An analysis of *maṣlaḥah* based resolutions issued by Bank Negara Malaysia

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Abstract

Purpose – This study aims to examine the resolutions issued by the Sharīʿah Advisory Council of Bank Negara Malaysia (SAC-BNM), which have recognized *maṣlaḥah* (public interest) as the basis of ruling to see the extent of its usefulness to the public and the extent of its adherence to the *maṣlaḥah* parameters. The study will also look into the opposing opinion to identify the basis of rejection and overall implication on Islamic finance based on opposing opinions of SAC-BNM and other bodies of collective *ijtihād* (juristic interpretation).

Design/methodology/approach – The study uses a qualitative approach by analyzing the SAC-BNM resolutions, which have been resolved based on *maṣlaḥah*. The study also applies the comparative approach by comparing the fatwa (Sharīʿah pronouncement) issuing bodies of Malaysia and the Gulf Cooperation Council countries. Furthermore, the secondary data is obtained from sources such as *uṣūl al-fiqh* (theory of Islamic jurisprudence) books, papers and relevant internet sources.

Findings – The study found that SAC-BNM's resolutions are in line with some of the major *maṣlaḥah* parameters mentioned in the *uṣūl al-fiqh* sources i.e. must not contradict with the Qurʾān and the Sunnah. While looking at the other two criteria of being in line with *ijmāʿ* (consensus) and having a general impact, such resolutions might not fulfill the criteria of valid *maṣlaḥah* considering, respectively, the stand of collective *ijtihād* or the impact on the group of customers and institutions.

Originality/value – Most available shari'ah (Islamic law) research considers the perspective of fiqh (Islamic jurisprudence) while analyzing the issue of *maṣlaḥah*. This study aims to conduct analysis based on *uṣūl al-fiqh*. Moreover, *maṣlaḥah* itself is a broad concept, which can be abused. Hence, this study discusses the parameters of *maṣlaḥah* to understand the validity of an important juristic tool in Sharīʿah.

Keywords *Maṣlaḥah* parameters, Theory of Islamic jurisprudence, SAC-BNM's resolutions

Paper type Research paper

Introduction

Islamic finance is an active financial market when it comes to developing new products and bringing innovation to the finance industry. Sharīʿah (Islamic law) scholars are required to practice *ijtihād* (juristic interpretation) to satisfy the Sharīʿah rule with sound reasoning to

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ensure the products are Sharīʿah-compliant. These bases could be evidence derived from the Qurʾān, Sunnah or *ijmāʿ* (consensus) of the scholars on the same matters. Conversely, the matter may not be found in the mentioned sources, thus, the scholars are required to look at the less referred sources of Sharīʿah such as *maṣlaḥah* (public interest), *ʿurf* (custom) and others (Ishak, 2019).

Maṣlaḥah is one of the important sources of Sharīʿah, which needs continuous research since each period of time has its own *maṣāliḥ* (plural of *maṣlaḥah*), which might differ from time to time. Muslims believe that Sharīʿah is a vital assistant to achieve the *maṣlaḥah* of Muslim society by recognizing whatever is beneficial and preventing whatever is harmful. Ibn Taymiyyah (1987) observed that the Sharīʿah will never ignore whatever has benefit (*maṣlaḥah*) for us and Allah (SWT) has completed the religion for us. *Maṣlaḥah* as a Sharīʿah source is considered flexible, which means that it can be abused if it is used inappropriately. Therefore, the parameters of *maṣlaḥah* are important to frame its use. The parameters of applying *maṣlaḥah* have been thoroughly discussed by Sharīʿah scholars, and there are a number of references in this regard, as it is an important part of the *maṣlaḥah* system. Following and considering the parameters of *maṣlaḥah* will ensure that Sharīʿah scholars are not using *maṣlaḥah* as a Sharīʿah basis in an inappropriate manner.

In the context of Islamic finance, as the issues of Islamic finance are quite complicated and some of them cannot be directly taken from classical works of jurisprudence, *maṣlaḥah* has become one of the main approaches in dealing with those modern issues. This concept, which reflects the idea of achieving public interest and averting harm, has played a significant role both in establishing rules and in developing products (Ishak, 2019). To this end, it is highlighted that the Sharīʿah Advisory Council of Bank Negara Malaysia (SAC-BNM) has relied on *maṣlaḥah* in some of its resolutions. However, there might be concerns regarding the non-methodological use of *maṣlaḥah* by the Sharīʿah committees of Islamic financial institutions (IFIs) to validate certain Islamic financial products and services that maximize profits by compromising Sharīʿah principles. Therefore, a thorough examination on the *maṣlaḥah*-based resolutions is important to better understand the level of compliance with *maṣlaḥah* parameters.

This study will thus highlight the SAC-BNM's resolutions based on *maṣlaḥah*. It aims to first study the stand taken by bodies of collective *ijtihād* (juristic interpretation) with regard to the resolutions of SAC-BNM where parameters of *maṣlaḥah* were considered, and second, to highlight the *maṣlaḥah* parameters to understand the recognized parameters. After that, the *maṣlaḥah*-based resolutions will be examined through these parameters to determine the level of compliance.

