
The Application Of *Maslahah* In Islamic Finance And Banking Products & Fatwa Resolutions In Malaysia

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ABSTRACT

From time to time, maslahah is one of the sources of Islamic law that is often used after the death of Prophet Muhammad PBUH to develop Shariah principles in line with the needs and wants of human beings. In fact, this concept of maslahah is not something new as it was discussed previously by the classical and contemporary Muslim scholars. In addition, it becomes a key part that has been used in the determination of Shariah rules by Shariah advisors and experts in the matters that related to the benefits and needs of the people. The debate in general and the theory on this concept has laid a general basis and guide in applying it to current Islamic finance and banking issues. However, some scholars are on the opinion that the use of maslahah as a source of law today is found not to be fully comply with Shariah principles as outlined by the scholars of Islamic jurisprudence. Therefore, to maintain the resilience of Islamic financial and banking products, the standard criteria of maslahah must be determined and outlined wisely to avoid any future misuse of this concept pertaining to the Islamic law. Continuing from this issue, this study was conducted to analyze the application of maslahah in Islamic finance and banking and fatwa resolutions nowadays. Qualitative methods were used in this study with a library research approach. The collection of data includes sources of Islamic tradition such as classical and contemporary Islamic jurisprudence books. The process of analyzing the data is done using the content analysis method. The results of the study found that the concept of maslahah is primarily implemented in the context of Islamic finance and banking products and fatwa resolutions in Malaysia. Thus, it is also discovered that certain Islamic finance and banking products developed based on maslahah have fulfilled the maslahah standard criteria stipulated by the Islamic law. This study is important in assisting the Shariah advisors and experts to determine the benchmark of maslahah concept that can be applied in Islamic finance and banking products and fatwa resolutions.

Keywords: Maslahah; Islamic finance and banking; Fatwa Resolutions

1. INTRODUCTION

Islam is a way of life as it is a religion of grace centered on relief and convenience. With this privilege, it is a religion that is suitable for all mankind in every age and in every place. Along with that, Islam also denies the elements of harm in religion. Among the concepts often associated with the features of convenience in religion is the concept of *maslahah* which means benefit. This concept is often used for justifying things that are not allowed in its original law. In the Islamic finance and banking industry, the concept of *maslahah* is also used in developing products.

In Malaysia, *maslahah* is recognized as one of the sources of law (Awang, M. D et al., 2014). In short, many innovations that occur in Islamic finance and banking transactions are decided based on the principle of *maslahah* (Che Abdullah, A.S., 2006; Awang, M. D et al., 2014; Mohamad, S., 2014). However, some scholars are on the opinion that the use of *maslahah* as a source of law today is found not to be fully comply with Shariah principles as outlined by the scholars of Islamic jurisprudence (Hakim, L., 2017). The absence of guidelines or rules provided by Bank Negara Malaysia regarding the use of legal resources including *maslahah* (Zakaria, A., 2013) is the cause of inconsistent law issuance from Shariah advisors (Shaharuddin, A., 2010). In deciding law that related to Islamic finance, Shariah advisors sometimes are very rigid with classical Islamic jurisprudence law and fail to see the impact of products from broader perspectives. In certain occasion, the Shariah advisors become very liberal by eliminating the conditions contained in Islamic contracts via using *maslahah* as their reasons. This study aims to explore the concept of *maslahah* in Islamic law, its position in the determination of law, and the application of this concept in selected Islamic finance and banking issues and fatwa resolutions in Malaysia.

2. THE CONCEPT OF MASLAHAH AND ITS STANDARD CRITERIA ACCORDING TO MUSLIM SCHOLARS

The Definition of *Maslahah*

The explanation of the meaning of *maslahah* can be highlighted according to literal and technical perspectives. The description of these two aspects will give a comprehensive overview to the concept of *maslahah* and further facilitate the process of determining *maslahah* in the context of Islamic banking and finance and fatwa resolutions which applies today.

Literal Definition of *Maslahah*

The word *maslahah* is an Arabic word comes from the root word of *salaha* which means good, beneficial, and not destructive. The word *maslahah* also refers to the noun of *salaha* and the *mufrad* (single) word form *maslahah* which means goodness or loss of harm (Mustafa, I., 1972) and benefit from something (Ibn al-Manzur, M. M., 1993). Thus, something that can bring profit and provide welfare is considered as a *maslahah*. The thing that is said to bring good is a human act that gives benefits and a positive impact which is called *al-Khayr* to oneself particularly and society generally. In this regard, *maslahah* is something that brings good to human beings because it has benefits in it and prioritizes the public interest (Sanu, Q. M., 2000).

Technical Definition of *Maslahah*

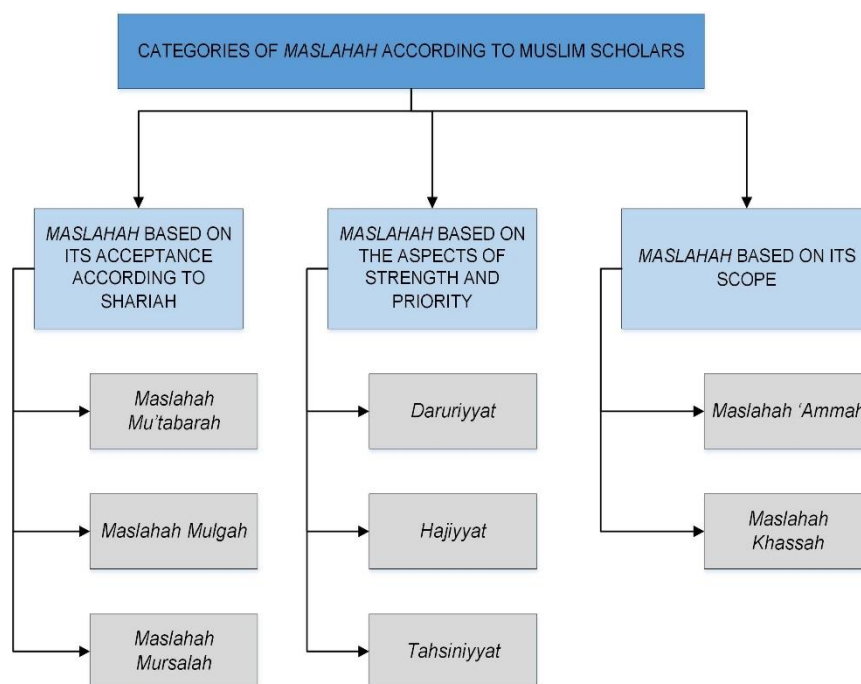
Muslim scholars have the same understanding of the meaning of *maslahah* in terms of terminology except that they are slightly different in the aspects of its emphasis. The difference in terms of this approach doesn't negate the similarity in terms of the desired

meanings. *Maslahah* refers to the protection of the objectives of Sharia which is to preserve religion, life, intellect, lineage, and property through the approach of embracing as many benefits as possible and avoiding anything that can be harmful. *Maslahah* according to al-Ghazali means to produce good or avoid the bad that is included in the expression “*Getting rid of harm is more important than taking good benefit*”. According to him, the notion of creating good and preventing bad is the servant’s goal and achieving well-being when the goal is accomplished. However, what is meant by *maslahah* in the context of *maqasid al-Shariah* is to uphold and maintain the objectives of Shariah towards the servant which includes the protection in the aspects of religion, life, intellect, lineage, and property. This definition further complements the meaning of *maslahah* stated by him in his other book, *Syifa’ al-Ghalil* when discussing the aspect of *al-Munasabah* as one of the ways of *ta’lil* in determining the Islamic law. *Al-Munasabah* meant something that can produce good and avoid bad and refer to the problems of religion and the world (al-Ghazali, A. H., 2002).

