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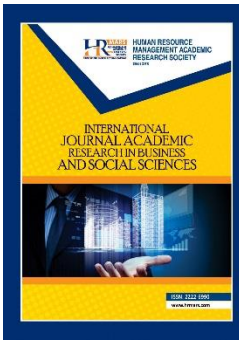
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An Analysis of the Hiyal Syariyyah Concept Pertaining to Deferred Products in Malaysia

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Abstract
Deferred products are classic in nature and should be adapted into the contemporary Islamic financial system. Thus, there arises a need to determine how far the importance of deferred products are implemented according to the contemporary circumstances in Malaysia. This is to ensure that deferred products, as in controversial products such as *īnah*, play a role in the syariah context and at the same time be competitive in the banking industry and Islamic finance. This study analysed deferred products as a form of a conventional frame from a *hilah* aspect and discussions related to theories on *hiyal* that have an effect on deferred products, which fulfil current and local needs as well as comply with the *maqaṣid al-shariah* framework in Islamic finance. This qualitative study obtained data through a document analysis. The findings showed that the use of *hiyal* in deferred products should follow a streamed-lined or uniform *hiyal* according to *maqaṣid al-shariah*.
Keywords: *Hiyal, Maqaṣid Al-Shariah, Deferred Products, Islamic Financial System*

Introduction

According to Aziz (2016 : 247), deferred products according to Malaysias Islamic banking system contains two elements, namely products based on debt and products based on sales and purchase. Deferred products according to the Malaysian banking system applies principles such as *Tawarruq, Murabahah, BBA, Inah, Salam* and *Iṣtisna*. Products that are structured based on a deferred agreement (*akad*) have fulfilled the outlined tenets (*rukun*) and agreement (*akad*); moreover, their status is still involved in continuous discussions and debates (Aziz, 2017). This involves deferred products that are structured based on current needs. For example, *akad inah*, which is permitted, considers a banking situation that has not matured at that time and it only permits products that are difficult to be structured, such as *inah*, that has proved the practice of *ḍarūrah* in its banking products. Hence, deferred products in Malaysia are dominated either from aspects of profit or customer demand. (The Council in The Regional Shariah Scholars Dialogue, 2006)

The inclusion of deferred products in Islamic banking products is closely related with the use of *hilah* or *makhraj* according to differences in meaning and application of Islamic law. According to Abu Bakar et al., (2009 : 690) the differences in view and acceptance between the fuqaha and Ulama *Uṣul* pertaining to the application of *hilah* is related to the last *maqaṣid* of a particular law. Following this, the controversy regarding deferred products in Islamic banking is due to the method of differentiating socioeconomic importance and shariah principles. This element is very important because the *Maqaṣid* for safeguarding property comprises two aspects. The differences in evaluating a *ḍarūrah* situation in *maqaṣid al-shariah* has an implication on producing a product that does not fulfil the actual criteria of syarak. (Wajdi, 2008 ; Chapra, 2008)

This article discusses the *hiyal* theory pertaining to deferred products, *fiqh* and contemporary *ijtihad*. Next, this article discusses the application of *hiyal* theory in contemporary needs in order to determine the current Islamic law as well as a depiction of Islamic financial practices in Malaysia.

The Hiyal Theory According to the Fiqh Perspective

Hilah, from a language aspect, means all forms of relationships or connections that achieve its aim in a covert or concealed manner (Ibn Hajar, 2003). The word *hiyal* is the singular for *hilah*, which means to achieve through a stratagem or a form of trickery (*al-Wasit,* 2:209)[1]. However, *hilah* is not presumed to be an alternative to evade Islamic law. There are several meanings of *al-hilah*, which means an effort to change or avoid from the fate of the original law to another aspect of law without being bound by the demands of syarak. (Mahrus, 2013)

According to fuqaha terminology, *hilah* means *tahayyul*, which retrospectively indicates that as if it is a practice prohibited by syarak or an action that is disallowed by syarak but purportedly presumed to be accepted by syarak. This is done with the aim of avoiding responsibility or blame when something prohibited is carried out. Therefore, *tahayyul* or *hilah* in Shariah according to this context is related to a practice whose prohibition is in the form of *syarie*, which is a prohibition by Allah SWT. However, doing something permitted by syarak and using different methods or providing a means for doing it is not presumed to be a form of manipulation or *tahayyul* because the action is known as management or eagerness *(hirṣ)* or being pious (*warak*).

