

THE ROLE OF MAŞLAĤAH IN CONSTRUCTING
CONTEMPORARY BANKING FATWĀS
AN ANALYTICAL STUDY OF SELECTED FATWĀS
ISSUED BY BANK NEGARA AND SECURITIES
COMMISSION OF MALAYSIA

BY

SUHAIB ABDULLAH ALDIRCHAWI

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

2018

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SUHAIB ABDULLAH ALDIRCHAWI

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for the degree of Master of Science (Islamic Banking and
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ABSTRACT

Sharī'ah has achieved many public interests (*Maṣāliḥ*) for Muslims through its general rulings and principles as stipulated in the *Fiqh* references. *Maṣlaḥah* has been recognized as one of the sources of *Sharī'ah* in particular on matters that have no *Sharī'ah* ruling or reference in primary sources such as Quran and Sunnah. Nonetheless, there are a host of parameters that *Maṣlaḥah* must meet in order to be recognised in *Sharī'ah*. This shows the flexibility of *Sharī'ah* to accommodate all public interests of Muslim communities. The scope of *Maṣlaḥah* could be very broad, hence, it might lead to the abuse of this concept in issuing *Fatwās* based on *Maṣlaḥah*. This is more significant in the area of Islamic Banking and Finance. This paper seeks to assess the extent of adherence to the *Maṣlaḥah* parameters from the highest two *Fatwā* authority in Malaysia, i.e. Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) and Shariah Advisory Council (SAC) of Securities Commission (SC). The significance of this paper stems from the deep analysis of the *Maṣlaḥah*-based resolutions via relying on *Uṣūl-Fiqh* literature. The study utilizes qualitative approach via analyzing documents and literature on *Maṣlaḥah*. It starts with deriving *Maṣlaḥah* parameters from contemporary *Uṣūl-Fiqh* literature, then the analysis of the resolutions with *Maṣlaḥah* parameters is further deliberated. The paper aims to discuss each resolution individually and assess the level of compliance i.e. complete or partial compliance. The paper concluded that SAC-BNM and SAC-SC have complied with *Maṣlaḥah* parameters in their *Maṣlaḥah* -based resolution. The paper further recommends that the SAC-BNM and SAC-SC should employ people who are qualified in *Sharī'ah* with practical experience to give more concern to such an area in order to increase the level of compliance with *Sharī'ah* rules and guidelines.

خلاصة البحث

حققت الشريعة الكثير من المصالح للمسلمين من خلال أحكامها المضمونة في الكتب الفقهية، واعتمدت المصلحة العامة كدليل معتبر شرعاً للأمر التي لم ينص الشرع على اعتبارها أو إلغاها ولكن بضوابط محددة للإقرار بشرعية تلك المصلحة من وجهة نظر الشريعة، وهنا يبرز قدرة الشريعة الإسلامية على مواكبة العصر ومسايرة مصالح الناس. وبسبب اتساع باب المصلحة، فقد أدى إلى التساهل في بناء الأحكام الشرعية عليها خاصة في عصرنا الحاضر لا سيما في باب المعاملات المصرفية والبنكية. يسعى هذا البحث الى تقييم مدى الإنضباط والالتزام بضوابط المصلحة من قبل أعلى مؤسستي الفتوى للمؤسسات المالية الإسلامية في ماليزيا وهما الهيئة الاستشارية الشرعية التابعة للبنك المركزي الماليزي والهيئة الاستشارية الشرعية التابعة لهيئة الأوراق المالية. تكمن أهمية هذه الورقة في تركيزها على تناول وتحليل القرارات المبنية على المصلحة تحليلاً عميقاً ومستنداً على كتب أصول الفقه. وقد اعتمد هذا البحث المنهج النوعي المرتكز على تحليل المصادر والوثائق، فبدأت باستخراج ضوابط المصلحة من كتب أصول الفقه ومن ثم تحليل القرارات المعتمدة على المصلحة والصادرة من الهيئتين المذكورتين سابقاً. وقد هدف البحث في تحديد نتيجة كل قرار على حده، سواء بالمطابقة الكلية أم الجزئية بضوابط المصلحة المستخرجة. وقد وصل البحث إلى أن الهيئة الاستشارية الشرعية التابعة للبنك المركزي الماليزي والهيئة الاستشارية الشرعية التابعة لهيئة الأوراق المالية قد التزمتا بضوابط المصلحة في قراراتهم المبنية على المصلحة العامة. وقد اقترحت الورقة بأن تقوم الهيئة الاستشارية الشرعية التابعة للبنك المركزي الماليزي والهيئة الاستشارية الشرعية التابعة لهيئة الأوراق المالية بتجهيز وتوظيف أشخاص ممن يملكون الكفاءة العلمية والعملية للقيام بالمزيد من الاهتمام والبحث والتعمق في الضوابط والقواعد المذكورة في الكتب الفقهية والأصولية ومدى مطابقة القرارات الصادرة معها.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a research paper for the degree of Master of Science (Islamic Banking and Finance).

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.....
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DECLARATION

I hereby declare that this research paper is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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TABLE OF CONTENTS

| | |
|--|----------|
| Abstract | ii |
| Abstract in arabic | iii |
| Approval page | iii |
| Declaration | iv |
| Copyright page | v |
| Acknowledgements | iii |
| List of Tables | vi |
| CHAPTER ONE: INTRODUCTION | 1 |
| 1.1 Introduction..... | 1 |
| 1.2 Background of Study | 2 |
| 1.3 Problem Statement..... | 4 |
| 1.4 Research Objectives..... | 5 |
| 1.5 Research Questions..... | 5 |
| 1.6 Research Significance and Contribution | 5 |
| 1.7 Scope of the Study | 6 |
| 1.8 Plan of the Study..... | 6 |
| CHAPTER TWO: LITERATURE REVIEW | 7 |
| 2.1 Introduction..... | 7 |
| 2.2 Al-Fatwā in Islamic Banking and Finance | 7 |
| 2.2.1 Preview of Al-Fatwā | 7 |
| 2.2.2 Concept of Al-Fatwā in Islamic Finance | 9 |
| 2.2.3 The Importance of Al-Fatwā in Islamic Finance Industry | 10 |
| 2.2.4 Types of Al-Fatwā in Islamic Finance | 11 |
| 2.2.5 The Characteristics of Al-Muftī in Islamic Finance | 11 |
| 2.2.6 The Methodology of Issuing Al-Fatwā for Islamic Financial Institution..... | 12 |
| 2.2.7 Contemporary of Al-Fatwā Bodies in the Islamic Financial Industry | 13 |
| 2.3 Al-Maṣlahah | 14 |
| 2.3.1 Concept of Maṣlahah | 14 |
| 2.3.2 Classification of Al-Maṣlahah | 15 |
| 2.3.3 Parameters of Al-Maṣlahah | 16 |
| 2.4 Shariah Advisory Council of Bank Negara Malaysia and Securities Commision | 21 |
| 2.4.1 Shariah Advisory Council of Bank Negara Malaysia (SAC- BNM)..... | 21 |
| 2.4.1.1 Overview of SAC-BNM..... | 21 |
| 2.4.1.2 SAC-BNM Shariah Resolutions In Islamic Finance | 22 |
| 2.4.1.3 Resolution Based on Maṣlahah | 22 |
| 2.4.2 Shariah Advisory Council of Securities Commission (SAC- SC)..... | 24 |
| 2.4.2.1 Overview of SAC-SC | 24 |
| 2.4.2.2 Resolutions of SAC-SC | 24 |

| | |
|--|-----------|
| 2.4.2.3 Resolutions Based on Maşlahah | 24 |
| 2.5 Chapter Summary | 26 |
| CHAPTER THREE: METHODOLOGY..... | 31 |
| 3.1 Introduction..... | 31 |
| 3.2 Document Analysis..... | 32 |
| 3.3 Sampling | 33 |
| 3.4 Justification of the Methodology | 34 |
| CHAPTER FOUR: FINDINGS AND DISCUSSION..... | 37 |
| 4.1 Introduction..... | 37 |
| 4.2 Analysis of SAC-BNM Resolution with Findings | 37 |
| 4.2.1 Third Party Guarantee for Capital And/Or Profit in Mudarabah | 37 |
| 4.2.2 Ibra in Islamic Finance..... | 39 |
| 4.2.3 Shariah Concept for the Operation of Islamic Guarantee Facility by Credit Guarantee Corporation | 42 |
| 4.2.4 Capital Segregation in the Operation of Danajamin. | 44 |
| 4.2.5 Restructuring and Rescheduling in Islamic Financing Agreement. | 46 |
| 4.3 Analysis of SAC-SC Resolution With Findings..... | 48 |
| 4.3.1 Ujrah for Guarantee | 48 |
| 4.3.2 Ibra Clause in the Documentation of Agreements | 50 |
| 4.3.3 Regulated Short Selling and Securities Borrowing and Lending | 53 |
| 4.3.4 Mixed Companies | 54 |
| 4.3.5 Image as Criteria for Listed Securities..... | 56 |
| CHAPTER FIVE: CONCLUSION..... | 63 |
| 5.1 Introduction..... | 63 |
| 5.2 Summary of Major Findings..... | 63 |
| 5.3 Recommendations..... | 64 |
| REFERENCES..... | 65 |

LIST OF TABLES

| <u>Table No.</u> | | <u>Page No.</u> |
|------------------|--|-----------------|
| 4.1 | Analysis of Third-Party Guarantee Resolution | 38 |
| 4.2 | Analysis of Ibra in Islamic Finance Resolution | 40 |
| 4.3 | Analysis of Islamic Guarantee Facility by Credit Guarantee Corporation | 42 |
| 4.4 | Analysis of Capital Segregation in the Operation of Danajamin resolution | 44 |
| 4.5 | Analysis of Restructuring and Rescheduling in Islamic Financing | 46 |
| 4.6 | Analysis of Ujrah for Guarantee Resolution | 48 |
| 4.7 | Analysis of Ibra Clause in the Documentation of Agreements Resolution | 50 |
| 4.8 | Analysis of Regulated Short Selling and Securities Borrowing and Lending | 53 |
| 4.9 | Analysis of Mixed Companies' Resolution | 55 |
| 4.10 | Analysis of Image as Criteria for Listed Securities Resolution | 56 |

CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION

Islam has given a concern to all aspects of life; it is obvious in the biography of Prophet Muhammad (PBUH) since he was delivering the *Sharī'ah* principles which are related to Muslim's life. Economic aspects of life have been elaborated extensively in *al-Fiqh al-Islāmī* particularly in chapter of *Fiqh al-Mu`amalat*. *Fiqh al-Mu`amalat* in generally related to the principles of *Sharī'ah* which must be followed by mankind. For instance, market controlling consider as a principle; it is the responsibility of Khalifa (head of the State) in Muslim community to protect markets from the elements of cheating and such unfair activities. These principles are taken from al-Quran and al-Sunnah which are the primary sources of *Sharī'ah*. However, these principles are framing the financial aspect of Muslim's life, since there are endless emerging matters which need to be ruled. Therefore, *Sharī'ah* have a defined methodology in term of giving *Fatwā* for any new matter. Al-Tirmidhī narrated¹ the conversation between Prophet Muhammad (PBUH) and Mu`ādh before sending him to Yemen. Prophet Muhammad (PBUH) asked Mu`ādh how he would judge when a matter arose. Mu`ādh replied that he would judge based on what is in the Quran firstly, then based on the Sunnah if it is not founded in al-Quran, then the last resort is *al-Ijtihād* (independent reasoning) which would include his point of view.

Therefore, the approach and process that the *Sharī'ah* scholars have to follow in order to issue a *Fatwā* is based on the explicit texts of al-Quran, al-Sunnah, and the

¹ Sunan al-Tirmidhī, book of Judgement, hadith No. 1327.

consensus of the companions in the first stage. The matters which has not been ruled in the primary sources will require scholars to apply the rational principles, which are based on *Ijtihād*, such as *Qiyās* (analogy), *ʿurf* (custom), *Maṣlahah* (interest), etc. (Al-Zuhaili, 2006).

The responsibility of *Sharīʿah* scholars is not limited to rule to the new matters only, they are also responsible to find a permissible alternative for what has been prevented. For instance, the case of interest-based financial system, which is not allowed under *Sharīʿah*, it required Islamic organizations such as al-Azhar's Islamic Research Academy, and the International Islamic Fiqh Academy to build a robust Islamic Financial System in order to protect Muslims from involving in interest (*Ribā*) based financial transactions.