A more detailed explanation was also made by al-‘Izz Ibn Abd al-Salam when *maslahah* is discussed from the aspect of the elements found in it. He has divided *maslahah* into four categories, namely deliciousness, the causes of deliciousness, joy, and the causes of happiness. These four categories are divided into two aspects, namely *maslahah* which is essential in nature and is represented by the aspect of deliciousness and joy and *maslahah* which is *majazi* that consists of the causes to both (Abd. al-Salam, I., 2000). The same division was also made when he elaborated on *mafsadah*. The meaning of *maslahah* by Abu Ishaq al-Shatibi (790H) outlines a more fundamental explanation of the objectives to be achieved and facilitates the application of this concept for future researchers for the purpose of expanding the debate on current jurisprudence. This is because al-Shatibi was taught under the influence of the Maliki school which paid great attention to the concept of *Maqasid al-Shariah* and made *maslahah* as an arrangement in the entire *ijtihad* of jurisprudence in the Maliki school. Thus, he expressed *maslahah* as something that refers to what is developing human life, the perfection of his life and achieving something that is demanded by the attributes of lust and intellect absolutely (al-Shatibi, A. I., 2012). In conclusion, *maslahah* in terms of terminology means something that contributes towards goodness and can also happen when *mafsadah* is eliminated. So, it is seen from two perspectives, namely bringing direct advantages and benefits that arise from the removal of *mafsadah*.

Categories of *Maslahah* According to Muslim Scholars

The Muslim scholars have divided the *maslahah* into various categories seen from different perspectives. Details on these categories of *maslahah* are important as a fundamental (Azzam, A. A., 2005) to the *tarjih* process when there is a clash between two or more *maslahah* in a situation. For example, the need for a debate on the similarity of nature found between the *maslahah* of safeguarding the intellect and property as both are related to the matter of *daruriyyat al-Khams*. The same thing happens when it occurs between the *maslahah* of the sale and purchase transaction and the *maslahah* that is alleged to exist behind the practice of *ribawi*. The nature of the *maslahah* accepted and rejected by the Islamic law is a consideration to the evaluation between these two *maslahah* (Ismail, P., 2003). Based on this premise, Muslim scholars later classify *maslahah* into various categories according to various angles and aspects. For instance, Ibn ‘Ashur divides *maslahah* according to four aspects, namely in terms of its effect in handling the affairs of the ummah, its relationship with the ummah either in general or certain groups or individuals in it and *maslahah* categories that reflect the goals of an action or long-term effect (Ibn ‘Ashur, M. T., 1985). Diagram 1.1 below summarizes the categories of *maslahah* according to Muslim scholars.

Diagram 1.1: Categories of *Maslahah* According to Muslim Scholars***Maslahah* Based on Its Acceptance According to Shariah**

The acceptance of Shariah referred to as assessment that has been set by Shariah from the aspect of validity according to the Islamic law whether it can be recognized as coinciding with the law or contrary to it. Therefore, the item that will differentiate between *maslahah* is based on Islamic sources. In addition, there are situations in which Allah SWT is silent about some law pertaining to some matters and this gives space to the *mujtahid* to perform legal *ijtihad* in accordance with the situation and coincides with the *maqasid al-Shariah* (Malaikah, M., 2002). Muslim scholars differentiate the *maslahah* in this category into three parts. The three *maslahah* are *maslahahmu'tabarah*, *maslahahmulghah* and *maslahahmursalah*. Provided are the details for each category:

i. MaslahahMu'tabarah

Maslahahmu'tabarah is a *maslahah* that is certified by Allah SWT where its authenticity is sourced from detailed propositions. This means that the *maslahah* has the basis of acceptance from the Islamic side with the existence of explanations and understanding of the texts or *ijma'* (Zaydan, A. K., 1996). *Maslahahmu'tabarah* contained in the texts indicates a certain goodness and benefit behind each of the instructions and prohibitions of the texts whether it gives the impact of obligatory (*wajib*), recommended (*mandub*), permissible (*mubah*), reprehensible (*makruh*), and forbidden (*haram*). In addition, all the obligations or prohibitions refer to the protection of *daruriyyat al-Khams* (Zaydan, A. K., 1996). The goal of preserving property behind the prohibition of *riba'* is *maslahahmu'tabarah*. The same goal was identified behind the order to carry out the punishment of cutting off the hands of thieves because of the *maslahah* in preserving property from being encroached upon by others.

ii. MaslahahMulghah

Maslahahmulghah is the *maslahah* that contradict to the Islamic texts, namely Quran, *Sunnah Ijma'*, and *Qiyas*. If the *maslahahmu'tabarah* refers to the *maslahah* recognized by the

Islamic law based on the existence of propositions that show its recognition, then the *maslahahmulghah* is a *maslahah* that is rejected and at the same time the text certified that it is invalidated in the view of Shariah. The nature of *maslahah* which is categorized as *maslahahmulghah* is something that is considered to bring goodness and benefits to the human view, while it clearly shows the opposite and is revoked by Allah SWT. Something that is decided by the Islamic law in *qat'i* (definitive) can't be eliminated by mere assumptions of the human mind alone without relying on the support of propositions. For example, the benefits that are thought to provide advantages and benefits by practicing *riba* in economic transactions is a *maslahah* that has been rejected by the Islamic law. This is clear when there is a prohibition in the word of Allah SWT regarding *riba*:

"Those who consume interest will stand 'on Judgment Day' like those driven to madness by Satan's touch. That is because they say, 'Trade is no different than interest.' But Allah has permitted trading and forbidden interest. Whoever refrains—after having received warning from their Lord—may keep their previous gains, and their case is left to Allah. As for those who persist, it is they who will be the residents of the Fire. They will be there forever." (Quran, 2: 275).

