

FATWA AND ITS SHARIAH METHODOLOGY IN ISLAMIC FINANCE

Ahcene Lahsasna



ABSTRACT

Fatwa plays a very significant role in Shariah by providing different resolutions and solutions to the Muslim community when it is needed to ensure the compliance with principles of Shariah and commends of God. It should be understood that fatwa is not confined to particular section in Islamic law but it covers the entire sections and subsection of Islamic law including business, finance and trade. Today, fatwa takes a different shape in Islamic finance; it is introduced and presented in the industry in the form of resolutions issued by Shariah board members who represent Shariah corporate governance body in the structure of the Islamic financial institutions. The resolution is further structured in the form of Shariah endorsement which is part and parcel of product approval as required by the regulators. The present paper discusses fatwa and its methodology in Islamic finance to ensure a sound process of issuing an accurate resolutions that comply with the rules and guidelines that have been set in Islamic jurisprudence.

Key words: Fatwa, resolutions, methodology, sources of *Shariah*, *Shariah* board.

INTRODUCTION

Fatwa plays a very important role in Islamic law in general and in Islamic finance in particular. By looking at the Islamic finance industry today, *fatwa* has been given a very prominent position and privilege in

the Islamic financial system. This importance is demonstrated in the industry by the role played by the *Shariah* advisory who represents an important corporate governance organ in the Islamic financial institutions with the responsibility of issuing Islamic rulings, resolutions and decrees (*fatawa*) pertaining to various matters and issues in business and finance. According to Imam *Shatibi*, *fatwa* is taking over the position of the Prophet (peace be upon him) in the *ummah* by providing Islamic ruling and issuing *fatwa* when it is needed¹. According to *Imam Nawawi*, *fatwa* is signing on behalf of Allah.² In addition to that, *fatwa* throughout history has always been known and recognized as the noble tasks of prophethood throughout the ages of mankind. Thus, due to the critical position of *fatwa*, the competent scholars appreciate its position and value in the Muslim society. As a matter of fact, scholars always prefer to stay away from *fatwa* and do not like to get involved in it due to the impact that may result in the daily life of mankind and respectively, the accountability in front of God. The influence of *fatwa* in Islamic finance can be observed very clearly in the daily business operations of Islamic banks and Islamic financial institutions. As a result of this strong link and relationship, there are numerous *fatawa* in Islamic finance in the industry issued by competent scholars in numerous areas of Islamic banking throughout the Muslim world in banking, *takaful* and capital market, issued individually or through *Shariah* board or through collective *ijtihad* and *fatwa*. The rapid growth and development results is a huge collection of *fatwa* in Islamic finance which becomes a platform for the scholars to set principles, guidelines, standards and parameters for the benefit of the Islamic financial institutions. This clearly shows that the critical role of *fatwa* in the Islamic financial system which becomes a part of the framework of the Islamic financial system. It is with the above context that the present article hopes to elaborate on the concept of *fatwa*, its characteristic and its *Shariah* methodology and governance by discussing various issues related to *fatwa* in Islamic finance.

1. Concept of *fatwa*

Fatwa is used widely in Islamic law as an Islamic ruling. *Fatwa* is issued by a religious law specialist on a particular issue. Technically, *fatwa* can be defined as an Islamic ruling on a point of Islamic law

¹ Al Shatibi, Al Muwafaqat, Vol. 4, p,595.

² Al Nawawi, Al Majmou, vol.1, p. 73.

that is given by a recognised authority based on sound evidence.³ It informs others about the rules of *Shariah* without incurring any binding terms. Inherently, the *Fatwa* is issued at the request of a *mustafti*, whether he is an individual or a group of people, or even an organization such as banks or financial institutions in order to resolve an issue arising from question in Islamic jurisprudence matter. The competent scholar who is capable of issuing *fatwa* is known as a *mufti*, whereas the one who receives the *fatwa* is called *mustafti*.

2. Concept of *fatwa* in Islamic finance

We can define *fatwa* in Islamic finance as follows: *Fatwa* in Islamic finance is a discovery of *Shariah* ruling by a competent *Shariah* scholar on ambiguous matters in Islamic finance by providing legal *Shariah* opinion extracted from Islamic sources through a process of *ijtihad* on a particular religious matter after the demise of the Prophet SAW in the light of the *Shariah* rules and Islamic jurisprudence principles.⁴

3. Characteristics of *fatwa* in Islamic finance

There are some important criteria of *fatwa* in Islamic finance which can be described as follows:

- i. *Fatwa* is feasible and very practical in relation to the current issues of Islamic finance faced by the individual and institutions in all aspects of banking and finance.
- ii. All *Fatawa* are based on major sources of *Shariah*; this includes primary sources and secondary sources.
- iii. The aim of *fatwa* is to provide an answer to the unclear issues in the religion raised by *al-mustafti*.
- iv. *Fatwa* is derived through *ijtihad* process to reach a specific *hukm* (Islamic ruling).
- v. *Fatwa* is not a theory illustration, or propositional opinion, but it is an existing issue arising from reality reflecting the need of the *mustafti*.
- vi. *Fatwa* in Islamic finance is based on the *الراجح من الأقوال* preferred opinion or favoured or acceptable opinion of recognised competent scholars.

³ Husain Mohamad al Malah, *Al Fatwa*, Vol.1, p. 398.

⁴ This definition is provided by the author.

- vii. *Fatwa* in Islamic finance can accommodate various opinions of competent scholars as long as it is supported by sound evidence.
- viii. *Fatwa* in Islamic finance is not a binding rule to *al mustafti* depending on the law.
- ix. *Fatwa* is فرض كفاية a communal obligatory act. However, it can be compulsory to a particular mufti in the following cases:
 - If there is no mufti available in his area except him.
 - If the mufti knows the Islamic ruling of the raised issue and he is able to issue a *fatwa*.
 - If there is no obstacle in issuing *fatwa*.
 - If the mufti is from the *Shariah* advisory and the mustafti is the Islamic financial institution; it will be compulsory for the institution to adhere to the *fatwa* of the *Shariah* advisory according to AAOIFI standards.
- x. It is allowed for mufti to provide *fatwa* to his relatives, such as father, mother, son, whereas juridical rulings and witnesses can be affected by the relationship to the judge. Even the mufti can provide *fatwa* to himself when it is needed.
- xi. The mufti should avoid *fatwa* in the case of sickness, happiness, thirst, hunger, anger, sleepiness or some other conditions such as hot weather, cool weather, or if he is in a bad emotional conditions, or in any other situations which may affect his *fatwa* negatively.
- xii. Fairness in *fatwa*: The mufti should be fair in his *fatwa*; seeking the middle way in providing the *fatwa*, so he has to observe the easy way to make the life of a Muslim easy and smooth with the idea that *Shariah* is a mercy to mankind. This is observed especially in the *ijtihad* based on *istihasa* which one of the secondary sources looking at the consequence of the *fatwa* and its application when it is applied.

4. Mufti in Islamic finance:

Mufti, who is also a mujtahid, is the jurist who has the task to provide the Islamic ruling on various religious issues presented to him based on sound evidence and proper methodology as described in Islamic jurisprudence. A Mufti is expected to lead the Muslims toward the lawful activities and fulfills their needs in

religious matters in daily activities to ensure that their conduct is established according to the divine law. Allah says:

”يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ أَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا“.

(سورة النساء : ٥٩)

O ye who believe! Obey Allah, and obey the messenger and those of you who are in authority; and if ye have a dispute concerning any matter, refer it to Allah and the Messenger if ye are (in truth) believers in Allah and the Last Day. That is better and more seemly in the end.

(An-Nisa: 59)

According to Al Hasan al Basri, muftis are the scholars in religion and intellect and jurists.⁵

4.1 Position of the mufti in the ummah in general and Islamic finance in particular

A mufti has a very sensitive position in the ummah in general and in Islamic finance in particular. According to *Shariah*, a mufti is signing on behalf of Allah because a *fatwa* has been attributed to Allah. Allah says:

”يَسْتَفْتُونَكَ فِي النِّسَاءِ قُلِ اللَّهُ يُفْتِيكُمْ“ (النساء: ١٢٧).

“They consult thee concerning women. Say: Allah giveth you decree”.

(An Nisa: 127)

”يَسْتَفْتُونَكَ قُلِ اللَّهُ يُفْتِيكُمْ فِي الْكَلَالَةِ“ (النساء: ١٧٦).

“They ask thee for a pronouncement. Say: Allah hath pronounced for you concerning distant kindred”.

(An Nisa: 176)

⁵ Husain Mohamad al Malah, *Al Fatwa*, Vol.1, p. 577.

Also giving a *fatwa* is similar of taking the position of the Prophet S.A.W in giving a *Shariah* position on religious matters because the Prophet (s.a.w) was the first person who exercised the task of giving a *fatwa*. Allah says:

يَسْأَلُونَكَ مَاذَا يُنْفِقُونَ قُلْ مَا أَنْفَقْتُمْ مِنْ خَيْرٍ فَلِلْوَالِدَيْنِ وَالْأَقْرَبِينَ
وَالْيَتَامَىٰ وَالْمَسَاكِينِ وَابْنِ السَّبِيلِ وَمَا تَفْعَلُوا مِنْ خَيْرٍ فَإِنَّ اللَّهَ بِهِ
عَلِيمٌ (البقرة: ٢١٥).

