa al-Siyar wa al-Ziyādāt wa al-Nawādir wa al-Fatāwa wa al-Wāqī'āt Mudallala bi-Dalā'il al-Mutaqaddimīn*. 25 vols. Karachi: Idārat al-Qur'ān, 2004.
- Ibn Nadīm, *Kitāb al-Fihrist*. Edited by Gustav Flügel. Leipzig: F.C.W. Vogel, 1872.
- Ibn Naṣr, Abū Muḥammad 'Abd al-Waḥhāb 'Alī. *al-Ma'ūna*. 2 vols. Beirut: Dār al-Kutub al-'Ilmiyya, 2004.
- Ibn Nujaym, Zayn al-Dīn ibn Ibrāhīm ibn Muḥammad. 9 vols. *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*. Beirut: Dār al-Kutub al-'Ilmiyya, 1997.
- Ibn Qayyim al-Jawziyya, Shams al-Dīn Abū 'Abdullah Muḥammad ibn Abī Bakr. *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*. Beirut: Dār al-Kutub al-'Ilmiyya, 2004.
- . *Ighāthat al-Lahfān min Maṣā'id al-Shayṭān*. Cairo: Maktaba al-Thaqāfa al-Dīniyya, 2001.
- Ibn Qudāma al-Maqdisī, Muwaffaq al-Dīn Abū 'Abdullah ibn Aḥmad. *al-Mughnī*. 14 vols. Beirut: Dār al-Kutub al-'Ilmiyya, nd.
- Ibn Qudāma al-Maqdisī, Shams al-Dīn Abū al-Faraj 'Abd al-Raḥmān. *al-Sharḥ al-Kabīr*. 14 vols. Beirut: Dār al-Kutub al-'Ilmiyya, nd.
- Ibn Quṭlūbugha, Zayn al-Dīn Abū al-'Adl Qāsim. *Tāj al-Tarājim*. Beirut: Dār al-Ma'mūn lī al-Turāth, 1992.
- Ibn Rajab, Abū al-Faraj 'Abd al-Raḥmān. *al-Dhayl 'alā Ṭabaqāt al-Ḥanābila*. Printed as the last two volumes of *Ṭabaqāt al-Ḥanābila*, by Ibn Abī Ya'lā. 4 vols. Beirut: Dār al-Kutub al-'Ilmiyya, 1997.
- Ibn Rushd, Abū al-Walīd Muḥammad ibn Aḥmad. *al-Muqaddimāt al-Mumahhidāt*. 2 vols. Beirut: Dār al-Kutub al-'Ilmiyya, 2002.
- Ibn Rushd, *Bidāyat al-Mujtahid*. 2 vols. Translated by Imran Ahsan Khan Nyazee. Reading: Garnet Publishing, 1996.
- Ibn Taymiyya, Abu al-'Abbās Taqī al-Dīn Aḥmad ibn 'Abd al-Ḥalīm. *Kitāb al-Ikhtiyārāt al-'Ilmiyya*. In *al-Fatāwā al-Kubrā*, by idem. Baghdad: Maktaba al-Muthannā, nd.
- . *Bayān al-Dalīl 'alā Buṭlān al-Taḥlīl*. Beirut: al-Maktaba al-'Aṣriyya, 2007.

BIBLIOGRAPHY

- . *Majmū‘at al-Fatāwā*. 37 vols. Cairo: Maktabat Ibn Taymiyya, 1978.
- . *Majmū‘a Rasā’il wa al-Masā’il*. Cairo: Maṭba‘a al-Manār, nd.
- Ibn Uthmān, Abd al-Raḥmān ibn Ibrāhīm. “*al-Radd ‘alā man Tamassak bi-Madhhabay Imāmayn Abī Hanīfa wa al-Shāfi‘ī fī Istibāḥat al-Ribā bi-al-Ḥiyal*.” In “*Hile-i Şer’iyye Konunsunda İlginç Bir Risāle*”, by Saffet Köse, 231-255. *İslam Hukuku Araştırmaları Dergisi* 1, 2003.
- Ibrāhīm, Muḥammad ‘Uqlat al-. *Ḥukm Bay‘ al-Taqsīt fī al-Sharī‘a al-Islāmiyya*. Amman: Maktaba al-Risāla al-Ḥadītha, 1987.
- İlkhān, ‘Awnī. “Shakḥiyyāt Islāmiyya: Muḥammad Efendī al-Birgivi.” In *İmam Birgivi*, edited by Mehmet Şeker, 23-131. Ankara: Türkiye Diyanet Vakfı Yayınları, 1994.
- Ilkiyā al-Harrāsī, Muḥammad al-Ṭabarī. *Aḥkām al-Qur’ān*. 4 vols. in 2. Beirut: Dār al-Kutub al-‘Ilmiyya, 2001.
- ‘Imādī, Abū al-Sa‘ūd Muḥammad ibn Muḥammad ibn Muṣṭafā al-. *Risāla fī Jawāz Waqf al-Nuqūd*. Edited by Abū al-Ashbāl Şaghīr Aḥmad Shāghif. Beirut: Dār Ibn Ḥazm, 1997.
- Imber, Colin. *Ebu’s-su‘ud: The Islamic Legal Tradition*. Stanford: Stanford University Press, 1997.
- Inalcik, Halil. “Capital Formation in the Ottoman Empire.” *Journal of Economic History* 29, no. 1 (1969): 97-140.
- . “Istanbul: An Islamic City.” *Journal of Islamic Studies* 1 (1990): 1-23.
- İpşirli, Mehmet. “A Preliminary Study of the Public Waqfs of Hama and Homs in the XVI Century.” *Studies on Turkish-Arab Relations Annual* 1 (1986): 119-47.
- Islam, Muhammad Wohidul. “Dissolution of Contract in Islamic Law.” *Arab Law Quarterly* 13, no. 4 (1998): 336-368.
- . “Al-Mal: The Concept of Property in Islamic Legal Thought.” *Arab Law Quarterly* 14, no. 4 (1999): 361-368.
- Islamic Finance Conference: Current Legal and Regulatory Issues: A Short Report*. Harvard, 2004. Available online from http://ifp.law.harvard.edu/login/sixth_harward; Internet; last accessed 02 May 2010.
- Ismail, Muhammed Imran. “Theories of Profit and a Juristic Understanding of Legitimate Entitlement to Profit.” *Review of Islamic Economics* 11, no. 2 (2007): 55-69.
- Jabūrī, Ḥusayn Khalaf al-. “*al-Ḥiyal wa Mawqif al-Fuqahā’ minhā*.” *Majallat Kulliyya al-Dirāsāt al-Islāmiyya* 5 (1973): 113-136. Baghdad, Maṭba‘a al-‘Ānī, offprint.
- Jaṣṣāṣ, Abū Bakr Aḥmad ibn ‘Alī al-Rāzī al-. *Aḥkām al-Qur’ān*. 5 vols. Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1992.