In the division of inheritance, there is a tendency to equate the portion obtained by the female heirs with the portion to be obtained by the male heirs on the grounds of preserving the female *maslahah* because both are in the same status as both siblings or grandchildren. However, this *maslahah* is categorized as *mulghah* because there is a text that clearly rejected it, which is the word of Allah SWT in the following verses:

"Allah commands you regarding your children: the share of the male will be twice that of the female. If you leave only two 'or more' females, their share is two-thirds of the estate. But if there is only one female, her share will be one-half. Each parent is entitled to one-sixth if you leave offspring. But if you are childless and your parents are the only heirs, then your mother will receive one-third. But if you leave siblings, then your mother will receive one-sixth- after the fulfilment of bequests and debts. 'Be fair to' your parents and children, as you do not 'fully' know who is more beneficial to you. 'This is an obligation from Allah. Surely Allah is All-Knowing, All-Wise.'" (Quran, 4: 11).

Based on the above proposition, the annulment of the *maslahah* assumed by man, equating the right of inheritance of property between men and women is because Allah SWT means the real *maslahah* and the greater the opposite. From the point of view of the Islamic law creation, there is no difference of opinion among scholars that all *maslahah* under *maslahahmulghah* is not valid to be used as a substitute because it has been canceled and there is no method that allows it to be accepted which is understood from the order to stay away from it. Understanding the text by knowing the *maqasid al-Shariah* on the other hand overcomes an action that may be done based on the limited ability of the intellect or according to lust alone.

iii. *MaslahahMursalah*

The elasticity and width of the scope of the practice of Shariah is not only stated in the form of instructions and prohibitions to preserve the interests of human beings alone, but at the same time by silencing the law for some related matters. The meaning of "silence" here doesn't mean that there is no law for the matter, but it doesn't state whether it has a recognized *maslahah* or a rejected *maslahah*. The existence of this *maslahah* is not based on certain propositions that prove it is accepted or rejected by Shariah. Muslim scholars categorize this type of *maslahah* as *maslahahmursalah*. It is also known by some scholars as

al-Maslahah al-Syabihah bi al-mu'tabarah. Al-Ghazali also uses various terms in his books to show the meaning of *maslahahmursalah* such as *al-Maslahah al-Mulaimah* in the book *Syifa' al-Ghalil*, the term *istislah* in the book *Asas al-Qiyas* and using the term *maslahahmursalah* in the book *al-Mustasfa*. *Maslahahmursalah* is named after *maslahah* because of its beneficial and good nature that can lift the bad and the destruction. *Mursalah*, on the other hand, refers to the fact that he does not have a text that acknowledges it and no text that revoke it.

The *maslahahmursalah* gives a wide space of *ijtihad* to the determination of the law for new questions. This happens a lot when in the time of the Companions when an action is done based on *maslahah* while there is no evidence of its acceptance as a *maslahah* that is accepted or rejected or a basis that can be compared with it. For example, the decision taken when collecting the Quran after seeing many memorizers of the Quran who were martyred on the battlefield. Other example of the determination of contemporary law based on *maslahahmursalah* are like not being convicted of a marriage unless there is an official statement such as registration of marriage at the relevant institution and not recognizing the occurrence of transfer of property without the sale and purchase documents made.

The three types of *maslahah* discussed above affect the process of law enforcement using deduction method or also known as *al-Istinbath*. *Maslahahmu'tabarah* must be accepted as a basis in the determination of the law and will not be affected with any new *maslahah* assumed by the intellect as better. Prayer has a *maslahah* that is recognized by the Shariah in strengthening the *maslahah* of preserving the religion. Therefore, it is illegal to change it to another law on the grounds that it will reduce the quality of focus on work or seeking knowledge. *Maslahahmulghah* can't be replaced with other *maslahah* which is also thought to be better because the cancellation made by Shariah is assumed to be the best for us as a servant of Allah SWT. Prohibition of alcohol is clearly illegal because of the *maslahah* of preserving the mind. Because of this, it is illegal to change it to another law on the justification that alcohol can strengthen the body and so on.

Maslahah Based on the Aspects of Strength and Priority

The Muslim scholars divided *maslahah* based on this category into three parts, namely *maslahahdaruriyyah*, *maslahahhajiyyah* and *maslahah tahsiniyyah*. The three divisions are made according to the extent to which it is necessary to achieve the *maqasid al-Shariah*. The following are the details of the three importance above according to the perspective of *maqasid al-Shariah*:

i. Daruriyyat

Al-Darurah in terms of Arabic language comes from the word *al-Dar* and the opposite of the word *al-Naf'u*. *Al-Dar* is against the benefit of something that is not good. Al-Qaradawi describes *daruriyyat* as an urgent need or desire and anything that must be required (al-Qaradawi, Y., 2006). This urgent need is understood when the scholars explain that neglect of the matter of *daruriyyat* will not only fail to meet the needs of human beings but will destroy them. From the above two meanings it can be concluded that *daruriyyat* means the absolute thing necessary for human life. It is something that is very important to uphold the problems of religion and the world and it is something that we can't live without. This is because its absence will lead to destruction and the loss of enjoyment and success in life and is categorized as a loser. This situation is overcome by preserving five things that are the objectives of Shariah, namely preserving religion, life, intellect, lineage, and property.

The five things categorized in the above *daruriyyat* matter have different levels and must be considered to realize the importance of religion and the world. The following verses 151 and 153 of surah al-`An`am clearly show the preservation of the five things:

“Say, ‘O Prophet, “Come! Let me recite to you what your Lord has forbidden to you: do not associate others with Him ‘in worship’. ‘Do not fail to ‘honor your parents. Do not kill your children for fear of poverty. We provide for you and for them. Do not come near indecencies, openly or secretly. Do not take a ‘human’ life—made sacred by Allah—except with ‘legal’ right.¹ This is what He has commanded you, so perhaps you will understand. And do not come near the wealth of the orphan—unless intending to enhance it—until they attain maturity. Give full measure and weigh with justice. We never require of any soul more than what it can afford. Whenever you speak, maintain justice—even regarding a close relative. And fulfil your covenant with Allah. This is what He has commanded you, so perhaps you will be mindful. Indeed, that is My Path—perfectly straight. So, follow it and do not follow other ways, for they will lead you away from His Way. This is what He has commanded you, so perhaps you will be conscious of Allah.” (Qur’an, 6:151-153)

Based on the above verses, then the five things that are emphasized are the basis of the most important needs of life and have a clear goal in preserving *maslahah* and eliminating *mafsadah*. Whereas, in the order of priority of five things of *daruriyyat*, the need to preserve religion comes before other needs. The need to preserve the soul takes precedence over other interests after religion. However, there is disagreement in determining the priority of preserving the intellect and lineage. The need to preserve property is at its most last level.