They ask thee, (O Muhammad), what they shall spend. Say: that which ye spend for good (must go) to parents and near kindred and orphans and the needy and the wayfarer. And whatsoever good ye do, lo! Allah is aware of it.

(Al Baqara: 215)

”يَسْأَلُونَكَ مَاذَا أُحِلَّ لَهُمْ قُلْ أُحِلَّ لَكُمْ الطَّيِّبَاتُ“ (المائدة: ٤).

They ask thee (O Muhammad) what is made lawful for them. Say: (all) good things are made lawful for you.

(Al Maeda: 4)

The meaning of the Prophet (S)’s position here is to provide a religious view on a matter that arises. It becomes the source of *Shariah* knowledge and reference for Muslims when they seek clarification on any religious matter; therefore, the task of a mufti is to give the proper interpretation of the text and relevant Islamic ruling to the Muslim community because Allah guides the Muslim to do so and acquire knowledge from them. Allah says:

”فَاسْأَلُوا أَهْلَ الذِّكْرِ إِنْ كُنْتُمْ لَا تَعْلَمُونَ“ (سورة النحل: ٤٣).

“Ask the followers of the Remembrance if ye know not”

(An-Nahl: 43)

Therefore a Mufti is entitled to this position because of the following:

- From a *Shariah* point of view, ifta (giving a *fatwa*) is informing the mustafti (person who asks) about the rule of God concerning the case presented.
- The task of ifta was given to the prophets throughout the history of mankind starting from the day that God created the universe and will remain until the Day of Judgment.
- The Messenger of God (S) left the *Shariah* as a code of life for Muslims to implement it in their lives and daily activities. The scholars have been given the task to carry out this mission and deliver the word of Allah through the use of *Shariah* guided by *fatwa* from competent scholars.
- The Prophet (S) had the task to spread the rules of *Shariah* and explain its goals and objectives universally. Therefore, after his death, the scholar of *Shariah* is qualified to carry out this task.
- The Prophet (S) after his death did not leave property or wealth but he left the knowledge. In turn, the scholars have inherited the knowledge of the Prophet (S). The Prophet (S) has explicitly mentioned it by saying that the scholars are the inheritors of the prophets.

”العلماء ورثة الأنبياء“ رواه أبو داود، الترمذي، ابن ماجه، وابن حبان
في صحيحه.

- This task of giving *fatwa* and explaining the issues of religious matters was well known and practiced even during the life of the Prophet (S). The companions who were scholars were carrying out this task; for example, Ali, Muad ibn Jabal, Ibn Abbas, Ibn Masoud and others.

4.2 Conditions of mufti in Islamic finance

There are some conditions that must be fulfilled in order to qualify for the position of *mufti*. It should be noted that currently the function of *fatwa* in Islamic finance is handled by the *Shariah* advisory who provides consultancy and advises to the financial institutions and Islamic banks. As a result of that, they issue *fatwa* and resolutions pertaining to various *Shariah* issues in Islamic finance. The conditions that

should be fulfilled are Islam, Sanity, Puberty, Piety and just (*al adalah*) and Intelligence.

5. Qualification and knowledge requirement for mufti in Islamic finance:

A Mufti should be *mujtahid* because his function is to issue an Islamic ruling for unclear matters needed by the *mustafti*. In order to do so, the person must be qualified for this position and be capable enough to handle this task. Some qualifications are required in a *mufti* to exercise *ijtihad* are Knowledge of *al-Kitab* (the Holy Quran), the knowledge of *Sunnah*, Knowledge of *Ijama'* and *klaf* (consensus and disagreement), Knowledge of the Arabic language, Knowledge of *Isul Fiqh* (Islamic jurisprudence), Knowledge of *maqasid al Shariah* and the objectives of *Shariah* in Islamic finance and Knowledge of Islamic finance.

6. Importance of fatwa and its roles in Islamic banking and Finance

Fatwa plays a crucial role in Islamic finance from the *Shariah* perspective by regulating the market by producing the relevant Islamic rules, *Shariah* standards and regulations. These resolutions and standards represent the platform of the Islamic finance industry. *Fatwa* has a significant role in Islamic finance. This role can be highlighted in the following:

- i. Settling unclear issues in banking and finance by issuing Islamic rulings.
- ii. Ensuring *Shariah* compliance of all financial transactions with the rules and principles of *Shariah*.
- iii. Producing resolutions and standards when needed by the industry.
- iv. Distinguishing what is lawful and what is unlawful in the financial transactions for banking and finance.
- v. Ensuring that the requirements of Islamic law are fulfilled when new products are created before marketing the product.
- vi. Obviously the marketability of any Islamic product in Islamic banking depends upon the approval of the *Shariah* advisory that is a form of *fatwa* before launching the product into the market place and before introducing it to the public.

7. Methodology of *Fatwa* in Islamic finance:

Fatwa in Islamic finance is part of the development of the Islamic legislation throughout history. There is no doubt that the *fatwa* in Islamic finance represents part of the Islamic law in *Shariah*. However, in order to enhance the *fatwa* in Islamic finance, the scholars in this field represented by the *Shariah* advisory, should benefit from the sound methodology and accurate approaches of the various schools of law and also take into account the different approaches of the independent scholars of the *ummah* at large in *fatwa* and *ijtihad*.

The *fatwa* in the area of Islamic finance becomes a vital duty due to the fast growth of the Islamic finance industry and also because of the implication of the *fatwa* on the financial activities of the Islamic finance institutions. With the consistent and daily demand of *fatwa* from relevant parties in the industry, both individuals, groups and corporate, *fatwa* becomes driven by the market demand. The Islamic finance market appreciates the *fatwa* as one of the important pillars in the Islamic finance industry to ensure a proper function of the financial institutions in Islamic finance. Furthermore, it represents one of the very important organs in corporate governance of Islamic financial institutions. However, in order to ensure the effectiveness and efficiency of *fatwa* in Islamic finance, it should be established on a strong methodology to ensure the accuracy and soundness of the Islamic ruling and resolutions and give as result of that the credibility to the Islamic finances institution. What is greatly needed is to have a proper structure of a standard methodology which can provide an appropriate procedure in deriving the Islamic ruling and *fatwa* according to Islamic jurisprudence discipline. In the structured methodology, a few steps, stages and technical tools must be observed by a mufti or *Shariah* advisory to ensure the issuance of sound *fatwa* that will realize the objectives of *Shariah* in Islamic finance. It is important to note here that it is not necessary for the qualified person who issues the *fatwa* to be an official mufti, appointed by the state, but he can be an independent jurist or a qualified and competent scholar as long as he fulfills the requirements and the qualifications of *ijtihad* as stipulated by the Scholars of Islamic jurisprudence. However, the authority regulated the function of the *fatwa* in Islamic finance market by

setting framework, rules and regulations, in case of Malaysia jurisdiction it is reflected in GPS1 guidelines of bank Negara.

7.1 The major rules governing the *fatwa* and the mufti in Islamic finance

There are some rules and governance which must be observed and highlighted to the parties involved in issuing a *fatwa* to the relevant parties in the Islamic finance industry:

- i. A Mufti/*Shariah* advisory must follow a clear, acceptable and accurate methodology in providing a *fatwa* or Islamic ruling. It is important that prior to that he has a full understanding of the case presented to him in order to issue an accurate *fatwa*.
- ii. A Mufti or *Shariah* advisory must seek easiness in a *fatwa* and take into account the conditions of the *mustafti*. (the person who is seeking the *Shariah* opinion).
- iii. Accommodation of the easy way in issuing *fatwa* does not mean changing the *Shariah* ruling and adopting the weakest *Shariah* opinion and rules.
- iv. The objective of *fatwa* is to moderate the problems by careful use of licenses.
- v. A Mufti or *Shariah* advisory should be flexible in *fatwa* by not being restricted to a specific School of Law but rather to seek the strong *Shariah* opinions and the appropriate *fatwa* for the new case under investigation and review.
- vi. If the mufti or *Shariah* advisory is not under pressure to issue the *fatwa* on the spot, he can defer the issuance of the *fatwa* once he is able to exercise *ijtihad* or by consulting other scholars and jurists in order to have a better understanding of the case. He can issue a *fatwa* in the future when he is able to do so.
- vii. It is better to have a collective *fatwa* through joint efforts (*ijtihad jamai*) and consultations because the outcome of resolution will be closer to the *Haq*.
- viii. A Mufti or *Shariah* advisory should take the task of *fatwa* in a very serious manner and employ his best effort while exercising *ijtihad* by engaging himself actively in deliberating and reviewing the *Shariah* issues.

- ix. It must be understood that issuing *fatwa* can expose the Islamic banks and the financial institutions to very serious financial obligations. Therefore professional knowledge, skills and attitude of competence, due care and diligence are expected of the *Shariah* advisory who is issuing resolutions.
- x. Obviously the participation of potential investors in a business depends on the *Shariah* advisory endorsement who validates the investment from the *Shariah* point of view and makes the revenue *halal* and permissible. Therefore, the investors' accountability to God is shouldered by the *Shariah* advisory.

7.2 Methodology of *fatwa* in Islamic finance prior to issuing a *fatwa* and resolutions:

This methodology is applied before issuing the *fatwa*.