Hiyal has a long history of debates and arguments among the fuqaha. Generally, the debate started due to differences in methodology among the different fiqh sects from its *istidlal* aspect. The *Hiyal* Theory was discussed in-depth by the Malikiyah, Hanbali and Hanafiah fuqaha. Scholars from the Hanbali sect, such as Ibn Taimiyyah and his student, Ibn al-Qayyim, had built a case against *hiyal* based on three different main points. First, they looked into the objective of legitimising the law according to syariat or *maqaṣid al-shariah*. Second, they looked into the role of intention and third, they examined classic discussions by the Ulama Usul, which was about the *uṣuli* method that blocks the means or *sadd al- dharai.* All three components above represent different arguments about *hiyal.* However, the Hanbali sect used it as an argument for formulating their law about *hiyal*.

[1] *Mu'jam al-Wasīt,* 2:209, entri: hiyal.

Basically, the two components of the argument, namely objective of the shariah and intention, was used to show that the *hiyal* theory basically contradicts Islamic law; whereas the *sadd al-dharai* argument indicates incompatibility between *hiyal* and *maqaṣid al-kulliyah* (Ibn al-Qayyim, 1996 ; Imran Muhammed Ismail, 2010 ; Frank E. Vogel & Samuel L. Hayes Iii, 1998). However, Imam Shafii held an opposing view because for him, intention has no effect on agreement (*akad*). Nevertheless, he stated that there was no element of early preparation when initiating the agreement (*akad*) process in order to obtain the reason for transgressing *maqaṣid al-shariah*.

There are general and specific definitions of *hiyal* that have been used by fiqh scholars. The general interpretation covers both forms of *hiyal*, which is *hiyal* that is prohibited and *hiyal* that is permitted. Whereas, the specific interpretation is more towards *hilah* that is permitted or limited to *hilah* that is prohibited. Generally, the Ulama have divided *hiyal* into *hiyal* that is prohibited if the way to achieve something totally unacceptable contradicts syarak, either by negating syarak law or changing it to another law, such as abstaining from what is mandatory and permitting what is prohibited as well as impair *qawaid al-Shariah*. The existence of *hiyal* in this category was agreed upon by ulama from all the sects (*mazhab*). (Fairooz, 2011)

The *Hiyal* Theory in Contemporary Ijtihad

The *hiyal* theory should be investigated further so that *hilah* is not the only mechanism for building the current ijtihad. This will ensure that those who receive *hilah* as one of the mechanisms for implementing the law need to apply *hilah* with caution. Since *hilah* is a deep-seated motive, the action would be evaluated according to the intention. Hence, the aspect of laying importance on motive or providing a means in any recognition of law substantiates the statement that Islam emphasises more on substance rather than the external framework. In other words, the essence surpasses the framework. (Abu Bakar et al., 2009)

A review for the need of *hilah* in the current ijtihad looks into the methodology of two contradicting sects from the aspect of the *instinbat* law framework, which refers to the Hanbali Sect like Ibn al-Qayyim and the Hanafi Sect like al-Sarakahsi (1999 : 93) and al-Shaybani (1999 : 90). Imam Abu Hanifahs methodology was different to that of Ibn Qayyim, as it considered the *maqaṣid* of substantive law, especially the part of dividing usury (*riba*) that considers the factor of intent of *hilah* being implemented and the implication on the final consequence of the action accruing from the act based on *hilah*.