To provide a *Sharīʿah* ruling and to resolve *Sharīʿah* issues are two of the essential aspects in Islamic Financial System. . It is the responsibility of *Sharīʿah* Committee in the financial institutions since they oversee *Sharīʿah* related matters. *Sharīʿah* has adopted a defined methodology for scholars to provide *Fatwā* or to resolve *Sharīʿah* related matters. Thus, scholars are required to follow the methodology in order to provide a valid *Fatwā*. A valid *Fatwā*, which is concerning the sources of *Sharīʿah* as well as the objectives of *Sharīʿah*.

1.2 BACKGROUND OF STUDY

Islamic finance is founded on the principles of *Sharīʿah*, Finance, Accounting, Law and other sciences. From *Sharīʿah* perspective, it is understood that *Sharīʿah* has given fundamental principles to control the financial aspect of Muslim's life. *Sharīʿah* scholars are responsible to adjust and enhance the financial products or services in order to comply it with *Sharīʿah* principles. Islam as a religion has different school of thought

which are called al-Madhāhib al-Fiqhiyah. Therefore, different opinions might be raised among scholars on the same subject matter since they are following different Madhāhib. Each school has its own methodology in terms of issuing rulings, especially in term of considering the Addilah Mukhtalaf 'alīhā (controversial source of *Sharī'ah*) such as 'urf, *Maṣlahah*, and Istihsān, etc.

The scholars who are authorized to issue a *Fatwā* related to Islamic finance domain must fulfil some requirements such as a excellent understanding of *Sharī'ah*, Finance and must have good reputation, etc. In the current practice of Islamic financial system, most of *Fatwās* are based on the collective deliberations among group of scholars such as the practice of Shariah Committees. Shariah Committees have experts with different backgrounds, who will deliberate on the matter to issue more suitable *Fatwās*.

Different Shariah Committees might have different opinions on a matter since the understanding and point of view of considering the matter might be different among them. In addition, different methodologies in constructing *Fatwās* might also lead to different *Fatwā*. Such a difference of opinion is acceptable from the *Sharī'ah* point of view if the *Fatwā* has been constructed based on a valid evidence. For instance, Kafālah bi al-Ujrah, when the Ujrah isn't limited to the actual expenses, it is allowed from some scholar's point of view such as sheikh Wahbah al-Zuḥāīlī. He allowed it based on *Maṣlahah 'amah*² (Al-Zuhaili W. , 1989). While International Islamic Fiqh Academy in its resolution No. 12 (2/12) (1) did not allow to charge fee for Kafālah contract. Therefore, a matter might have two opinions while different scholars have different considerations and understanding of the matter.

² Maslahah consists of considerations which secure a benefit or prevent harm but are in the meantime, harmonious with the objectives of the Shariah, provided by al-Ghazali.

Maṣlaḥah, which is one of the secondary sources of *Sharī'ah*, has been used as a *Sharī'ah* basis to address some critical issues which are unruled as of primary sources. Imam Ibn Taymiyyah said, “*Sharī'ah* will never ignore whatever has benefit (*Maṣlaḥah*) for us and Allah has completed the religion for us” (Ibn Taymiyah, 1995). However, *Sharī'ah* scholars are responsible to put *Maṣlaḥah* in their consideration when it comes to provide a *Fatwā* for a matter.

1.3 PROBLEM STATEMENT

The focus of this paper is the use of *Maṣlaḥah* as a *Sharī'ah* basis for constructing *Fatwās*. *Maṣlaḥah* as evidence can be used extensively in all matters of life, and it can be a way to give an easy *Fatwā* for the matters which are unruled. The area that needs to be explored are the parameters of *Maṣlaḥah* to understand the proper use of *Maṣlaḥah* from *Sharī'ah* perspective. It is important to observe, understand and evaluate the current use of *Maṣlaḥah* through its parameters in order to see the scope of *Maṣlaḥah* Shar'iyah (*Maṣlaḥah* compliant with its parameters) and *Maṣlaḥah* non-Shar'iyah (*Maṣlaḥah* Non-compliant with its parameters). Abdullah Ibn Wahb reported that Imam Malik bin Anas said to him, “O Abdullah, do not carry people on your back, and if you are a player, do not play with your religion” (al-Asbahani, 1999). Imam Malik was advising Abdullah to avoid giving his own opinion against a ḥadith if there is. It shows the riskiness of playing and violating *Sharī'ah* principles.

In the current structure and environment of Islamic financial institutions, some *Fatwās* have been issued by their Shariah Committees based on *Maṣlaḥah*. Therefore, there is a need to differentiate and understand the *Maṣlaḥah* compliant with *Sharī'ah* parameters (*Maṣlaḥah* Shar'iyah) and *Maṣlaḥah* Non-compliant with *Sharī'ah*

parameters (*Maṣlaḥah* Non- Shar‘iyyah) since *Maṣlaḥah* is one of the secondary sources of *Sharī‘ah* and it is recognized by *Sharī‘ah*.

1.4 RESEARCH OBJECTIVES

The study aims to achieve the following objectives:

- 1- To understand the role of recognized *Maṣlaḥah* in term of issuing *Al-Fatwās*.
- 2- To highlight some examples of the invocation of *Maṣlaḥah* in the *Fatwās* issued by Shariah Advisory Council (SAC) Bank Negara Malaysia (BNM) and Shariah Advisory Council (SAC) Securities Commission (SC).
- 3- To examine these BNM SAC and SC SAC *Fatwās* against the principles and parameters of valid *Maṣlaḥah* identified by past jurists.

1.5 RESEARCH QUESTIONS

- 1- Does *Maṣlaḥah* play any role in term of issuing *Fatwās*?
- 2- What are the *Fatwās* that have been issued by SAC-BNM and SAC-SC based on *Maṣlaḥah*?
- 3- Did these *Fatwās* match with the parameters set by past jurists in contemporary literature?

1.6 RESEARCH SIGNIFICANCE AND CONTRIBUTION

The role and responsibility of Shariah Committee is known in term of giving *Fatwās* and solving *Sharī‘ah* issues. Since *Maṣlaḥah* is frequently used as a *Sharī‘ah* basis for the contemporary *Fatwās*, it is important to observe the legitimate extent of the *Maṣlaḥah* through its parameters. The contribution of this thesis will be expressed from the analysis of the resolutions/*Fatwās* that have been selected from SAC-BNM and SAC-SC. The result of the examined resolutions will highlight whether the declared *Maṣlaḥah* is a *Maṣlaḥah* Shar‘iyyah or no.

1.7 SCOPE OF THE STUDY

The study will be conducted on the *Fatwās* that have used *Maṣlahah* as a *Sharī'ah* basis of ruling. It has been selected from the two main *Fatwā*-issuing bodies for the Islamic financial institutions in Malaysia, namely the Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM), and Shariah Advisory Council (SAC) of Securities Commission (SC). The purpose is to examine and observe the extent to which the *Maṣlahah* is compliant with *Sharī'ah* parameters mentioned in the contemporary literature by the previous scholars and jurists.

1.8 PLAN OF THE STUDY

The study is organized into five chapters, starting with the introductory chapter. Chapter Two includes the relevant literature from the *Uṣūl-Fiqh* books and other sources on the matters of *Fatwā* in Islamic finance industry along with *Maṣlahah* as a source of *Sharī'ah*. Chapter Three will further elaborate on the methodology used in this research for the analysis and the expected outcomes of the analysis. Chapter Four attempts to analyze the *Fatwās*, along with the discussing on the *Maṣlahah* parameters set by classical Islamic schools of thought. Chapter Five provides conclusions and recommendations.

CHAPTER TWO

LITERATURE REVIEW

2.1 INTRODUCTION

This chapter will highlight and discuss the relevant contemporary literature for the research which is the foundation of the thesis. The chapter is divided into three parts. First part will overview the *Fatwā* in Islamic Banking and Finance in order to understand the role and importance of *Fatwā* in IFI in general. Also, the methodology of issuing *Fatwās* along with some examples of contemporary *Fatwā* bodies. Second part of this chapter will summarize *Maṣlaḥah* which is one of Secondary *Sharī'ah* Sources along with classification of *Maṣlaḥah*. The Parameters of *Maṣlaḥah* will also be discussed in this part since it is the critical element of the study. The third part will highlight the Shariah resolution of Bank Negara Malaysia and Securities Commission which has been issued based on *Maṣlaḥah*.

2.2 AL-FATWĀ IN ISLAMIC BANKING AND FINANCE

2.2.1 PREVIEW OF AL-FATWĀ

Fatwā in Islam refer to provide a *Sharī'ah* ruling with an evidence to who has asked about it³. However, *Fatwā* can be in two forms, either the *muftī* issues a *Fatwā* on a new matter in order to provide *Sharī'ah* point of view, or the *muftī* will issue a *Fatwā* upon the request from *mustafī*, who can be an individual or organization (Lahsasna, 2010). Historically, it is known that al-Ifta' has started with Prophet Muhammad (PBUH) when he used it to give ruling to life related issues. Allah (SWT) says, "O you

³ This definition has been provided by al-Mawsū'ah al-Fiqhiyah, (32/20), and OIC Fiqh Academy, Resolution No. 153 (2/17).

who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day, that is the best way and best in result” (Surah al-Nisa, verse No. 59). The verse highlights that Prophet Muhammad (PBUH) was a responsible ruler to give the *Sharī‘ah* ruling in his era. However, Prophet Muhammad (PBUH) rulings were based on the revelation from Allah (SWT). After Prophet Muhammad (PBUH), his companions, with the right authority over religion and state matters issued Fatwas. Ibn al-Qayyim (1991) in *I‘lam al-Muwaqqi‘in ‘an rabbi al-‘alamin* has mentioned the companions who gave *Fatwā* extensively, namely Umar Ibn al-Khattab, Ali Ibn Abī Talib, Abdullah Ibn Abbas, Abdullah Ibn Mas‘ud, Abdullah Ibn Umar, Aisha bint Abī Bakr, and Zayd Ibn Thabit. Al-Shatibi (1997), stated that “*mufī* is taking the position of the Prophet Muhammad (PBUH) by providing the *Sharī‘ah* ruling on any matter”. Thus, Prophet’s companions were very cautious to give a *Fatwā* in case if they are not very sure about it. Collective *Ijtihād* has been practiced among companion in order to deliver a ruling based on the consensus (Al-Qaradawi, 1988). Thereafter, al-Madhāhib al-Fiqhiyah, which is (school of thought within al-Fiqh al-Islāmī) were established, started with *Ḥanafī* School, *Mālikī*, *Shāfi‘ī*, and *Ḥanbalī*. They were practicing *Ijtihād* based on the primary sources namely al-Quran, Hadith, and the secondary sources such as consensus of companions. The scholars of these Madhāhib wrote number of books related to the Madhhab’s *Fatwā*. According to al-Qaradawi (1988), al-*Fatwā* al-Hindiyah or al-Fatawā al-Amgiri is an example of the *Fatwā* literature in the *Ḥanafī* Madhhab. It includes transaction, taxation, economic, family and other life related *Fatwās*, which have been ruled by *Ḥanafī* jurists. In the *Mālikī* Madhhab, Fatawā Ibn Rushd and Fatawā al-Shatībī has specialized to deliver *Fatwā* based on the *Mālikī* Madhhab understanding. In the *Shāfi‘ī* Madhhab, Fatawā al-

Nawawī and Fatawā Ibn al-Salah has specialized in the *Shāfi'ī* Madhhab understanding to deliver Fatwas; al-Nawawī's book has include all *Fiqh* book, such as book of pray, fasting, zakat, etc. Finally, in the *Hanbalī* Madhhab, Fatawā ibn Taymiyyah were famous even though ibn Taymiyyah is a Mujtahid but he restricted to give a *Fatwā* based on the principles of *Hanbalī* madhhab. Currently as before daily human life has endless issues and matters, which need a *Sharī'ah* ruling, there are some individual *muftī*s delivering *Sharī'ah* ruling based on their understanding, as well as some *Fatwās* committees, which consist of group of scholars. For instance, Islamic Fiqh Academy, which is based in Jeddah, Saudi Arabia, it was created in 1981 by the Organization of the Islamic Conference. It is practicing *Ijtihād* on the religious and other matters by the Muslims expertise and scholars from all the world. Other example is al-Azhar al-Sharif, which is based on Egypt, and it is evaluating and understanding the new matters to provide the proper *Sharī'ah* ruling. In addition, European Council for *Fatwā* and Research, which is based in Dublin, Republic of Ireland is an example of responsible Fatwa issuing body in Europe, aiming to solve Muslim's problems and issue collective *Fatwās* based on *Sharī'ah* principles⁴.