7.2.1 Complete understanding, full knowledge and adequate details of the case raised by *al mustafti*:

A Mufti/ *Shariah* advisory should have a complete understanding and full knowledge about the case that is to be the subject of a *fatwa*. This will include details and specific peculiarities of the new case which have been raised by the *mustafti*. The full knowledge will enable the mufti/*Shariah* advisory to provide accurate Islamic ruling through an appropriate *fatwa* procedure. Otherwise, there will be some important elements that will be missed out which can lead him to confusion, making erroneous decisions and a wrong interpretation of his *fatwa*. On the other hand, it is the duty of the *mustafti* whether he is an individual, businessman, entrepreneur, or Islamic financial institution to furnish in full details and the required information. The *mustafti* should understand that the *fatwa* issued for him is based on his full disclosure of all information and description provided by him and not based on evidence provided by the mufti/*Shariah* advisory because it is a *fatwa* not judgment of the court.

7.2.2 Full understanding of the *mustafti's* conditions and circumstances.

The *fatwa* is based on a 'case by case' procedure and this specific requirement is pertinent since it has to relate to the particular case with specific conditions provided by *al mustafti* based on his description and illustration. The mufti must fully understand the case raised by *al mustafti* including the normative conditions pertaining to his case as well as whether the *mustafti* is an individual person, Islamic banks or financial institutions. The reason being that in order to enable the mufti to issue an accurate *fatwa*, the *mufti* should understand that his *fatwa* can be affected by the surrounding circumstances of the case, the normative standards of the case, the position of the *mustfati* himself and so it will follow that the Islamic ruling can take a different ruling depending on the criteria and the elements involved in the case. To illustrate this, the Islamic bank will be taken as an example where it can be the holder of a client account, either *wadiah* or *mudarabah* account. It can act as an entrepreneur/*mudarib* and also be a capital provider/*rab al mal* if the capital is provided to other parties. The capital of *mudarabah* can be from its funds and from depositors account from the two tier *mudarabah*. For any position that the bank holds as described above, there will be implications in the areas of profit, loss and liability whilst the *Shariah* ruling itself will vary accordingly.

The conditions of the financial institution can be articulated in the form of a proposal with details of their requirements to enable the mufti/*Shariah* advisory to issue an Islamic ruling in accordance with the *Shariah* to satisfy the *mustafti*.

7.2.3 Inquiring further information and getting additional clarifications on a case presented in order to have a comprehensive picture, if the illustrations of *al mustafti* is not clear.

As we mentioned earlier, the *fatwa* is based on the information and description provided by *al mustafti* where it is incumbent on him to provide adequate information to help the mufti/*Shariah* advisory perform his duty. However, in such a case where the mufti/*Shariah* advisory feels that the information is insufficient or inadequate for him to issue the *fatwa* due to some missing elements in the case, his duty is to hold or suspend the *fatwa* until all elements of the case are clear and fully provided and well described. The mufti/*Shariah* advisory has the right to ask for further information from the *mustafti* to enable him to issue a clear statement and comprehensive Islamic ruling on the case. This inquiry and clarification of the mufti might be in the form of verbal questions or request for some official banking documents to be provided for a particular transaction for further checking, review and investigation. The *mustafti* must comply with the demand of the mufti/*Shariah* advisory in order to enable him to issue a reasonable resolution.

7.3 Responsibility of the Islamic Financial Institution as *mustafti*:

The Islamic bank and the Islamic financial institution as *mustafti* and seeker of the Islamic ruling should deal with the mufti/*Shariah* advisory in such a manner as to facilitate his task and duty and make his function smooth. According to the guidelines of the Central Bank of Malaysia, the Islamic financial institution is responsible to facilitate the function of the *Shariah* advisory in the following manner as stipulated below:⁶

⁶ Guideline on the governance of Shariah committee for the Islamic finance institution, p. 9.

7.3.1 To refer all *Shariah* issues to the *Shariah* Committee

The Islamic financial institution must refer all *Shariah* issues in its business operations to the *Shariah* Committee for advice. The submission for an advice or a decision must be made in a comprehensive manner for an effective deliberation by the *Shariah* Committee. This will include explaining the process involved, documents to be used and other necessary information.

7.3.2 To adopt the *Shariah* Committee's advice

The Islamic financial institution is required to adopt and take necessary measures for the full implementation of the *Shariah* Committee's advice.

7.3.3 To ensure that product documents are validated

The Islamic financial institution shall obtain validation of the *Shariah* Committee relating to *Shariah* issues in all product documentations.

7.3.4 To have a *Shariah* compliant manual

The Islamic financial institution shall ensure that the *Shariah* Compliance Manual is endorsed by the *Shariah* Committee.

7.3.5 To provide access to relevant documents

The Islamic financial institution must provide necessary assistance to the *Shariah* Committee. The *Shariah* Committee must be given access to relevant records, transactions, manuals or other relevant information, as required to perform their duties. For this purpose, the *Shariah* Committee members are granted exemptions from the secrecy provisions under the respective legislations.

7.3.6 To provide sufficient resources

The Islamic financial institution must provide the *Shariah* Committee with sufficient resources, such as budget

allocations, independent expert consultation, reference materials and trainings. It is also the duty of the Islamic financial institution to familiarize the *Shariah* Committee with its operations and business. The abovementioned responsibility of the *mufta* will greatly facilitate the duty and task of *Shariah* advisory.

7.4 Methodology of *fatwa* in Islamic finance in issuing the Islamic ruling:

To ensure an accurate process of issuing Islamic ruling there is a methodology to be applied which will be described below as follows:

7.4.1 Consideration of the Islamic primary sources and secondary sources in issuing *fatwa*:

The mufti/*Shariah* advisory must refer to the Islamic sources of law as the highest references and sources for Islamic finance to issue a *fatwa*. The sources consist of two major categories of primary sources, which are agreed upon amongst the majority of the Muslim jurists and the secondary sources as well. The first category consists of the Holy Quran, the Holy *Sunnah* (tradition of the Prophet, peace upon him), the consensus (*ijma'*) and the analogy (*Qiyas*). If the mufti cannot derive the *fatwa*/Islamic ruling from the four primary sources, then he should refer to the next secondary sources, the techniques of legal reasoning implemented in the *ijtihad* process. These secondary sources are: juristic preference (*al-istihsan*), practices of people of Madina (*amal ahl al-madinah*), consideration of public interest (*al-istislah*), *maslahah mursalah*, general customary practices (*al-'adah*), presumption of continuity (*al-istishab*), *saad al-dariah* (blocking the lawful means to an unlawful end) and the Companion's opinion (*qawl al-sahabi*). Within the framework of the above Islamic sources, the mufti/*Shariah* advisory will be able to provide a clear explanation for the unclear cases that may arise in Islamic finance. It is important to note that each of the mentioned

sources have their particular conditions and a specific approach must be observed during the exercise of *ijtihad*.

7.4.2 Issuing *fatwa* through a valid examination of the legal Islamic sources:

The abovementioned Islamic sources must be consulted as major sources through which a valid examination process can be undertaken. The understanding of the valid examination process can be gleaned from the content of each source as presented by the Muslim scholars of Islamic jurisprudence. Therefore, the mufti/*Shariah* advisory should observe the terms and conditions for each particular source that he is depending on in issuing the *fatwa*. The procedure of *ijtihad* should be within the principles and rules of *Shariah* without contradicting any Islamic ruling or *Shariah* text.

For example, if the mufti refers to the *maslahah* as a source to issue a *fatwa* for Islamic banks, he should consider some requirements of the *maslahah* as follows:

- i. *Maslahah* or public interest (*al-istislah*) should be understood as one of the important sources in Islamic jurisprudence based on the reasoning process and the mufti/*Shariah* advisory must understand that there are three (3) types of *maslahah*, namely:
 - *Maslahah* that is acknowledged by the Lawgiver. This type of *maslahah* must be implemented and cannot be ignored under any circumstances.
 - *Maslahah* that is not acknowledged by the Lawgiver. This type of *maslahah* is totally rejected and cannot be accommodated to extract *fatwa* based on it.
 - *Maslahah* is neither acknowledged by *Shariah* nor rejected. This type of *maslahah* is known as *maslahah mursala*.

The mufti/*Shariah* advisory may refer to this as a source of law and will depend on it in exercising *ijtihad*. However to ensure a valid implementation of this source of law, the

mufti/*Shariah* advisory should observe the valid examination of these sources and take into account the following requirements of the *maslaha mursalah*. The requirements stipulated by the scholars of Islamic jurisprudence are as follows:

- i. Make sure that the new principle formulated based on *maslahah* does not clash with the Text or alter the implication of a Text.
- ii. Make sure that the new principle does not clash with the existing principles and propositions of Islamic law.
- iii. Make sure that the new principle is within the purposes of Islamic law as recognized by the *Shariah*.

With the fulfillment of these requirements and conditions in *maslahah mursalah* the mufti/*Shariah* advisory will be able to engage himself actively in deliberating the *Shariah* issues and can issue a *fatwa* accordingly.