BIBLIOGRAPHY

- . *Uṣūl al-Fiqh al-Musammā bi: al-Fuṣūl fī al-Uṣūl*. 4 vols. Kuwait: Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyya, 1994.
- Jennings, Ronald C. "Loans and Credit in Early 17th Century Ottoman Judicial Records." *Journal of the Economic and Social History of the Orient* 16, no. 2/3 (1973): 168-216.
- Johansen, Baber. "Commercial Exchange and Social Order in Hanafite Law." In *Law and the Islamic World: Past and Present*, edited by Christopher Toll and Jakob Skovgaard-Petersen, 81-95. Copenhagen: The Royal Danish Academy of Sciences and Letters, 1995.
- . "Islamic Studies. The Intellectual and Political Conditions of a Discipline." In *Penser l'Orient: Traditions et actualité des Orientalismes français et allemande*, edited by Youssef Courbage and Manfred Kropp, 65-93. Beirut: Institut Français du Proche-Orient & Orient-Institut, 2004.
- . "Legal Literature and the Problem of Change: the Case of the Land Rent." In *Islam and Public Law. Classical and Contemporary Studies*, edited by Chibli Mallat, 29-47. London: Graham and Trotman, 1993. Reprinted in *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*, by Baber Johansen, 446-464. Leiden: Brill, 1999.
- . "Politics, Paradigms and the Progress of Oriental Studies: The German Oriental Society (Deutsche Morgenländische Gesellschaft) 1845-1989." *M.A.R.S.* 4 (1995): 79-94.
- . "The Muslim Fiqh as a Sacred Law." In *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*, by idem, 1-76. Leiden: Brill, 1999.
- . "The Valorization of the Human Body in Muslim Sunni Law." In *Law and Society in Islam*, edited by Devin J. Stewart, Baber Johansen and Amy Singer, 71-112. Princeton: Markus Wiener Publishers, 1996.
- . *The Salam Contract: Law and Capital Formation in the Abbasid Empire (11th and 12th Centuries)*. Translated by Harvey L. Mendelsohn. Available from <http://law.harvard.edu/faculty/bjohansen/pubs.php>; Internet; last accessed 03 May 2010.
- Jokisch, Benjamin. "Ijtihād in Ibn Taymiyya's *Fatāwā*." In *Islamic Law: Theory and Practice*, edited by Robert Gleave and Eugenia Kermeli, 119-37. London: I.B.Tauris, 2001.
- Jones, William R. "Pious Endowments in Medieval Christianity and Islam." *Diogenes* 109 (1980): 23-36.
- Kalwadhānī, Abu al-Khaṭṭāb Maḥfūz ibn Aḥmad al-. *al-Hidāya*. Kuwait: Geras, 2004.
- Kamali, A. H. "*Kitab al-Hiyal* in the Political Philosophy of the Ummah." *Iqbal Review* 7, no. 3 (1966): 59-81.

BIBLIOGRAPHY

- Kāsānī, ‘Alā’ al-Dīn Abū Bakr ibn Mas‘ūd al-. *Badā’i’ al-Ṣanā’i’ fī Tartīb al-Sharā’i’*. 10 vols. Beirut: Dār al-Kutub al-‘Ilmiyya, 2000.
- . *Badā’i’ al-Ṣanā’i’ fī Tartīb al-Sharā’i’*. 8 vols. Beirut: Dār al-Ma‘rifa, 2000.
- Kawtharī, Muḥammad Zāhid al-. Annotation on *Bayān Zaghl al-‘Ilm*, by Shams al-Dīn Abū ‘Abdullah Muḥammad ibn Aḥmad al-Dhahabī. Damascus: Maṭba‘a al-Tawfīq, 1347 AH.
- . *Husn al-Taḳāḍī fī Sīrat al-Imām Abī Yūsuf al-Qāḍī*. Cairo: al-Maktaba al-Azhariyya li al-Turāth, 2002.
- . *Ta’nīb al-Khaṭīb ‘alā mā Sāqahū fī Tarjimat Abī Ḥanīfa min al-Akādhīb*. Cairo: al-Maktab al-Azhar li al-Turāth, 2006.
- . *Bulūgh al-Amānī fī Sīrat al-Imām Muḥammad ibn al-Ḥasan al-Shaybānī*. Cairo: al-Maktaba al-Azhariyya li al-Turāth, 1998.
- . Introduction to *Ahkām al-Qur’ān*, by Abū ‘Abdullah Muḥammad ibn Idrīs al-Shāfi‘ī, 12-17. Beirut: Dār al-Kutub al-‘Ilmiyya, 1980.
- Kayapinar, Ayşe. “The Gazi Mihaloğullari *Waqfs* in Northern Bulgaria (15th-16th Centuries).” In *Proceedings of the Second International Symposium on Islamic Civilisation in the Balkans*, 163-74. Istanbul: IRCICA, 2006.
- Kayapinar, Levent. “The Charitable Foundations of the Family of Turhan Bey who Conquered Thessaly Region in Greece in the 15th – 16th Centuries.” In *Proceedings of the Second International Symposium on Islamic Civilisation in the Balkans*, 149-62. Istanbul: IRCICA, 2006.
- Kayoko, Hayashi. “The *Vakıf* Institution in 16th-Century Istanbul: An Analysis of the *Vakıf* Survey Register of 1546.” *Memoirs of the Research Department of the Toyo Bunko* 50 (1992): 93-113.
- Ken’ichi, Isogai. “A Commentary on the Closing Formula Found in the Central Asian Waqf Documents.” In *Persian Documents: Social History of Iran and Turan in the fifteenth and nineteenth centuries*, edited by Kondo Nobuaki, 3-12. London: RoutledgeCurzon, 2003.
- Kermeli, Eugenia. “*Vakfs* Consisting of Shares in Ships: *Hüccets* from the Saint John the Theologos Monastery on Patmos.” In *The Kapudan Pasha: His Office and his Domain*, edited by Elizabeth Zachariadou, 213-220. Rethymnon, Crete: Crete University Press, 2002.
- Khadduri, Majid. *Islamic Jurisprudence: al-Shāfi‘ī’s Risāla*. 2nd ed. Cambridge: Islamic Texts Society, 1961.
- Khalilieh, Hassan S. “Legal Aspects from a Cairo Geniza Responsum on the Islamic law of the Sea: Practice and Theory.” *The Jewish Quarterly Review* 96, no. 2 (2006): 180-202.