2.2.2 CONCEPT OF AL-FATWĀ IN ISLAMIC FINANCE

According to Accounting and Auditing Organization for Islamic Financial institutions (AAOIFI), the term *Fatwā* has been defined in standard 29, clause 2/1, it stated that, "*Fatwā* refers to a *Sharī'ah* opinion presented to a person who seeks it with regard to an incidence that has already occurred (the *Fatwā* incidence) or is expected to occur. It does not refer to answering queries pertaining to hypothetical incidences" (AAOIFI, 2015). However, this definition defined al-*Fatwā* in general, while Lahsasna (2010),

⁴ Look to their official website, <http://www.iifa-aifi.org/> , <http://www.azhar.eg/splash.html> , <https://www.e-cfr.org/>

stated a specific definition for the *Fatwā* in Islamic finance, he stated that “*Fatwā in Islamic finance is a discovery of Sharī‘ah ruling by a competent Sharī‘ah scholar on unclear matters of Islamic Finance. By providing legal Sharī‘ah opinion extracted from Islamic source through a process of Ijtihād on a particular religious matter after the demise of the Prophet (PBUH) in the light of the Sharī‘ah rules and Islamic jurisprudence principles*”.

2.2.3 THE IMPORTANCE OF AL-FATWĀ IN ISLAMIC FINANCE INDUSTRY

The importance of *Fatwā* in Islamic finance industry can be observed as Fatwa is used to provide *Sharī‘ah* ruling for unresolved Islamic financial issues, along with distinguishing between the valid and invalid financial transactions from *Sharī‘ah* point of view (Al-Zuhayli, n.d.). This is the main responsibility of the *mufī* who is asked to provide a *Sharī‘ah* ruling. However, if the qualified *mufī* is not taking the position and responsibility to provide a *Sharī‘ah* ruling, thus the unqualified people who has not fulfilled the *Mufī* requirements will take the position and declare the *Sharī‘ah* ruling, it will lead to distortion of the truth of Islam (al-Buti, 2009). Allah (SWT) in al-Quran says, “*And do not utter falsehoods by letting your tongues declare: This is lawful and that is unlawful, thus fabricating lies against Allah. Surely, those who fabricate lies against Allah will never prosper*” (Surah al-Nahl, verse No.116). Therefore, al-Shaqawi (2015), discussed some reasons, which enabled unqualified *Mufī* to give a *Fatwā*, such as the case if the objective of someone to get famous among the society, so by giving *Fatwā* he might get famous, or if the *Mustafī* use financial compensations to get the *Fatwā* he/she wished, or maybe to create controversy among Muslims in the favor of Non-Muslim⁵.

⁵ This is an Arabic article in Alukah Network, <http://www.alukah.net/sharia/0/84529/>.

2.2.4 TYPES OF AL-FATWĀ IN ISLAMIC FINANCE

According to Lahsasna (2010), *Fatwā* is classified into two categories; the first category is official *Fatwā* and the second category is the Non-official *Fatwā*, while the second category can be individual *Fatwā* or collective *Fatwā*. Lahsasna has differentiated between an official *Fatwā* and Non-official *Fatwā* through the position of the *Muftī* whether the *Muftī* is appointed by the government or not. Therefore, the official *Muftī* who has been appointed by the government has more influence and importance than the Non-official *Muftī*, because the *Fatwā* from an official *muftī* will be enforced by the government. However, Lahsasna elaborated the second category, which is individual *Fatwā* or collective *Fatwā*, individual *Fatwā* refers to *Fatwā*, which has been issued via a single competent *Sharī'ah* scholar, while the collective *Fatwā* refers to the *Fatwā* which has been issued by a group of *Sharī'ah* scholars by forming a committee. Therefore, by observing the current working of the Islamic financial institutions, it can be observed that collective *Fatwā* is the most popular form of *Fatwas* since the *Fatwā* are being issued by the Shariah committee or are being issued by the Shariah committee of the central bank (Lahsasna, 2010).

2.2.5 THE CHARACTERISTICS OF AL-MUFTĪ IN ISLAMIC FINANCE

According to Ibn al-Qayyim (1991), *Muftī* is signing on behalf of Allah (SWT) because *Fatwā* has been attributed to Allah (SWT). Therefore, *al-Muftī* position must be held by competent scholars only. Al- Nawawī (1408 AH), divided conditions for being a *Muftī* into two stages. At the first stage, *Muftī* has to fulfil the following conditions, Islam, Sanity, Puberty, Piety and just, and Intelligence. While in the second stage, the conditions are more noticeable, i.e. the *Muftī* must have copious knowledge of *Sharī'ah* rulings and how it has been derived, so he must be knowledgeable in al-Quran, al-Sunnah, consensus and disagreement, the analogy, *Fiqh and Uşūl al-Fiqh*, and Arabic

language. Lahsasna (2010), discussed further conditions for the *Muftī* in Islamic finance field. *Muftī* or the Shariah advisor of Islamic financial institutions must be aware of the verses related to Islamic financial system and their meanings. Al-Sunnah or Aḥadith al-Ahkam are also required to be known by the *Muftī*, particularly, aḥadith that are related to trade and transactions. In addition, *Muftī* must be aware of the cases that has been concluded based on consensus. As *Muftī* cannot reconsider the cases that has been ruled based on consensus unless the consensus is based on *Maṣlahah* or customs. Arabic language is also a requirement for the *Muftī*, Arabic language is important for him in order to understand the meanings of Al-Quran and Al-Sunnah. Finally, *Uṣūl al-Fiqh* and *Maqāṣid al-Sharī'ah* are two of the most important sciences for the *Mujtahid* in order to derive the *Sharī'ah* rulings. *Uṣūl al-Fiqh* knowledge is important for the *Muftī* to prevent him from making mistakes by following the principles and the methodology of al-*Ijtihād*. AAOIFI (2015), in standard No. 29, clause 5, mentioned three conditions of *Muftī*. Firstly, he must be versed in term of *Fiqh*, and well informed of the contributions of diligent *Sharī'ah* scholars. Secondly, *Muftī* does not have to be competent in all area of *Fiqh*. He must be competent in the area of *Fiqh al-Mu'amalat* at least. Thirdly, *Muftī* of the Islamic financial institution must not have any personal interest by issuing any particular *Fatwā* for that institution.

2.2.6 THE METHODOLOGY OF ISSUING AL-FATWĀ FOR ISLAMIC FINANCIAL INSTITUTION

It is agreed among *Sharī'ah* scholars that *Fatwā* should be derived from primary sources of *Sharī'ah*, namely Al-Quran and Al-Sunnah in the first stage. In case if the primary sources are silent on the matter, then the *muftī* must refer to the existing Ijma/consensus if there is any. However, if there is no Ijma among scholars on that matter, then the *muftī* can apply analogy along with relying on other secondary sources such as

Maṣlaḥah, *Istiḥsān*, etc (Duski, 2007). According to Lahsasna (2010), *Muftī* (Shariah advisory) of Islamic financial institutions shouldn't restrict to specific Madhhab, rather should be flexible and find an appropriate *Fatwā*. However, the *Muftī* must put into account the following items, such as Rules and regulations of the country and the governing standards of *Fatwā* beside *Sharī'ah* principles. According to AAOIFI (2015), in standard No. 29, clause 7/4, the Shariah board of Islamic financial institutions may transfer the matter to other Shariah board to provide a *Fatwā* if the latter is more reliable. AAOIFI (2015), required additional questioning from the *mustaftī* (IFI) if the case is not clear to the Shariah board, or it can consult with other Shariah boards.

2.2.7 CONTEMPORARY OF AL-FATWĀ BODIES IN THE ISLAMIC FINANCIAL INDUSTRY

The issuance of *Fatwā* for Islamic financial institutions can be through an internal Shariah board, and it can also be through an external Shariah body. Examples of the famous Shariah regulatory bodies are, The International Islamic Fiqh Academy, Accounting and Auditing Organization for Islamic Financial Institution, Shariah Advisory Council of Bank Negara Malaysia, Shariah Advisory Council of Securities Commission of Malaysia, Shariah Supervisory board of Dallah al-Baraka Group, and Shariah Supervisory board of Kuwait Finance House (Shaharuddin *et al.*, 2012). The first two bodies issue *Fatwās* and guidelines that can be followed by any Islamic financial institution in the world. While the third and fourth are meant for Malaysian Islamic financial institutions only, whereas the last two are for specific Islamic financial institution.

2.3 AL-MAŞLAĤAH

2.3.1 CONCEPT OF MAŞLAĤAH

According to Ibn Manzūr (1999) in *Lisān al-‘Arab*, “*al-Maşlahah* is the opposite of *al-Mafsadah*, which means to repair things after its ruination”. Imām al-Ghazālī (1993), defines *Maşlahah* as “The considerations which secure a benefit and prevent harm but are in the meantime harmonious with the objectives of the *Sharī‘ah*”. The objectives of *Sharī‘ah* mentioned by Imām al-Ghazālī includes the five essential values namely, protection of religion, life, intellect, lineage and property. According to Imām al-Ghazālī, any measures which secure these values falls within the scope of *Maşlahah* and anything violates them is called *Mafsadah*. According to al-Bouṭī (1973), *Sharī‘ah* sources has validated *al-Maşlahah*; the evidence can be found in Al-Qur’ān and Al-Sunnah. In Al-Qur’ān, Allah (SWT) says, “*We have sent you forth as nothing but mercy to people of the whole world*” (al-Anbiyā’: 107). In this verse Allah (SWT) is addressing Prophet Muhammad (PBUH) that He (PBUH) is a blessing and mercy to all the world, since Prophet Muhammad (PBUH) was responsible to guide people and rescue them from disbelief (al-Bouṭī, 1973). Al-Tirmidhī narrated in his Sunan, ḥadīth No. 1327, the conversation between Prophet Muhammad (PBUH) and Mu‘ādh before sending him to Yemen. Prophet Muhammad (PBUH) asked Mu‘ādh how he would judge when a matter arose. Mu‘ādh replied that he would judge based on what is in the Qur’ān first, if solution is not found then based on the Sunnah if it is not founded in Al-Qur’ān and Al-Sunnah, then the last resort is *al-Ijtihād* (independent reasoning) which would include his point of view along with relying on the sources of *Sharī‘ah* such as *Maşlahah*. In addition, *Maşlahah* is being practiced since the era of Prophet Muhammad’s (PBUH) companions. For instance, in the Abū Bakr caliphate, ‘Umar ibn al-Khaṭṭāb requested from Abū Bakr to compile the Qur’ān in a written format in order to preserve it from

loss, Abū Bakr has allowed it when he observed that it is in the interest of the Muslims (Kamālī, 1998).

2.3.2 CLASSIFICATION OF AL-MAŞLAĤAH

Scholars has classified *Maşlahah* into three categories. The first category is *Maşlahah Mu'tabarah* (Accredited *Maşlahah*). This type of *Maşlahah* is validated from primary *Sharī'ah* sources, namely Al-Qur'ān and Al-Sunnah. For instance, protection of life, *Sharī'ah* has adopted punishments such as *al-Qiṣāṣ* to protect life. Allah (SWT) has mentioned it clearly in Sūrah al-Baqarah, verse 179, “*And there is for you in legal retribution saving of life*”. This type of *Maşlahah* must be upheld and cannot be rejected because a clear evidence for the Primary sources of Shariah has supported it.

Invalid *Maşlahah* (*Maşlahah Mulgha*) is the second type of *Maşlahah*. *Maşlahah Mulgha* is what *Sharī'ah* has nullified clearly in its primary sources. For instance, the practice of usury in transaction, it is forbidden clearly in al-Qur'ān in Sūrah al-Baqarah verse 275, “*Allah has permitted trade and has forbidden interest*”. Charging interest is a *Maşlahah* for the lender to get more money, yet *Sharī'ah* has not recognized this *Maşlahah* and therefore disallowed it to happen (Kamālī, 1998). *Sharī'ah* scholars have agreed on the both types of *Maşlahah* which has *Sharī'ah* evidence from the primary sources, because *Sharī'ah* came to achieve what is beneficial for Muslim community and forbid what is unbeneficial (Al-Zuḥaīlī, 2006).