7.4.3 Processing *fatwa* according to the requirement of *ijtihad* in Islamic jurisprudence.

The mufti/*Shariah* advisory should follow the process of *ijtihad* in issuing a *fatwa* according to the Islamic jurisprudence requirement and standards because there is no difference between *fatwa* and *ijtihad* in this aspect. The task of mufti/*Shariah* advisory or *mujtahid* is to provide an Islamic ruling or *fatwa* through the Islamic jurisprudence process known as *ijtihad*. In this context, the Muslim jurists did not differentiate between the mufti and *mujtahid*. The only difference is that the mufti has an official position and usually is assigned to a particular task to do so by the authority (government). Whereas, the *mujtahid* does not have this official position. Therefore, if the authority discharges the mufti from his official position, he can still exercise *ijtihad*, thus discharging him from his position will not disqualify him from exercising *ijtihad*. In this regard, any competent scholar who is taking the position of issuing Islamic ruling must observe the process and requirements of *ijtihad* as stipulated by

the scholars of Islamic jurisprudence, whether he is a mufti or *Shariah* advisory.

The *Mujtahid*, *mufti* or *Shariah* advisory practice three types or modes of *Ijtihad* which are: ⁷

- **The first mode:** The *Mujtahid* will stay as he can to the sources (al Quran and Sunnah). He should try to find an explanation for the difficult or unelaborated words from the texts themselves. However he may move to other sources like the meaning of words in literature and use the linguistic aspect as tool for interpretation. The sources may not indicate the required meaning through a plain reading, therefore he can use other techniques to deduce hukm which is called *dalalat*.
- **The second mode:** When the second is exhausted by the *Mujtahid* and he cannot found hukm, he turns to *qiyas* (Analogy). This mode of *ijtihad* is confined to strict types of analogy. These are called *qiyas al ma'na* and *qiyas al 'illah*. Certain loose forms of analogy like *qiyas al shabah* or analogy of resemblance are rejected by some jurist.⁸ The reason why the *mujtahid* stick to the strict methods analogy is to stay close to the intention of the Lawgiver. If very loose methods are applied, the color of the Islamic legal system may be lost.
- **The third mode:** The second mode discussed is confined to the extension of the law from the individual texts, while the third mode refers to all the secondary sources considered collectively. This means the *Ijtihad* process is undertaken more in line with the spirit of the law and its purposes rather than the confines of individual texts. In this mode, the *Shariah* advisory will use other techniques and sources of *Ijtihad* such as *istihsan* and *Maslahah* to deduce hukm. However, *Maqasid Al* is always

⁷ Imran Ahsan Khan Nazyee, *Islamic jurisprudence*, p. 275.

⁸ *Ibid*.

taken into account in every aspect of *Ijtihad*.⁹ The third mode of *Ijtihad* provides the *Mujtahid* with the opportunity to generate new principles, provided he observes a prescribed methodology and fulfils the conditions imposed for such *Ijtihad*.

According to jurists, it is not enough for a *Mujtahid* to complete these three circles of mode. There are some other processes involved to complete it. These processes must be followed by *mujtahid*.

- Before involving in the *Ijtihad* process, the *mujtahid* must fulfill the qualifications necessary for *Ijtihad*.
- The *mujtahid* must understand the different forms of elaboration of the texts.
- The *mujtahid* exercises all three modes of *Ijtihad*, if necessary, in his effort to derive the law from the sources
- The *mujtahid* understands abrogation and identifies the occasions on which rules have been replaced
- The *mujtahid* exercises preponderance (*tarjih*) and reconciliation among apparently conflicting evidences.¹⁰

7.4.4. Ensure that the *fatwa* is fully complied with in the case that has been arisen by al *mustafti* and realize *Manat al hukm* (the underlying cause of the Islamic ruling in that particular case).

This is a very important stage whereby the mufti/*Shariah* advisory should observe while processing *ijtihad*. This methodology will ensure that the *fatwa* will be fully in compliance with the issue raised by the *mustafti* by

⁹ The *Mujathid* must fully understands the doctrine of Maqasid al Shar'ah because without understanding this doctrine , the hukm will not fulfill the objectives of Islamic law which in regard of to protect religion, life, intellectual, progeny and property. See Hallaq, W (1997), "A history of Islamic Legal Theories", UK: Cambridge Press, pp 199-205

¹⁰ Imran, Islamic jurisprudence, p. 263.

realizing *manat al hukm* or the underlying cause of the Islamic ruling for that particular case. This methodology comes under applying *ijtihad* in Islamic jurisprudence.

7.4.6. Consideration of the arguments of the minority of Muslims jurists and flexibility in accommodating their *Shariah* opinions when applicable.

A Mufti/*Shariah* advisory in Islamic finance should have the flexibility in accommodating the various *Shariah* opinions in issues pertaining to Islamic finance. In fact, part of the duty of the mufti/*Shariah* advisory is:

1. To find solutions to different problems faced by Islamic finance.
2. To provide explanations of unclear matters in Islamic finance.
3. To overcome the existing problems in Islamic finance by settling unclear issues in banking and finance.
4. To show the rule of *Shariah* by issuing *fatwas* when is needed.
5. To show what is lawful and what is unlawful in the financial transactions within banking and finance.
6. To ensure that the requirements of the Islamic law are fulfilled especially when a new product is created.

Obviously, all the abovementioned requires flexibility in *Shariah* opinions. Flexibility is one of the norms of the *Shariah* to be adopted by the scholar/*Shariah* advisory to enable him to address the suitable Islamic ruling to each case he faces in Islamic finance. The wisdom behind adopting this methodology is to seek the public benefit for the *ummah* and the interest of the Islamic finance, as well as to enhance the Islamic financial system globally. However, when the *Shariah* advisory supports one of the *Shariah* opinions, he should implement the preferred approach as demonstrated by the scholars of Islamic jurisprudence and support his preference with valid arguments and sound evidence without any violation of *Shariah* rules and principles.

7.4.7. Consideration of the various *Shariah* opinions which enhance the Islamic finance.

Islamic law is very rich with *Shariah* opinions from competent scholars and recognized Muslim jurists based on different interpretations. These differences in legal *Shariah* opinions on the same subject matter in Islamic finance give flexibility to the financial transactions conducted in the market, which also helps to allow business operations to run very smoothly. The various *Shariah* opinions give flexibility to accommodate the various business proposals in Islamic finance; however, we can only observe the value of this fact when we look at the rapid development in Islamic finance industry today and the growth of innovations and sophisticated tools and instruments in the financial sector.

However, it may be that some other thinkers view the issue differently and may say that these various *Shariah* opinions on the same subject matter tend to confuse the public and widen the gap between Islamic banks and finance, creating conflict between them. It is within the Islamic financial system's quest to look for one universal standard for worldwide transactions which can be adopted and implemented by players in the relevant industry globally. However, in a very brief statement we can say that there is a difference between providing *fatwa* or *Shariah* opinions and creating a *Shariah* standard which can govern the Islamic banks globally.

In fact, the various opinions of *Shariah* on the same subject matter will give the scholars of standardization more choice and flexibility in selecting the strong *Shariah* opinion which can accommodate the banking and financial proposal in the current business scenario. However, if it is assumed that there is only one *Shariah* view in all matters in Islamic finance (which is very hard to achieve for the subject matter of the issue under investigation), this will lead to a very restricted legal system and framework of Islamic finance within a very limited business scope. Meanwhile, it will not give Islamic finance the opportunity to expand and compete in the global market.

7.4.8. Giving careful *fatwas* and postponing issuing *fatwas* in the future when the case presented needs further research

The mufti/*Shariah* advisory should know that it is not compulsory for him to issue a *fatwa* on the spot, immediately upon the request of the Islamic financial institution. He can request more time to investigate the case so as to issue an accurate *fatwa* in the future. This approach depends on the nature of the case that is whether it is complex or complicated, the mufti/*Shariah* advisory is not able to take a position immediately and issue a *fatwa*, so he can postpone the *fatwa* for further research in order to clarify some particulars related to the case presented. This is the practice of the competent scholars throughout the history of *fatwa* and Islamic legislation.

7.4.9. Maintaining the middle way in *fatwa* and applying justice and fairness.

A Mufti/*Shariah* advisory should adopt the middle way in issuing a *fatwa* by observing the general objectives of *Shariah* and the general rules and principles of Islamic law in legislations. *Islam* is a religion of mercifulness and *Shariah* should be applied and referred to on this solid ground for each *fatwa*. Therefore, the issued *fatwa* in Islamic finance should not bring harm or hardship to the industry or to the society or to the business sector respectively but a *fatwa* usually brings mercy, blessings, prosperity, equity and justice. In this context, it is very important for the *Shariah* advisory to look at the consequences of the *fatwa* and the impact of the resolution on the mustafti before the announcement of the *fatwa*, otherwise it might be subject to further review and adjustment.

Allah says: “Ramadhan is the (month) in which was sent down the Qur’an, as a guide to mankind, also clear (Signs) for guidance and judgment (Between right and wrong). So every one of you who is present (at his home) during that month should spend it in fasting, but if any

one is ill, or on a journey, the prescribed period (Should be made up) by days later. God intends every facility for you; He does not want to put to difficulties. (He wants you) to complete the prescribed period, and to glorify Him in that He has guided you; and perchance ye shall be grateful.