In relation to the context explained above, this study aims to fill the research gap in this issue as there are no specific studies that have considered specific fatwas (Sharīʿah pronouncements) or resolutions of a specific fatwa board/committee and systematically examined them. There are some studies that have been conducted on the methodology of fatwa and the requirements of a mufti (the legal expert empowered to give legal rulings), but there is no study of the existing fatwas and their implications.

This study is divided into seven sections. After the introduction, the second section provides an overview of *maṣlaḥah* including its parameters. The third section gives an overview of SAC-BNM and its Sharīʿah resolutions, while the fourth section briefly discusses previous studies on the application of *maṣlaḥah*. The fifth section provides the methodology of the study. The sixth section provides the discussion and analysis of the selected resolutions of SAC-BNM. The seventh section provides the conclusions of the study.

Maṣlaḥah

According to Ibn Manẓūr (1999) in *Lisān al-ʿArab*, *maṣlaḥah* is the opposite of *mafsadah* (harm), it means to repair what has been ruined. Islamic jurists have discussed the concept of *maṣlaḥah* extensively. Imam al-Ghazālī (1993) defines *maṣlaḥah* as the considerations, which secure benefit and prevent harm and are harmonious with the objectives of the Sharīʿah. The objectives of Sharīʿah, as highlighted by Imam al-Ghazālī are protecting the five essentials, which are religion, life, intellect, lineage and property. According to Imam al-Ghazālī, any measures that secure these values fall within the scope of *maṣlaḥah* and anything, which violates them is defined as *mafsadah*. Al-Bughā (1999) also stated a similar opinion that *maṣlaḥah* has the same meaning as benefit and interest, which the Sharīʿah strives to achieve for humans by way of protecting the five basic values. The International Islamic Fiqh Academy defined *maṣlaḥah* in its Resolution No. 141 (7/15) precisely similar to what has been given by Imam al-Ghazālī.

According to Al-Būṭī (1973), Sharīʿah sources have validated *maṣlaḥah*; its evidence can be found in the Qurʾān and the Sunnah. In Qurʾān (21:107), Allah (SWT) says, "It was only as a mercy that we sent you to all people." In this verse, Allah (SWT) addresses Prophet Muhammad (PBUH) that he (PBUH) is a blessing and mercy to the world, as he (PBUH) was responsible for guiding people and rescuing them from disbelief (Al-Būṭī, 1973). Al-Tirmidhī narrated in his *Sunan*, *ḥadīth* no. 1327, the conversation between Prophet Muhammad (PBUH) and his companion Muʿādh before sending him to Yemen. Prophet Muhammad (PBUH) questioned Muʿādh as to how he would take a juristic decision when a matter came to him. Muʿādh replied that he would take a decision based on what is mentioned, firstly, in the Qurʾān, and then based on the Sunnah, if it is not found in the Qurʾān, and then the last resort is *ijtihād*, which would include his point of view along with relying on the sources of Sharīʿah such as *maṣlaḥah*. *Maṣlaḥah* has been applied, as the era of Prophet Muhammad's (PBUH) companions. For instance, during the time of Abū Bakr's caliphate, ʿUmar ibn al-Khaṭṭāb requested from Abū Bakr to compile the Qurʾān in a written format to preserve it from loss, and Abū Bakr permitted this act when he observed that it is in the interest of the Muslims (Kamālī, 2000).

Classification of maṣlaḥah

Ibn ʿĀshūr (2006) in his comprehensive book pertaining to *maqāṣid al-Sharīʿah* also studied *maṣlaḥah* and *mafsadah* extensively. He classified *maṣlaḥah* into two groups as follows: direct *maṣlaḥah* to individuals such as having food to survive and indirect *maṣlaḥah* such as guard duty at night to protect society. The latter is called general *maṣlaḥah*, as it benefits the whole society. He also classified *maṣlaḥah* into *maṣlaḥah ḍarūriyah* (*maṣlaḥah* for essentials), which consists of the preservation of the five objectives, namely, protection of religion, life, mind, lineage and property. *Maṣlaḥah ḥājiyyah* (*maṣlaḥah* for complementarities), which is below the *ḍarūriyah* level, is like the supplementary actions, which must be taken to protect the *ḍarūriyah*. The last type is *maṣlaḥah taḥsīniyyah* (*maṣlaḥah* for embellishments), which completes the life of a Muslim.

From another angle, scholars have classified *maṣlaḥah* into three categories as follows. The first category is *maṣlaḥah muʿtabarah* (accredited *maṣlaḥah)*. This type of *maṣlaḥah* is validated by primary Sharīʿah sources, namely, the Qurʾān, Sunnah, *ijmāʿ* and *qiyās* (analogy) (Al-Bughā, 1999). For instance, in the protection of life, the Sharīʿah has adopted punishments such as *qiṣāṣ* (retribution) to protect the life of humans (Al-Zuḥailī, 2006). Allah (SWT) has mentioned clearly that "...fair retribution saves life for you" (Qurʾān 2:179). According to al-Bughā (1999), *maṣlaḥah muʿtabarah* could be through *qīyās*; for example, the Qurʾān (62:9) states that it is obligatory to suspend selling after the call for Friday prayers. Likewise, any transaction that interferes with the remembrance of Allah (SWT) and

prayers, such as leasing, pledging collateral or any other transaction, would have the same ruling of prohibition. This is an example of *maṣlaḥah muʿtabarah* based on *qiyās*. This type of *maṣlaḥah* must be upheld and cannot be rejected because there is clear evidence supporting it.