The third type of *Maşlahah* is *Maşlahah Mursalah*. It is the type of *Maşlahah* which have no textual evidence from the primary *Sharī'ah* sources, neither validating it or otherwise. The objective of this type of *Maşlahah* is to benefit Muslims and to prevent them from something permissible that can lead to the harm. For instance, combination of Al-Qur'ān, has achieved a real *Maşlahah* for Muslims since it has

protected Al-Qur'ān from distortion and losing. This *Maṣlaḥah* is not mentioned in Al-Qur'ān and Al-Sunnah, thus it is called *Mursalah*.

Both *Maṣlaḥah Mu'tabarah* and *Maṣlaḥah Mulgha* are agreed among scholars to be considered as legal references/acceptable source for *Uṣūl al Fiqh* since these *Maṣlaḥah* are sourced from Al-Qur'ān and Al-Sunnah.

According to Al-Zuḥāilī, scholars are divided into two groups when it comes to the legality of *Maṣlaḥah Mursalah* as a source of law in Islam. The first group is al-*Shāfi'ī* and al-*Zāhirīs*. According to them *Maṣlaḥah Mursalah* is not a source of law since *Sharī'ah* can only consider type of *Maṣlaḥah* that are mentioned in Al-Qur'ān, Al-Sunnah, and the consensus. The second group consists of *Ḥanafī*, *Mālikī*, and *Ḥanbalī* school of thoughts. According to them *Maṣlaḥah Mursalah* should be considered as source of law in Islam as new issues, problems and challenges are arising with the evolution in society some of which can benefit Muslims, thus, it should be considered as source of law even though it is not mentioned in Al-Qur'ān and Al-Sunnah (Al-Zuḥāilī, 2006).

2.3.3 PARAMETERS OF AL-MAṢLAḤAH

According to al-Bouṭī (1973), *Maṣlaḥah* parameters is the most important knowledge for a *Mujtahid* in order to identify, analyse and understand the appropriate cases which can be legitimized based on *Maṣlaḥah*. A *Mujtahid* must consider all these parameters before delivering his point of view. Scholars have differed in term of the number of the parameters, but overall most of them have agreed with what will be mentioned in this study.

First parameter: *Maṣlaḥah* must not contradict with Al-Quran and Al-Sunnah

Al-Qur'ān, Al-Sunnah, and the consensus among the companions of Prophet Muhammad (PBUH) and Muslim scholars are the primary sources of *Sharī'ah* (Ayub, 2007). A valid *Maṣlahah* must be in line with what is mentioned in Al- Qur'ān and Al-Sunnah since both sources seeks to achieve *Maṣlahah* for Muslims (Kamaruddin *et al.*, 2015). It is an obligation for Muslim to adhere to the both primary sources since they are called “*revelation*” from Allah (SWT). Ḥadīth narrated by al-Tirmidhīn his Sunan, Ḥadīth No. 1327, about the conversation between Prophet Muhammad (PBUH) and Mu'ādh before sending him to Yemen. Prophet (PBUH) was asking Mu'ādh how he would judge when a matter arose. Mu'ādh replied that he would judge based on what is in the Qur'ān first, then based on the Sunnah if the solution is not founded in al-Qur'ān and Sunnah, then the last resort is *al-Ijtihād* (independent reasoning) which would include his own understanding of the problem and solution. The ḥadīth is an evidence that practicing *Ijtihād* and delivering an opinion must be after extensive investigation of the underlying issue in Al-Qur'ān and Al-Sunnah since Prophet accepted Mu'ādh reply. Therefore, a *Mujtahid* can give his point of view based on *Maṣlahah* if the both primary sources i.e. Al-Qur'ān and Al-Sunnah are silent on the underlying issue. (Nazaran *et al.*, 2014). For instance, the case of Turkey in the period of President Mustafa Kemal Atatürk when *Hijab* was banned in the society, and the argument was that *Hijab* does not suit Turkish current life style and taking off *Hijab* will attract more tourists which is beneficial for the economy of the country (Nazaran *et al.*, 2014). This type of *Maṣlahah* is rejected from *Sharī'ah* perspective since ḥijab has a reference in Al-Qur'ān, when Allah (SWT) says, “*And enjoin believing women to cast down their looks, and guard their private parts, and not reveal their adornment except that which is revealed of itself, and to draw their veils over their bosoms*” (Sūrah al-Nūr: 31).

Other Another example is the case of Tunisia when the Government in 1960 came up with a rule stating the ban on fasting in Ramaḍān, since fasting will affect the productivity and the economy (Nazaran *et al.*, 2014). Again, this government decision is against the reference from the primary sources of *Sharī'ah* i.e. AL-Qur'ān and Al-Sunnah. The ḥadīth “Islam is built on five pillars: bearing witness that there is no god except Allah and that Muhammad is the Messenger of Allah, establishing prayer, paying zakat, pilgrimage and fasting Ramaḍān.” (Al-Bukhārī, 1981). Therefore, the argument of breaking fast in Ramaḍān to protect the economy is invalid *Maṣlahah* from *Sharī'ah* point of view since it is against the reference of the issues in the primary sources of *Sharī'ah*.

Second parameter: *Maṣlahah* must not contradict with Consensus/Ijma

Ijmā' means, “The unanimous agreement of the *Mujtahidīn* (Experts of *Sharī'ah* law) of the Muslim community of any period after the demise of the Prophet Muhammad on any matter” (Al-Zuḥālī, 2006). *Ijmā'* is considered as source of law since all schools of thought has accepted it. *Ijmā'* could be based on *Maṣlahah*, thus, the *Mujtahidīn* can put into their account the *Maṣlahah* of the Muslim society before delivering any *Fatwā*. However, any new *Fatwā* based on *Maṣlahah* must not contradict with the former *Fatwā* since the former *Fatwā* has already considered the *Maṣlahah* (Abdul Ghani *et al.*, 2011). For instance, there is an existing *Ijmā'* among scholars on the prohibition of lard which was based on analogy (*Qiyas*) since the pork is prohibited in *Sharī'ah* (Islamweb, 2002). Thus, scholars considered lard as pork. Hypothetically, if now all scholars agree to allow selling of the lard based on *Maṣlahah* since it would benefit the economy, such an *Ijmā'* is contradicting the former *Ijmā'*, therefore, it is void.

Third parameter: *Maṣlahah* must protect *Sharī'ah* objectives

The five essential objectives that *Sharī'ah* recognized include, protection of religion, protection of life, protection of mind, protection of lineage and protection of property (Al-Ghazālī, 1993). Thus, *Maṣlahah* could be called on any such matter which protect these five objectives of *Sharī'ah*, while *Mafṣadah* are called to what impairs these objectives of *Sharī'ah*. The first objective, which is religion, is bounded in *al-'aḳīdah* and *al-'ibādah*. *Maṣlahah* could be called to the activities which lead to the strengthen of the faith, and to what encourage the practice of *al-'ibādah* such as daily pray, fasting, and *Ṣadaqah* (Al-Ghazālī, 1993). For instance, in the period of King Abdullah (the former king of Saudi Arabia) a new rule was imposed on *al-Masjid al-Nabawī*, which was a request to remain the masjid open for the whole day which will give extra time to Muslims for *'ibādah* (Al-Khayat, 2018)⁶. This was the good example of real *Maṣlahah* for Muslims which will lead to protection of religion. The second objective is the protection of life which can be observed through the serious rules/punishments such as *al-Qiṣāṣ* in Islam which leads to protection of life (Al-Rifai, 2016). Such rule can be legitimized based on *Maṣlahah* as long as it is protecting life of Muslims. The third objective is the protection of mind, which can be achieved through forbidding harmful products affecting the mind such as tobacco-based products (Rajab, 1996)⁷. The fourth objective is the protection of lineage. In this regard, *Sharī'ah* forbids adultery and one of the reasons for it is that it will mix the lineages (Bahjat, n.d.)⁸. Therefore, phone communication or any other way of unprofessional contact between male and female which might leads to adultery can also be considered for prohibition. For instance, *Maṣlahah* can be noticed in case of separation male and female students in the schools and so on, as it will reduce the opportunity of physical contact between them. The last

⁶ This is an Arabic article.

⁷ This reference is an Arabic article.

⁸ This is an Arabic reference.

objective is the protection of property. *Sharī'ah* is the way of life for Muslims and the right of ownership is one of the most important aspect of human life therefore, all forms of snatching/damaging other property is unacceptable from *Sharī'ah* point of view, while *Sharī'ah* has allowed transfer of ownership through *hibah* (Ayub, 2007). Islam also considered the *Maṣlahah* for the society when it forbids all types of bribery. In addition, all forms of investments are acceptable from *Sharī'ah* point of view except what has been forbidden in *Sharī'ah*. Therefore, *Sharī'ah* has considered the *Maṣlahah* for the society when it allows and encouraged trade and investment (Al-Zuḥāīlī, 2006).

Fourth parameter: *Maṣlahah* must be genuine (Ḥaqīqīyah)

One of the important parameters is the genuineness level of the allowed activity that is based on *Maṣlahah*. *Sharī'ah* has only allowed to permit the activities which has real benefit to the society as a whole (Kamālī, 1998). For instance, family law of the country, which requires every marriage contract to be registered in the court of law, is an example that benefit the whole society (Medium, 2015). Other example can be the traffic law which oblige every driver to fasten a seatbelt. It has a real benefit to protect the life of drivers and passengers in case of accident.

Fifth parameter: *Maṣlahah* must be general (Kullīyyah)

Sharī'ah allow activity to be legitimized based on *Maṣlahah* if that activity is securing benefits or preventing harms to the people. It means the *Maṣlahah*, which benefits just a limited number of people, is not acceptable or legal (Kamālī, 1998). For instance, determining the minimum age of marriage benefits all people (Odal, n.d.), thus it can be called *Maṣlahah* Kullīyyah.

Sixth parameter: It should not contradict another *Maṣlahah*, of the same strength or a higher level

Sharī'ah has recognized the *Maṣlahah* for Muslims society. There is a disparity in term of the importance of these *Maṣlahah*, since it is divided into three categories, namely *Darūriyyāt*, *Hājiyyāt*, and *Taḥsīniyyāt*. *Darūriyyāt* includes the preservation of the five objectives, namely protection of religion, life, mind, lineage and property. *Hājiyyāt* include things that people usually need for the basic necessities, such as food, water etc. *Taḥsīniyyāt* include the things which are not important, but it will add beauty to life such as wearing perfume when attending prayers at mosque (al-Bouḫī, 1973). Therefore, the *Maṣlahah* which is achieved in the level of *darūriyyāt* will have priority over the *Maṣlahah* which is achieved in the level of *hājiyyāt*, and *taḥsīniyyāt*, and the *Maṣlahah* which is achieved in the level of *hājiyyāt* will have priority on the *Maṣlahah* which is achieved at the level of *taḥsīniyyāt*.

2.4 SHARIAH ADVISORY COUNCIL OF BANK NEGARA MALAYSIA AND SECURITIES COMMISSION

This section of the chapter provides a brief overview about Shariah Advisory Council of Bank Negara Malaysia SAC-BBM and Shariah Advisory Council of Securities Commission SAC-SC. In addition, their resolutions which are based on *Maṣlahah* will also be mentioned in this section.

2.4.1 SHARIAH ADVISORY COUNCIL OF BANK NEGARA MALAYSIA (SAC-BNM)

2.4.1.1 Overview of SAC-BNM

In May 1997, Bank Negara Malaysia established the highest Shariah authority for Islamic financial matters, it is called Shariah Advisory Council (SAC). The role of SAC was to supervise and advice on the *Sharī'ah* matters of the businesses which are based on *Sharī'ah* principles. SAC is also responsible to validate all Islamic banking and Takāful products to ensure their compliance with *Sharī'ah* principles. SAC consists of

members who are qualified along with an enormous experience particularly in the areas of Islamic banking and finance.⁹

2.4.1.2 SAC-BNM *Sharī'ah* Resolutions in Islamic Finance

SAC-BNM has combined its resolutions in a book since its establishment in 1997 to 2009. They published two editions so far, the first edition was published in 2007 while the second edition was published in 2010. These books are considered as reference to the *Sharī'ah* rulings that related to Islamic finance. This book focused on the matters related to Islamic Banking and Takaful (SAC-BNM, 2010).

