

EXPLORING THE FATWA METHODOLOGY OF COMMITTEE OF THE NATIONAL COUNCIL FOR ISLAMIC AFFAIRS: CASE OF ASB TRUST FUND

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Abstract

Amanah Saham Bumiputera (ASB) is a Malaysian initiative trust fund that was established in 1990 with the basic aim of enhancing the financial independence and improves the economic control of the Bumiputera Malaysians. This effort has provided investment opportunity for its target audience as an alternative savings scheme in order to generate long term consistent and competitive returns on investment. Despite the achievement and successful result recorded by the establishment, there are continuous quest particularly among the Bumiputera on the extent of Shariah compliance of the investment channels of ASB trust fund. Although ASB was designed as a fixed price equity income fund at RM1.00 with no sale charges, the return on investment as declared dividend is questionable. More so, the means of investment and in which product or services to invest pool fund is a question for debate among the investors. Despite the latest Fatwa MKI pronouncement by Muzākarah Jawatankuasa on this issue in 2012, which declared that investments in ASB and other relative investments are “harus”, that is investing in ASB is neither prohibited nor allowed from an Islamic perspective. It is rather Mubāḥah; based on free choice. Hence, there are still arguments as to whether ASB is prohibited in Islam. The researcher therefore aims to explore into the methodology of the Fatwa committee of the National Council for Islamic Affairs on how and why permissible position was taken in comparison with the position of PNB on its permissibility. The study also conducts textual analysis on Islamic principles, maxims and conditions on issuing fatwa on matters relating to Islamic financial transactions as reported in Islamic literatures. The study also employs the Maqāṣid shariah approach and found out that the decision the current which permits ASB investment for muslims in Malaysia was as a result re-consultation and research among the shariah scholars and ASB stakeholders to arrive at a common ground on the use of maṣlahah as evidence for the permissibility of the ASB in Malaysia context.

Keywords: *Fatwa-Methodology, ASB, PNB, Maṣlahah*

1.0 Introduction

A Fatwā is a juristic declaration made by Islamic scholars (*ulama*) in interpreting and in achieving it adaptation to contemporary issues. The Ulama usually use these methodologies in deriving new rules in Shariah law, particularly on issues that are based on economy and socio-political interactions.¹ Fatwā is been a mainstay approach adopted by the companions after the demise of the prophet (PBUH). By making the major sources of

¹ Wiechman, D.J., Kendall, J.D. and Azarian, M.K. (1996). “Islamic law: myths and realities”, *Crime & Justice International Online*, Vol. 12 No. 3, 9.

Islamic law; Quran and hadith adaptable to arising contemporary and making adaption of circumstances across different culture and environments.²

However, fatwa has been an important driving force that shapes the position and direction of Islamic finance. It is basically scholastic rulings which can either permit or prohibit certain economic, social or political interaction between Muslims. Hence, Fatwa is frequently use in commercial activities to give juristic opinion on consumers' behaviors, such as purchasing, consuming or supporting products or brands. Also, fatwa pronouncement could be conditional or unconditional for prohibiting or permitting certain products or behaviors can have conditions attached. These conditions are expected to comply with permissibility or prohibition. Al-farūqī gives a good example, *fatwa* rulings that permit Muslim consumers to listen to music with the condition that it promotes Islamic values and ethics and its content do not violate any of the fundamental principles.³

Malaysia is a Muslim majority country with varying Islamic achievement and landmarks. One of the unique efforts is the position and niche it has carved for itself in Islamic financial services. Today, Malaysia represent the Hub of Islamic financial services with sectors ranging from banking, capital market, financing portfolio, takaful and socio-economic finance of *zakat*, *sodaqoh* and *waqaf*.⁴ Several efforts have been recorded by the Malaysia government in institutionalizing the Fatwa procedures by establishing Fatwa pronouncement under specific recognized professional scholars.⁵ Although different countries under OIC tends to have its unique way of deriving Fatwa in Islamic Law and its incorporated into their legal system. The study of Aziz and Shamsul (2004), asserted that Saudis legal system tend to adopt a more comprehensive version of Islamic Law than Malaysia. The latter has a legal system that is dominated by civil law). The authors argued that environments and culture has influence on the differences in *fatwa* declarations across international Muslim communities.⁶ Haven said that, the position of Fatwa on permissibility of ASB remain a challenge particularly among the Bumiputra (The local Malay).