BIBLIOGRAPHY

- Khan, Fareeha. "Tafwīd al-Ṭalāq: Transferring the Right of Divorce to the Wife." *The Muslim World* 99, no. 3 (2009): 502-520.
- Khan, Mir Siadat Ali. "The Mohammedan Laws against Usury and How They Are Evaded." *Journal of Comparative Legislation and International Law* 3rd Ser. 11, no. 4 (1929): 233-44.
- Khaṣṣāf, Abū Bakr Aḥmad ibn 'Amr al-. *Aḥkām al-Awqāf*. Beirut: Dar al-Kutub al-'Ilmiyya, 1999.
- . *Kitāb al-Ḥiyal wa al-Makhārij*. Edited by Joseph Schacht (*Das Kitāb al-ḥiyal wa al-makhārij*). Hildesheim: Georg Olms Verlagsbuchhandlung, 1968.
- . *Sharḥ Adab al-Qāḍī*. With a commentary by 'Umar ibn 'Abd al-'Azīz Ḥusām al-Dīn. Beirut: Dār al-Kutub al-'Ilmiyya, 1994.
- . *Kitāb al-Khaṣṣāf fī al-Ḥiyal*. Cairo: Maktaba al-Qāhira, 1314.
- Khatīb al-Baghdādī, Abū Bakr Aḥmad ibn 'Alī al-. *Tarīkh Baghdād aw Madīnat al-Islām*. 14 vols. Cairo: Maktaba Khānjī, 1931.
- Khazhdan A. P., and Epstein, Ann Wharton. *Change in Byzantine Culture in the Eleventh and Twelfth Centuries*. Berkley: University of California Press, 1985.
- Krawietz, Birgit. "Cut and Paste in Legal Rules: Designing Islamic Norms with Talfīq." *Die Welt des Islams* n.s. 42, no. 1 (2002): 3-40.
- Köse, Saffet. "Hile-i Şer'iyye Konunsunda İlginç Bir Risâle." *İslam Hukuku Araştırmaları Dergisi* 1 (2003) 231-255.
- Kuran, Timur. "The Provision of Public Goods under Islamic Law: Origins Impact, and Limitations of the Waqf System." *Law and Society Review* 35, no. 4 (2001): 841-97.
- Labib, Subhi Y. "Capitalism in Islam." *The Journal of Economic History* 29, no. 1 (1969): 79-96.
- Laknawī, Muḥammad 'Abd al-Ḥayy al- "al-Fulk al-Mashhūn fīmā Yata'allaq bi-Intifā' al-Murtahin bi-al-Marhūn." In volume 3 of *Majmū'a Rasā'il al-Laknawī*, edited by Na'im Ashraf Nūr Aḥmad. 6 vols. Karachi: Idārat al-Qur'ān, 1419 AH.
- . "al-Nāfi' al-Kabīr li-man Yuṭāli' al-Jāmi' al-Şaghīr." As an introduction to *al-Jāmi' al-Şaghīr* by Muḥammad ibn Ḥasan al-Shaybānī, 5-31. Beirut: 'Ālam al-Kutub, 1986.
- Lambton, A. K. S. "The Merchant in Medieval Islam." In *A Locust's Leg: Studies in Honour of S. H. Taqizadeh*, edited by W. B. Henning and E. Yarshater, 121-130. London: Percy Lund, Humphries & Co., 1962.
- Lammens, H. "al-Ḥiyal wa al-Makhārij." *al-Machriq* 29 (1931): 641-46.

BIBLIOGRAPHY

- Lane, E. W. *Arabic~English Lexicon*. 8 vols. Cambridge: Islamic Texts Society, 1863-93.
- Lane, Frederic C. "Investment and Usury in Medieval Venice." *Explorations in Entrepreneurial History* ser. 2, vol. 2, no. 1 (1964): 3-15.
- . *Venice and History*. The collected papers of Frederic C. Lane edited by a committee of colleagues and former students. Baltimore: John Hopkins Press, 1966.
- Le Gall, Dina. *A Culture of Sufism: Naqshbandīs in Ottoman World 1450–1700*. New York: SUNY Press, 2005.
- Lieber, Alfred E. "Eastern Business Practices and Medieval European Commerce." *The Economic History Review* n.s. 21, no. 2, (1968): 230-243.
- Lowry, Joseph E. *Early Islamic Legal Theory: The Risāla of Muḥammad ibn Idrīs al-Shāfiʿī*. Leiden, Brill, 2007.
- Lucas, Scott C. "The Legal Principles of Muḥammad B. Ismāʿīl al-Bukhārī and their Relationship to Classical Salafī Islam." *Islamic Law and Society* 13, no. 3 (2006): 289-324.
- . "Principles of Traditionist Jurisprudence Reconsidered." *The Muslim World* 100, no. 1 (2010): 145-56.
- Lydon, Ghislaine. "Contracting Caravans: Partnership and Profit in Nineteenth- and Early Twentieth-Century Trans-Saharan Trade." *Journal of Global History* 3 (2008): 89-113.
- Maḥmūd, ʿAbd al-Majīd. *al-Ittijāhāt al-Fiqhiyya ʿinda Aṣḥāb al-Ḥadīth fī al-Qarn al-Thālith al-Hijrī*. Cited in Abū Ghudda's introduction to *Kashf al-Iltibās ʿammā Awradahū al-Imām al-Bukhārī ʿalā baʿḍ al-Nās*, by ʿAbd al-Ghanī al-Ghunaymī al-Maydānī, 16-50. Aleppo: Maktab al-Maṭbūʿāt al-Islāmiyya, 1993.
- Malamud, Margaret. "The Politics of Heresy in Medieval Khurasan." *Iranian Studies* 27, no. 1-4 (1994): 37-51.
- Mallat, Chibli. "The Debate on Riba and Interest in Twentieth Century Jurisprudence." In *Islamic Law and Finance*, edited by idem, 69-88. London: Graham and Trotman, 1988.
- Mandaville, Jon E. "Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire." *International Journal of Middle East Studies* 10, no. 3 (1979): 289-308.
- Marghīnānī, Burhān al-Dīn Abū al-Ḥasan ʿAlī ibn Abī Bakr al-. *al-Hidāya*. np. Miṣbah, nd.
- Martinez, A.P. "Third Portion of the History of Ġāzān Xān in Rašīdu ʿD-Dīn's Ta'rīx-e Mobarak-e Ġāzānī. Comprising Narratives and Documents Relating to the Agrarian-Fiscal, Financial, and Monetary, Judiciary, Military, Religious and Other Reforms Instituted by Ġāzān Xān Together with Some Notes on His Personal Qualities and Character. Part Two: The Twentieth, Twenty-First, and Twenty-Sixth Sections