Invalid *maṣlaḥah (maṣlaḥah mulghā)* is the second type of *maṣlaḥah*. It is what the Sharīʿah has clearly invalidated in its primary sources (Al-Zuḥailī, 2006). For instance, the practice of usury in transactions is clearly forbidden in the Qurʾān. Allah (SWT) says "Allah has permitted trade and has forbidden interest" (Qurʾān 2:275). Charging interest is a *maṣlaḥah* for the lender in that he gets more money, yet the Sharīʿah has not recognized this *maṣlaḥah* and has prohibited its occurrence (Al-Zuḥailī, 2006). In another example, an argument that trade in alcohol enhances economic development is not acceptable. In fact, the Sharīʿah considers this to be harmful (*mafsadah*) rather than being a *maṣlaḥah*. Its classification as *maṣlaḥah* is weak and cannot stand its ground in relation to the well-defined prohibition provided by the text of the Qurʾān (Abdul Ghani *et al.*, 2011). According to al-Zuḥailī (2006), Sharīʿah scholars have no difference of opinion in recognizing, defining and classifying the first two types of *maṣlaḥah*, as both types are based on the original sources of Islam.

The third type of *maṣlaḥah* is *maṣlaḥah mursalah* (considerations of public interest), for which there is no explicit textual evidence in the primary Sharīʿah sources, neither validating it nor rejecting it (Kamālī, 2000). The objective of this type of *maṣlaḥah* is to benefit Muslims or to prevent them from something permissible that can lead to harm. For instance, the compilation of the Qurʾān achieved a real *maṣlaḥah* for Muslims because it protected it from distortion and loss. This *maṣlaḥah* has not been mentioned in the Qurʾān and Sunnah; thus it is called *maṣlaḥah mursalah*.

According to Al-Zuḥailī (2006), scholars are divided into two groups in terms of recognizing *maṣlaḥah mursalah* as a source of Sharīʿah. The first group is al-Shāfiʿī and the Zāhirīs. According to them, *maṣlaḥah mursalah* is not a source of law, and the Sharīʿah only recognizes *maṣlaḥah* that is mentioned in the Qurʾān, Sunnah or *ijmāʿ* (consensus). The second group consists of scholars from the Ḥanafī, Mālikī and Ḥanbalī Schools of jurisprudence. According to them, *maṣlaḥah mursalah* should be recognized as a source of law in Islam, as it can be relied upon for the emerging issues, which are not mentioned in the Qurʾān and the Sunnah (Al-Zuḥailī, 2006).

Parameters of maṣlaḥah

According to Al-Būṭī (1973), parameters of *maṣlaḥah* are important for a *mujtahid* (an Islamic jurist who can arrive at rulings) to identify, analyze and understand the appropriate cases, which can be permitted based on *maṣlaḥah*. A *mujtahid* must consider all these parameters of *maṣlaḥah* before delivering his point of view.

Al-Būṭī (1973) divided the parameters of *maṣlaḥah* into five types. He began by stressing that any *maṣlaḥah* must be in line with the objectives of the Sharīʿah. Thus, any matter that protects the five objectives of the Sharīʿah would be called *maṣlaḥah*, while whatever impairs these objectives would be called *mafsadah*. The first objective, which is religion, is bounded in *ʿaqīdah* (belief) and *ʿibādah* (worship). Activities, which lead to strengthening the faith and which raise the practice of *ʿibādah* could be referred to as *maṣlaḥah*; for example, daily prayers, fasting and *ṣadaqah* (charity) (Al-Ghazālī, 1993).

Al-Būṭī (1973) further stated that *maṣlaḥah* must not contradict with the Qurʾān and the Sunnah as the second and third parameters of *maṣlaḥah*. The Qurʾān, Sunnah, and the consensus of the companions of Prophet Muhammad (PBUH) and Muslim scholars are the primary sources of Sharīʿah (Ayub, 2007). A valid *maṣlaḥah* must be in line with what is

mentioned in the Qurʾān and the Sunnah, as both sources seek to achieve *maṣlaḥah* for the Muslims (Kamaruddin *et al.*, 2015). A *mujtahid* can also give his point of view based on *maṣlaḥah* if both sources (Qurʾān and Sunnah) are silent on the underlying issue (Abdul Rahim, 2004). For instance, in some Muslim countries, *ḥijab* (head covering) was opposed based on the argument that observing *ḥijab* will not have a positive effect on tourists visiting the country (Al-Khateeb, 2013). This type of *maṣlaḥah* is rejected from the Sharīʿah perspective, as *ḥijab* has a reference in the Qurʾān, when Allah 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 (Qurʾān, 24:31).

Another example is the case of the Tunisian Government's decision in 1960 to ban fasting in Ramaḍān, arguing that it would negatively impact economic productivity (Salih, 2013). Again, this decision directly conflicts with the primary sources of Sharīʿah; for example, 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 in Ramaḍān (Al-Bukhārī, 1981).