² Azra, A. (2005). "Islamic thought: theory, concepts, and doctrines in the context of Southeast Asian Islam", in Nathan, K.S. and Kamali, M.H. (Eds), *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century*, Institutes of Southeast Asian Studies, Singapore, 2- 21.

³ Al- Faruqi, L.I. (1985). "Music, musicians and Muslim law", *Asian Music*, Vol. 17 No. 1, 3- 35.

⁴ Asyraf Wajdi Dusuki et. al. (2014). *Historical Roots of Islamic Finance in Malaysia: From the Pre-Islamic Era until 1983*, (Kuala Lumpur: ISRA), 145.

⁵ Nazlida Muhammad Hashim and Dick Mizerski. (2010). "Exploring Muslim consumers' information sources for fatwa rulings on products and behaviors", *Journal of Islamic Marketing*, Vol. 1, Issue: 1, 37-50, <https://doi.org/10.1108/17590831011026213>,

⁶ Aziz, A. and Shamsul, A.B. (2004). "The religious, the plural, the secular and the modern: a brief critical survey on Islam in Malaysia", *Inter- Asia Cultural Studies*, Vol. 5, No. 3, 341- 56.

Although the Muzākarah Fatwa Committee; the National Council of Islamic Religious Affairs in February 2008, finally positioned that investment in Amanah Saham Bumiputera (ASB) and Amanah Saham Nasional (ASN) since 2008 are permissible. However, the Selangor⁷ and Penang⁸ Fatwa Council did not agree with that view. The fact of the argument is the combination of haram and halal sources particularly in investing the fund of ASB in the Maybank.⁹

Overall, this study aims to explore into the fatwa methodology of fatwa and evaluate the extent of Fatwa coordination among the Malaysia Ulama, by examining the causes of varying pronouncement and its impact on the Islamic financial services. Doing so, the study will explicate the position of Malaysia Fatwa committee on ASB investment portfolio versus the position of Selangor and Penang shariah committee. The study will highlight the influences of this differences among the Bumiputra Malaysians. The Therefore, remaining part of this study is organized into four different sections. (1) Literature review, (2) Fatwa methodology in Islamic finance (3) Exploring Fatwa methodology on the permissibility of ASB (4) Conclusion and Recommendations.

2.0 Literature Review

Limited literature in the methodology of fatwa in relation to financial activity and investment has spurred the interest of this study. Hence, in recent time some researchers have tried to address related issues. For example, in the study of “Ahcene lahsasna”¹⁰ entitled: “Fatwa and its Shariah methodology in Islamic Finance” the study examines the concept of fatwa and its application in Islamic finance. The understanding of fatwa and its basic features from classical jurisprudence courses and the sources of fatwa in Islamic law. The Mufti usually relies on the primary and secondary law in deriving a fatwa. The author discussed importance of the position of a mufti particularly in Islamic finance by

⁷ Although the Selangor Fatwa Council ruled that ASB investment is not permissible investment schemes, after series of research and consultations the council later positioned that the ASB is permissible investment for the muslims due to the fact that the current percentage of the investment that comply with Syariah had reached beyond 66% as prescribed by Security Commission of Bank Negara Malaysia. The permissibility is also subject to re-evaluation after 3 years that the percentage of the Syariah compliant investment should at least 75%. This decision was made in its meeting on April 2017, but it was not been gazette. Retrieved on 28/8/2019, from: <http://www.muftiselangor.gov.my/fatwa-personalisation/fatwa-tahunan/keputusan-fatwa-xwarta/2016/685-fatwa-pelaburan-pemrodalan-nasional-berhad-pnb>.

⁸ The Penang Fatwa Council in its meeting on August 2017 concluded that; investing in ASB is permissible and further cancelled its previous decision on June 1999 that investment in ASB is not permissible. Retrieved on 26/8/2019, from: <http://mufti.penang.gov.my/index.php/efatwa-2/324-pelaburan-asn-asb-serta-dividen-atau-bonus-yang-diterima>.

⁹ Mohamed Azam Mohamed Adil, “Why ASB/ASN investments are permissible for Muslims”, Retrieved on 21/01/2019, from: <https://www.nst.com.my/opinion/columnists/2017/06/251470/why-asbasn-investments-are-permissible-muslims>.