2.4.1.3 Resolution based on *Maṣlaḥah*

Third party guarantee for capital and/or profit in Muḍārabah transaction

In October 2009, SAC has resolved in its 91st meeting the matter related to the Third-Party Guarantee in Muḍārabah transactions. SAC has allowed it with a condition that the third party must be an independent party. It is allowed based on *Maṣlaḥah* since it is important to give confidence to investors and attract them to invest in the country's projects based on Islamic financial principles (SAC-BNM, 2010).

Ibra in Islamic Finance

Ibra refers to waiver of debt either partially or wholly in sale-based contracts such as Murabahah. On 20th May 2010, SAC in its 101st meeting has resolved that BNM may require Islamic Financial Institutions to practice Ibra with customers who has settled their debt prior to the due date. SAC has relied on the *Maṣlaḥah* (public interest) since it will preserve customers' rights and achieve fairness (SAC-BNM, 2010).

***Sharī'ah* Concept for the operation of Islamic guarantee facility by credit guarantee corporation.**

⁹ Refer to the official website of BNM
http://www.bnm.gov.my/index.php?ch=en_about&pg=en_thebank&ac=439&lang=en

Islamic Credit Guarantee is a facility which helps borrowers to obtain financing from Islamic financial institutions. It is a fee-based guarantee where the guaranteed party will be charged a fee. In 27th October 2005, SAC in its 54th meeting resolved that the facility offered from CGC which is a fee-based guarantee is allowed, the ruling is based on *Maṣlahah* because it is achieving a real *Maṣlahah* for borrowers since it is difficult to get free of charge guarantee for such transaction (SAC-BNM, 2010).

Capital segregation in the operations of Danajamin Nasional Berhad

Danajamin Nasional Berhad is an institution which provides financial guarantee to Malaysian bond and Sukuk market. The matter that needed to be addressed was about the segregation of Danajamin's capital which will be used for guaranteeing facilities for both Sukuks and conventional bonds. In 9th April 2009, SAC in its 10th meeting resolved that the capital of Danajamin which will be used to guarantee Sukuks and bond needs to be segregated. In addition, the guarantee fee of Sukuks and bonds need to be separated as well. SAC relied on *Maṣlahah* as the basis of ruling, it was to ensure that Danajamin is able to play its role effectively as guarantor, and lead to growth of the capital market including the Islamic capital market (SAC-BNM, 2010).

Restructuring and Rescheduling in Islamic Financing Agreement

The mechanism of restructuring and rescheduling in Islamic finance is different than the mechanism of its conventional counterpart, since Islamic finance requires additional legal documents which will require additional legal fee and stamp duty. In 26th June 2002, SAC in its 26th meeting has resolved the issue of restructuring and rescheduling by inserting an additional paragraph in the agreement of financing facility in order to verify the agreement of restructuring and rescheduling. SAC has relied on the basis of *Maṣlahah* to avoid double payment of the stamp duty by the customer (SAC-BNM, 2010).

2.4.2 SHARIAH ADVISORY COUNCIL OF SECURITIES COMMISSION

2.4.2.1 Overview of SAC-SC

Securities Commission is a statutory body which regulate and supervise the activities of the capital market of Malaysia. It is also responsible of the stock exchange, clearing house, etc. Since Malaysia wanted to develop its Islamic Capital Market, there was a need for a central *Sharī'ah* Committee to supervise and control the institutional activities under *Sharī'ah* principles for Islamic capital market instruments. Thus, on 16th May 1996 Shariah Advisory Council of Securities Commission was established with the goal to ensure that Islamic Capital Market complies with *Sharī'ah* principles. SAC of SC is also responsible for the listing of the Shariah compliant securities since it is important for Muslims investors to know the securities which complies with *Sharī'ah* principles and which does not¹⁰.

2.4.2.2 Resolutions of securities commission Shariah Advisory Council of security commission

SAC – SC oversee the *Sharī'ah* matters related to the instruments of Islamic capital market and Islamic Securities. The first edition of the resolution of SAC of SC was published in 2002, however, after getting feedback and comments, SAC published the second edition in 2006. It is considered as reference of the *Sharī'ah* rulings that related to Islamic capital market (SAC-SC, 2006).

2.4.2.3 Resolutions based on Maşlahah

Ujrah for Guarantee

Ujrah refer to a fee which will be paid in order to get a service. Majority of the past scholars were of the opinion that charging fee on a guarantee/Kafālah is not permissible if the Ujrah is more than the actual expenses since Kafālah is a type of Tabarru'

¹⁰ Refer to official website of Securities Commission, <https://www.sc.com.my/the-169th-shariah-advisory-council-of-the-securities-commission-malaysia-meeting-26-february-2015/>

contracts. Shaikh Wahbah al-Zuhāīlī who is a prominent scholar allowed Kafālah bil Ujrah since there is a need for such services in the society. On 6th February 2002, SAC SC in its 36th meetings resolved that Kafālah bil Ujrah is allowed and they agreed with the view of sheikh Zuḥāīlī that there is a real *Maṣlahah* for the society because it is hard to find a guarantor who doesn't charge a fee (SAC-SC, 2006).

Ibra clause in the documentation of the agreements

Ibra means waive of rights and it is a form of Tabarru' contracts, such as when creditor waive full or portion of the debt for the debtor. Dha wa Tajal is a principle which is required from *Sharī'ah*. On 8th November 2000, and 7th March 2003 SAC SC discussed the use of Ibra and allowed it. The *Maṣlahah* of al-Ibra is one of the topics which has a continuous discussion among *Sharī'ah* scholars (SAC-SC, 2006).

Regulated short selling and securities borrowing and lending

The contract of securities Borrowing and Lending (SBL) rely on a loan of securities between two parties for specific time. The objective of this activity is to enhance the liquidity and development of the stock market. From *Sharī'ah* perspective the activity can be compliant when applying Ijarah contract instead of loan. In 19th March 1998 and 18th April 2006, SAC discussed and resolved that Securities borrowing and lending (SBL) is *Sharī'ah* compliant since it is included in the regulated short selling (RSS) which is eliminating the element of Gharar. SAC allowed SBL since there is a *Maṣlahah* for the stock market participant and it provides a liquidity to the share market (SAC-SC, 2006).

Mixed companies

Mixed companies are the companies who have permissible and non-permissible business activities. On 21st August 1996, SAC in its 2nd meeting resolved that the companies who have both permissible and non-permissible business activities can be

listed as Shariah compliant securities if the portion of non-permissible business activities do not exceed the benchmark set by SAC-SC. SAC has considered the *Maşlahah* of allowing such mixed companies since it will benefit the Muslim investors and fund managers (SAC-SC, 2006).

Image as criteria for listed securities

Companies who are running permissible and non-permissible business activities will be examined through two approaches, quantitative approach and qualitative approach in order to prepare the list of Shariah compliant securities. Image (market reputation) is one of the factors of the qualitative approach. Image refer to the general perception or the mental picture of the organization. on 22nd July 2002, SAC in its 40th meeting resolved that Image could be considered as *Sharī'ah* criteria in order to analyze the companies of Bursa Malaysia. *Maşlahah* is considered one of the main factors that SAC took into their account when it comes to analyze mixed business activities companies, it is for the purpose to measure the real need and benefits of that particular business (SAC-SC, 2006).

2.5 CHAPTER SUMMARY

In brief, the chapter is had three sections, started with the literature on al-*Fatwā*, followed by *Maşlahah*, and the lastly the *Fatwā* bodies of Malaysia i.e. SAC-BNM, SAC-SC. Most important literature is regarding *Maşlahah* parameters and the resolutions of SAC-BNM and SAC-SC since it is the scope of the study.

- *Maşlahah* Parameters
 - 1- *Maşlahah* must not contradict with Al-Quran and Al-Sunnah.
 - 2- *Maşlahah* must not contradict with Ijmā'.
 - 3- *Maşlahah* must protect *Sharī'ah* objectives.

- 4- *Maşlahah* must be genuine (Ḥaqīqīyah).
 - 5- *Maşlahah* must be general (Kulliyyah).
 - 6- It should not contradict another *Maşlahah*, of the same strength or a higher level.
- Resolution of SAC-BNM and SAC-SC
 - 1- Third Party Guarantee for Capital and/or Profit in muḍārabah Transaction.
 - 2- Ibra in Islamic Finance.
 - 3- *Sharī'ah* Concept for the Operation of Islamic Guarantee Facility by Credit Guarantee Corporation.
 - 4- Capital Segregation in the Operation of Danajamin.
 - 5- Restructuring and Rescheduling in Islamic Financing Agreement.
 - 6- Ujrah for Guarantees.
 - 7- Ibra Clause in the Documentation of Agreements.
 - 8- Regulated Short Selling and Securities Borrowing and Lending.
 - 9- Mixed Business Companies.
 - 10- Image as Criteria for Listed Securities.

CHAPTER THREE

METHODOLOGY

3.1 INTRODUCTION

The study will rely on qualitative research tools and techniques, concentrating on an objective assessment of opinions and attitudes. The qualitative research methods are widely used to assess and examine opinions, particularly in research area which uses selected case studies and involves an analysis on that selected cases. The cases highlighted in this research are a group of *Fatwās* that are issued from reputable Shariah Advisory Councils in Malaysia. The conclusion involves a degree of certainties through investigating these *Fatwās* which have issued through two bodies of issuing *Fatwās* related to Islamic financial transactions in Malaysia. The research will use the inductive approach since it will allow to summarize the collected data (Thomas, 2006). Thus, the study will use the indicative approach in order to come up with a general perception about the parameters of using *Maṣlahah* which is one of the secondary sources of *Sharī'ah* for Islamic financial transactions.

Qualitative research is a method of study in depth rather than breadth and places, along with more emphasis on the full analysis of a limited number of events or conditions and their interrelations. Also, case study is essentially an intensive investigation of the particular unit under consideration. Thus, the object of the case study method is to locate the factors that account for the behavior patterns of the given unit as an integrated totality (Kotheri, 2004).

Qualitative research is more appropriate for this kind of research, where there is absence of statistical data (Mokhtar, 2016). The researcher will rely on the main instrument of the qualitative method which is document analysis, as well as *Uşūl -Fiqh* literature in order to determine the level of adherence between the *Fatwās* which have used *Maşlahah* as basis of ruling and *Maşlahah* parameters which have been determined from *Uşūl -Fiqh* literature.

3.2 DOCUMENT ANALYSIS

According to Glenn and Bowen (2009), there are number of advantages to use document analysis as method to reach to the study's objectives. Firstly, it is very efficient since it is based on data selection rather than data collection. Secondly, it is available and easy to find with low cost. Thirdly, exactness and coverage since the details of the documents are exact with broad coverage. Connell, Waring and Lynch (2001) have used document analysis to investigate the social impact inside selected institutions and organizations. Thus, it highlights the importance that document analysis can be used in all areas including Islamic finance. According to Angrosino and Mays de Perez (2000), document analysis is a way to do the verification of findings or proved evidence from other documents or sources. Therefore, relying on classical *Sharī'ah* literature will lead to the verification of the use of *Maşlahah* in the existing resolution of BNM and SC. However, official document Analysis is considered the main tool in qualitative research. It is the most suitable method for data collection in the event where statistical data is not available. In addition, the analysis of the documents should be very coherent to the topic and should be analyzed in an effective and systematic way to avoid selectiveness and unrealism during the research procedures (Mokhtar, 2016). Qualitative analysis is

basically relying on the writer's involvement and interaction with documents selected for their relevance to a research topic (Altheide and Schneider, 2013).

To apply in this study, Firstly, the researcher will study in depth the *Uşūl -Fiqh* literature in terms of the matters related to *Fatwā* in Islamic finance industry along with the *Maşlahah* as a source of *Sharī'ah* rulings. Secondly, selecting sample cases that have used *Maşlahah* as a basis of the *Fatwās* issued by Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) and Shariah Advisory Council (SAC) of Securities Commission (SC), through their official websites. Lastly, comparing and evaluating the analyzed *Fatwās* which have been built on *Maşlahah* against the parameters of valid *Maşlahah* identified by past jurists through the *Uşūl -Fiqh* literature.