Therefore, the argument that the fast must be broken in Ramaḍān to protect the economy is an invalid *maṣlaḥah* from the Sharīʿah point of view, as breaking the fast during the day of Ramaḍān with no valid reason (as considered by Islam) is against the Sharīʿah.

The fourth parameter of *maṣlaḥah* according to Al-Būṭī (1973) is that *maṣlaḥah* must not contradict *qiyās*. Finally, it should not contradict another *maṣlaḥah* of the same strength or a higher level. According to Al-Zuḥailī (2006), *maṣlaḥah* must not contradict *ijmāʿ*. *Ijmāʿ* means the unanimous agreement of the *mujtahidīn* (plural of *mujtahid*) of the Muslims' community of any period following the demise of Prophet Muhammad (PBUH) on any Sharīʿah matter (Al-Zuḥailī, 2006). *Ijmāʿ* is considered a source of law, as all jurisprudential schools have accepted it. *Ijmāʿ* could be based on *maṣlaḥah*; thus, the *mujtahidīn* can consider the *maṣlaḥah* of the Muslim society before delivering any fatwas. However, any new fatwas based on *maṣlaḥah* must not contradict the former fatwas, as the former fatwas have considered the *maṣlaḥah* (Abdul Ghani *et al.*, 2011). For instance, there is an existing *ijmāʿ* among scholars on the prohibition of lard, which was based on analogy, as pork is prohibited in Sharīʿah (Islamweb, 2002). Thus, scholars considered lard as pork. Hypothetically, if all scholars agreed to allow selling lard based on the *maṣlaḥah* of benefiting the economy, such an *ijmāʿ* would contradict the former *ijmāʿ*; therefore, it would be void.

Kamālī (2000) provided two other parameters, which are also stated by Al-Zuḥailī (2006). Kamālī (2000) stated that *maṣlaḥah* must be *ḥaqīqīyah* (genuine). The activity allowed on the basis of *maṣlaḥah* must have real benefits to society. For instance, the family law of a country that requires every marriage contract to be registered in the court of law is an example of something that benefits society (Medium, 2015). Similarly, observing traffic laws (such as stopping at red lights or fastening seatbelts) will result in protecting the lives of the drivers and passengers from accidents or their effects.

Also, Kamālī (2000) stated that *maṣlaḥah* must be *kulliyyah* (general). The Sharīʿah allows an activity to be legitimized based on *maṣlaḥah* if that activity secures benefits or prevents harms to all people. It means that a *maṣlaḥah*, which only benefits a limited number of people is not acceptable (Kamālī, 2000). For instance, determining the minimum age of marriage benefits all people (Odala, 2013); thus it can be called *maṣlaḥah kulliyyah*.

However, not all scholars agree to this parameter; they argue that the Sharīʿah has recognized some *maṣāliḥ* that affect a very large number of people although they may not affect all the people (Maḥmūd, 2009).

Sharīʿah Advisory Council of Bank Negara Malaysia and its Sharīʿah resolutions in Islamic finance

In May 1997, Bank Negara Malaysia established the highest Sharīʿah authority for Islamic financial matters, called the Sharīʿah Advisory Council (SAC). The role of the SAC is to supervise and advise on Sharīʿah matters of those businesses that are based on Sharīʿah principles. The SAC is also responsible for validating all Islamic banking and *takāful* (Islamic insurance) products to ensure their compliance with Sharīʿah principles. The SAC consists of members who are qualified with enormous experience particularly in the areas of Islamic banking and finance (SAC-BNM, 2010).

SAC-BNM has compiled its resolutions issued since its establishment in 1997 up until 2009. It has published two editions of the book so far; the first was published in 2007 and the second in 2010. These publications are considered as references for Sharīʿah rulings related to Islamic finance. They focus on matters related to Islamic banking and *takāful* (SAC-BNM, 2010).

Literature review: studies on the application of *maṣlaḥah*

There is an enormous number of references on the issues of *maṣlaḥah*, including those that studied applications of it. Hassan (1998) in his book, *Naẓariyat al-Maṣlaḥah fī al-Fiqh al-Islāmī*, studied the theory of *maṣlaḥah* in each *madhhab* (schools of fiqh) separately. One of the books that examined the application of *maṣlaḥah* is *Al-Maṣlaḥah al-Mursalah wa dawruhā fī al-Qaḍāyā al-Ṭibbiyyah al-Muʿāṣirah*, by Al-Samadi (2008). He studied the role of *maṣlaḥah* in organ transplantation for humans, medical check-up before marriage, autopsy after death and other cases. Maḥmūd (2009) in his book *Al-Maṣlaḥah al-Mursalah wa Taṭbīqatuhā al-Muʿāṣirah fī al-Ḥukum wa al-Nuẓum al-Siyāsiyyah* studied the role of *maṣlaḥah* in political applications such as the selection of a president for a state, voting and consultative assembly. He studied the relationship between those applications and *maṣlaḥah*. Al-Ṣāliḥ (2000), in his paper *al-Maṣlaḥah al-Mursalah wa Taṭbīqatuhā al-Muʿāṣirah*, studied some *maṣlaḥah* applications such as providing a law, which may protect workers from unfair dismissal and determining minimum wage rates and daily working hours.