ii. *Hajiyyat*

Hajiyyat is something that human beings need but it doesn’t reach the level of *daruriyyat* and doesn’t destroy life in its absence. But human life will be hard and difficult. This matter of *hajiyyat* is needed to eliminate difficulties in life, ensure that the matter of *daruriyyat* is preserved while ensuring the achievement of other interests. For example, in the matter of *muamalat*, transactions needed by human beings are required even if the transaction violates *qiyas* such as buying and selling via *bay’ salam*. In addition, *hajiyyat* is a necessary thing either to help overcome difficulties at certain times such as *rukhsah* which requires things good and so on. These requirements are required by the *mukallaf* to ensure that the *Maqasid al-Shariah* is achieved. It also shows that the Islamic treatise is a blessing to the whole world. In addition, Islamic law celebrates *maslahah* and lifts harm from believers in accordance with its objectives. The objective behind the law of sale and purchase is not achieved if there is no *rukhsah* for the *bay’ salam* when facing with difficulties in trading.

iii. *Tahsiniyyat*

Tahsiniyyat is a complement that makes human life more perfect as it is known as *al-Kamaliyyat*. Through this matter, *tahsiniyyat* can improve the situation of individuals and society in line with the values of manners to maintain human dignity. If this value expires then the perfection of human intellect and beauty will be lost as a perfect human being. This is because the matter of *tahsiniyyat* is contained in every Islamic law as *daruriyyat* and *hajiyyat*. The absence of *tahsiniyyat* although won’t damage human development or disrupt peace or cause human beings to be difficult, but it remains a fundamental part of completing matters of *daruriyyat* and *hajiyyat*. For example, in *muamalat*, Islam forbids the sale and purchase of excruciating goods, unclean things, carcasses and the sale and purchase of one person over the sale and purchase of another.

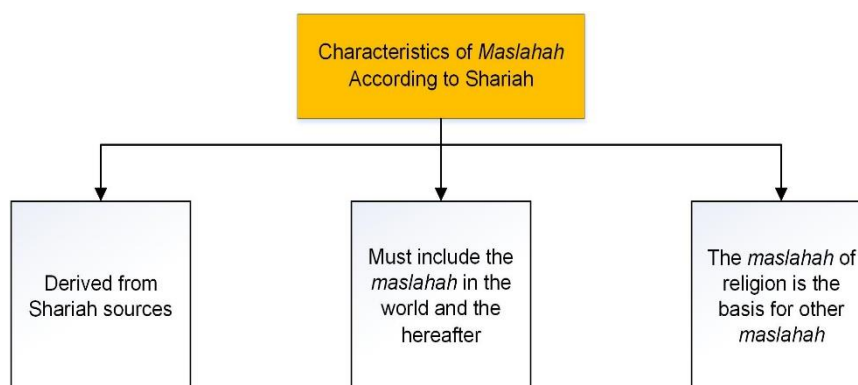
Maslahah Based on its Scope

The division of *maslahah* according to the aspect of its scope is classified into two main parts namely general interest (*maslahah 'ammah*) and special interest (*maslahah khassah*). *Maslahah 'ammah* or also known by some scholars as *maslahah kulliyah* is something that brings benefits and lifts harms (*mafsadah*) from all ummah or most of them. This *maslahah* has two important objectives, namely, to bring benefits and lift harm. For example, *jihad* against the enemy for the sake of religion, life, and descent, keeping the two holy lands from falling into the power of non-Muslims and everything related to the benefit of the entire ummah. On the other hand, *maslahah khassah* or *maslahah juz 'iyyah* is the benefits and interests obtained by an individual or a small group of individuals only with reference to certain groups such as doctors, fishermen or traders only. It is the secrets in each of the laws prescribed set by Allah SWT. Ibn 'Ashur claimed that this kind of *maslahah* is specialized in questions related to family, property transactions, *muamalah badaniyyah* such as *mudarabah* and *muzara'ah*, judiciary and testimony, *tabarru'at* and *'uqubat* (Ibn 'Ashur, M. T., 1985). For example, the *maslahah* meant behind the injunction to record when in debt is to preserve the rights of the debtor, to avoid causes that lead to disputes, to manage human *muamalah* and to avoid damaged contracts. Both categories have same objectives but with different *maslahah* environments.

In addition, *maslahah aghlabiyyah* is related to the scope of time were also discussed by scholars. This type of *maslahah* refers to the benefits that will be obtained in the future. Thus, the real risk factor (*i'tibar al-ma'al*) for a thing makes an action can be known through the aspects of its needs. It is directly related to the state of no *wasilah* (action to achieve an objective) when there is no objective (al-Kamali, A., 2000). The use of this approach is within the framework of *sadd al-Zari'ah*.

Characteristics of Maslahah According to Shariah

A *maslahah* that is taken accepted and backed up in the determination of the law has certain characteristics that monitor it. These characteristics directly guide the *mujtahids* to identify which one is noted as *maslahah shar'iyyah* and which one that don't meet the setting criteria. Ibn Qayyim's view of Shariah refers to its universal nature when it is built because of the existence of wisdom and *maslahah* to the servant, both in this world and hereafter. Therefore, all things that can change from *maslahah* to *mafsadah*, from justice to tyranny shouldn't be viewed as coming from Sharia. Based on the importance of this element of *maslahah* in every aspect of human life, knowing the criteria and standards for this *maslahah* is a pre-condition before discussing it from the perspective of application in the process of legalization. Establishing a law for a new thing without proper measurements and balance will only produce results that deviate from the *maqasid al-Shariah* as if performing *Qiyas* between two things that are not the same on its *'illah* (cause) or known as *qiyas ma'a al-Fariq* (Muhammad Wasil, N.F., 1980). In this regard, the scholars have outlined some features that must be present in a *maslahah*. The following Diagram 1.2 are the characteristics of *maslahah* according to Shariah.

Diagram 1.2: Characteristics of *Maslahah* According to Shariah

i. Derived from Shariah sources

In line with the function of *maslahah* as the basis for the evaluation of law, the *maslahah* must be sourced from the Islamic law or Shariah (Khalaf, A. W., 1978) and rejects the element of lust or intellect alone. This is due to the characteristic of human mind itself that is limited, and its ability is tied to the limitation of time and places. Although the nature of the limited mind can't reach matters related to the hereafter, but in this situation, Islam doesn't deny the men's ability to understand some problems of the world though these problems aren't understood in a comprehensive manner (al-Zuhayli, W., 1996).