BIBLIOGRAPHY

- Concerning Standards and Weights and the Prohibition of Interest and Dishonest Credit Transactions, Especially those Involving the State or its Ministers, Together with Ġāzān Xān's Decree on Standards, Weights and Measures." *Archivum Eurasiae Medii Aevi* 8 (1994): 99-206.
- Masters, Bruce. "Ottoman Policies toward Syria in the 17th and 18th Centuries." In *The Syrian Land in the 18th and 19th Century: The Common and the Specific in the Historical Experience*, edited by Thomas Philipp, 11-26. Stuttgart: Franz Steiner Verlag, 1992.
- . *The Origins of Western Economic Dominance in the Middle East: Mercantilism and the Islamic Economy in Aleppo, 1600-1750*. New York: New York University Press, 1988.
- Masud, Muhammad Khalid. "Apostasy and Judicial Separation in British India." In *Islamic Legal Interpretation: Muftis and their Fatwas*, edited by Muhammad Khalid Masud, Brinckley Messick and David S. Powers, 193-203. Cambridge Mass: Harvard University Press, 1996.
- . *Shāfi'ī's Philosophy of Islamic Law*. Islamabad: IRI, 1995.
- Masyita, Dian; Tasrif, Muhammad, and Telaga, Abdi Suryadinata. *A Dynamic Model For Cash Waqf Management as One of the Alternative Instruments for the Poverty Alleviation in Indonesia*. Paper submitted to the 23rd international conference of the Systems Dynamics Society. Boston: MIT, July 17-21, 2005.
- Matroudi, Abdul Hakim I. al-. *The Hanbalī School of Law and Ibn Taymiyya: Conflict or Conciliation*. London: Routledge, 2006.
- . "Circumstantial Evidence and Legal Stratagems in Sūrat Yūsuf (*al-Qarīna wa al-Ḥīla fī Sūra Yūsuf*)." *Journal of Qur'anic Studies* 9, no. 1 (2007): 199-235.
- Māwardī, Abū al-Ḥasan 'Alī ibn Muḥammad ibn Ḥabīb al-. *al-Ḥāwī al-Kabīr*. 19 vols. Beirut: Dār al-Kutub al-'Ilmiyya, 1999.
- Meilink-Roelofsz, M.A.P. *Asian trade and European influence in the Indonesian Archipelago between 1500 and about 1630*. The Hague: Nijhoff, 1962.
- Melchert, Christopher. "Traditionist-Jurisprudents and the Framing of Islamic Law." *Islamic Law and Society* 8, no.3 (2001): 383-406.
- . *The Formation of the Sunnī Schools of Law, 9th-10th Centuries C.E.* Leiden: Brill, 1997.
- Menning, Carol Bresnahan. "The Monte's 'Monte': The Early Supporters of Florence's Monte di Pietà." *The Sixteenth Century Journal* 23, no. 4 (1992): 661-76.
- . *Charity and State in Late Renaissance Italy: The Monte Di Pietà of Florence*. Ithaca NY: Cornell University Press, 1993.

BIBLIOGRAPHY

- Minkov, Anton. *Conversion to Islam in the Balkans: Kisve Bahası Petitions and Ottoman Social Life, 1670-1730*. Leiden: Brill, 2004.
- Miqdād, Ziyād Ibrāhīm. *Bay‘ al-Dayn: Aḥkāmuḥū wa Taṭbīqātuhū al-Mu‘āşira*. (Beirut: Dār al-Kutub al-‘Ilmiyya, 2003.
- Miṣrī, Rafīq Yūnus al-. *al-Jāmi‘ fī Uṣūl al-Ribā*. 2nd ed. Damascus: Dār al-Qalam, 2001.
- . *al-Ribā wa al-Ḥasm al-Zamanī fī al-Iqtisād al-Islāmī*. Damascus: Dār al-Maktabī, 2000.
- . *Fiqh al-Mu‘āmalāt al-Māliyya*. Damascus: Dār al-Qalam, 2005.
- Mudarris, Muḥammad Maḥrūs ‘Abd al-Laṭīf al-. *Mashāyikh Balkh min al-Ḥanaḥiyya wamā Infaradū biḥī min al-Masā’il al-Fiqhiyya*. 2 vols. Baghdad: al-Dār al-‘Arabiyya, 1977.
- Muṭī‘ī, Muḥammad Bakhīt al-. *Risāla fī Bayān al-Kutub allatī Yu‘awwal ‘alayhā wa Bayān Ṭabaqāt ‘Ulamā’ al-Madhhab al-Ḥanaḥī wa al-Radd ‘alā Ibn Kamāl Bāshā*. Damascus: Dār al-Qādirī, 2008.
- Mūsā, Muḥammad Yūsuf. “The Liberty of the Individual in Contracts and Conditions According to Islamic Law.” *Islamic Quarterly* 2 (1955): 79-85, 252-63.
- Muslim, A. G. “The Theory of Interest in Islamic Law and the Effects of the Interpretation of this by the Hanafī School up to the end of the Mughal Empire.” PhD diss., University of Glasgow, 1974.
- Naqīb, Aḥmad ibn Muḥammad al-. *al-Madhhab al-Ḥanaḥī*. 2 vols. Riyadh: Maktabat al-Rushd, 2001.
- Nasafī, Najm al-Dīn Abū Ḥaḥṣ ‘Umar al-. *Ṭilbat al-Ṭalaba fī Isṭilāḥāt al-Fiqhiyya*. Beirut: Dār al-Kutub al-‘Ilmiyya, 1997.
- . *al-Qand fī Dhikr ‘Ulamā’ Samarqand*. Tehran: Mīrāth Maktūb, 1999.
- Nawawī, Abū Zakariyya Yaḥyā ibn Sharaf al-. *Rawḍa al-Ṭālibīn*. 8 vols. Beirut: Dār al-Kutub al-‘Ilmiyya, 2000.
- . *al-Majmū‘ Sharḥ al-Muhadhdhab*. 22 vols. Beirut: Dār al-Fikr, 2000.
- Naysābūrī, Muslim ibn al-Ḥajjāj al-Qushayrī al-. *Ṣaḥīḥ Muslim*. 2 vols. Liechtenstein: Thesaurus Islamicus Foundation, 2000.
- Niel, Robert van “Christiaan Snouck Hurgronje: In Memory of the Centennial of his Birth.” *The Journal of Asian Studies* 16, no. 4 (1957): 591-594.
- Nizām al-Dīn and a group of Indian scholars. *al-Fatāwā al-‘Ālamgīriyya* (also known as *al-Fatāwā al-Hindiyya*). Queta: Maktaba Rashīdiyya, 1983.
- Noonan, John T. Jr. *The Scholastic Analysis of Usury*. Cambridge MS: HUP, 1957.