Regarding financial matters based on *maṣlaḥah,* Zain (1428H) in his book titled *Al-Istidlāl bi al-Maṣlaḥah al-Mursalah fī al-Qaḍāyā al-Māliyyah al-Muʿāṣirah* studied a number of applications, such as financial penalties, zakat on fiat money, *ribā* in fiat money, benchmarking the market, mutual insurance and establishing an Islamic stock exchange. He focused on the benefits of these applications to the public. Yousuf (2012) conducted a study titled "Ḍawābiṭ al-ʿAmal bi al-Maṣlaḥah al-Mursalah ʿinda al-Uṣūliyyan bi al-Ṭatbīq ʿalā Ḍamān al-Maṣrif al-Islāmī li Wadāʾiʿ Istithmār al-Muḍārabah." He studied the guarantee, which Islamic banks bear to be in line with conventional banks; he investigated if there is a real *maṣlaḥah* in this application. He concluded that there is no *maṣlaḥah* in such application and that it is unfair for the bank to guarantee the capital of *muḍārabah* transactions. Ishak (2019) conducted a study where he analyzed the argument of *maṣlaḥah* on the issues of *bayʿ al-ʿīnah* (sell-and-buy-back contract), *taʿwīḍ* (late payment charges) and *ibrāʾ* (rebate) in the banking sector of Malaysia. He tried to harmonize between the Sharīʿah and reality by applying the role of *maṣlaḥah* in solving the current debatable issues among scholars of Islamic finance. He concluded that the Central Bank of Malaysia considers the *maṣlaḥah* principle for both Islamic banks and their customers by implementing the contracts and principles of Islamic banking. Yusoff and Oseni (2019)

conducted a study on standardization of legal documentation in Islamic home financing in Malaysia. They concluded that the standardization of legal documentation is not a requirement of the positive law but functionality of *maṣlaḥah* whereby the diverse interests of all parties to the contract are proactively protected. Hassan *et al.* (2019) mentioned in their study regarding cryptocurrency that there is real *maṣlaḥah* in having currency issued by the government, as it will ensure its stability, which will enable it to serve its purpose for the community. The SAC of Securities Commission Malaysia (SAC-SC, 2018) referred to *maṣlaḥah* when they allowed investment in companies whose activities are a mix of the permissible and impermissible. Arshad *et al.* (2018) in proposing the performance model of waqf institutions pointed out that the *maqāṣid* of waqf (ultimate aims of waqf establishment) should cover the *maṣāliḥ* of protecting religion, life, intellect, property and posterity. The execution of any waqf activities must be in accordance with the priority of *ḍarūriyāt* (essentials), *ḥājiyyāt* (complementarities) and *taḥsīniyyāt* (embellishments).

Moreover, there is number of studies on the practice of fatwa in IFIs. Al-Khulaifi (2005) compares theory and practice in the decisions of IFIs' Sharīʿah committees, Billah (2019) reviews fatwas on investing in different asset classes and Hassan *et al.* (2019) study fatwas on cryptocurrency as a medium of payment. Oseni (2017) examines the phenomenon of fatwa shopping, its effect on consumer trust in Islamic finance products, and the need for effective consumer protection regulations in the Islamic finance industry. Hassan *et al.* (2019) discuss how fatwa shopping has acted as one of the hindering factors affecting the Islamic finance industry. The reason is that managers of IFIs move around between various *fiqh* schools to suit their investment needs. They conclude that there is a need to harmonize Sharīʿah standards to support the regulators to achieve unified guidelines for Islamic financial transactions. Ifzal *et al.* (2015) have studied the Islamic concept of fatwa, the practice of fatwa in Malaysia and Pakistan, and the relevance of the Malaysian fatwa model to Pakistan's legal system. They suggest the need to take Malaysian fatwa as a model to provide legal status and grant the judiciary the power to implement Islamic verdicts in Pakistan.

Methodology of the study

The study relies on qualitative research tools and techniques, concentrating on an objective assessment of opinions and attitudes. Qualitative research methods are widely used to assess and examine opinions, particularly in research areas, which use selected case studies and involve analysis of those selected cases. The cases highlighted in this research are a group of fatwas that are issued by reputable fatwa-issuing bodies. The study uses the inductive approach, as it allows summarization of the collected data (Azungah, 2018). The inductive approach also assists in coming up with a general perception of *maṣlaḥah* and its parameters as one of the secondary sources of Sharīʿah for Islamic financial transactions.

Moreover, the study uses a comparative-analytical approach to examine the opinions of different fatwa-issuing bodies. To this end, this study relies on document analysis, which is based on data selection rather than data collection (Bowen, 2009). Sommerhoff *et al.* (2018) in fact recommend document analysis for qualitative studies because of its several advantages over the data collection method such as questionnaires. Maḥmūd (2009) in his study titled *Al-Maṣlaḥah al-Mursalah wa Ṭatbīqātuhā al-Muʿāṣirah fī al-Ḥukum wa al-Nuẓum al-Siyāsiyyah* adopted the same approach to display scholars' opinions and conducted his study based on it.