Accordingly, to identify *maslahah* that is sourced from Islamic guidelines, several other criteria are needed. The view of al-Shatibi which backs up the achievement of *maslahah* and eliminates *mafsadah* to this Islamic law also strengthens the idea that *maslahah* can't be influenced by human habits and lusts. In addition, individuals involved in evaluating *maslahah* and *mafsadah* for a matter must also consist of those who are pious and have a comprehensive knowledge related to the reality and present of a matter. The existence of these attributes is an important factor in the result of *maslahah* and avoidance of *mafsadah*. Moreover, the capability of translating between two good things or between two destructive things is very much needed (al-Shatibi, A. I., 2012).

Adherence to Islamic guidelines in evaluating a *maslahah* or *mafsadah* clearly guarantees the achievement of the *maqasid al-Shariah* as the considerations made will strengthen the original meaning of Shariah. This is possible by following guidelines stipulated by the Muslim scholars, through the identification of the more important *maslahah* by setting aside the less *maslahah* and lifting the larger *mafsadah* by setting aside the smaller *mafsadah*.

ii. Must include the *maslahah* in the world and the hereafter

The second criterion that makes a *maslahah* accepted in the eyes of Shariah is that it must be seen from both worldly and hereafter perspectives. This reflects the doctrine of *maqasid al-Shariah* which aims to ensure happiness in this world and the hereafter. Therefore, when evaluating and identifying a *maslahah* or *mafsadah*, both worldly and hereafter values become the main arrangement without neglecting any of them. Every act of a servant that produces benefits to the perpetrator even in the future as after his death is counted as a good deed (al-Zuhayli, W., 1996). The combination of these two values becomes the determining mechanism to achieve the real *maqasid al-Shariah* or not.

iii. The *maslahah* of religion is the basis for other *maslahah*

The *maslahah* of religion become the backbone of other *maslahah*. This means that the determination of *maslahah* and *mafsadah* must be in accordance with the framework and propositions of Shariah, related to the law and provisions of Shariah from the aspect of *halal* and *haram* as well as not depending on experience and common-sense judgement only.

When the *maslahah* of religion is at the highest level, then the law must precede the importance of religion, even if at the same time it will involve the neglect of other *maslahah*. For example, it is obligatory to perform *jihad* for the sake of religious matters, while by doing so it will endanger and destroy human life (al-Qaradawi, Y., 2002). Losing one's life is easier than the destruction of religion due to not performing the *jihad*. When religion is not taken care of directly, other problems will be ignored.

Conditions of Practicing *Maslahah* And Its Standards

The discussion of *maslahah* whether in the discipline of Islamic jurisprudence or *maqasid al-Shariah* has a common focus of debate when it is seen from the aspect of the extent to which it is considered in the legal evaluation of something that is not in the Islamic text. In the discipline of Islamic jurisprudence, *maslahah* is accepted as a basis in the legalization of law even though the scholars' agreement doesn't arise in acknowledging it as an Islamic evidence. While in the discipline of knowledge *maqasid al-Shariah*, *maslahah* is an element contained in the objective behind Islamic law that is a law that will be decided must bring *maslahah*. Al-Ghazali states that something that can eliminate *maslahah* is considered as *mafsadah* and eliminating this *mafsadah* is a *maslahah* (al-Ghazali, A.H., 2004). Thus, looking at the position of *maslahah* which is very important in the discussion of these two disciplines, the scholars have a specific debate in determining its basis and criteria. The Muslim scholars have set up some conditions that must be complied with to practice the *maslahah*. The condition referred to here is a guideline or criteria that controls something that can be considered as a *maslahah*. In this regard, they set the conditions of practicing with the *maslahah* in addition to set its standards in general.

Maslahah is an Islamic proposition that can't be accepted as a proposition that is in nature as other propositions such as the Quran, Sunnah, *Ijma'* and *Qiyas* that allow the construction of the law based on it alone. In this regard, a *maslahah* must be based on detailed Islamic propositions. In addition, there are general guidelines in acknowledging the elements of *maslahah* when evaluating the law. There are three categories of *maslahah* if it's viewed from the point of Islamic acceptance of it, namely *maslahah mu'tabarah*, *maslahah mulghah*, and *maslahah mursalah* as described earlier. For *maslahah mu'tabarah* which already has a specific text related to the law, then it is necessary to use the law that is existed without being required by a specific guideline. For *maslahah mulghah*, there is no confusion among the scholars and there is no room to be taken into account in determining the law because there is a clear text that cancels it. The scholars only put specific guidelines for the third category of *maslahah* which is *maslahah mursalah*. The setting of specific guidelines for this category of *maslahah* is very important compared to *maslahah mu'tabarah* and *maslahah mulghah*. In the case of the first and second *maslahah*, both don't require guidelines because there was already clear text that guided it. However, this third type of *maslahah* is more to applications. This is because it's considered as an interest and has benefits, but there is no Islamic evidence that shows it is accepted or rejected. Thus, with the existence of specific guidelines, it can

control from the occurrence of contradictions of Islamic law and misuse when determining the law. There are several conditions of practicing *maslahah* set by the scholars seen from several aspects. These conditions are clearly shown in Diagram 1.3 below:

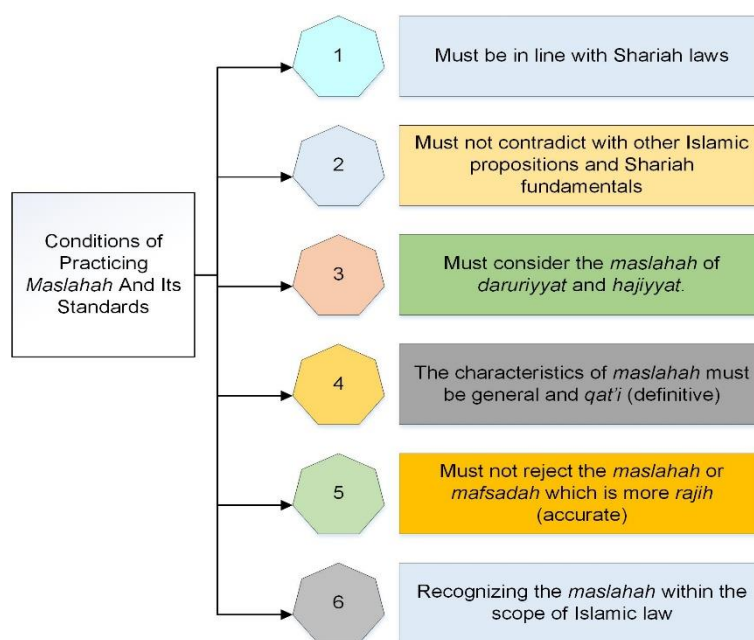


Diagram 1.3: Conditions of Practicing *Maslahah* and Its Standards

i. Must be in line with Shariah laws

The scholars' debate on the condition of practicing with *maslahah* stipulates that a *maslahah* that is to be recognized as a basis of legal evaluation must be in line with the *maqasid al-Shariah*. For example, al-Ghazali's approach in the application of *maslahah* theory when making assessments and determinations of a law is something that is interesting to be highlighted (al-Ghazali, A.H., 2004). The focus of his debate is not only on achieving benefits and rejecting harm to meet the objectives and needs of human beings alone, but also aims to preserve the objectives of Islamic law which is to protect religion, life, intellect, lineage, and property. In this regard, he has laid down strict conditions in using the theory of *maslahah* before a decision is made as stated in the book of al-Mustasfa.