The ulama who were against the use of *hilah* argued that *hilah* could cause the loss of shariahs essence. Moreover, it is seen to belittle the sustainability as well as dignity of *maqaṣid al-shariah*. Hence, the difference between the two opinions is more substantial, whereby basically the use if *hilah* is still subject to the laws of fiqh that is closely related to laws pertaining to *haram* (prohibited), *halal* (permitted), *mandub*, *makruh* and *mubah*. As stated by al-Shatibi (2003 : 328) this situation is suitable with the current context, which is substantiated with the view that permits *hilah* and not to destroy the spirit of syariah so that it is not included in the category of *hilah* that is prohibited or

despised. Therefore, the context of *hilah* from its structural aspect is evident from the justification of its element of substance that surpasses the element of its framework. This situation ensures that the use of *hilah* is not solely dependent on the technical term so much so that it entraps when used, which needs close examination based on various contexts and different implication of the law through certain cases (*juziy).*

The *Hiyal* Theory in Deferred Products

Products based on *ḥilah*, such as Bay Inah, are consumed in order to avoid being involved in *ribawi* products. There are apprehensions concerning disputes about Islamic financial products as to whether *ḥilah* can overcome the legislative constraints and limitations on innovative products or vice versa. Hence, classic discussions about the *ḥiyal* theory should be re-analysed in order to determine whether the theory and its practice has failed in achieving the aims of *ḥilah* as an alternative to usury (*riba*) or has it succeeded in becoming the *makharij* to usury (*riba*). (Muhammed Imran Ismail, 2010)

Criticisms from Islamic economists had characterised Islamic financial products to be solely in the form of a framework. This was outlined by Habib Ahmed when he divided the formation of Islamic banking products conceptually into three forms. First was the pseudo-Islamic product, which is a product that uses *ḥilah* as an alternative. Pseudo-Islamic products fulfil the needs and tenets of sales and purchase but do not possess the element of *maqaṣid*, which aims to serve social needs. Second, these products should be Shariah-compliant and Shariah-based (Habib Ahmed, 2011 ; Habib Ahmed, 2011). The problem arises when the product building process does not aim to fulfil criteria for Shariah-based products, which inadvertently accomplishes the social and *maqaṣid* goal or essence.

Saleh (1991 : 123) asserts that the internal challenge in Islamic banking is the way of interacting using *hiyal* in order to cancel out the prohibitions of usury (*riba*) and *gharar*. Various allegations and arguments have stated that Islam prohibits usury (*riba*) but by using another term as an alternative, namely, *hiyal* or *hiyal shariyyah* (legal stratagems), it helps the creditor to obtain higher returns compared to current interests. El-Gamal (2006 : 82) criticised this approach by saying that *hiyal shariyyah* is a cunning approach in reality because it provides financing but sells and buys with a profit margin. He stressed that by solely focusing on the legal context while neglecting the ethical implications, prohibiting usury (*riba*) could lead to an injunction on shariah as well as neglecting the meaning of shariah. (Mahmoud & Elgamal, 2006)

The form of finances in the profit-sharing element, including *hilah*, for organising the profit as a percentage of the initial capital is not something new. According to Abraham Udovitch (1981) this practice has become a form of trade financing during the mid-Mediterranean era referred to as *"bankers without banks".* Much of Udovitchs analysis is based on his study of the compendium of Hanafi Jurisprudence al-Mabsut by al-Sarakhsi, which listed numerous legal stratagems or ruses that are not dislike those utilized today in Islamic finance to replicate conventional financial practices. (Elgamal, 2006 ; Udovitch, 1981)

Based on studies, this matter has continued in Islamic banking practices until now. Ismail (2010 : 2) stated the *legal stratagems* or also called *hiyal,* have been widely practiced in Islamic

banking and financial industry, and the voice that has protested against this practice has grown in volume. The apprehension that was voiced was concerning the industrys habit in giving *default templates* as the new instruments design for future Islamic financial products. In 1998, Vogel was of the view that there was a need to re-open debates by classic ulama in order to resolve the dispute pertaining to Islamic financial products in deciding whether *hilah (artifice)* could overcome legal constraints and limitations on product innovation or inadvertently it has failed in achieving the aim of *hilah* as a way-out from usury (*riba*). (Vogel, 1998)