”شَهْرُ رَمَضَانَ الَّذِي أُنزِلَ فِيهِ الْقُرْآنُ هُدًى لِّلنَّاسِ وَبَيِّنَاتٍ مِّنَ الْهُدَىٰ وَالْفُرْقَانِ فَمَن شَهِدَ مِنْكُمُ الشَّهْرَ فَلْيَصُمْهُ وَمَن كَانَ مَرِيضًا أَوْ عَلَىٰ سَفَرٍ فَعِدَّةٌ مِّنْ أَيَّامٍ أُخَرَ يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ وَلِتُكْمِلُوا الْعِدَّةَ وَلِتُكَبِّرُوا اللَّهَ عَلَىٰ مَا هَدَاكُم وَلَعَلَّكُمْ تَشْكُرُونَ“ (البقرة: 185).

This verses show that *Shariah* is a mercy for human beings and flexible in its rules and principles that takes into account the different circumstances of people.

7.4.10. Knowledge of *maqasid al Shariah* in order to be applied in *ijtihad*

Maqasid al Shariah is a very important discipline in Islamic jurisprudence which helps a mufti/*Shariah* advisory to improve his *ijtihad* in Islamic finance. The observation of *maqasid al Shariah* will enhance the *fatwa* and guide the mufti/*Shariah* advisory to a better understanding of the current issues in Islamic finance. On the other hand, the objectives of *Shariah* in Islamic finance are basically under the framework of *maqasid al Shariah* itself. *Maqasid al Shariah* in *ijtihad* and *fatwa* can be taken as a measurement to weigh the *fatwa* and ensure its accuracy and soundness. Therefore, a mufti/*Shariah* advisory should consider *maqasid al Shariah* in each *fatwa*. It is very important that *maqasid al Shariah* must be observed and implemented in all stages of *ijtihad* as it is a guideline for the mufti/*Shariah* advisory to ensure the soundness of the *fatwa*.

Maqasid al Shariah is considered as a standard and parameter for the mufti/*Shariah* advisory to help him to

monitor and govern the process of each *fatwa*. Obviously when we talk about *maqasid al Shariah*, we should take into account its three major elements:

1. The essentials or necessities (*al-daruriyyat*).
2. The needs.
3. The complementary.

However, due to the importance of *maqasid al Shariah*, the mufti/*Shariah* advisory should have a deeper understanding of its concept for a proper implementation in *fatwa*. *Maqasid al Shariah* consists of the following:

1. The essentials, necessities (*al-daruriyyat*): Basically *al-daruriyyat* refers to the necessities and the essentials that people depend on and without them the whole society will be in total disaster and disorder and end in total collapse.¹¹
2. The needs: This category refers to the supporting needs and interests required in order to have smooth life.¹²
3. The complementary: This category refers to the interest which provides improvement in the society and leads to a better life.¹³

The mufti/*Shariah* advisory should observe the sequence of these categories in each *fatwa* and consider the priority of the essentials *al daruriyyat* because this category governs the others. The essentials are the matters on which the religion and worldly affairs of the people depend. As we mentioned, *al-daruriyyat* refers to the necessities and essentials that the people depend on and without them the whole society will be in total disaster, disorder and end in total collapse. The important criteria of this category are:

¹¹ Ibn Ashur, *Maqasid al Shariah*, p. 210. For further reading in English see: Mohamad Akram Laldin, Introduction to Shariah and Islamic jurisprudence, p, 18.

¹² Ibn Ashur, *Maqasid al Shariah*, p. 214. For further reading in English see: Mohamad Akram Laldin, Introduction to Shariah and Islamic jurisprudence, p, 30.

¹³ Ibn Ashur, *Maqasid al Shariah*, p. 215. For further reading in English see: Mohamad Akram Laldin, Introduction to Shariah and Islamic jurisprudence, p, 30.

1. Their neglect will lead to total disruption and disorder.
2. This category consists of five universal fundamentals and they must be protected.
3. Individuals and/or government authorities must safeguard this category.
4. These five universal fundamental principles have been addressed in all revelations.
5. There is a general consensus from all religions that these five *daruriyyat* must be protected in all cases.¹⁴ These values include the five fundamental matters in life:
 - Protection of Religion (al-din),
 - Protection of Life (al-nafs),
 - Protection of Family (al-'ird - nasl),
 - Protection of Intellect or Mind (al-'aql),
 - Protection of Property (al-mal).¹⁵

7.4.11. Referring to legal maxims in supporting the *Shariah* ruling

Legal maxims represent wordings which have been established occasionally by competent scholars from different Schools of Law and have been refined by others jurists throughout the ages. Therefore, legal maxims play an important role in *ijtihad* and *fatwa*. They help the mufti and *Shariah* advisory to encapsulate and understand the details of Islamic law in very fast manner. They also help to derive Islamic ruling and have a very fast access to the Islamic law where no explicit provision exists.

The five leading Legal Maxims are:

1. Acts are judged by their Goals and purposes. (Al Umuru Bimakasidiha)
2. Certainty is not to be overruled by doubt. (Al yaqin la yuzal Bi al-shaq)

¹⁴ Ibn Ashur, *Maqasid al Shariah*, p. 210. For further reading in English see: Mohamad Akram Laldin, Introduction to Shariah and Islamic jurisprudence, p, 18.

¹⁵ For more details see: Ahcene Lahsasna, *Maqasid al Shariah*, p 19.

3. Harm must be eliminated (Al Darar Yuzal)
4. Hardship begets facility. (Al Mashaqqah Tajlib Al Taysir)
5. Custom is basis of judgments. (Al-Adah Muhakkamah)

Besides the above five leading legal maxims, there are other legal maxims very relevant to the business and finance such as *al ghum bil gurm* and *al kharaj bil daman* which means that the entitlement to revenue depends on a corresponding liability for loss and other relevant legal maxims.

It must be understood that each of the above leading five legal maxims has rules and principles that must be observed by a mufti and *Shariah* advisory in order to implement the relevant legal maxims in an accurate manner.

7.4.12. Special consideration of the objectives of *Shariah* in business transactions in the *fatwa*.

Since *fatwa* is related to Islamic finance, mufti/*Shariah* advisory should have a full understanding of the objectives of *Shariah* in Islamic finance. These objectives provide an appropriate guideline and sound procedure to issue *fatwa* within the main objectives of *Shariah*. It is fully understood that every single *fatwa* in Islamic finance will realize the objectives of *Shariah*, either explicitly or implicitly.

The objectives of the *Shariah* in financial transactions refer to the overall goals of *Shariah* in all kinds of activities. *Shariah* aims to achieve various goals which bring to the *ummah* all benefit, public interest, and realize peace, prosperity, happiness and wealth. However, these objectives are not confined to one type of financial transaction, but include all aspects of financial activities. These objectives seem very specific as they deal with finance but they can be considered as integral objectives when their universal goals are considered. This is because

such objectives do not deal with specific types of rulings, but they are related to almost all types of financial transactions and involve all activities of trading, profit making, spending and consumption.

The objectives of *Shariah* in financial activities are:

1. The circulation of wealth and the continuity of its circulation.
2. The investment of wealth and the continuity of its investment.
3. The achieving of comprehensive communal prosperity.
4. The financial transparency.

7.4.13. Observation of the *Shariah* principles in Islamic finance as a guideline in *ijtihad* and issuing *fatwa*.

The mufti/*Shariah* advisory should understand the major Islamic principles in Islamic finance in order to issue a *fatwa* in a related matter or provide an explanation or justification on an Islamic ruling in Islamic finance. These principles are well established in Islamic finance and they are *Shariah*-based principles and they have been adopted by the Islamic banks and the Islamic financial institutions globally. Therefore it is very important that the issuing *fatwa* should conform to those principles and take them into account during the process of providing an Islamic ruling. The five categories which consist of the *Shariah* principles in Islamic finance are:

1. The trade based principle:
2. The profit-sharing principle.
3. Fee-based principles:
4. Free of charge principles.
5. Lease base principle
6. Supporting contract

7.4.14. Observation of the prohibited elements in Islamic finance in issuing a *Fatwa*

The *fatwa* must be free from any prohibited elements

in *Shariah*. Obviously, whenever there is a prohibited element in a particular case, the *fatwa* will be leading to an unlawful ruling. Whenever the case is free from any prohibited elements, the *fatwa* will lead to a lawful ruling. Therefore, the mufti/*Shariah* advisory should be guided by the prohibited elements of *Shariah* in Islamic finance included in the duty is the responsibility to eliminate those prohibited elements and suggest alternative elements which are lawful to ensure the *Shariah*-compliance of the product.

The major prohibited elements that the mufti/*Shariah* advisory should take into account while exercising *ijtihad* to issue a *fatwa* are: *Riba Maisir* or gambling, *Gharar* (Uncertainty/Risk taking), Duress, Mistake or *Ghala*, Deception or *Taghrir* or fraud.

The mufti/*Shariah* advisory is required to observe all the above-mentioned prohibited elements and ensure that the product and the transaction subject-matter of the *fatwa* is free from the above mentioned elements. The existence of any prohibited elements in *Shariah* will render the transaction and the product invalid from *Shariah* perspective. The prohibited elements can be identified by careful investigation of the case or careful review of the product and full understanding of the concept and the particulars of the subject matter of *fatwa*.