This study will firstly search the *uṣūl al-fiqh* literature in terms of matters related to fatwa in Islamic banking and finance along with *maṣlaḥah* as a source of Sharīʿah rulings. Secondly, selected sample cases that have used *maṣlaḥah* as a basis of the fatwas issued by

the SAC-BNM are considered; concurrently, what other fatwa-issuing bodies have said on the same matters will be examined. The selected fatwa-issuing bodies in this study comprise the Islamic Fiqh Academy, the Accounting and Auditing Organization for Islamic Financial institutions (AAOIFI), Kuwait Finance House (KFH), Dubai Islamic Bank (DIB) and Dallah al-Barakah Bank (DBB). They are chosen because they are considered among the most important and official bodies issuing fatwas for IFIs worldwide. In this regard, Laldin *et al.* (2012) in their comparative study on fatwas in Islamic banking between Malaysia and the Gulf Cooperation Council countries and Fakhrunnas (2018) in his study on fatwas on Islamic law of transactions and their role in the Islamic finance ecosystem have chosen those fatwa-issuing bodies in their studies.

Accordingly, the study uses two samples as follows: the first comprises the *uṣūl al-fiqh* literature. It is referred to understand in depth the definition of *maṣlaḥah*, its conditions and parameters and the role of recognized *maṣlaḥah* in issuing fatwas on Islamic financial transactions. In addition, *uṣūl al-fiqh* literature is used to identify the usage of *maṣlaḥah* in constructing fatwas between past and present financial environments. The second sample comprises the official documents of SAC-BNM and the other selected fatwa-issuing bodies. Through these two samples, this study can draw a clear picture of these fatwas from the Sharīʿah-compliance perspective, i.e. whether a specific fatwa is compliant with all parameters or conflicts with some of them.

Discussion and analysis of selected resolutions

The discussion on resolutions will be assembled into two sub-sections as follows: firstly, resolutions related to issuing a guarantee based on *maṣlaḥah*, and secondly, resolutions related to *ibrāʾ* (rebate), refinancing and rescheduling in Islamic financing agreements based on *maṣlaḥah*.

Resolutions related to issuing a guarantee based on maṣlaḥah

In its 91st meeting, on October 2009, the SAC-BNM resolved the issue of a third-party guarantee of capital and/or profit in *muḍārabah* transactions. The SAC-BNM has allowed this transaction on the condition that the third party must be an independent party. The transaction is allowed based on *maṣlaḥah*, as it is important to provide confidence to investors and attract them to invest in the country's projects based on Islamic financial principles (SAC-BNM, 2010).

According to Mishʿal (2012), a third-party guarantee is allowed in two cases as follows. Firstly, it is allowed in the case where it is based on *kafālah* (guarantee) with recourse. In such a scenario, the guarantor gives a guarantee to the *rabb al-māl* (capital provider) to protect him in case there was negligence from the *muḍārib* (entrepreneur). In this regard, the Sharīʿah requires an Islamic bank to guarantee deposits deposited in the bank by allowing the deposits to be guaranteed by a third party, such as a deposit insurer (Mustafa and Najeeb, 2018). The second case is if the guarantee is *tabarruʿ* (a donation) from the third party, which gives the guarantee amount as a *hibah* (gift) (Mishʿal, 2012). The principle of *tabarruʿ* is used to require each Islamic bank to contribute a certain amount to the *takāful* fund, whereas the principle of cooperation is applied to financially assist any member institution when it fails to fulfill its financial obligations towards its insured depositors (Mustafa and Najeeb, 2018). Islamic Fiqh Academy (Majmaʿ al-Fiqh al-Islāmī al-Duwālī) (2000) in its Resolution No. 30 (5/4) stated that there is nothing in Sharīʿah preventing the inclusion of a statement in the prospectus or the *muḍārabah* certificates about a promise made by a third party, totally unrelated to the two parties of the contract in terms of legal personality or financial status, to donate a specific amount without any counter benefit to

meet losses in a given project. The SAC-BNM also issued a resolution, which implies that the third party should be an independent party. Overall, if the guarantee does not involve a fee, there are no Sharīʿah issues, and there is no issue with the use of *maṣlaḥah* as evidence.

The SAC-BNM addressed the matter of extending the guarantee against a fee in a resolution titled "Sharīʿah concept for the operation of Islamic guarantee facility by Credit Guarantee Corporation (CGC)." CGC is an Islamic credit guarantee, which is a type of facility that helps borrowers to obtain financing from IFIs. It is a fee-based guarantee where the applicant for the guarantee is charged a fee. On 27 October 2005, SAC-BNM in its 54th meeting resolved that the facility offered by the CGC is a fee-based guarantee, which is allowed based on *maṣlaḥah* because it achieves a real *maṣlaḥah* for borrowers, as it is hard to get a guarantee, in current financial markets, against no fee (SAC-BNM, 2010).