3.3 SAMPLING

The study will use to two samples, the first sample is, the *Uşūl -Fiqh* literature in order to understand in depth the definition of *Maşlahah* and its conditions and parameters as well as the role of recognized *Maşlahah* in terms of issuing *Fatwās* associated to Islamic Financial Transactions. In addition, to identify the usage of *Maşlahah* in constructing *Fatwās* between past and present financial environment. The second sample is, the official documents of Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) and Shariah Advisory Council (SAC) of Securities Commission (SC), which are the most important and official bodies of issuing *Fatwās* for the Islamic financial institutions in Malaysia. The selection and examination will be only on the *Fatwās* that are issued based on *Maşlahah*, in order to examine these *Fatwās* with the parameters of valid *Maşlahah* identified by past jurists through the *Uşūl -Fiqh* literature. Therefore, through these samples the research can draw a clear picture of these *Fatwās* from *Sharī'ah* compliance perspective i.e. whether the specific *Fatwā* is following and

compliant with all parameters or it is following and compliant with most of the parameters.

3.4 JUSTIFICATION OF THE METHODOLOGY

One of the obstacles of any research study is choosing the research method, where each method has its advantages and disadvantages, as well as each method has its relevant subjects and contexts and each method has different tools and means. There is a similar concern about choosing a method that would best suit a research that examines *Fatwās* issued from Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) and Shariah Advisory Council (SAC) of Securities Commission (SC) with the absence of statistical data based on *Maṣlahah*. Hence, application of Qualitative method would be aped for such a research using its relevant tools such as document analysis through the official websites and documents as well as the *Uṣūl -Fiqh* literature.

Qualitative method is usually used in case of understanding values and perceptions of a subject matter and the influence of its actions. At the same time, it can be used for exploring and perfectly defining a phenomenon and highlighting its reasons of appearance or asking open-ended questions in an effort to explore. In addition, it also focuses on developing ideas through deep understanding via interviews, documents analysis/content analysis and observation.

As a result of that, qualitative method is chosen for this research to investigate the *Fatwās* that are issued from the most reputable bodies of issuing *Fatwā* for the Islamic financial institutions in Malaysia, in order to examine these *Fatwās* according to the parameters of *Maṣlahah* of *Uṣūl -Fiqh* literature or the opinions of the past *Sharī'ah* Scholars through evaluating these *Fatwās* with these *Maṣlahah* parameters. This investigation will provide a control mechanism issuing *Fatwās* which are based on

Maṣlaḥah, in order to prevent using this evidence which is one of the secondary sources of *Sharī'ah* in a wrong use in any *Sharī'ah* matters, particularly in *Fatwā* pertaining to Islamic Financial Transactions. Therefore, qualitative method is considered the best available option to achieve this kind of investigation for the reasons mentioned above.



CHAPTER FOUR

FINDINGS AND DISCUSSION

4.1 INTRODUCTION

Chapter four is the main chapter of the thesis which aims to analyze the resolutions of SAC-BNM and SAC-SC with *Maṣlahah* parameters which are derived from *Uṣūl -Fiqh* literature in order to reach to the result of each resolution individually. The result of the analysis of each resolution should be one of two. The first result is *resolution compliant with all Parameters*, while the second result is *resolution compliant with most of the Parameters*.

4.2 ANALYSIS OF SAC-BNM RESOLUTION WITH FINDINGS

4.2.1 Third party guarantee for capital and/or profit in Muḍārabah Transaction

According to Mishal (2012), third party guarantee is allowed in two cases. Firstly, if it is based on *Kafālah* with recourse, thus the guarantor is guaranteeing the Mudarib in case if he neglected his duties. Secondly, if it is a *Tabarru'* from the third party as he is donating based on Hibah. OIC in its resolution No. 30 (5/4) stated “*There is nothing in Sharī'ah preventing the inclusion of a statement in the prospect or the muḍārabah certificates, about a promise made by a third party, totally unrelated to the two parties to the contract, in term of legal personality or financial status, to donate a specific amount without any counter benefit to meet losses in a given project*”. SAC-BNM also requested that the third party should be an independent party. However, SAC allowed if such a guarantee is based on Ujrah. The resolution is made on the basis of *Maṣlahah* since the third-party guarantee will lead to the investor's confidence in a particular

project (SAC-BNM, 2010). Thus, this *Maşlahah* will be examined through the *Maşlahah* parameters in *Sharī'ah*:

Table 4.1 Analysis of Third-Party Guarantee Resolution

| <i>Maşlahah</i> Parameters | Answer | Comments | (Compliant or not) |
|---|---------------|---|------------------------------|
| Does third party guarantee service contradict with al-Quran or al-Sunnah? | No | There is no text prohibits the third-party guarantee since it is based on whether <i>Kafālah</i> contract or <i>Tabarru'as Hibah</i> . | Compliant with the parameter |
| Does third party guarantee service contradict with any consensus? | No | The third-party guarantee has no issue among scholars if it is based on <i>Kafālah</i> or Hibah. The issue is a <i>Kafālah</i> with fee which will be elaborated in coming resolution. | Compliant with the parameter |
| Does third party guarantee service protect any of <i>Sharī'ah</i> objectives? | Yes | The guarantee from a third party will give a confidence to the investors to invest their money in a <i>Sharī'ah</i> compliant projects, since the investors will be sure that their money won't be lost. Therefore, to attract investors with a <i>Sharī'ah</i> compliant project is a clear <i>Sharī'ah</i> objective. | Compliant with the parameter |
| Does third party guarantee service consider as a genuine <i>Maşlahah</i> to Muslims | Yes | The third-party guarantee has a sense of a real <i>Maşlahah</i> since it will lead to the prosperity of Islamic economy which will | Compliant with the parameter |

| | | | |
|---|-----|--|------------------------------|
| (<i>Maṣlaḥah</i> Haqīqīyah)? | | benefit Muslim community. | |
| Does third party guarantee service fulfil <i>Maṣlaḥah</i> to everyone (<i>Maṣlaḥah</i> Kullīyyah)? | Yes | As it's mentioned the third-party guarantee will lead to the prosperity of Islamic economy which will benefit everyone whether directly or indirectly. | Compliant with the parameter |
| Does third party guarantee service contradict with another <i>Maṣlaḥah</i> , of the same strength or a higher level? | No | To the best of my knowledge, third party guarantee is a need for our current context, thus, it is not contradicting other <i>Maṣlaḥah</i> . | Compliant with the parameter |
| Result: Since the Third-Party Guarantee service has no issue with all of the <i>Maṣlaḥah</i> parameters, thus, the <i>Maṣlaḥah</i> mentioned in this resolution is compliant with all of <i>Maṣlaḥah</i> parameters. | | | |

4.2.2 Ibra in Islamic Finance

Ibra has certain concerns among scholars, OIC in its resolution No.64/2/7 stated that “To reduce a deferred debt with the aim of accelerating its repayment, whether at the request of the creditor or of the debtor (pay less but ahead of time), is permissible in *Sharī'ah* and doesn't fall within the province of Ribā if it's not based on an advance agreement and as long as the relation between the creditor and the debtor are bilateral”. According to Laldin *et al.*, (2012), all *Fatwā* bodies in the Middle East don't allow Ibra which is stipulated in the agreement and agreed upfront while SAC-BNM has allowed that Ibra between IFI and its customers to be agreed and stipulated in the agreement. SAC-BNM has relied on *Maṣlaḥah* as basis of the ruling. Thus, this *Maṣlaḥah* will be examined through the *Maṣlaḥah* parameters in *Sharī'ah*:

Table 4.2 Analysis of Ibra in Islamic Finance Resolution

| <i>Maṣlahah</i> Parameters | Answer | Comments | (Compliant or not) |
|---|---------------|---|------------------------------|
| Does stipulated Ibra contradict with al-Quran or al-Sunnah? | No | The contract itself has no issue in al-Quran and al-Sunnah since it is a form of benevolence and it is encouraged by <i>Sharī'ah</i> . The issue is when the contract is stipulated in the agreement between the two parties. However, this can be considered as a consent between both parties which is also encouraged in <i>Sharī'ah</i> . | Compliant with the parameter |
| Does stipulated Ibra contradict with any consensus? | No | There is no consensus among scholars on the matter that Ibra shouldn't be stipulated in the agreement. OIC mentioned that Ibra can't be stipulated in the agreement, while SAC-BNM accepted Ibra to be stipulated in the agreement. In nutshell, there is no consensus among scholars on this matter. | Compliant with the parameter |
| Does stipulated Ibra protect any of <i>Sharī'ah</i> objectives? | Yes | Protection of wealth is a clear <i>Sharī'ah</i> objective which will be protected through allowing to stipulate | Compliant with the parameter |

| | | | | |
|--|-----|---|---|--|
| | | | Ibra clause in the agreement between the IFI and its customers. It will clearly lead to protection of the debtor's wealth since he isn't obliged to pay the extra profit anymore while he is able to settle his debt prior maturity, and also stipulated Ibra will remove the Gharar in the price, thus, removing Gharar is also <i>Shari'ah</i> objective. | |
| Does stipulated Ibra consider as a genuine <i>Maṣlahah</i> to Muslims (<i>Maṣlahah Ḥaḳīqīyah</i>)? | Yes | The <i>Maṣlahah</i> of stipulated Ibra could be noticed through the avoiding of uncertainty in price and avoiding a dispute between IFI and its customers since the Ibra clause in the agreement will lead to a clear contract. | Compliant with the parameter | |
| Does stipulated Ibra fulfil <i>Maṣlahah</i> to everyone (<i>Maṣlahah Kullīyah</i>)? | Yes | Stipulated Ibra will fulfil a <i>Maṣlahah</i> to every debtor and creditor who has entered in a sale-based contracts. | Compliant with the parameter | |
| Does stipulated Ibra contradict with another <i>Maṣlahah</i> , of the same strength or a higher level? | No | According to the available literature, stipulated Ibra is a need for our current context, to avoid a dispute among Muslims. | Compliant with the parameter | |

Result: Since the stipulated Ibra has no issue with all of the *Maṣlahah* parameters, thus, the *Maṣlahah* mentioned in this resolution is compliant with all of *Maṣlahah* parameters.

4.2.3 *Sharī'ah* Concept for the Operation of Islamic Guarantee Facility by Credit Guarantee Corporation (CGC)

Islamic guarantee has the issue with a fee which might exceed the actual expenses. Laldin *et al.*, (2012), studied the different opinions among *Fatwā* bodies. Thus, they found that the Middle East *Fatwā* bodies such as OIC¹¹ and AAOIFI¹² does not allow the fee which is more than actual expense. While SAC-BNM allowed to charge a fee, which might exceed the actual expenses. SAC-BNM relied on sheikh al-Zuḥailī opinion who stated that there is a *Maṣlahah* to allow guarantee based on fee even though it might exceed the actual expenses (Laldin *et al.*, 2012). Thus, this *Maṣlahah* will be examined through the *Maṣlahah* parameters in *Sharī'ah*:

Table 4.3 Analysis of Islamic Guarantee Facility by Credit Guarantee Corporation Resolution

| <i>Maṣlahah</i> Parameters | Answer | Comments | (Compliant or not) |
|--|--------|---|------------------------------|
| Does the fee which might exceed the actual expenses in a guarantee contract contradict with al-Quran or al-Sunnah? | No | Since there is a dispute among <i>Sharī'ah</i> scholars on this matter, it means there is no definitive text in al-Quran and al-Sunnah that prohibits to charge a fee which might exceed the actual expenses. | Compliant with the parameter |
| Does the fee which might exceed the actual expenses in a guarantee contract contradict | No | There is no consensus on this matter since there are some <i>Sharī'ah</i> scholars such as | Compliant with the parameter |

¹¹ Majma al-Fiqh al-Islami, Resolution No. 12 (12/2)

¹² AAOIFI, Shariah Standard No. 5.

| | | | |
|---|-----|---|------------------------------|
| with any consensus? | | Sheikh al-Zuḥaīlī and also member of SAC-BNM who are at the side of allowing to charge a fee more than actual expenses, while there are some others such as OIC and AAOIFI who doesn't allow it. | |
| Does the fee which might exceed the actual expenses in a guarantee contract protects any of <i>Sharī'ah</i> objectives? | Yes | According to sheikh al-Zuḥaīlī ¹³ , to allow guarantee based on Ujrah will lead to ease Muslim's life since some needs such guarantee to travel abroad whether for treatment or study. Thus, to ease Muslim's life is also consider <i>Sharī'ah</i> objective. | Compliant with the parameter |
| Does the fee which might exceed the actual expenses in a guarantee contract consider as genuine <i>Maṣlahah</i> for Muslims (<i>Maṣlahah</i> Ḥaḳīqīyah)? | Yes | The <i>Maṣlahah</i> could be noticed through the cases when people need a guarantor to obtain some kind of visas for example. | Compliant with the parameter |
| Does the fee which might exceed the actual expenses in a guarantee contract consider as <i>Maṣlahah</i> to | Yes | Allowing such guarantee will help everyone who needs to have a guarantor, since it is hard in the current context to get | Compliant with the parameter |

¹³ Al-Fiqh al-Islami wa Adillatuh, v. 6, p. 4178.

| | | | |
|--|----|--|------------------------------|
| everyone (<i>Maşlahah</i> Kulliyyah)? | | a guarantor who will charge the actual expense only. | |
| Does the fee which might exceed the actual expenses in a guarantee contract contradicts with another <i>Maşlahah</i> , of the same strength or a higher level? | No | According to the available literature, the <i>Maşlahah</i> of such guarantee doesn't contradict with other <i>Maşlahah</i> . | Compliant with the parameter |

Result: Since the guarantee provided from CGC has no issue with all of the *Maşlahah* parameters, thus, the *Maşlahah* mentioned in this resolution is compliant with all of *Maşlahah* parameters.