BIBLIOGRAPHY

- Nyazee, Imran Ahsan Khan. *Islamic Law of Business Organization: Corporations*. Islamabad: Islamic Research Institute and International Institute of Islamic Thought, 1998.
- Nyazee, Imran Ahsan Khan. *Islamic Law of Business Organization: Partnerships*. Islamabad: Islamic Research Institute and International Institute of Islamic Thought, 1999.
- . *The Concept of Ribā and Islamic Banking*. Islamabad: Niazi Publishing House, 1995.
- Pamuk, Şevket. "The Evolution of Financial Institutions in the Ottoman Empire, 1600-1914." *Financial History Review* 11, no. 1 (2004): 7-32.
- Perinbaum, Marie. "The Julas in Western Sudanese History: Long-Distance Traders and Developers of Resources." In *West African Culture Dynamics: Archaeological and Historical Perspectives*, edited by B. K. Swartz Jr. and Raymond E. Dumett, 455-475. The Hague: Mouton Publishers, 1980.
- Peters, Rudolph. "What does it mean to be an Official Madhhab? Hanafism and the Ottoman Empire." In *The Islamic School of Law: Evolution, Devolution and Progress*, edited by Peri Bearman, Rudolph Peters and Frank E. Vogel, 147-58. Cambridge Mass: ILSP Harvard Law School, 2005.
- Pixley, Michael M. "The Development and Role of the Şeyhülislam in Early Ottoman History." *Journal of the American Oriental Society* 96, no. 1 (1976): 89-96.
- Postan, M. M. *Medieval Trade and Finance*. Cambridge: CUP, 1973.
- . "Partnership in English Medieval Commerce." In *Studi in Onore di Armando Saporì*, 521-549. Milan: Istituto Editoriale Cisalpino, 1957.
- Powers, David S. "A Court Case from Fourteenth-Century North Africa." *Journal of the American Oriental Society* 110, no. 2 (1990): 229-54.
- . "Fatwās as a Source for Legal and Social History: A Dispute over Endowment Revenues from Fourteenth-Century Fez." *Al-Qantara* 9, no. 2 (1990): 295-340.
- . "kadijustiz or Qādī-Justice? A Paternity Dispute from Fourteenth-Century Morocco." *Islamic Law and Society* 1, no. 3 (1994): 332-366.
- . "Orientalism, Colonialism and Legal History: the Attack on Muslim Family Endowments in Algeria and India." *Comparative Studies in Society and History* 31, no. 3 (1989): 535-71.
- Powers, Paul R. *Intent in Islamic Law: Motive and Meaning in Medieval Sunnī Fiqh*. Leiden: Brill, 2006.
- Pryor, John H. "The Origins of the *Commenda* Contract." *Speculum*, 52, no. 1 (1977): 5-37.

BIBLIOGRAPHY

- Qazwini, Abū Ḥātim Mahmūd ibn al-Ḥasan al-. *Kitāb al-Ḥiyal fī al-Fiqh*. Edited by Joseph Schacht (*Das Kitāb al-ḥiial fīl-fiqh*). Hannover: Orient-Buchhandlung Heinz Lafaire, 1924.
- Qudūrī, Aḥmad ibn Muḥammad al-. *al-Mukhtaṣar*. Multan: Maktaba Ḥaqqāniyya, nd.
- Qurashī, ‘Abd al-Qādir ibn Abī al-Wafā’ al-. *al-Jawāhir al-Muḍī’a, fī Ṭabaqāt al-Ḥanafīyya*. Beirut: Dār al-Kutub al-‘Ilmiyya, 2005.
- Qurṭubī, Abū ‘Abdullah Muḥammad ibn Aḥmad al-Anṣarī al-. *al-Jāmi‘ li Aḥkām al-Qur’ān*. 22 vols. Dār al-Fikr, 1952.
- Rafeq, Abdul-Karim. “City and Countryside in a Traditional Setting: The case of Damascus in the First Quarter of the Eighteenth Century.” In *The Syrian Land in the 18th and 19th Century: The Common and the Specific in the Historical Experience*, edited by Thomas Philipp, 295-332. Stuttgart: Franz Steiner Verlag, 1992.
- . “Making a Living or Making a Fortune in Ottoman Syria.” In *Money, Land and Trade: An Economic History of the Muslim Mediterranean*, edited by Nelly Hannan, 101-123. London: I.B. Tauris, 2002.
- . “The Syrian ‘Ulamā, Ottoman Law and Islamic Sharī’a.” *Turcica* 26 (1994): 9-32.
- Rahman, Fazlur. “Ribā and Interest.” *Islamic Studies* 3 (1964): 1-43.
- Ramlī, Khayr al-Dīn al-. *al-Fatāwā al-Khayriyya*. 2 vols. Printed on the margins of *al-‘Uqūd al-Durriya fī Tanqīḥ al-Fatāwā al-Ḥāmiyya*, by Muḥammad Amīn Ibn ‘Ābidīn. 2 vols. Quetta: Maktaba Ḥabībiyya, nd.
- Rashīdī, Aḥmad Fahd al-. *‘Amaliyyāt al-Tawarruq wa Taṭbīqātuhā al-Iqtisādiyya fī al-Maṣārīf al-Islāmiyya*. Amman, Dār al-Nafā’is, 2005.
- Ray, Nicholas Dyan. “The Medieval Islamic System of Credit and Banking: Legal and Historical Considerations.” *Arab Law Quarterly* 12, no. 1 (1997): 43-90.
- Raysuni, Ahmad al-. *Imam al-Shāṭibī’s Theory of the Higher Objectives of Islamic Law*. Translated by Nancy Roberts. London: IIIT, 2005.
- Rāzī, Fakhr al-Dīn al-. *al-Tafsīr al-Kabīr*. 32 vols. Cairo: al-Maṭba‘a al-Bahiyya al-Miṣriyya, nd.
- Reinhart, A. Kevin. “Mollā Ḥüsrev: Ottoman Jurist and *usūlī*.” In *Studies in Islamic Law: A Festschrift for Colin Imber*, edited by Andreas Christmann and Robert Gleave, 245-180. *Journal of Semitic Studies*, Supplement 23. Oxford: Oxford University Press, 2007.
- Repp, Richard C. “Qānūn and Sharī’a in the Ottoman Context.” In *Islamic Law: Social and Historical Contexts*, edited by Aziz al-Azmeh, 124-45. London: Routledge, 1988.