7.4.15. Adequate knowledge in Islamic finance

Since the *fatwa* is related to Islamic finance, the process of *ijtihad* is confined to this particular discipline. Therefore, it is required that the mufti/*Shariah* advisory must have adequate knowledge in Islamic finance in order to understand the case under *fatwa* and issues the *Shariah* opinion accordingly. Understanding Islamic finance will enable the mufti/*Shariah* advisory to understand the case presented and address the solution respectively, especially if the case is complicated or consists of complex issues in business and finance. It is very important that the *mustafti* and the *mufti* speak the same language and understand

each other to ensure that the *fatwa* is answering the right question. The knowledge of Islamic finance ensures the establishment of a proper dialogue and smooth communication.

7.4.16. Understanding the special features of trade in Islam, and business ethics and norms of Islamic finance before issuing *fatwa*

The mufti should understand the special features of the business ethics of Islamic finance before issuing a *fatwa*. This should be a part of the methodology of *fatwa* in Islamic finance today. These special features distinguish Islamic finance from conventional finance. Meanwhile, these features are deemed to be guidelines for the *fatwa* in Islamic finance. The task of *fatwa* becomes easier by taking into account these features and principles.

For example, the conventional system does not differentiate between *riba* and interest in their banking system. They are treated synonymously, therefore the two terms are used interchangeably in their banking system; whereas, the scenario is completely different in the Islamic financial system.

The major features in Islamic finance can be described as follows:

1. Differentiating between sale and interest-based transactions in banking and finance.
2. Rejection of the idea of a fixed rate of return on financial capital.
3. Insistence on asset-backing financing in banking and finance.¹⁶
4. Using money as the medium of exchange not as commodities.¹⁷
5. Valid gain on investment.
6. Entitlement in profit – with risk and responsibility.

¹⁶ See: Muhammad Taqi Usmani, Introduction to Islamic finance, p. 18.

¹⁷ For further details, see: Hifzur Rab, Economic Justice in Islam (Monetary Justice and the way out of interest, p. 137.

7. Islamic banks dealing in goods not money.
8. Transparency in financial transactions and mutual agreement on the clauses on documentation (contract agreement).

Beside these features, there are other important components under the name of business ethics that should also taken into account as well . These include:

1. Justice and fair dealing
2. Mutual cooperation and removal of hardship
3. Free marketing and fair pricing
4. Freedom from *darar* (detriment)

The above mentioned are some of the special features of trade in Islam and business ethics within the norms of Islamic finance that should be observed by the person who is issuing *fatwa*.

7.4.17. Consideration of Islamic finance custom and best practices in the Islamic market

The *fatwa* should consider the custom and best practices in the market. However, the custom should be within the framework of the *Shariah* rules and principles. If the custom of the market is free from all the prohibited elements of *Shariah* and it is not contradicting any *Shariah* text, not violating any Islamic ruling, or principles of Islamic law, the mufti is strongly advised to adopt the market custom and best practices and issue his *fatwa* within the framework of that particular custom subject to the nature of the case under *fatwa*. The general customary practices or *al-'adah* or *al urf* is one of the secondary sources that the mufti/*Shariah* advisory should refer to in order to issue a *fatwa*. From the word *urf* we understand that it is usually associated with the word *ma'ruf* (good) in texts. In this context, the *urf* is what the *Shariah* considers to be good and useful which brings the benefit to the *umma* and not what human reason or prevalent practices consider to be good without special reference to *Shariah*.¹⁸

¹⁸ See: Imaran Ahsan Khan Nyazee, Islamic jurisprudence, p. 257.

The fifth leading legal maxims support this concept. Custom is the basis of judgments (*Al-Adah Muhakkamah*). This maxim has its origin from the Quran:

“Keep to forgiveness, enjoy *urf* and turn away from the ignorant – (Sura Al 'Araf 199).

Ibn Masoud said: “What the Muslims determine to be good is good with Allah.”

One of the criteria of custom is that it must not contravene the clear stipulation of an agreement; a custom can only be applied if there is no contractual agreement made in a particular transaction. It will not be valid if it is contrary to an explicit condition.

The general rule is that contractual agreements prevail over customs. If there is any conflict between the two, it will normally be determined in the favor of the former. For example, the costs of registration in the sale of real estate or property, according to the custom, are payable by the purchaser, which includes others fees, but if there is a stipulation in the contract agreement that requires the seller to bear these fee and both contracting parties agreed to the clause stipulated, then the the contractual agreement prevails and the custom would not be used as a reference for judgement in case of a dispute settlement in this particular case compared to similar cases.

7.4.18. Consideration of *Shariah* standards in Islamic finance (AAOIFI)

The *Shariah* standards in Islamic finance have a very important role in regulating the financial system by using various parameters, instruments and standards. The appropriate standards, regulations and supervision protect the financial system and safeguard the market at large. Furthermore, the effectiveness and adequate regulatory standards ensure the stability of the financial system. In this context, the *fatwa* should observe the standards that have been established by industry players, especially AAOIFI which acts as a regulator setting body.

A careful observation of the said standards ensures the consistency of the *fatwa* and takes into account the best practices in the market. The standards of AAOIFI aim to facilitate the function of the Islamic financial institutions by providing various standards related to the Islamic banking industry. These standards can be observed as a custom of the market and best practices for Islamic banks and Islamic financial institutions as well. By adopting this approach, we can achieve in the future one unique and universal *Shariah* standard with a global feature for the Islamic financial institution. In this regard, *fatwa* plays a crucial role in the harmonization process by bridging the gap between the various *Shariah* opinions and limits the space of argument in Islamic finance. The standards of the regulators and *fatwa* should complement each other for this achievement. The AAOIFI include *Shariah* standards, accounting standards, auditing standards, governance standards and ethics.

The objectives of AAOIFI are as follows:

1. To develop accounting and auditing thoughts relevant to Islamic financial institutions;
2. To disseminate accounting and auditing thoughts relevant to Islamic financial institutions and its applications through training, seminars, publication of periodical newsletters, carrying out and commissioning of research and other means;
3. To prepare, promulgate and interpret accounting and auditing standards for Islamic financial institutions; and
4. To review and amend accounting and auditing standards for Islamic financial institutions.

AAOIFI carries out these objectives in accordance with the precepts of Islamic *Shari'a* which represent a comprehensive system for all aspects of life in conformity with the environment in which Islamic financial institutions have developed. This activity is intended both to enhance the confidence of users of the financial statements of Islamic financial institutions in the information that is

produced about these institutions and to encourage these users to invest or deposit their funds in Islamic financial institutions and to use their services.¹⁹

7.4.19. Consideration of IFSB Guideline in Islamic finance

The Islamic Financial Services Board, IFSB, based in Kuala Lumpur, was officially inaugurated on 3rd November 2002 and started operations on 10th March 2003. It serves as an international-standard setting body of regulatory and supervisory agencies that have vested interest in ensuring the soundness and stability of the Islamic financial services industry, which is defined broadly to include banking, capital market and insurance. IFSB promotes the development of a prudent and transparent Islamic financial services industry through introducing new, or adapting existing international standards consistent with Islamic Shari'ah principles and recommend them for adoption. IFSB complements of the work done by the Basel Committee on Banking Supervision, International Organization of Securities Commissions and the International Association of Insurance Supervisors. Malaysia is the host country of the IFSB.²⁰

The objectives of the IFSB are:

1. To promote the development of a prudent and transparent Islamic financial services industry by introducing new standards or adapting existing international standards consistent with *Shari'ah* principles and recommending these for adoption.
2. To provide guidance on the effective supervision and regulation of institutions offering Islamic financial products, and to develop for the Islamic financial services industry the criteria for identifying, measuring, managing and disclosing risks, taking

¹⁹ <http://www.aaofi.com/Objectives.html>. Retrieved: 18/9/2008. 10.23 am.

²⁰ <http://www.ifsb.org>.

- into account international standards for valuation, income & expense calculation and disclosure.
3. To liaise and cooperate with relevant organizations currently setting standards for the stability and the soundness of the international monetary and financial systems and those of the member countries.
 4. To enhance and coordinate initiatives to develop instruments and procedures for efficient operations and risk management.
 5. To encourage cooperation amongst member countries in developing the Islamic financial services industry.
 6. To facilitate training and personnel development and their skills in areas relevant to the effective regulation of the Islamic financial services industry and related markets.
 7. To undertake research into and publish studies and surveys on the Islamic financial services industry.
 8. To establish a database of Islamic banks, financial institutions and industry experts.²¹

In light of the sound objectives of the two regulators of the Islamic finance industry, *fatwa* can add more value by adopting the guidelines to ensure consistency of the *fatwa*, resolution guidelines and standards. However, the adoption of the standards does not mean that the mufti/*Shariah* advisory is not allowed to adopt a different *Shariah* view, but it depends on the cases and the banking products under his investigation. These can be studied on a case by case basis.

The most important IFBF publications are:

- Guiding Principles on Corporate Governance for Institutions offering only Islamic financial services (Excluding Islamic Insurance (Takaful) Institutions and Islamic Mutual Funds)
- Capital Adequacy Standard for Institutions (other than Insurance Institutions) offering only Islamic Financial Services (IIFS)

²¹ <http://www.ifsb.org/objectif.php>. Retrieved: 18/9/2008. at: 10.27 am.

- Guiding Principles of Risk Management for Institutions (other than Insurance Institutions) offering only Islamic Financial Services (IIFS)

The Guiding Principles are designed to facilitate Institutions offering Islamic Financial Services (IIFS) to identify areas where appropriate governance structures and processes are required and to adopt best practices in addressing these issues. It also aims to empower stakeholders, in particular investment account holders (IAH), with better knowledge.