The thought of *maqasid al-Shariah* presented by al-Shatibi is greatly influenced by his background which was educated under the influence of the Maliki school. Furthermore, the flow of this sect is more prominent in focusing on the *maqasid al-Shariah*. This is clear when there are three bases in the Maliki school that are closely related to the concept of *maqasid al-shariah*, namely; *masalih mursalah*, *sadd al-Zara'i* and recognizing *khilaf* (al-Shatibi, A. I., 1991). This statement is evidenced by his thinking on the determination of *maslahah* criteria in the evaluation of law. The *maslahah* criteria set by al-Shatibi has a wider range of applications and is closer to the achievement of *maqasid al-Shariah*. Compared to the conditions compiled by al-Ghazali as stated earlier, the *maslahah* criteria outlined by al-Shatibi are more practical. Explanation of al-Shatibi in his book, al-'Itisam stipulates that a *maslahah* must be in accordance with the *maqasid al-Shariah* in general (al-Shatibi, A. I., 1991). This is in line with what is stated in al-Muwafaqat that the act of *mukallaf* if contrary to the *maqasid al-Tashri'* is considered invalid, not accepted and not rewarded.

Apart from that, this condition is also a major condition for some other scholars. Al-Buti elaborates in detail on this condition by presenting measures to ensure the achievement of

maqasid al-Shariah in terms of preserving *daruriyyat*, *hajiyyat* and *tahsiniyyat* (al-Buti, M.S.R., 1973). His explanation by showing the importance of the relationship between these three aspects becomes a guideline in practicing with *maslahah* so as not to prioritize one of them only without considering other aspects. This is agreed by al-Yubi by stating that the measure of *maslahah* and *mafsadah* that must be evaluated must be based on Islamic considerations and not according to lust, even if based on the texts to prove there is no contradiction with the law (al-Yubi, M.S., 1998). To summarize, this condition is seen as the main condition to other conditions because it is in accordance with the original general principle of every law established by Allah SWT which is to ensure that the *maslahah* of the servant is maintained either from the aspect of bringing benefits and lifting harms.

ii. Must not contradict with other Islamic propositions and Shariah fundamentals.

A *maslahah* that is to be considered as the basis of a law must have intact characteristics because it determines the validity of the law to be decided. In this regard, a *maslahah* is required not to contradict the Islamic definite sources (*qat'i al-Dalalah*) such as Quran, Sunnah and *Ijma'*, doesn't violate Qiyas and the law that has been decided. For example, the practice of *riba'* which is considered as *maslahah* for economic growth should not be taken into account because it is contrary to the text that is under definite sources. This condition is essential because a *maslahah* must coincide with the *maslahah* that Islamic law wants to achieve. Al-Shatibi seems to be consistent with his previous principles which emphasizes the achievement of *maqasid al-Shariah* in a more practical way when it is argued that this *maslahah* is either of the type desired by the Shariah clearly or close to it even though it doesn't have a specific proposition about it (al-Shatibi, A. I., 2012). Scholars other than al-Tufi agreed that there is no conflict between a text that is *qat'i* (definitive) in terms of *thubut* and *dilalah* with *maslahah*. This is because something that is deemed has a *maslahah* that is *qat'i* in the Islamic view and other than that, it is considered as a *maslahah* that is *mawhumah* and is treated as *mulghah* and void. Accordingly, there is no contradiction between *maslahah* and the *qat'i* text because the nature of the law built through *ijtihad istislahi* based on *maslahah* only occurs in matters that don't have the text or '*illah* (cause) that can be compared to it. Moreover, the provision of law based on *maslahah* is applied within the scope of the limits of Islamic truth without denying the existence of a clear text about a matter.

iii. Must consider the *maslahah* of *daruriyyat* and *hajiyyat*.

Scholars require that the category of *maslahah* has the basic for determining the law is *maslahah daruriyyat* and *hajiyyat* to achieve *maqasid al-Shariah*. *Maslahah daruriyyat* is a must because it touches on the survival of human life from the five aspects discussed earlier, namely religion, life, intellect, lineage, and property. *Maslahah hajiyyat* is also needed because it will lift the hardships and difficulties of the *mukallaf* and make it easier for them to perform *taklifsyar'i* and ensure the achievement of *maslahah daruriyyat*. Nevertheless, there are differences of opinion among scholars regarding the extent of this *maslahah* application. Al-Shatibi states that a *maslahah* should refer to the protection of a troubled *maslahah* or can also refer to a *maslahah* that is functioned to lift the burdens in the religion (al-Shatibi, A. I., 2012) as mentioned earlier. However, what is presumed as a *maslahah* in Islamic law according to al-Ghazali must be *amaslahah* that is under the classification of *daruriyyat* only (al-Ghazali, A.H., 2004). Therefore, other than *maslahah daruriyyat*, like *maslahah* under the classification of *hajiyyat* and *tahsiniyyat* is not valid to be used as a backup in the process of inferring the law. This view is seen as quite strict and difficult to practice in real situations

because most of the *maslahah* that is needed to achieve is the one that is *hajiyyat*. Even so, what al-Ghazali stated was his view of a specific situation related to individual rights only. He accepted *maslahah hajiyyat* as a subject to be achieved and provided arguments in the matters involving human rights as stated in Syifa'al-Ghalil (al-Ghazali, A. H., 2002). The approach is in accordance with the description of the meaning of *maslahah* stated which is to preserve the five basic purposes of Islamic law, namely, to preserve religion, life, intellect, lineage, and property. A *maslahah* that doesn't lead to this goal is considered as a *maslahah gharibah* and void. Therefore, in this case al-Ghazali's view is similar to al-Shatibi's view when he gives a relatively simple and practical space to the process of evaluation and determination of law based on *maslahah*. This view is more in line with the spirit of *maqasid al-Shariah* (al-Ghazali, A.H., 2004).