BIBLIOGRAPHY

- Riḍā, Muḥammad Rashīd. *al-Ribā wa al-Mu‘āmalāt fī al-Islām*. Cairo: Dār al-Kulliyyāt al-Azhariyya, 1986.
- Rodinson, Maxime. *Islam and Capitalism*. Translated by Brian Pearce. London: Allen Lane, 1974.
- Rosly, Saiful Azhar, and Sanusi, Mahmood. “Some Issues of *Bay‘ al-‘Īnah* in Malaysian Financial Markets.” *Arab Law Quarterly* 16, no. 3 (2001): 263-280.
- Rosly, Saiful Azhar, and Seman, Azizi Che. “Juristic Viewpoints on *Bay‘ al-‘Īnah* in Malaysia: A Survey.” *IIUM Journal of Economics and Management* 11, no. 1 (2003): 87-111.
- Rosly, Saiful Azhar. “*Iwāḍ* as a Requirement of Lawful Sale: A Critical Analysis,” *IIUM Journal of Economics and Management* 9, no. 2 (2001): 187-201.
- Saeed, Abdullah. *Islamic Banking and Interest: A Study of Prohibition of Riba and its Contemporary Interpretation*. Leiden: Brill, 1996.
- Safar, Aḥmad. *al-Ta‘mīnāt al-‘Ayniyya: al-Rahn al-‘Aqārī wa al-Bay‘ bi al-Wafā’, al-Ta‘mīn al-‘Aqārī - Ḥuqūq al-Imtiyāz*. Beirut: np. 2003.
- Şahin, İlhan. “The Story of the Emergence of a Balkan City: Sarayova.” In *Proceedings of the International Symposium on Islamic Civilisation in the Balkans*, edited by Rama M. Z. Keilani and Svetlana Todorova, 113-119 (Istanbul: IRCICA, 2002), 114.
- Said, Edward W. “Islam, the Philological Vocation, and French Culture: Renan and Massignon.” In *Islamic Studies: A Tradition and its Problems*, edited by Malcolm H. Kerr, 53-72. California: Undena Publications, 1980.
- Saleem, Muhammad. *Islamic Banking: A \$300 Billion Deception*. USA: Xlibris, 2005.
- Saleh, Nabil. “Are the Validity and Construction of Legal Acts Affected by Cause (Sabab)? A Comparative Study under Islamic and Arab Laws.” *Arab Law Quarterly* 7, no. 2 (1992): 116-40.
- . *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking*. Cambridge: CUP, 1986.
- Samarqandī, Abū Layth Naṣr ibn Muḥammad ibn Ibrāhīm al-. *‘Uyūn al-Masā’il fī Furū‘ al-Ḥanafīyya*. Beirut: Dār al-Kutub al-‘Ilmiyya, 1998.
- Samarqandī, Nāṣir al-Dīn Abū al-Qāsim Muḥammad ibn Yūsuf al-Husaynī al-. *al-Multaqaṭ fī al-Fatāwā al-Ḥanafīyya*. Beirut: Dār al-Kutub al-‘Ilmiyya, 2000.
- Samarqandī, Sa‘īd ibn ‘Alī al-. *Jannat al-Aḥkām wa Junnat al-Khiṣām fī al-Ḥiyāl wa al-Makhārīj*. Edited by Saffet Köse and İlyās Qablān. Beirut: Dār Şādir; Istanbul: Maktabat al-Irshād, 2005.

BIBLIOGRAPHY

- Samour, Nahed. "The Principle of "Just Exchange" in the Private and Public Spheres of Islamic Law: The Consequences of the Construction of Property and Proprietor for the Hanafī Woman." In *Yearbook of Islamic and Middle Eastern Law*, edited by Eugene Contran, 85-114. Leiden: Kluwer Law, 2002.
- Ṣanʿānī, Abū Bakr ʿAbd al-Razzāq ibn Hammām al-. *al-Muṣannaḡ*. 12 vols. Johannesburg: al-Majlis al-ʿIlmī, 1983.
- Sanhūrī, ʿAbd al-Razzāq al-. *Maṣādir al-Ḥaḡ fī al-Fiqh al-Islāmī*. 6 vols. in 2. Beirut: Dār Iḡyā al-Turāth al-ʿArabī, 1997.
- Sarakhsī, Abū Bakr Muḡammad ibn Aḡmad ibn Abī Sahl al-. *Kitāb al-Ḥiyal min al-Mabsūṡ*. Edited by Joseph Schacht and printed together with *al-Makhārij fī al-Ḥiyal*, by Muḡammad ibn al-Ḥasan al-Shaybānī. Edited by Joseph Schacht. Leipzig: Baghdad, al-Muthanna Library, 1930.
- . *Kitāb al-Mabsūṡ*. 30 vols. Beirut: Dār al-Kutub al-ʿIlmiyya, 2001.
- Ṣaymarī, Abū ʿAbdullah Ḥusayn ibn ʿAlī al-. *Akḡbār Abī Ḥanīḡa wa Aṣṡābihī*. Beirut: ʿĀlam al-Kutub, 1985.
- Schacht, Joseph. "Modernism and Traditionalism in a History of Islamic Law." *Middle Eastern Studies* 1, no.4 (1965): 388-400.
- . "Review," of *Traité de Droit Musulman Comparé*, by Y. Linant de Bellefonds. *Middle Eastern Studies* 3, no.4 (1967): 416-421.
- . *An Introduction to Islamic Law*. Oxford: Clarendon Press, 1982.
- . "The Schools of Law and Later Developments of Jurisprudence." In *Law in the Middle East*, edited by Majid Khadduri and Herbert J. Liebesny, 57-84. Washington D. C.: The Middle East Institute, 1955.
- Shāḡīʿī, Abū ʿAbd Allah Muḡammad ibn Idrīs al-. *al-Risāla*. Beirut: al-Maktaba al-ʿIlmiyya, 1939.
- . *Aḡkāḡ al-Qurʿān*. 2 vols. in 1. Beirut: Dār al-Kutub al-ʿIlmiyya, 1991.
- . *Kitāb al-Umm*. 9 vols. Beirut: Dār al-Kutub al-ʿIlmiyya, 1993.
- Sharma, R. S. "Usury in Early Mediaeval India (A.D. 400-1200)." *Comparative Studies in Society and History* 8, no. 1 (1965): 56-77.
- Shāṡībī, Abū Ishāḡ Ibrāḡīm ibn Mūsā al-. *al-Muwāḡaqāt fī Uṣūl al-Sharīʿa*. Beirut: Dār al-Kutub al-ʿIlmiyya, 2004.
- Shaw, Stanford J. *The Financial and Administrative Organization and Development of Ottoman Egypt 1517-1798*. Princeton, New Jersey: Princeton University Press, 1962.