7.4.20. Consideration of the international conventional standards in finance which are consistent with *Shariah* rules and principles

Shariah has very flexible laws which can accommodate various business proposals even from the conventional financial system as far as those proposals do not contradict any of the Islamic rulings in *Shariah* or violate any Islamic principles in Islamic finance. Therefore, if some of the applications, products, and standards in accounting or corporate governance in the conventional system are sound and very useful for the Islamic financial system, the *Shariah* has no objection in accepting them to be part of the Islamic financial system. However, the adoption and adaptation will be very smooth if it is related to guidelines, instruments, standards, corporate governance, accounting and some techniques tools in risk management, whereby the mufti/*Shariah* advisory after reviewing the relevant subject matter under *fatwa* should grant its permissibility, if it's free from all the prohibited element of the *Shariah*. Therefore, the mufti/*Shariah* advisory cannot issue a *fatwa* of prohibition on the ground that the subject matter is simply imported from the conventional banking and finance. A mufti is governed by the principles and rules of *Shariah in fatwa and ijtihad* regardless of the source and the nature of the cases presented.

7.4.21. *Fatwa* is confined to a particular case but it can be extended to similar cases or circulated as general Islamic ruling when it is applicable

Basically, the *fatwa* is confined to a particular case or specific subject matter, because *fatwa* obviously is issued based on questions raised by the *mustafti* who is looking for a *Shariah* opinion. Therefore, the *fatwa* is answering a particular case with particular criteria and circumstances and conditions. However, a *fatwa* can be generalized and extended to other similar cases based on the equality between the underlying causes found in the two cases by referring to the analogy as a source of law. Furthermore, the *fatwa* can be circulated as a general Islamic ruling in Islamic finance, especially if it is a result of a resolution of collective *ijtihad* from fiqh academics, *Shariah* committee, *Shariah* council, or an official *fatwa* from the mufti of the state. The nature of the body who issues the *fatwa* will give the nature of the *fatwa* implication respectively. In this context, the mufti/*Shariah* advisory should carefully observe his *fatwa* due to its implication and impact on other relevant parties.

7.4.22. *Fatwa* does not stop at issuing the ruling but it also provides solutions and alternative structures and proposals for the cases presented

The duty of a mufti/*Shariah* advisory is not only to provide the Islamic ruling in his *fatwa*, but he should also be more productive and innovative by providing solutions and alternative ideas, especially if he issues a prohibitory *fatwa*. This is very relevant if the subject-matter of the *fatwa* is structuring products in financial engineering, whereby, unfortunately, the bulk of innovation in Islamic finance is adopting and restructuring the existing products of the conventional banking. Therefore, the product imported from conventional finance is built and structured based on the conventional model and has been created and structured based on the principles and rules governing the conventional banking which incorporates the prohibited

elements in *sharia* especially usury. Therefore, the mufti/*Shariah* advisory is required, as part of his duty, to understand the product, evaluate it, analyse it, eliminate the prohibited elements, enhance it with relevant *Shariah* principles, restructure it again according to the principles of Islamic finance to be a new *Shariah*-compliant product for the benefit of the Islamic finance industry.

7.4.23. Accommodation of the Parallel Practice of the *Shariah* rules in the same banking industry

The mufti/*Shariah* advisory should not restrict the industry by one *fatwa* or one single Islamic ruling; however, he may allow other different *Shariah* opinions to co-exist, in different cases and scenarios, because a *fatwa* is issued on a case by case basis, and every mufti has his own conditions to present, the *fatwa* should be issued accordingly. If the *fatwa* today is prohibited to one particular mufti one, it might be permissible for the other one, therefore *fatwa* can take different rulings for the same case presented depending upon the circumstances of each case presented to a mufti. This approach gives more flexibility to the Islamic financial institution in the market.

7.4.24. Consideration of the principles of *al Darurah*.

The principle of *darurah* is recognized by *Shariah*, especially in *fatwa* if the case presented is surrounded by some special circumstance. A Mufti should consider this principle while he is issuing a *fatwa* by looking at the nature of the conditions of al mufti. Allah says: "He hath only forbidden you dead meat, and blood, and the flesh of swine and that on which any other name hath been invoked besides that of God. But if one is forced by necessity, without wilful disobedience, nor transgressing due limits,- then is he guiltless. For God is Oft-forgiving Most Merciful. (2: 173).

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالْدَّمَ وَلَحْمَ الْخَنزِيرِ وَمَا أُهْلَ بِهِ لِغَيْرِ اللَّهِ
فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ.
(البقرة: 173).

This principle is supported by other legal maxims such as: Hardship begets facility *al Mashaqqah tajlib Al Taysir*. The Quran says: “We hath chosen you and hath not laid upon you in religion any hardship” (22:78)

A Mufti should distinguish between *darurah* (compulsive necessity), and *haja* (need). *Al darurah* is an indispensable necessity that, if not met, may cause severe hardship resulting in loss of life, known or suspected. Hardship may be faced by al mustafti because of compulsion, distress and universal affliction (*umum balwa*), sickness or other causes.

Some of the criteria that must be considered are:

- The necessity should not be speculative nor imaginative.
- No lawful alternative should be available.
- The *fatwa* should not violate the rights of other people and should not destroy the right of others.
- There should be a very strong justification such as the protection of life or limb at the category of *daruriyyat*.
- A *Fatwa* which leads to the violation of some of rules of *Shariah* should be supported by experts in the field.

7.5. Methodology of Presenting *Fatwa* in Islamic finance

7.5.1. Providing an introduction

The mufti/*Shariah* advisory should start his *fatwa* or resolution with an introduction consisting of the background of the subject matter, articulate the issue under discussion, then provide the *fatwa* on solid evidence from Holy *Quran*, tradition of the Prophet (S) and other sources of law when applicable. A Mufti/*Shariah*

advisory is advised also to support the *fatwa* with relevant Islamic jurisprudence rules and legal maxims related to the subject matter of the *fatwa*.

7.5.2. ***Fatwa should be documented and endorsed by a mufti/ Shariah advisory***

Obviously, a mufti provides a *fatwa* in a verbal statement in different occasions depending on his position and situation. In some cases, the *fatwa* is documented by other parties rather than the mufti himself because the *fatwa* can be issued on the spot through conversation or interview and through other means of communication. The *fatwa* is usually documented in cases that are issued by an official and authorized body or if it is issued by collective *ijtihad*. In the Islamic finance context, a *fatwa* should also be documented due to the sensitive and controversial issues of Islamic finance. In addition to that fatwa will be forwarded to other parties such as central bank for further process and review for final approval.

The objectives of the documentation of *fatwa* are as follows:

1. To provide a clean statement with adequate information to the *mustafti*, whether the *mustafti* is an individual, Islamic bank, or corporate firm.
2. To enable the *mustafti* to follow the *fatwa* because most of the cases in Islamic finance, the *fatawa* is very complicated and complex due to the nature of the banking transactions which involves many financial elements, standards, applications, and tools, which need a careful analysis and sharp thinking in order to identify the case and provide it to the *mustafti* in an appropriate manner.
3. The documented *fatwa* is to avoid confusion and misunderstanding.
4. The documents remain as a reference with easy access for reference when needed.

5. It is part of documentations procedure especially for new products as requested by the authority such as the central bank in Malaysia.

7.5.3. *Fatwa* should be clear in its statement, focus and precisely described

The *fatwa* is not a project paper, article or assignments whereby the research may cover various topics and different issues with many Islamic rulings. The nature of a *fatwa* requires the mufti to present his *fatwa* in a precise manner, by providing a clear statement, focusing on the issue under discussion, and precisely describe the case associated with its *hukm* /Islamic ruling. It should be well presented and structured. If the issue or subject of the *fatwa* can accommodate different cases, the *fatwa* must include the different Islamic rulings for each case. However, it should be noted that sometimes the *fatwa* might be a result of research or outcomes of a scholarly paper or assignment such as the research of the International *Fiqh* Academy, but the *fatwa* or resolution should be provided and summarized at the end of the research.

7.5.4. *Fatwa* should provide the necessary supporting evidence for the Islamic ruling issued

The *fatwa* should be supported by sound evidences from Islamic sources. Even though the *fatwa* is the legal opinion of a competent scholar, which involve human involvement in the process, the *Shariah* opinion is derived from the text through appropriate methodology recognized and agreed upon among the Muslim scholars in Islamic jurisprudence. The process of *ijtihad* is based on recognized rules and legal framework and legal maxims which are governed by the Islamic principles of *Shariah* and Islamic jurisprudence rules. Having said that the mufti/*Shariah* advisory is not providing an Islamic ruling from his own point of view or statement according to his own perspective, but the issued statement which the *fatwa* is reflecting is the point of view of Islamic law through

that particular procedure, therefore the *fatwa* obviously is supported by *dalil* or evidence which indicates the source of the *fatwa*.