4.2.4 Capital Segregation in the Operation of Danajamin Nasional Berhad

SAC-BNM requested Danajamin to segregate their capital which they use to guarantee bond market, from the capital which they use to guarantee Sukuk market. In addition, the fee of guarantee from bond market must be segregated from the fee of Sukuk market as well. It is based on *Maşlahah* to ensure that Danajamin is able to function effectively within both markets (SAC-BNM, 2010). Thus, this *Maşlahah* will be examined through the *Maşlahah* parameters in *Sharī'ah*:

Table 4.4 Analysis of Capital Segregation in the Operation of Danajamin resolution

| <i>Maşlahah</i> Parameters | Answer | Comments | (Compliant or not) |
|---|--------|--|------------------------------|
| Does this this requirement contradict with al-Quran or al-Sunnah? | No | Segregation of whatever related to Sukuk market from whatever related to bond market is a logical requirement since it will achieve the <i>Sharī'ah</i> requirement which is | Compliant with the parameter |

| | | | | |
|---|-----|--|--|------------------------------|
| | | | to stick on halal funds to guarantee Sukuk market parties. | |
| Does this requirement contradict with any consensus? | No | | There should be a consensus among <i>Sharī'ah</i> scholars on the matter that Muslims has to segregate the halal fund from the Non-halal. | Compliant with the parameter |
| Does this requirement protect any of <i>Sharī'ah</i> objectives? | Yes | | Protection of religion is a clear <i>Sharī'ah</i> objective which will be protected through segregation and separation of what is related to Sukuk market from what is related to bond market. It will preserve Sukuk market from getting involved into a Non-halal funds. | Compliant with the parameter |
| Does this requirement have a genuine <i>Maṣlahah</i> to Sukuk market (<i>Maṣlahah</i> Haqīqīyah)? | Yes | | To be preserved from getting involved in Non-halal funds is considered as a real <i>Maṣlahah</i> for Muslims. | Compliant with the parameter |
| Does this requirement have the sense of <i>Maṣlahah</i> to everyone involved with the service of Danajamin? | Yes | | Segregation of the Danajamin's capital is a <i>Maṣlahah</i> for every participant in a Sukuk market who has a guarantee from Danajamin company. | Compliant with the parameter |

| | | | |
|---|----|---|------------------------------|
| Does this requirement contradict with another <i>Maṣlahah</i> , of the same strength or a higher level? | No | Protection of Muslims from getting involved in Non-halal funds is a great <i>Maṣlahah</i> , it is encouraged from <i>Sharī'ah</i> . | Compliant with the parameter |
|---|----|---|------------------------------|

Result: The requirement to segregate Danajamin’s capital which will be used for the guarantee facility for both Sukuks and conventional bonds, and the guarantee fee of Sukuk and bond has no issue with all of *Maṣlahah* parameters, thus, the *Maṣlahah* mentioned in this resolution is compliant with all of *Maṣlahah* parameters.

4.2.5 Restructuring and Rescheduling in Islamic Financing Agreement

SAC-BNM has resolved the issue which is faced by IFI when it comes to restructure or reschedule the financing agreement, the issue is to charge again for the new agreement, which means double payment of stamp duty. Thus, SAC suggested that the method of cross reference from the new agreement to the original agreement through inserting an additional paragraph to verify the method is a proper way to avoid double payment of stamp duty. This resolution relied on *Maṣlahah*, which is to protect the customers of IFI from a double charge. Thus, this *Maṣlahah* will be examined through the *Maṣlahah* parameters in *Sharī'ah*:

Table 4.5 Analysis of Restructuring and Rescheduling in Islamic Financing Agreement Resolution

| <i>Maṣlahah</i> Parameters | Answer | Comments | (Compliant or not) |
|---|--------|---|------------------------------|
| Does this suggestion contradict with al-Quran or al-Sunnah? | No | Allah says in al-Quran “let there be trading by mutual consent.” which means that every contract must be based on mutual consent. Thus, inserting an additional paragraph in the agreement of | Compliant with the parameter |

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|--|-----|--|--|------------------------------|
| | | | financing facility is permissible as long as it's based on mutual consent. | |
| Does this suggestion contradict with any consensus? | No | | This suggestion has no consensus on permissibility of it nor otherwise. | Compliant with the parameter |
| Does this suggestion protect any of <i>Sharī'ah</i> objectives? | Yes | | Protection of wealth is a clear <i>Sharī'ah</i> objective which will be protected through avoiding a double payment of stamp duty. | Compliant with the parameter |
| Does this suggestion consider as a genuine <i>Maṣlahah</i> (<i>Maṣlahah</i> <i>Haqīqīyah</i>)? | Yes | | The clear <i>Maṣlahah</i> behind this suggestion is to avoid extra payment especially for those people who are already defaulted in term of settling their installments. | Compliant with the parameter |
| Does this suggestion consider as a <i>Maṣlahah</i> to everyone? | Yes | | It is a <i>Maṣlahah</i> for everyone who defaulted in his finance installments. | Compliant with the parameter |
| Does this suggestion contradict with another <i>Maṣlahah</i> , of the same strength or a higher level? | No | | According to the available literature, inserting an additional paragraph in the agreement of financing facility to avoid double payment of stamp duty is a real <i>Maṣlahah</i> and it doesn't contradict with any other <i>Maṣlahah</i> . | Compliant with the parameter |

Result: Since the suggestion of SAC-BNM for the Restructuring and Rescheduling in Islamic Financing Agreement has no issue with all of the *Maṣlahah* parameters,

thus, the *Maṣlahah* mentioned in this resolution is compliant with all of *Maṣlahah* parameters.

4.3 ANALYSIS OF SAC-SC RESOLUTION WITH FINDINGS

4.3.1 Ujrah for Guarantee

Guarantee in Islamic capital market is meant to protect the debt obligation from the default. According to Shaharuddin *et al.*, (2012), such guarantee has dispute among *Fatwā* bodies. The first group consists of OIC¹⁴, AAOIFI¹⁵, Dallah al-Baraka¹⁶, Kuwait Finance House¹⁷, and Dubai Islamic Bank¹⁸, those bodies don't allow to charge more than actual expenses as a fee to get a guarantee. On the other hand, SAC-SC who didn't stipulate any condition on the fee of guarantee. SAC-SC relied on the opinion of sheikh al-Zuhāīlī who allowed to charge fee to get guarantee even though it's more than an actual expense (Shaharuddin *et al.*, 2012). The resolution is agreed to consider the *Maṣlahah* behind such a guarantee. Thus, this *Maṣlahah* will be examined through the *Maṣlahah* parameters in *Sharī'ah*:

Table 4.6 Analysis of Ujrah for Guarantee Resolution

| <i>Maṣlahah</i> Parameters | Answer | Comments | (Compliant or not) |
|--|--------|---|------------------------------|
| Does the fee which might exceed the actual expenses in a guarantee contract contradict with al-Quran or al-Sunnah? | No | Since there is a dispute among <i>Sharī'ah</i> scholars on this matter, it means there is no definitive text in al-Quran and al-Sunnah that prohibits to charge a fee which might exceed the actual expenses. | Compliant with the parameter |

¹⁴ Majma al-Fiqh al-Islami, Resolution No. 12 (12/2)

¹⁵ AAOIFI, Shariah Standard No. 5.

¹⁶ Dallah al-Baraka, 2007, p.187

¹⁷ Kuwait Finance House, p.181

¹⁸ Dubai Islamic Bank, 2001, p.731

| | | | |
|---|-----|--|------------------------------|
| Does the fee which might exceed the actual expenses in a guarantee contract contradict with any consensus? | No | There is no consensus on this matter since there are some <i>Sharī'ah</i> scholars such as Sheikh al-Zuḥāīlī and also members of SAC-BNM who are at the side of allowing to charge a fee more than actual expenses, while there are some others such as OIC and AAOIFI who doesn't allow it. | Compliant with the parameter |
| Does the fee which might exceed the actual expenses in a guarantee contract protects any of <i>Sharī'ah</i> objectives? | Yes | According to sheikh al-Zuhaili ¹⁹ , to allow guarantee based on Ujrah will lead to ease Muslim's life since some needs such guarantee to travel abroad whether for treatment or study. Thus, to ease Muslim's life is also consider <i>Sharī'ah</i> objective. | Compliant with the parameter |
| Does the fee which might exceed the actual expenses in a guarantee contract consider as genuine <i>Maṣlahah</i> for Muslims (<i>Maṣlahah</i> Ḥaqīqīyah)? | Yes | The <i>Maṣlahah</i> could be noticed through the cases when people need a guarantor to obtain some kind of visas for example. | Compliant with the parameter |
| Does the fee which might exceed the actual expenses in a guarantee contract consider as <i>Maṣlahah</i> to everyone (<i>Maṣlahah</i> Kulliyyah)? | Yes | Allowing such guarantee will help everyone who needs to have a guarantor, since it is hard in the current context to get a guarantor who will | Compliant with the parameter |

¹⁹ Al-Fiqh al-Islami wa Adillatuh, v. 6, p. 4178.

| | | | |
|--|----|--|------------------------------|
| | | charge the actual expense only. | |
| Does the fee which might exceed the actual expenses in a guarantee contract contradicts with another <i>Maṣlahah</i> , of the same strength or a higher level? | No | According to the available literature, the <i>Maṣlahah</i> of such guarantee doesn't contradict with other <i>Maṣlahah</i> . | Compliant with the parameter |

Result: Since the Guarantee based on Ujrah has no issue with all of the *Maṣlahah* parameters, thus, the *Maṣlahah* mentioned in this resolution is compliant with all of *Maṣlahah* parameters.