BIBLIOGRAPHY

- Shaybānī, Abū ‘Abdullah Muḥammad ibn al-Ḥasan al-. *al-Ḥujja ‘alā Ahl al-Madīna*. 4 vols. Beirut: ‘Ālam al-Kutub, 1968.
- . *Kitāb al-Aṣl al-Ma‘rūf bi al-Mabsūṭ*. 5 vols. Beirut: ‘Ālam al-Kutub, 1990.
- . *Kitāb al-Aṣl*. MS 90. ‘Āshir Efendi, Istanbul.
- . *Kitāb al-Aṣl*. MS 604. Fayd Allah Efendi, Millat KutupKhane, Istanbul.
- . *Kitāb al-Kasb*. Printed with al-Sarakhsī’s commentary although no distinction is discernable between the original text and its commentary. Aleppo: Maktaba al-Maṭbū‘āt al-Islāmiyya, 1997.
- . *al-Makhārij fī al-Ḥiyāl*. Edited by Joseph Schacht (*Das kitāb al-maḥāriḡ fīl-ḥijal des Muḥammad ibn al-Ḥasan aṣ-Ṣhaybānī. In Zwei Rezensionen*. Hildesheim: Georg Olsm Verlagsbuchhandlung, 1968
- . *al-Makhārij fī al-Ḥiyāl*. Edited by Joseph Schacht. Leipzig: Baghdad, al-Muthanna Library, 1930.
- . *The Muwaṭṭa of Imām Muḥammad*. Translated by Mohammed Abdurrahman and Abdassamad Clarke. London: Turath Publishing, 2004.
- Siwār, Muhammad Waḥīd al-Dīn. *al-Ta‘bīr ‘an al-Irāda fī al-Fiqh al-Islāmī*. Amman: Maktaba Dār al-Thaqāfa, 1998.
- Skaist, Aaron. *The Old Babylonian Loan Contract*. Jerusalem, Bar-Ilan University, 1994.
- Smith, Henry Preserved. “Review: Sachau on the Mohammedan Legal System.” *The American Journal of Semitical Languages and Literatures* 15, no. 3 (1899): 177-81.
- Strawson, John. “Islamic law and English Texts.” In *Laws of the Postcolonial*, edited by Eve Darian-Smith and Peter Fitzpatrick, 109-26. Ann Arbor: The University of Michigan Press, 1990.
- . “Revisiting Islamic Law: Marginal notes from Colonial History.” *Griffin Law Review* 12, no. 2 (2003): 362-383.
- Sucesko, Avdo. *Les Credits de Vakoufs a Sarajevo*. Sarajevo: Orijenalni Institut u Sarajevu, 1966. Translated into Arabic as “*Waqf al-Nuqūd fī Sarāyifū*.” In *Dirāsāt fī Waqf al-Nuqūd: Maḥūm Mughāyir li-al-ribā fī al-Mujtama‘ al-‘Uthmānī*, co-authored by Mohamed Arnaout, Avdo Sucëska and John E. Mandville, 37-63. Zaghwān, Tunisia: Mu‘assasat al-Tamīmī li al-Baḥth al-‘Ilmī wa al-Ma‘lūmāt, 2001.
- Sughdī, Abū al-Ḥasan ‘Alī ibn al-Ḥusayn al-. *al-Nutaf fī al-Fatāwā*. Beirut: Dār al-Kutub al-‘Ilmiyya, 1996.
- Suhrawardy, A. al-Ma‘mūn. “The Waqf of Moveables.” *Journal of the Royal Asiatic Society of Bengal* n.s. 7 (1911): 323-430.

BIBLIOGRAPHY

- Sulaymān, Ḥabīb Aḥmad. *al-Ḥiyāl wa Atharuhā fī al-Aḥwāl al-Shakhsiyya*. np.: Dār al-Nafā'is, 2005.
- Ṭabarī, Abū Ja'far Muḥammad ibn Jarīr al-. *Jāmi' al-Bayān 'an Ta'wīl Āy al-Qur'ān*. 30 vols. Beirut: Dār al-Fikr, 1984.
- Tag el Din, Seif el Din I. "The Elimination of *Ribā*: A Measure Truly Dedicated to Poverty Alleviation." In *Islamic Economic Institutions and the Elimination of Poverty*, edited by Munawar Iqbal, 187-207. Leicester: The Islamic Foundation, 2002.
- Ṭahāwī, Abū Ja'far Aḥmad ibn Muḥammad al-. *Sharḥ Ma'ānī al-Āthār*. 4 vols. Beirut: Dār al-Kutub al-'Ilmiyya, 2006.
- Tanūkhī, Saḥnūn ibn Sa'īd al-. *al-Mudawwana al-Kubrā*. 5 vols. Beirut: Dār al-Kutub al-'Ilmiyya, 1994.
- Ṭarābulusī, Burhān al-Dīn Ibrāhīm ibn Mūsā ibn Abī Bakr al-. *al-Is'āf fī Aḥkām al-Awqāf*. Beirut: Dār al-Rā'id al-'Arabī, 1981.
- Ṭāshkubrāzāda, *al-Shaqā'iq al-Nu'māniyya fī 'Ulamā' al-Dawla al-'Uthmāniyya*. Beirut: Dār al-kitāb al-'Arabī, 1975.
- Thanvī, Ashraf 'Alī. "*al-Ḥīla al-Nājiza li al-Ḥalīla al-'Ājiza*." In *Ḥīla Nājiza Ya'nī Aurato kā Haq-i Tansīkh-i Nikāḥ*, by idem, 19-83. Karachi: Dār al-Ishā'at, 1987.
- Thomas, Abdulkader, ed. *Interest in Islamic Economics: Understanding Riba*. London: Routledge, 2006.
- Thorburn, S. S. *Musalmans and Money Lenders in the Punjab*. Delhi: Mittal Publications, 1983/4.
- Toaff, Ariel. "Jews, Franciscans, and the First *Monti di Pietà* in Italy (1462–1500)." In *Friars and Jews in the Middle Ages and Renaissance*, edited by Steven J. McMichael and Susan E. Myers, 239-253. Leiden: Brill, 2004.
- Tor, D. G. "The Islamization of Central Asia in the Sāmānid Era and the Reshaping of the Muslim World." *Bulletin of the School of Oriental and African Studies* 72, no. 2 (2009): 279-99.
- Tsafrir, Nurit. *The History of an Islamic School of Law: The Early Spread of Hanafism*. Cambridge MS: ILSP Harvard Law School, 2004.
- Ṭūfī, Najm al-Dīn Abū al-Rabī' Sulaymān ibn 'Umar al-. *Sharḥ Mukhtaṣar al-Rawḍa*. 3 vols. Saudi Arabia: Ministry of Islamic Affairs, Endowments, Propagation and Guidance, 1998.
- Tumurtāshī, Muḥammad ibn 'Abdullah al-. *Tanwīr al-Abṣār wa Jāmi' al-Biḥār*. Printed with the commentary of Muḥammad ibn 'Alī al-Ḥaṣkafī, *al-Durr al-Mukhtār* (Beirut: Dār al-Kutub al-'Ilmiyya, 2002).