The scope of *maslahah* application which also acknowledges the *hajiyyat* situation makes it easier and meets the current needs. This condition is similar to what he stated in al-Itisam, that a *maslahah* must coincide with the *maqasid al-Shariah* and at the same time, doesn't violate the *ijma'* and doesn't lead to neglect of *maslahah* which is more important than it (al-Shatibi, A. I., 1991). By focusing on these two types of *maslahah*, the benefits are possibly achieved and the *mafsadah* can be lifted to achieve the objective behind the determination of a law that is needed. Rejection of *maslahah* which is *tahsiniyyat* in nature avoids being involved in the determination of the law based on common needs only and contrary to the criteria of truth making *maslahah* as a strict legal basis.

iv. The characteristics of *maslahah* must be general and *qat'i* (definitive)

The nature of the preserved *maslahah* has an impact and benefit to the public and is used as a basis for individual interests. Therefore, the scholars stipulate that a *maslahah* should be general (*'ammah*), which includes all human beings and should not be *khassah* (Ibn 'Ashur, M. T., 1985) also in considering *maslahah* which is *aghlabiyyah* (usual) and *kulliyyah* (comprehensive). The general scope referred to *maslahah* which will be obtained not only in this world, but also in the hereafter. For example, *maslahah* in maintaining the purity of faith, unity of the ummah and preserving the holy places of Muslims. In addition, it must be in line with the precision that *maslahah* has the basis of law, the *maslahah* must also be *qat'i* (definitive) or *zanni* (speculative) that is close to *qat'i* (Ibn 'Ashur, M. T., 1985). Therefore, *maslahah* that contains the elements of *zann* and *waham* is not recognized in the deduction methods of law

v. Must not reject the *maslahah* or *mafsadah* which is more *rajih* (accurate)

A *maslahah* or *mafsadah* that is to be asserted in the evaluation of the law must be firstly identified its position and order of priorities. This is because what is meant by Islamic law which acknowledges the *maslahah* of the servant is by prioritizing the *maslahah* that needs to be concerned compared to other *maslahah* (al-Shatibi, A. I., 2012). Therefore, the *maslahah* that is believed to be achieved can't reject the *maslahah* or *mafsadah* that is more accurate (*rajih*) or lead to *mafsadah* that is accurate (*rajih*).

Apart from that, al-Shatibi also requires that the *maslahah* must be something rational that can be accepted by the logic of reason. Therefore, it doesn't include things that fall under the category of worship because it is *ta'abbudi*. He has given examples in his work to explain what is meant as related to the requirements of purification, setting the time and number of *rakaat* of prayer, refraining from eating and drinking as well as things that can invalidate the fast done during the day instead of on nighttime as well as other examples (al-Shatibi, A. I., 2012). This shows that practicing with *maslahah* occurs on customary things that human beings need in their daily lives in the world such as in the field of *muamalat* and *ta'zir* (al-

Shatibi, A. I., 2012). Besides, scholars also have discussed the issue of the clash that occurred between *maslahah* and *mafsadah* through their work which can be used as a guidance in determining its priorities.

vi. Recognizing the *maslahah* within the scope of Islamic law

Scholars have different views in determining the scope of law that falls under the scope of *maslahah* which covers the aspects of worship and non-worship from customs, *muamalat* and so on. However, the *maslahah* that is recognized in Islamic law did involve in both aspects. In short, most scholars agreed that the origin of *maslahah* is not originated from an act of worship (that is called as *ta'abbudi*) and is not discussed because it has been clearly established through Islamic propositions (al-Yubi, M.S., 1998).

In general, the criteria stated by the scholars above are guidelines to deal with problems in determining the law. It is flexible and can be applied to issues that are within the stated criteria range. In this regard, creating a specific standard for each current problem and issue becomes a must so that each current question is evaluated according to current factors considering the guidelines set by the scholars.

ANALYSIS OF MASLAHAH APPLICATION IN CONTEMPORARY ISLAMIC FINANCE AND BANKING ISSUES AND FATWA RESOLUTIONS IN MALAYSIA

The concept of *maslahah* is widely used in Islamic finance and banking as the products developed by Islamic financial institutions are closely related to human needs in their daily lives. Therefore, this study tries to scrutinize some examples in analyzing the use of the concept of *maslahah* in Islamic finance and banking and fatwa resolutions applied in Malaysia.

The investment in companies conducting mixed activities between *halal* and *haram*, with the ratio of illegal activities are relatively small. Because of this, Muslim investors are facing difficulties to venture into investment companies which overall activities are *halal* because most of the investment activities are mixed between *halal* and *haram* and doesn't meet the Shariah requirements. Under this situation, there is a strong *maslahah* for Muslim investors to invest in places where mixing exists with Shariah non-compliant activities, but in a limited range or below the allowable benchmark. This requirement can be based on the concept of *maslahah*. By considering the drawbacks of Muslim investors, it is permissible for Muslim investors to invest in mixed companies because of *maslahah*. This is because, if they aren't allowed to invest in mixed companies, they couldn't develop their properties through investing in shares and don't get the opportunities to dominate these companies through the purchase of shares to convert it to fully Shariah compliant companies or shares. Thus, for the *maslahah* of the Muslim economy and the need to convert mixed shares to fully Shariah compliant shares through the control of most of the company's shares, the involvement in investment of mixed companies is allowed based on the concept of *maslahah*.

This factor is considered by the Fatwa Committee of the National Council of Islamic Religious Affairs Malaysia when deciding the permissibility of investment in the National Unit Trust Scheme (ASN) and the Bumiputera Unit Trust Scheme (ASB). In the statement of the fatwa stated, "Every law that is decided must meet the demands of justice, *maslahah* and avoid further bad damages". In this regard, if Permodalan Nasional Berhad (PNB) relinquishes its shareholdings in Maybank Berhad with the Maybank Berhad status as one of the largest Islamic banking institutions in Asia Pacific, it will not only ruin the economy of the majority shareholders Malay Muslims, but it will also bring bad impacts to many Muslim-

related organizations. In fact, the job employments involving 16,531 Muslim Bumiputera staff will also be affected (JabatanKemajuan Islam Malaysia, 2021). Apart from this, in Malaysia generally, the benchmark set by the Shariah Advisory Council of Securities Commission can be used as a reference because it comprises of many *ijtihad* that were decided collectively by Shariah experts. Other bodies that can be referred to in determining the rate or benchmark are the Dow Jones Islamic Market Index and The Financial Times Islamic Index Series (Jamal, J, Hambali, N & Mohd Ali, H., 2010).

Other examples can be seen in the issue of submission and settlement in on-spot foreign exchange transactions at T + 2 (two days after the date of the transaction). Foreign exchange trading is a form of *sarf* trading; therefore, it is subjected to all conditions of sale and purchase of *sarf*. Among the conditions is the possession (*taqabud*) of both currencies in a ceremony. Based on this original law, submission in a transaction foreign exchange can't be done late. However, due to the *maslahah* factor where the system such settlements and payments have become one of the business customs (*'urf*), this submission and settlement can be made at T + 2. Shariah Advisory Council of Bank Negara Malaysia in its 38th meeting dated 28 August 2003 has decided that the submission and other foreign currency transaction settlements made at T + 2 is allowed. According to them, the settlement and submission at T + 2 is accepted in the transaction on a regular basis due to such a period it is necessary for the parties of the transaction to make such verification. Such settlement and payment systems have been accepted as custom (*'urf*) in business (Bank Negara Malaysia, 2010). According to Ahmad Muhyi al-Din, the delay in on-spot submission for the currency transactions on a cash basis are allowed based on strong *maslahah* and *hajah* (Ahmad, A. M., 1998).