Such a practice has not been accepted by most Islamic scholars. Moreover, majority of them have voiced their disagreement to this practice. Among them are Ibn Batta (1988 : 41), Ibn Qudamah (2004 : 834) and Ibn al-Qayyim (1996 : 87). Besides that, there is a need to thoroughly examine their writings that have been alleged to use *ḫilah* widely to determine whether they had actually used it. Abu Yusuf and al-Shaybani (1999 : 90), are two writers who have extensively written on differing principles about *Hiyal. Hiyal* does exist in Islam and in some instances is permitted but Islam has principles that curtail or lessen its use rather than encourage its practice.

In relation to the discussions above, criticisms in the context of deferred products appears when most banking products are *hilah*-based.

As stated by Munawar Iqbal (2013 : 17):-

"...the way this instrument is being practised by banks is very different. It appears to be simply a "devious artifice" (ḫilah) to get around the prohibition of interest through an intermediate process, the end result being what was prohibited... The few scholars who have allowed tawarruq require the banks to actually buy and at least take constructive possession of the commodities, and then sell them."

According to Munawar, contemporary banking instruments are seen as a *hilah* in order to avoid the prohibition of usury (*riba*) from the immediate process produced by usury (*riba*) in the form of interest. A small number of scholars who allow *tawarruq* have requested that banks actually buy the assets or at least take the right of possession constructively from the commodity and then re-sell it.

The problem of *hilah* related to products and financial instruments is not only limited solely to the question of *fiqhi* and *ikhtilaf*, but rather according to in-depth studies on credit products based on *hilah* through the fractional reserve system offered by Islamic banks. For example, a buyback (*īnah)* transaction encourages economic instability and inflationary pressure because the contracts framework is based on the overall assets of the supply unit according to the rate of monetary supply. Hence, according to the analysis, there is a correlation and direct relationship between the products based on *hilah* and inflation. (Yaakob & Khalid, 2014)

This is similar to the inverse relationship between *hilah* and currency value (buying power). It could be concluded based on this finding that Islamic banking as the financier involved deeply in supplying (*bayʿ al-īnah*) based on the element of *hilah* through the *fractional reserve system,* cannot

provide a solution for the financial and economic problems that occur, especially due to inflationary pressure (Firdaus Mohammad Hatta et al., 2014). This situation explains the product issue based on *hilah* although *hilah shariyyah* is not limited in fiqh matters, rather it can create credit debts that produce an Islamic financial and economic *bubble*. (Hassan, 2015)