7.5.5. *Fatwa* should provide the necessary justification when there is preference *Tarjih*

The *fatwa* should provide some justification if the mufti considers specific Islamic rulings based on preference. The justification becomes strongly recommended if there are different *Shariah* opinions in the case. However, the mufti/*Shariah* advisory may prefer one of those opinions or support one school of laws by using the preference (*tarjih*) approach, which is known in Islamic jurisprudence. It is important to note that if the preference is related to the text or evidences, there are many rules in Islamic jurisprudence implemented in *tarjih*:

- The explicit meaning (*nass*) is preferred over the manifest meaning (*Zahir*).
- The elaborated meaning (*mufassar*) is preferred over the explicit meaning (*nass*).
- The *muhkam* is preferred over all other meanings.
- The rule established through a plain reading of the text (*'ibarat al nass*) is preferred over one proved through an indirect implication (*ishārat al-nass*).
- The rule established through an indirect implication (*ishārat al nass*) is preferred over one established through its implication (*dala'iat al-nass*).
- Preference is undertaken through the power of argument rather than through the number of evidences.

This approach has some sub-rules as well which are:

1. The evidences from the *Quran* and the *Sunnah* are preferred over analogy.
2. *Ijmā'* is preferred over analogy. Consensus is definitive and will be preferred over probable evidences in case of conflict. It is for this reason that al-Ghazālī states that the first thing a jurist must do,

is to find out if a consensus has occurred on the point under consideration.

3. A *mutawdtir* tradition will be preferred over a *khobar wahid*.
4. A *khobar wahid* transmitted by a Companion who enjoys a reputation as a jurist will be preferred over another *khobar wāhid* transmitted by a Companion who does not enjoy such reputation.²²

However, the task of a mufti before this process of preference is to try his best and put his maximum effort in order to reconcile the conflicting evidences when the two texts are of the same strength.²³ The mufti/*Shariah* advisory should always observe the rules of interpretation and different approaches used in preference in order to reach an accurate *fatwa* consistent with *Shariah* rules, regulation and principles and realize the objective of *Shariah* in business and finance.

7.5.6. Issuing *fatwa* without saying this is the rule of Allah or this is the rule of his Prophet (S)

When the mufti/*Shariah* advisory issues a *fatwa* in Islamic finance, he should avoid making statements by saying this is the rule of Allah or this is the rule of his Prophet (S) because the Islamic ruling in the *fatwa* is the outcome of a process of his *ijtihad* as a human being,; therefore, there is a probability of making a mistake in the *fatwa*.²⁴

7.5.7. *Fatwa* should be comprehensive covering the whole issue raised by *al mustafti*

The *fatwa* should be comprehensive in providing the answers of the questions as they are raised by the *mustafti*. The *fatwa* can be a combination of a few questions, therefore, the mufti/*Shariah* advisory is required to cover all the questions and ensure that he satisfactorily

²² Imran Nyazee, *Islamic jurisprudence*. Islamabad, the Other press, 2000, p, 267 - 268.

²³ For further reading see: Imran Nyazee, *Islamic jurisprudence*, p. 323-324.

²⁴ See: Ibn Qaim, *Alam al-muwaqqi'in an Rabb al-alamain*, vol. 1, p. 31.

answered all the *mustafti* 's questions in his *fatwa*. In the case that the *fatwa* is issued by a verbal statement, the mufti may clarify any questions asked by the *mustafti*; but in case the *fatwa* is issued in writing, the *mustafti* may come back to him, if the matter is not clear. This is to ensure smooth interaction amongst all the parties involved in the *fatwa*.

7.5.8. *Fatwa* should be briefly presented.

The *fatwa* is not a scholarly paper or research or assignment, but it is a statement which provides an Islamic ruling in unclear matters to be clarified by the *Shariah*. Therefore, the *fatwa* should be presented in a very brief statement by providing a full and comprehensive answer on the cases presented by the *mustafti*, provided that the mufti satisfactorily answers the *mustafti*'s questions.

7.5.9. Stipulation of conditions when it is necessary to avoid generalization in *fatwa*

If the *fatwa* requires stipulation of some restricted conditions due to the nature of the case presented, a mufti or *Shariah* advisory should stipulate those conditions. This avoids confusion by other parties who are concerned about the obligations and implications of the *fatwa* but they have different conditions and situations. The *fatwa* should be presented within its terms and conditions. The *fatwa* will be valid within the given terms and conditions.

7.5.10. Sequentially ordering the issues raised in a *fatwa*

For better presentation of a *fatwa*, it is better to sequentially order the issues discussed in the *fatwa* to achieve a better understanding and ensure that all the relevant issues of the *fatwa* have been covered. Sometimes the sequential ordering of the *fatwa* is part of the flow of the *fatwa* itself.

7.5.11. Referring to the School of Law and its views in issuing a *fatwa* when applicable and stipulating that the issue is subject to disagreement not consensus

A Mufti or *Shariah* advisory should take into account the views of the different Schools of Law when applicable when he presents his *fatwa* to show that the case under *ijtihad* carries different views and thoughts. There is a process of preference in the *fatwa*.

7.6. Methodology of empowering the *fatwa* in Islamic finance:

The mufti/*Shariah* advisory should adopt in his *fatwa* methodology, some criteria to empower his *fatwa* in Islamic finance and to give it more credibility to the Islamic ruling produced. The following criteria should be observed in the core methodology to empower a *fatwa*:

7.6.1. Refer to *al dalil* (evidence)

The mufti/*Shariah* advisory should emphasize on *al dalil* and depend on it in issuing a *fatwa* or any other supporting evidence in *Shariah* so as to empower the *fatwa*: the stronger the evidence, the stronger the *fatwa*. The mufti/*Shariah* advisory should look for any explicit text from the *Quran* or *Hadith* related to the case. If not, he should consult the consensus or a valid analogy to give the *fatwa* a solid basis. Besides that, the mufti/*Shariah* advisory should also emphasize more on the legal maxims and Islamic jurisprudence rules in his *fatwa* as additional evidence in supporting the *Shariah* opinion.

7.6.2. Connecting the various *Shariah* opinions to the Islamic jurisprudence rules

Linking the *fatwa* to the Islamic jurisprudence rules will empower the *fatwa* because the rules of Islamic jurisprudence are sound rules derived from the original sources of *Shariah*. They play a crucial role in the validation of the *fatwa*.

7.6.3. Linking the investigation in *fiqh* for the *fatwa* issued to the *ahadith*

Providing various *ahadith* for the *fatwa* as supporting evidence will enhance the *fatwa* and give it more power for the Islamic ruling. Therefore, the *fatwa* will be derived from the hadith or supported by it and in all cases, the *fatwa* will be more accurate and sound.

7.6.4. Refer to reasoning as additional evidence

The mufti/*Shariah* advisory should require reasoning as additional evidence to support the *fatwa*. The reasoning will help to establish logical dimension for the *fatwa* and provide a clear justification to the Islamic ruling extracted.

7.6.5. Consideration of the social and business dimensions in issuing *fatwa*

The *fatwa* is related to reality and it is very practical. It is not a propositional Islamic ruling based on theory or a result of pure reasoning and sophisticated thinking. In this context, the social and business dimensions should be clearly observed in the *fatwa*. Obviously the existing *fatwa* is related to the existence of the issue or case faced by the Islamic finance industry because it required a solution through the issuance of a *fatwa*. A *fatwa* can be exercised through various types of categories depending on the position of the mufti and the organization that he belongs to as discussed below.

CONCLUSION

From the above discussion we can conclude the following:

- The *Fatwa* is very vital aspect in Muslim's life, it has a very respectable position in the society, and consider as noble religious tasks.
- The contemporary Islamic finance is in great need of *fatwa* to be part of the total solution package for Islamic banking and finance.
- The *fatwa* has a strong influence in Islamic finance today, this

influence is clearly observed in the position of the *Shariah* board in the composition of the Islamic banks and the Islamic financial institutions.

- *Fatwa* is issuing an Islamic ruling in the name of Allah and the mufti/*Shariah* advisory is taking over the position of the prophet SAW in providing the needed knowledge about *Shariah*, whether it is in form of explanation or hukm.
- The qualifications of the mufti come in form of sufficient knowledge requirement in *sharia*, Islamic law, Islamic jurisprudence and Islamic finance.
- The *fatwa* is not providing a personal opinion or preferable point of view but it is a *Shariah* opinion. This *Shariah* opinion is outcome of a process govern by Islamic rules and regulation whereby the mufti/*Shariah* advisory is bound to follow it in order to accept his *fatwa*.
- There is a methodology of *fatwa* required in Islamic finance has to be observed in order to ensure the best result and outcome of the Islamic ruling.
- There are some rules governs the *fatwa* and the mufti/*Shariah* advisory must be observed.
- The Mufti/*Shariah* advisory must follow a clear, acceptable and accurate methodology in providing the Islamic ruling, and prior to that he has to understand the case presented to him in order to issue a sound *fatwa*.
- The Mufti/*Shariah* advisory must seek easiness in his *fatwa* and take into account the conditions of mustafti (person who arises the case and need *fatwa*).

There is a methodology of *fatwa* prior issuing the Islamic ruling that should be observed. On the other hand there is a responsibility for Islamic financial toward the successful exercise of *fatwa* in Islamic finance, whereby the Islamic bank should provide support and facilitate the task of *fatwa*. In addition to that, there is methodology of *fatwa* in issuing the Islamic ruling, whereby the mufti should comply with in order to produce a sound *fatwa* that is inline with the objectives of *Shariah*. Mufti should empower *fatwa* and straighten it by providing support and sound evidence.

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