BIBLIOGRAPHY

- Udovitch, Abraham L. "At the Origins of the Western *Commenda*: Islam, Israel, Byzantium?" *Speculum* 37, no. 2 (1962): 198-207.
- . "Bankers without Banks: Commerce, Banking and Society in the Islamic World of the Middle Ages" in *The Dawn of Modern Banking*, selected papers delivered at a conference held at UCLA September 23-25 1977, 255-273. New Haven and London: Yale University Press, 1979.
- . "Commercial Techniques in Early Medieval Trade." In *Islam and the Trade of Asia: A Colloquium*, edited by D. S. Richards, 37-62. Oxford: Bruno Cassirer; Pennsylvania: University of Pennsylvania Press, 1970.
- . "Formalism and Informalism in the Social and Economic Institutions of the Medieval Islamic World." In *Individualism and Conformity in Classical Islam*, edited by Amin Banani and Speros Vryonis, Jr., 61-81. Wiesbaden: Otto Harrassowitz, 1977.
- . *Partnership and Profit in Medieval Islam*. Princeton: Princeton University Press.
- . "Reflections on the Institutions of Credit and Banking in the Medieval Islamic Near East." *Studia Islamica*, 41 (1975): 5-21.
- . "The "Law Merchant" of the Medieval Islamic World." In *Logic in Classical Islamic Culture*, edited by G. E. von Grunebaum, 113-130. Wiesbaden: Otto Harrossowitz, 1970.
- ʿUmayr, Sulaymān ibn ʿAbdullah al-. Introduction to *Ibtāl al-Ḥiyal*, by Abū ʿAbdullah ʿUbayd Allah ibn Muḥammad Ibn Baṭṭa al-ʿUkbarī, 5-46. Beirut: Muʿassasat al-Risāla, 1996.
- ʿUmrānī, ʿAbdullah ibn Muḥammad al-. *al-Manfaʿa fī al-Qarḍ*. Riyadh: Dār Ibn al-Jawzī, 1427 AH.
- Urbach, Ephraim E. *The Halakhah: its Sources and Development*. Tel-Aviv: Modan, 1996.
- Ūshī al-Farghānī, ʿAlī ibn ʿUthmān al-. *al-Fatāwā al-Sirājiyya*. Karachi: Madrasa Fāṭima al-Zahrā, nd.
- Usmani, Muhammad Imran Ashraf. *Meezanbank's Guide to Islamic Banking*. Karachi: Darul Ishaat, 2002.
- Usmani, Muhammad Taqi. *An Introduction to Islamic Finance*. Karachi: Idaratul Maʿarif, 1999.
- . *Islāmī Baynkārī: Tarīkh o Pas-Manẓar awr Ghalaṭ Fahmiyo kā Izāla*. 2009. Available from http://www.deeneislam.com/ur/misc/BOOKS/Islamic_Banking/; Internet: last accessed 04 May 2010.
- (Spelt in this publication as Mohammed Taqi Al Othmani). "Methods of House Building Financing According to Shari'ah." In *Islamic Banking Modes for House Building Finance*, edited by Mahmoud Ahmad Mahdi, 61-74. Jeddah: IRTI, 1995.

BIBLIOGRAPHY

- Ūzjandī, Fakhr al-Dīn Ḥasan ibn Manṣūr al-. *Fatāwā Qāḍī Khān*. Printed on the margins of vols. 1-3 of *al-Fatāwā al-‘Ālamgīriyya* (also known as *al-Fatāwā al-Hindiyya*), by Niẓām al-Dīn and a group of Indian scholars Queta: Maktaba Rashīdiyya, 1983.
- Vogel, Frank E., Hayes III, Samuel L. *Islamic Law and Finance: Religion, Risk, and Return*. The Hague: Kluwer Law International, 1998.
- Wakin, Jeanette A. *The Function of Documents in Islamic Law: The Chapters on Sales from Ṭahāwīs Kitāb al-Shurūṭ al-Kabīr*. New York: SUNY Press, 1972.
- . “Written Documents in Islamic Law.” In *Actas: IV Congresso de Estudos Árabes Islâmicos*, 347-54. Leiden: E. J. Brill, 1971.
- Walz, Terence. “Trading in the Sudan in the Sixteenth Century.” *Annales Islamologiques* 15 (1979): 211-237.
- Watenpaugh, Heghnar Zeitlian. *The Image of an Ottoman City: Imperial Architecture and Urban Experience in Aleppo in the 16th and 17th Centuries*. Leiden: Brill, 2004.
- Wheeler, Brannon M. *Applying the Canon in Islam: The Authorization and Maintenance of Interpretive Reasoning in Ḥanafī Scholarship*. New York: SUNY Press, 1996.
- Yegar, Moshe. *Islam and Islamic Institutions in British Malaya: Policies and Implementation*. Jerusalem: The Magnes Press, 1979.
- Yi, Eunjeong. *Guild Dynamics in Seventeenth-Century Istanbul: Fluidity and Leverage*. Leiden: Brill, 2004.
- Zahraa, Mahdi, and Mahmoor, Shafaai M. “Definition and Scope of the Islamic Concept of the Sale of Goods.” *Arab Law Quarterly* 16, no. 3 (2001): 215-238.
- Zaman, S. M. Hasanuz. “Bay‘ Salam: Principles and Practical Application.” *Islamic Studies* 30, no. 4 (1991): 443-61.
- Zarqā, Muṣṭafā Aḥmad al-. *al-Madkhal al-Fiqhī al-‘Āmm*. 2 vols. Damascus: Dār al-Qalam, 2004.
- Özcan, Tahsin. “The Role of the Cash Foundations in the Construction and Development of Balkan Cities.” In *Proceedings of the Second International Symposium on Islamic Civilisation in the Balkans*, 193-200. Istanbul: IRCICA, 2006.
- Zuḥaylī, Wahba al-. *al-Fiqh al-Islāmī wa Adillatuhū*, 4th ed. 11 vols. Damascus: Dār al-Fikr, 1997.
- Zysow, Aron. “Two Unrecognized Karrāmī Texts.” *Journal of the American Oriental Society* 108, no. 4 (1988): 577-587.