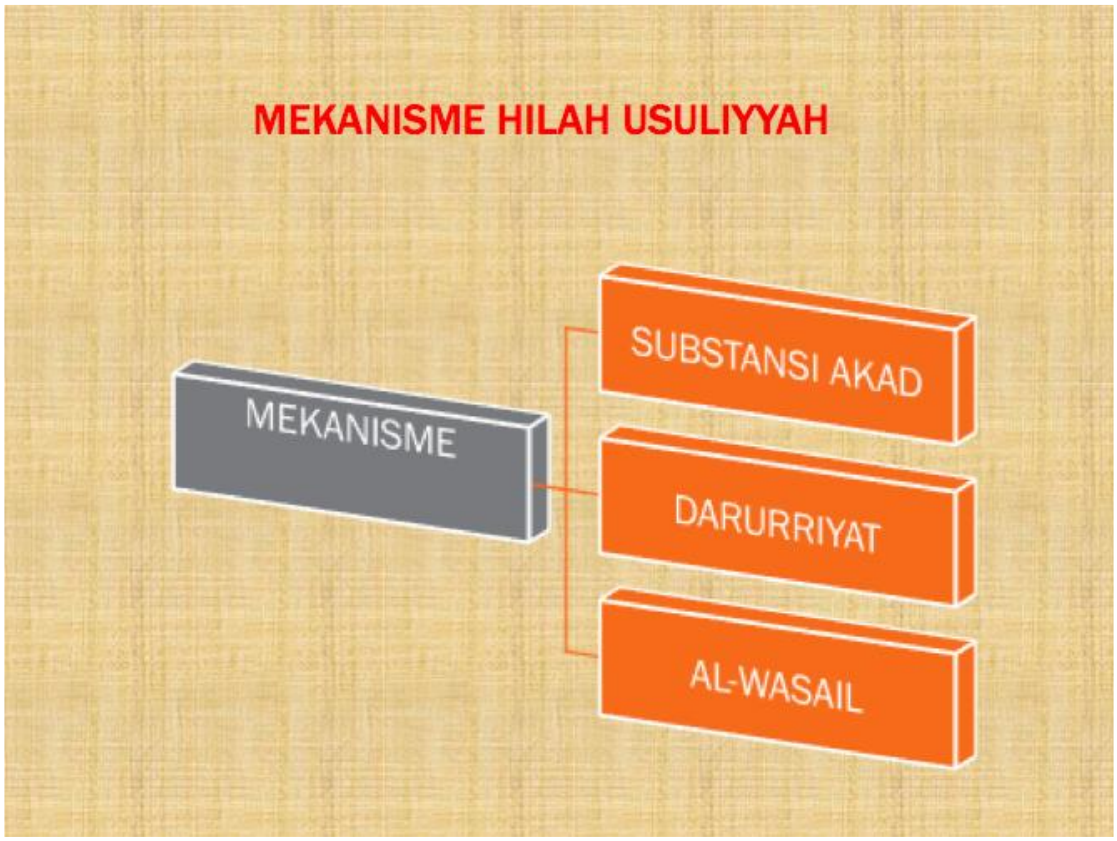
A new approach in personal financing with improvements to the current contract is needed. This is because problems such as *hilah,* which have been agreed between the client and the bank concerning *bayʿ al-ʿīnah* products, could jeopardise shariah-complaint contracts. Stipulations regarding conditions for goods is that it must be sold back to the original seller (bank) and the pact that exist before the *akad* with the bank has stipulated prior conditions that two transactions should occur.

It is feared that this arrangement would lead to *hilah ribawiyyah*, which would make the contract illegal according to law. Therefore, among the mechanisms that can help avoid *hilah* from occurring in the contract would be to use three parties in the *al-tawarruq* contract, in which the first party is the client or lessee, the second party is the bank and the third party is the leasing institution or receiver of the leased goods. (Ahmad, 2011)

The Aspect of Forming *Hilah* in Deferred Products

Actually, the element of *hilah* in Islamic products and finance is rather complex because the parties involved are more focused on dealing with the literal aspect of *naṣ* shariah and also the issues of legal ethics (Mawil Izzi Dien, 2008). The permissibility context allowed by Imam Hanafi refers to whatever that is given to the Ummah and prevents them from transgressing Shariah law (Khaṣṣaf, 1968). In the context of a definition, *riba al-faḍl* is more complex because it involves socio-economical aspects as a preventive measure; hence, it must ensure that the product formed does not contain elements of *riba al-faḍl.*

Diagram 1: The Hiyal Usuliyyah Mechanism



Based on the diagram above, *hiyal* in deferred products is temporarily permissible in order to achieve *maqaṣid aṣliyyah, maqaṣid kulliyyah* and *maqaṣid ammah* related to the safeguarding of property, which is from the aspect of its existence (*janib al-wujud*) and avoidance from destruction (*janib al-adam*). Thus, from this perspective, *Hiyal* is usually planned to maintain the existence of the property and develop it until it is beneficial for all segments of society. Hence, if *hiyal* is not implemented, a bigger disaster would occur in the form of difficulties and destruction to the commercial (*muamalat*) or financial systems that are operating. *Hiyal* during the time of *ḍaruriyyat,* is given priority compared to *hiyal* in the *maqaṣid tabiyyah* and *juziyyah* positions (Hashim et al., 2015). Thus, the *hiyal* that is permitted is *hiyal* that has become *mukammil* and is related (*wasilah*) to the achievement of *maqaṣid* for commerce. Therefore, determining the forms of *hilah* in deferred products comprises several elements of law on *maqasid* and *wasail*.