4.3.2 Ibra clause in the documentation of agreements

Ibra refers to an agreed clause in the agreement of sale-based contracts, it is based on the concept of da' wa ta'jjal (SAC-SC, 2006). *Sharī'ah* scholars discussed the issue of Ibra extensively, OIC in its resolution No.64/2/7 stated that “*To reduce a deferred debt with the aim of accelerating its repayment, whether at the request of the creditor or of the debtor (pay less but ahead of time), is permissible in Sharī'ah and doesn't fall within the province of Ribā if it's not based on an advance agreement and as long as the relation between the creditor and the debtor are bilateral*”. According to Shaharuddin et al., (2012), *Fatwā* bodies in the Middle East don't allow Ibra which is stipulated in the agreement and agreed upfront while SAC-SC allowed that Ibra between IFI and its customers to be agreed and stipulated in the agreement. SAC-SC has relied on *Maṣlahah* as basis of the ruling. Thus, this *Maṣlahah* will be examined through the *Maṣlahah* parameters in *Sharī'ah*:

| <i>Maṣlahah</i> Parameters | Answer | Comments | (Compliant or not) |
|---|--------|--|------------------------------|
| Does stipulated Ibra contradict with al-Quran or al-Sunnah? | No | The contract itself has no issue in al-Quran and al-Sunnah since it is a | Compliant with the parameter |

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|--|-----|--|---|------------------------------|
| | | | form of benevolence and it is encouraged by <i>Sharī'ah</i> . The issue is when the contract is stipulated in the agreement between the two parties. However, this can be considered as a consent between both parties which is also encouraged in <i>Sharī'ah</i> . | |
| Does Ibra stipulated with any consensus? | No | | There is no consensus among scholars on the matter that Ibra shouldn't be stipulated in the agreement. OIC mentioned that Ibra can't be stipulated in the agreement, while SAC-BNM accepted Ibra to be stipulated in the agreement. In nutshell, there is no consensus among scholars on this matter. | Compliant with the parameter |
| Does Ibra protect any of <i>Sharī'ah</i> objectives? | Yes | | Protection of wealth is a clear <i>Sharī'ah</i> objective which will be protected through allowing to stipulate Ibra clause in the agreement between the IFI and its customers. It will clearly lead to | Compliant with the parameter |

protection of the debtor's wealth since he isn't obliged to pay the extra profit anymore while he is able to settle his debt prior maturity, and also stipulated Ibra will remove the Gharar in the price, thus, removing Gharar is also *Sharī'ah* objective.

| | | | |
|--|-----|---|------------------------------|
| Does stipulated Ibra consider as a genuine <i>Maşlahah</i> to Muslims (<i>Maşlahah Ḥaqīqīyah</i>)? | Yes | The <i>Maşlahah</i> of stipulated Ibra could be noticed through the avoiding of uncertainty in price and avoiding a dispute between IFI and its customers since the Ibra clause in the agreement will lead to a clear contract. | Compliant with the parameter |
| Does stipulated Ibra fulfil <i>Maşlahah</i> to everyone (<i>Maşlahah Kulliyyah</i>)? | Yes | Stipulated Ibra will fulfil a <i>Maşlahah</i> to every debtor and creditor who has entered in a sale-based contracts. | Compliant with the parameter |
| Does stipulated Ibra contradict with another <i>Maşlahah</i> , of the same strength or a higher level? | No | According to the available literature, stipulated Ibra is a need for our current context, to avoid a dispute among Muslims. | Compliant with the parameter |

Result: Since the stipulated Ibra has no issue with all of the *Maşlahah* parameters, thus, the *Maşlahah* mentioned in this resolution is compliant with all of *Maşlahah* parameters.

4.3.3 Regulated short selling (RSS) and securities borrowing and lending (SBL)

According to AAOIFI (2015), in its standard No.21, clause 3/15 “It is not permissible to rent shares, whether for pledging them or for the purpose of selling the rented shares, and returning shares similar to them, as is done in the stock-markets, or for acquiring their profit or for showing a stronger financial position of the hirer or for another reason”. Also, in clause 3/16, “It is not permissible to lend shares by way of Ijarah for the purpose of pledging them or for the purpose of granting their profit to the borrower as is done in stock markets, the borrower doesn’t have the right to sell the shares except for the execution of the terms of the mortgage”. Thus, it is obvious that AAOIFI doesn’t allow short selling. While SAC-SC allowed short selling since it’s regulated in the market which will eliminate Gharar. SAC-SC relied on some *Sharī’ah* principle such as *Istihsān*, *Istihsān* with *Maṣlahah*, and *Istihsān* with *‘urf* (SAC-SC, 2006). Thus, this *Maṣlahah* will be examined through the *Maṣlahah* parameters in *Sharī’ah*:

Table 4.8 Analysis of Regulated Short Selling and Securities Borrowing and Lending Resolution

| Maṣlahah Parameters | Answer | Comments | (Compliant or not) |
|---|---------------|--|------------------------------|
| Does this activity contradict with al-Quran or al-Sunnah? | No | SBL has no issue in al-Quran and al-Sunnah since it is relying on <i>Sharī’ah</i> contract which is Ijarah/Rent. | Compliant with the parameter |
| Does this activity contradict with any consensus? | No | Since there is no text from al-Quran and al-Sunnah on this matter. Thus, there is no consensus in most cases. | Compliant with the parameter |
| Does this activity protect <i>Sharī’ah</i> objectives? | Yes | This activity has affected the market since it will help | Compliant with the parameter |

| | | | |
|--|-----|---|------------------------------|
| | | with liquidity issue and will lead to the development of the market. | |
| Does this activity consider as genuine <i>Maṣlahah</i> to people (<i>Maṣlahah</i> Ḥaqīqīyah)? | Yes | This activity has a real <i>Maṣlahah</i> to those who are participating in such transaction, it benefits the capital market as well in term of liquidity. | Compliant with the parameter |
| Does this activity consider as <i>Maṣlahah</i> to everyone? | Yes | It is available for whoever willing to get involved in such transaction. | Compliant with the parameter |
| Does this activity contradict with another <i>Maṣlahah</i> , of the same strength or a higher level? | No | It doesn't contradict with any other <i>Maṣlahah</i> . | Compliant with the parameter |

Result: Since the Regulated Short Selling and Securities Borrowing and Lending has no issue with all of the *Maṣlahah* parameters, thus, the *Maṣlahah* mentioned in this resolution is compliant with all of *Maṣlahah* parameters.

4.3.4 Mixed Companies

The issue of the mixed business has been addressed by past jurists. According to SAC-SC (2006), most Madhāhib allow Muslims to have Non-Muslim partners with a condition that the permissible fund is more in percentage. Ibn Taymiyyah also give same view, he mentioned that “*Should the permissible be more, then a business transaction will not be judged as prohibited... and should one’s wealth be found to have a mixture of the permissible and prohibited, then the permissible element will not be prohibited; on the contrary, the owner is allowed to take according to the permitted*”

ratio.”²⁰ SAC-SC relied on *Maşlahah* as an argument to permit the mixed companies to be listed as *Sharī‘ah* compliant if it comply with the benchmark. Thus, this *Maşlahah* will be examined through the *Maşlahah* parameters in *Sharī‘ah*:

Table 4.9 Analysis of Mixed Companies’ Resolution

| <i>Maşlahah</i> Parameters | Answer | Comments | (Compliant or not) |
|--|---------------|--|------------------------------|
| Do the mixed business companies contradict with al-Quran or al-Sunnah? | No | Al-Quran and al-Sunnah has no issue with mixed companies since the portion of Non-Permissible is tolerable. | Compliant with the parameter |
| Does the mixed business companies contradict with any consensus? | No | There is no consensus among <i>Sharī‘ah</i> scholars on this matter. There are some scholars don’t allow such activity, while majority allow it. | Compliant with the parameter |
| Do the mixed business companies protect any of <i>Sharī‘ah</i> objectives? | Yes | It gives more choice to Muslims investor to invest their money, thus, it will lead to generate more profit, which means it will help Muslims to have better life. Such an objective is required from <i>Sharī‘ah</i> . | Compliant with the parameter |
| Do the mixed business | Yes | There is a real <i>Maşlahah</i> since | Compliant with the parameter |

²⁰ Ibn Taymiyah, *Majmu al-Fatawa*, vol. 29, p. 273.

| | | | |
|---|-----|--|------------------------------|
| companies consider as a genuine <i>Maşlahah</i> to people (<i>Maşlahah</i> <i>Haqīqīyah</i>)? | | Muslims investors will have more options of stocks to buy and trade with in the stock market. | |
| Do the mixed business companies consider as a <i>Maşlahah</i> to everyone? | Yes | It is <i>Maşlahah</i> for people who are involving in Islamic stock market. | Compliant with the parameter |
| Does the mixed business companies contradict with another <i>Maşlahah</i> , of the same strength or a higher level? | No | It doesn't contradict with other <i>Maşlahah</i> since <i>Sharī'ah</i> permitted to mixed wealth if the impermissible is little. | Compliant with the parameter |

Result: Since mixed companies has no issue with all of the *Maşlahah* parameters, thus, the *Maşlahah* mentioned in this resolution is compliant with all of *Maşlahah* parameters.

4.3.5 Image (Market Reputation) as Criteria for Listed Securities

The use of Image (market reputation) as *Sharī'ah* criteria to analyze the securities is consider as good step taken from SAC in order to preserve Muslim community. Non-Islamic image might lead the negative perception, which will affect the business at the end. SAC-SC relied on *Maşlahah* in order to stick on the *aslah* for the society. Thus, this *Maşlahah* will be examined through the *Maşlahah* parameters in *Sharī'ah*:

Table 4.10 Analysis of Image as Criteria for Listed Securities Resolution

| <i>Maşlahah</i> Parameters | Answer | Comments | (Compliant or not) |
|----------------------------|--------|----------|--------------------|
|----------------------------|--------|----------|--------------------|

| | | | |
|--|-----|---|------------------------------|
| Do image criteria (market reputation) contradict with al-Quran or al-Sunnah? | No | Al-Quran and al-Sunnah has no issue to set criteria in order to measure the permissible portion of the business. | Compliant with the parameter |
| Does image criteria contradict with any consensus? | No | There is no consensus on this matter. | Compliant with the parameter |
| Do image criteria protect any of <i>Shari'ah</i> objectives? | Yes | Considering the general perception which is a type of image will lead to make a proper decision for the society. It might protect Muslims society from the imitation of Non-halal items in term of designing. Because the companies might put the design into their account in order to avoid misunderstand of people in term of the permissibility of their items. | Compliant with the parameter |
| Do image criteria consider as a genuine <i>Maṣlahah</i> to people | Yes | It will protect Muslims society from the imitation of | Compliant with the parameter |

| | | | |
|---|-----|--|------------------------------|
| (<i>Maşlahah</i> Haqīqīyah)? | | Non-Halal products. | |
| Do image criteria consider as a <i>Maşlahah</i> to everyone? | Yes | It will protect the community all together. | Compliant with the parameter |
| Does image criteria contradict with another <i>Maşlahah</i> , of the same strength or a higher level? | No | It doesn't contradict with any other <i>Maşlahah</i> . | Compliant with the parameter |

Result: Since Image as Criteria for Listed Securities has no issue with all of the *Maşlahah* parameters, thus, the *Maşlahah* mentioned in this resolution is compliant with all of *Maşlahah* parameters.

CHAPTER FIVE

CONCLUSION

5.1 INTRODUCTION

This chapter has two sections. The first section will give a summary of the major findings discussed in chapter four. While the second section will provide some suggestions and recommendations.

5.2 SUMMARY OF MAJOR FINDINGS

This study has focused on few areas, started with *Fatwā, Maṣlahah*, and ended with the analysis of contemporary resolutions of SAC-BNM and SAC-SC. This paper aims to assess the extent of adherence to the *Maṣlahah* parameters from the highest *Fatwā* authority in Malaysia, i.e. Shariah Advisory Council (SAC) of Bank Negara Malaysia (BNM) and Shariah Advisory Council (SAC) of Securities Commission (SC) for Islamic finance matters. The paper aims to discuss each resolution individually and assess the level of compliance which is divided into complete and partial compliance. The paper discussed and analyzed five resolutions of SAC-BNM namely Third-Party Guarantee for Capital and/or Profit in muḍārabah Transaction, Ibra in Islamic Finance, *Sharī'ah* Concept for the Operation of Islamic Guarantee Facility by Credit Guarantee Corporation, Capital Segregation in the Operation of Danajamin, and Restructuring and Rescheduling in Islamic Financing Agreement. In addition, the paper discussed and analyzed five resolutions of SAC-SC namely Ujrah for Guarantees, Ibra Clause in the Documentation of Agreements, Regulated Short Selling and Securities Borrowing and Lending, Mixed Companies, and Image as Criteria for Listed Securities. The result of the analysis has highlighted that declared *Maṣlahah* used in the resolutions of SAC

BNM and SAC SC are compliant with all of *Maṣlahah* parameters. In nutshell, it is concluded that SAC-BNM and SAC-SC have fulfilled the *Maṣlahah* parameters in their *Maṣlahah* -based resolution. In addition, this research has also found that the resolutions of SAC-BNM based on *Maṣlahah* are compliant with *Maṣlahah* parameters in order to fill up the gap of dispute between the Islamic finance industry stakeholders regarding the casual use of *Maṣlahah* by the Shariah committees of the islamic financial institutions.

5.3 RECOMMENDATIONS

1. At the end of the research, it is suggested that the SAC-BNM and SAC-SC should employ people who are qualified in *Sharī'ah* with practical experience to give more focus to such an area in order to increase the level of compliance with *Sharī'ah* rules and guidelines even though that both of SAC-BNM and SAC-SC content of qualified members, it is necessary to have some extra members to look to the suggested area only. It is a further step in a right direction to improve and increase the level of compliance with *Sharī'ah*.
2. The Islamic finance regulatory authorities around the world should copy the *Fatwā* formation and level of compliance of *Maṣlahah* parameters from SAC BNM and SAC SC as both Malaysian regulatory authorities in Islamic finance are performing ideal work for the betterment of Muslim Ummah and Islamic finance industry.

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