A fee in the guarantee should as per Islamic resolutions, not exceed the actual expenses. The Islamic Fiqh Academy in its Resolution No. 12 (12/2) stated that *kafālah* (guarantee) is a benevolent contract, motivated by grace and mercy. The jurists have decided against taking fee for issuing guarantees, the reason being that in the event of the guarantor's payment of the guaranteed sum, it will resemble a loan with guaranteed profit to the lender, which is forbidden in Sharīʿah. Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) (2017) Sharīʿah Standard No. 5, clause 3/1/5, states that it is not permissible to take any remuneration whatsoever when providing a personal guarantee *per se* or to pay commission for obtaining such a guarantee. The guarantor is, however, entitled to claim any expenses actually incurred during the period of a personal guarantee, and the institution is not obliged to inquire as to how the guarantee produced has been obtained by the customer. Kuwait Finance House (2011) in its Resolution No. 286 stated that it is permissible to charge a fee, which reflects only the actual expenses incurred to avoid *ribā*. Al-Baraka Banking Group (Majmūʿat al-Barakah al-Maṣrafiyyah) (2007) in its Resolution No. 3/1 stated that the bank cannot charge a fee based on the guaranteed amount; the bank can only charge a fee, which reflects the efforts borne by the bank. Finally, DIB in its Resolution No. 281 stated that the fee must be based on actual services. The bank is not allowed to charge a fee based on the financing amount or its maturity, to avoid *ribā*.

As per the above, the Sharīʿah resolutions have agreed that a fee, which is more than the actual expenses is not permitted. Laldin *et al.* (2012) and Fakhrunnas (2018) also studied the different opinions among fatwa-issuing bodies and found that the Middle East fatwa bodies do not allow a fee, which is more than the actual expenses, while SAC-BNM allows fee charging, which might exceed the actual expenses. They relied on the opinion of Al-Zuḥailī (2002), who stated that there is a *maṣlaḥah* in allowing a guarantee based on a fee even though it might exceed the actual expenses (Laldin *et al.*, 2012; Fakhrunnas, 2018). In the case of IFIs, if they are not allowed to charge a fee on the common types of guarantee, it would lead to huge risks on the financial institutions. Also, it would hinder any business activities of the customer because no financial institution would be ready to extend a guarantee against a small fee. On this argument, Ishak (2019) concludes that the *maṣlaḥah* of Islamic banks and their customers are found to be considered by SAC-BNM in the implementation of contracts and principles of Islamic banking in Malaysia. These *maṣāliḥ* are embodied in the viability of Islamic banks and the promotion of fairness and transparency between Islamic banks and their customers.

The issue of charging a fee on a guarantee has been studied extensively in Islamic *fiqh*. The stand by four schools of *fiqh* could be derived from the references of the *madhhab*. The impermissibility of charging a fee on a guarantee is mentioned in *Sharḥ Fatḥ al-Qadīr* from Ḥanafī School (Ibn Hammām, 2002), *al-Tāj wa al-Iklīl li Mukhtaṣar Khalīl* from Mālikī School (Al-Mawwāq, 1994), *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj* from Shāfiʿī School (Al-Ramlī,

1984) and *al-Mughnī* from Ḥanbalī School (Ibn Qudāmah, 1968). In addition, contemporary fatwa bodies such as AAOIFI, Islamic Fiqh Academy and other Sharīʿah committees have the same opinion on charging a fee on a guarantee. One of the *maṣlaḥah* parameters states that *maṣlaḥah* should not contradict with *ijmāʿ*. However, the issue of charging a fee on a guarantee gained a unified stand as per collective *ijtihād*, as the four schools of *fiqh* and the majority of chosen fatwa bodies – except SAC-BNM – agreed on the impermissibility of charging a fee on a guarantee. Therefore, it can be concluded that charging a fee on a guarantee based on *maṣlaḥah* contradicts with the stand of collective *ijtihād*, which is similar to achieving *ijmāʿ*.

Furthermore, the application of *maṣlaḥah* should be general and not for a limited number in a group of people (Al-ʿUlūm, 1977). Considering the positive impact on three parties (the guarantor, the beneficiary and the applicant), it is evident that charging a fee will impact a limited group in expanding their businesses and saving them from uncalculated losses. Hence, the validity of such a *maṣlaḥah* conflicts with this particular parameter.

Resolution related to ibrāʾ (rebate) in Islamic finance

Ibrāʾ (rebate) refers to a waiver of debt, partially or wholly, in a sale-based contract. On 20 May 2010, SAC-BNM in its 101st meeting resolved that BNM may require IFIs to practice *ibrāʾ* with customers who settle their debt prior to the due dates. SAC-BNM relied on the principle of *maṣlaḥah,* as it will preserve customers' rights and achieve fairness (SAC-BNM, 2010). Also, the resolution refers to al-Zarqa's (1982) opinion, who says that the inclusion of a condition in financial contracts such as a sale contract is permissible under the Sharīʿah if the inclusion is made for the purpose of protecting the interests of the transacting parties and it does not contradict with the principle of sale and purchase (Laldin *et al.*, 2012). However, there are differing opinions among scholars about the addition of *ibrāʾ* in a contract. Laldin *et al.* (2012) and Ishak (2019) stated that fatwa-issuing bodies in the Middle East do not allow *ibrāʾ*, which is stipulated in the agreement and agreed upfront, while SAC-BNM does allow it.