¹⁰ Ahcene Lahsasna. (2011). “Fatwa and its Shariah Methodology in Islamic Finance”, Journal of Fatwa management & Research, 133.

describing the conditions he must follow in arriving at a fatwa. Such as; qualification and knowledge requirement of a Mufti, understanding the role of fatwa in Islamic finance and well acquainted with the methodology of fatwa in deriving an opinion in Islamic law. The author further argued that Fatwa does not necessarily ends at issuing rulings but also provide solutions and alternative structures for the cases presented before the Mufti. Although fatwa is an essential tool in Islamic finance that draws directions and act as pathfinder, hence, rulings of fatwa must comply with the fundamental principles of Shariah, its maxims and Maqāsid.

Similarly, in the study of Muhammad Fathullah Al Haq Muhamad Asni & Jasni Sulong,¹¹ entitled: “Fatwa Coordination between State: Analysis of the Practices of Standardization and its Methods in Malaysia”. The authors emphasized their study on the application of Fatwa and its enforcement in different states of Malaysia. The study asserted that despite the presence of national Committee on Fatwa, arising differences in the fatwa pronouncement of the 14 states Mufti department is causing confusion and concerns among the citizen and the central government. However, there is an urgent need to work towards harmonizing the methodology and pronouncement of fatwa between these 14 Mufti states departments. The authors explore into the causes of differences in the pronouncement of fatwa. The research data collection relies on library based and field work approach. The researcher conducted interview with members of the national Fatwa Committee. The respondent explained effort made by the committee towards standardizing the Fatwa methodology but there are still some state Mufti members who are still strict on a particular school of law.

Similarly, in the online column analysis of Dr. Mohamad Azam Mohamed Adil,¹² on the recent pronouncement by Selangor Fatwa Committee meeting (April 27), when a fatwa was issued declaring ASB/ASN investments to be permissible for Muslims. According to the analyst, the position of the committee was praiseworthy from many quarters in Malaysia because of the change in its position. This change according to Dr. Mohamad Azam seems to favour the investment future of Bumiputera which are majorly Malay Muslims. Although an economic factor is the basis of change in Fatwa, considering the Maslahah of

¹¹ Muhammad Fathullah Al Haq Muhamad Asni & Jasni Sulong. (2017). “Fatwa Coordination between State: Analysis of the Practices of Standardization and its Methods in Malaysia”, Journal of Fatwa Management and Research, Vol. 9, No. 1.

¹² Mohamed Azam Mohamed Adil, deputy chief executive officer, International Institute of Advanced Islamic Studies (IAIS) Malaysia. <https://www.nst.com.my/opinion/columnists/2017/06/251470/why-asbasn-investments-are-permissible-muslims>.

the Bumiputera in Malay bank investment, hence, some experts are still concern whether the methodology employed is justifiable.

Another recent literature is the work of Shakir Ullah et. al., (2016), entitled: "Fatwa Repositioning: The Hidden Struggle for Shari'a Compliance within Islamic Financial Institutions". The authors viewed that Shariah is the key indicator in Islamic Financial Institutions. The role of Shariah advisory board or the fatwa issuing committee is very important and such conflict with the role of business managers. According to the authors, majority of the business sponsors and Managers of Islamic finance institutions are not into the market for the purpose of achieving Shariah objectives of holistic business environment, rather, profit making. Hence, there usually arises extent of refraining from prohibited transaction. The authors explore into the challenges of internal struggle between managers and Shari'ah scholars in pursuit of their respective objectives. Grounded theory was used in the study to investigate the relationship of managers and shariah committee. Based on the data collected from three IFIs from two countries, the study reveal that Shari'ah scholars and managers are divergent in pursue of their objectives. These differences further show that Shari'ah committee scholars are usually not in control of Shariah compliance which is their basic objectives.¹³

Also, in his work: "Status Halal ASN Dan ASB", (2017), Prof. Dato Mahmood Abdul Majid explicate juristic opinion on the permissibility of the ASN and ASB in Islamic law. The scholar contends that investment schemes of ASN and ASB is justified in Islamic law because it is necessary to create new standard for determining the permissibility of its activities based on the tool of *Siyāsah Shar'iyah*, (Islamic policy) to protect the interest of the Muslim and religion particularly in a multireligious environment. The contribution of ASN and ASB in Malaysia economy cannot be overemphasized and as such the understanding of Islamic policy permits offering it careful and special consideration. The author does not explicate the methodology of the ASB and ASN in detail, hence this study aims to explore in details available literatures on these methodologies.