Moreover, the application of *maslahah* can also be traced in financing program for unpaid balance settlement (including the principal amount and interest) in a conventional credit card. Some Islamic banking institutions have offered their customers that have the burden of conventional credit card debt to take personal financing to settle the outstanding arrears of the conventional credit card, and subsequently close the credit card account. Such a program contains elements that are not allowed by Shariah, i.e, helping the payment or settlement of conventional credit card debt that contains the element of *riba'* (usury). This is clearly ban and is included in the prohibition of helping the act of immorality and sin. However, such financing program gives benefits to Muslim customers, where it is a form of encouragement to stop the use of conventional credit cards by them and in the end it free them from usury transactions via conventional credit card. Based on the strong *maslahah*, this financing program for the specific purpose is permissible. On the base of *maslahah*, the "Balance Transfer Program" introduced by Al-Rajhi Bank Malaysia (ARBM), which is a financing program for the settlement of unpaid conventional credit card balances was approved by the Shariah Advisory Council of ARBM in a meeting held on 4th December 2008. The Shariah Advisory Council of ARBM in its decision states: "*The approval is an exception of the general rules that prohibits the Bank to involve in any impermissible transactions (such as paying the interest). This is due to the prevailing interest (maslahah) in this product as it encourages the Customer to release themselves from the riba' based transactions to Islamic compliant transactions.*" (Shariah Board, Al Rajhi Bank Malaysia Berhad, 2008).

Guarantee (*kafalah*) is a form of *tabarru'* contract that shouldn't be charged as *ujrah* fee because it can lead to the issue of the *qard* giving benefits to the *qard* giver. In the case where the guarantee recipients (customers) can't fulfill its payment obligations, it will be paid by the guarantor, and subsequently the payment is categorized as *qard*. i.e., the guarantee recipient is considered as indebted to the guarantor. The *ujrah* fee paid by the guarantee recipient (customer) to the guarantor is deemed as the interest or benefit obtained by debtors. However, in some cases involving *maslahah*, the imposition of *ujrah* fee on *kafalah* is

allowed by some Muslim scholars. Among the examples is the credit guarantee offered by Credit Guarantee Corporation (CGC) against financing provided by Islamic financial institutions to customers, where the guarantee recipient (customer) is required to pay a certain amount of fee to the guarantor (CGC). Shariah Advisory Council (SAC) of Bank Negara Malaysia on its 54th meeting dated 27 October 2005 has decided that credit guarantee facilities with a fee offered by CGC on financing provided by the Islamic financial institutions is allowed. Among the considerations taken calculated by SAC of Bank Negara Malaysia is the policy of *maslahah* and society needs. Plus, getting a guarantee for free and without any charges is not easy and practical to be implemented (Bank Negara Malaysia, 2010).

Another *maslahah* application is identified via *ibra'* clause (rebate) for financing based on sale and purchase contract. *Ibra'* in the context of Islamic finance is a rebate given by one party to another party in dealings such as sale and purchase. It's closely related to the issue of the necessity of *da' wata'ajjal* disputed by scholars. By taking the view that *ibra'* and *da' wata'ajjal* are permitted, most of the Islamic financial institutions in Malaysia make it possible and practical for the customer to pay off the financing in advance. Perhaps, initially many Islamic financial institutions didn't include the *ibra'* clause in the agreement signed by the customer, as it is seen to be leading towards the issue of *gharar* (uncertainty) in the selling price. However, the practice of not including the *ibra'* clause in agreements can lead to disputes between customers and Islamic financial institutions. Based on the concept of *maslahah*, Shariah Advisory Council (SAC) of Bank Negara Malaysia has referred this issue and decided on its 101st meeting that Bank Negara Malaysia as an authoritative body may oblige Islamic financial institutions to give *ibra'* to the customers that pay off debt in advance for financing based on sale and purchase contract (Bank Negara Malaysia, 2010).

Finally, is the issue of third-party guarantee for capital or profit in *mudarabah* transaction. The issue arises as to whether a third party may guarantee the capital or profit of *mudarabah* transaction. Here, at its 91st meeting on 1 October 2009, the SAC of Bank Negara Malaysia agreed that a third-party guarantee of the capital or estimated profit of a *mudarabah* transaction is permissible on condition that the third party offering the guarantee is an independent party and has no direct or indirect association whatsoever with the *mudharib*. If a third-party guarantor is entitled to claim the guaranteed amount from a *sukuk* issuer in the event of a default or charges a fee for such guarantee, such a guarantor shall be listed as a restricted third party and, hence, the condition referred to above shall not be met. A guarantee of capital or estimated profit by a third-party in a *mudarabah* transaction is focused on *maslahah*, which is intended to ensure the ongoing confidence of investors in investing into megaprojects in Malaysia.

Based on the analysis conducted, it is found that the criteria of *maslahah* applications in the above-mentioned issues have met the standard criteria set by the Muslim scholars according to Islamic law.

3. CONCLUSION

The function of applying the elements of *maslahah* in the evaluation of contemporary issues in Islamic law as a mechanism of *ijtihad* makes the process of legal intervention able to meet the current needs and atmosphere. Although there are differences of opinion among the Muslim scholars on the acceptance of *maslahah mursalah* as a basis of law, but the basic concept of *maslahah* and its application doesn't show the real difference. The consideration of using *maslahah* is very much vital in ensuring the sustainability of the Islamic banking and financial industry. This is because, if *maslahah* isn't envisaged especially in the development of Islamic banking and financial products, the Islamic financial institutions will consequently

encounter difficulties in offering financial services as offered by conventional banks. As a result, this will eventually benefit the conventional financial sector and stifles the development of Islamic financial sector. In applying the concept of *maslahah* especially in the Islamic finance and banking products, the Shariah advisors and experts who were appointed in the Shariah Advisory Committee at the respective Islamic financial institutions level must always ensure that they meet the criteria of *maslahah* outlined by Muslim scholars so that this concept is not easily abused. In conclusion, there is still a filling gap that requires further studies in relation to the application of *maslahah* as a source of law especially in the field of Islamic finance and banking in Malaysia. Undeniably, with the development of many *muamalat* transactions from time to time, new problems often arise. This indirectly makes the role of *maslahah* very crucial especially in solving problems that there is no clear law from the Quran or Sunnah.

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