Looking at the stand of collective *ijtihād bodies*, they have similar views when it comes to the early settlement of a credit sale. The Islamic Fiqh Academy 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 Sharīʿah and does not fall within the province of *ribā* if it is not based on an advance agreement and as long as the relation between the creditor and the debtor is bilateral. AAOIFI, Sharīʿah Standard No. 8, clause 5/9 stated that it is permissible for the institution to give up part of the selling price if the customer pays early, provided this was not part of the contractual agreement. KFH in its Resolution No. 780 stated that the deduction is permissible if the client did not stipulate the deduction for early settlement up-front, and if it did not arise from an oral or written commitment in the contract or after it; rather, it should be by the independent will of the creditor, if he wishes, without any verbal or implied stipulation. Al-Baraka Banking Group in its Resolution No. 15/1 stated that early settlement is allowed based on the principle of *ḍaʿ wa taʿajjal* (take less for accelerating payment) just as the Islamic Fiqh Academy has agreed on that but with a condition that the *ibrāʾ* clause must not be stipulated in the contract. DIB in its Resolution No. 28 stated that early settlement is allowed based on *ḍaʿ wa taʿajjal*, as the Islamic Fiqh Academy also agreed on that but on the condition that the *ibrāʾ* clause must not be stipulated in the contract and no extra charge should be requested from the bank to be paid to the client because of the early settlement. However, the collective *ijtihād* bodies agreed that stipulated *ibrāʾ* is not a form of *ḍaʿ wa taʿajjal*.

The parameter of being in line with *ijmāʿ* could be looked at in similar lines as given in the previous part on the issue of guarantee against a fee. On the other hand, the application of *maṣlaḥah* should be general and not for a limited number in a group of people (Al-ʿUlūm, 1977). Considering the positive impact on the customers, who will be willing to settle before time, and on the banks, which will be willing to receive early liquidity, allowing *ibrāʾ* will not impact a large number of people. Hence, the *maṣlaḥah*, in this case, fails to comply with this parameter.

Resolutions related to restructuring and rescheduling in Islamic financing agreements

The mechanism of restructuring and rescheduling in Islamic finance differs from the mechanisms available in the conventional industry. It needs additional legal documents, which entail an additional legal fee and stamp duty. On 26 June 2002, the SAC-BNM in its 26th meeting resolved the issue of restructuring and rescheduling by inserting an additional paragraph in the agreement of the financing facility to verify the agreement of restructuring and rescheduling. SAC-BNM relied on *maṣlaḥah* to avoid double payment of the stamp duty (SAC-BNM, 2010). Also, on 27 February 2003, the SAC-BNM in its 32nd meeting resolved that based on mutual agreement, the financing period for the customer may be extended without the need for a new contract, provided that both parties satisfy all concluded promises and the price imposed on the customer does not exceed the original sales price. SAC-BNM resolved the issue faced by IFIs when it comes to restructuring or rescheduling the financing. Charging twice for additional documents for the new agreement means double payment of stamp duty. Thus, SAC-BNM suggested that an additional paragraph for rescheduling and restructuring to be provided in the Islamic financing agreement, if the need arises, be inserted in the original agreement. This would verify the method and avoid double payment of stamp duty. This resolution relied on *maṣlaḥah*, which is to protect the customers of IFIs from a double charge.

By analyzing these resolutions with the *maṣlaḥah* parameters, it seems like it has no issues unless it is said that such a resolution is benefiting the involved parties only and not a huge number of people. However, these resolutions have no Sharīʿah issues, as it is not a sale of debt or extending debt maturity with extra charges.

Conclusion

The study focuses on *maṣlaḥah* in general to understand the role of *maṣlaḥah* in terms of resolving the Sharīʿah issues faced by IFIs. The discussion further includes the different types of *maṣlaḥah* and their superiority to each other. The study includes the analysis of *maṣlaḥah* based on resolutions from the SAC-BNM, as well as the opinions of other fatwa-issuing bodies such as AAOIFI, Islamic Fiqh Academy, KFH, DIB and DBB. Therefore, this study aims to assess the extent to which the resolutions that SAC-BNM issued relying on *maṣlaḥah* have adhered to the parameters for the proper use of *maṣlaḥah* in fatwas.

The study concludes that the resolutions of SAC-BNM to allow charging fees on guarantee and inclusion of *ibrāʾ* in the financing agreement based on *maṣlaḥah* is too generic to be included under the definition of *maṣlaḥah* as defined in the Qurʾān and Sunnah and the relevant parameters of *ijmāʿ*. Further, collective *ijtihād* is considered as *ijmāʿ*; if that is accepted, the considered *maṣlaḥah* would contradict with the parameter of being in line with *ijmāʿ*. Another parameter of *maṣlaḥah* is that the impact should be general. It was evident that the *maṣlaḥah* in these cases is limited with regard to the number of people affected.

For future research in this area, as it has been said that *ijmāʿ* is not possible to be practiced in the current era, researchers may look into the possibility of gaining *ijmāʿ*

through the internet and new technologies by creating a platform and gather all Sharīʿah scholars in that platform. Researchers may try to evaluate how this idea can be implemented and the possibility of calling it *ijmāʿ*, which is known as one of the primary sources of Sharīʿah.

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