3.0 Concept of Fatwa and its methodology in Islamic finance

The fatwa is a juristic expression on issues based on evidences in Islamic law and contemporary application. The fatwa is derived from the word *fatawā* means to make expression and method of articulation. Such as saying, *aftahu*, that is I gave him fatwa; meaning "I express opinion to him or articulate opinion

¹³ Shakir Ullah et al. (2016). "Fatwa Repositioning: The Hidden Struggle for Shari'ah Compliance Within Islamic Financial Institutions", *Journal of Business Ethics*, 1-23.

to him". To strengthen obscure statement using scientific expression.¹⁴ The concept of Fatwa is basically representing three similar expressions: first; Fatwa could mean an explanation of something; such as explaining an obscure situation, second, Fatwa is used as an answer to an unclear question presented by a questioner, third, Fatwa is specific used to be a process of proffering solution to questions and issues that are not clear using scientific expressions.¹⁵

The term Fatwa has a basis in from the primary source of Islamic law; the Quran and hadith. The Glorious Al-Quran mentioned the word Fatwa is in different terms and derivatives as follow:

Firstly,

﴿وَيَسْتَفْتُونَكَ فِي النِّسَاءِ قُلِ اللَّهُ يُفْتِيكُمْ فِيهِنَّ﴾

"And they request from you, [O Muhammad], a [legal] ruling concerning women".

[An-Nisāi:127],

Secondly,

﴿يَسْتَفْتُونَكَ قُلِ اللَّهُ يُفْتِيكُمْ فِي الْكَلَالَةِ﴾

"They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs". [Al-Nisāi: 176],

Thirdly,

﴿يُوسُفُ أَيُّهَا الصِّدِّيقُ أَفْتِنَا فِي سَبْعِ بَقَرَاتٍ سِمَانٍ﴾

"[He said], "Joseph, O man of truth, explain to us about seven fat cows". [Yusuf: 46],

Fourthly,

﴿وَلَا تَسْتَفْتِ فِيهِمْ مِنْهُمْ أَحَدًا﴾

"Nor consult any of them about (the affair of) the Sleepers". [Al-Khaf: 22],

Also, in;

﴿قُضِيَ الْأَمْرُ الَّذِي فِيهِ تَسْتَفْتِيَانِ﴾

"The matter has been decreed about which you both inquire". [Yusuf: 41],

Finally, in the verse;

﴿فَاسْتَفْتِهِمْ أَهْمُ أَشَدُّ خَلْقًا أَمْ مَنْ خَلَقْنَا﴾

"Then inquire of them, [O Muhammad], "Are they a stronger [or more difficult] creation". [As-Saffat: 11].

¹⁴ Aḥmad bin Fārīs bin Zakariyyā, Abū Al-Ḥusain. (1979). "Mu'jam Maqāyīs al-lughah", Muḥaqqiq: Abdus-Salām Muhammad harūn, Vol.6, Dar-al-Fikr, Dimishqi Mu'jam, Mādah (Fataya) (4/474), 491.

¹⁵ Ibn Manzūr, Muḥammad bin Mukrim Al-Ifriqiyyi Al-Masri. (n.d). "Lisān Al-'arab". Al-Qāhirah: Dār Ṣādir, 137-138.

The concept of Fatwa is also embedded in the tradition of the prophet (PBUH). The term fatwa (juristic opinion) is used by the prophet (PBUH) in his tradition as mentioned below:

(وَالْإِثْمُ مَا حَاكَ فِي النَّفْسِ وَتَرَدَّدَ فِي الصَّدْرِ وَإِنْ أَفْتَاكَ النَّاسُ وَأَفْتَوَكَ)

“Wrongdoing (sin) is that which is stuck in your chest and without rest if people ask you about and issue, seek your conscience”.¹⁶

During the period of the prophet (PBUH) with the companions, he does teach directly or indirectly how to derive fatwa whenever they are confronted with issues. A very prominent was the hadith of the prophet of scenario between the prophet (PBUH) and Muaz bin Jabal when he asked Muaz thus:