Maqasid and *wasail* are important elements in the current context and place for the *al-ḍarurah* concept in the *al-maqasid* framework for deferred products in Malaysia. *Al-wasail* is a dynamic factor in deciding the need and implementation of a product based on current factors. Pre-intent (*maqsud al-mutaaqidayn*) and post-outcome (*maalat al-afal*) are also deciding factors of current needs because this principle has positive and negative implications on the use of the *al-ḍarurah* concept on

deferred products in order to give due consideration to the law based on current factors. For example, if the product is not supported by fiqh law then it is proper to refer to the *wasail* and *maqasid* elements to ensure that the product is in line with the actual meaning of syarak.

In addition, to better understand how the *al-maqaṣid* and *al-wasail* components play their role in satisfying the current and local needs of the product based on *hilah*, one must first understand the basis for prohibiting *riba al-faḍl* according to Umar Chapra because of its connection with persecution and repression. Umar Chapras statement emphasised that the prohibition of *riba al-faḍl* was because the relationship (*wasilah*) and its intentions must be integrated so that all the deferred products do not lead to the prohibition of usury (*riba*). Hence, two important elements must be considered when ensuring the *hiyal* permitted by syarak is consistent with the context of the permission, which is not to transgress the *maqaṣid al-shariah* and thus, it needs to fulfil two main principles, which is not to contradict the *shariah* and not to lead to the violation of the law, either civil or shariah. (Chapra, 2008)

Table 1: Role of *Hilah* in Deferred Products

Issue	Contruct	Analysis
Process	Temporarily forms the *hilah-based product*	To integrate the actual financial value and *Maqaṣid* muamalat Islam
Agreement (*Akad*)	To avoid errors (*khilaf*)	Product Innovation
Frame (*Sighah*)	Syariyyah	Intention to avoid usury (*riba*)
Role of Intentions	Intention to obtain credit	Should be based on *ḍarurah uṣuliyyah* because of the dire need for the sustenance of life; hence, it is not encouraged in a continuous form in order to avoid economic instability. As for the Shafii sect, there is no problem concerning the law pertaining to the role of intentions as long as its *tanzim* process does not transgress *mabadi* syarak
Wasail and *maqaṣid*	*Hilah* could be related to usury (*riba*) but there is a bigger need, which is to be an alternative to bank interest; thus, the relationship, whereby *hilah* is permitted as long as its aim is permissible	Need to apply *sad al-dzharai*, *rukhṣah* and *raful haraj* according to the current ijtihad methodology

The table above shows the components for each element related to *hilah* that plays a role in the formation and practice of deferred products in Malaysias Islamic banking sector.

Conclusion

The classical debate about *hiyal* should be reviewed because it is difficult to decide whether *hilah* can overcome difficulties in managing legislation or *hilah* is used until is causes the loss of meaning of the syarak (Ismail, 2010 ; Vogel & Hayes, 1998). Hence, the *ḍarurah uṣuliyyah maqaṣidiyyah* framework is needed to ensure the actual use of *hilah* in the current context.

Therefore, the wisdom in interacting with the interpretation of the *naṣ* Al-Quran and law ethics is strongly required so that the use of *hilah* is within the permitted confines and not based on *hilah shariyyah*. Prohibiting actual usury (*riba*) is aimed at ensuring justice while rejecting abuse and persecution. The prohibition is clearly aimed at safeguarding justice and avoiding all forms of exploitation through unfair transactions and also *back-door* or illicit usury (*riba*) because according to Shariah, all that leads to the prohibited (*haram*) is prohibited (*haram*). (Ibn Rushd, 2006 ; Chapra, 2008)

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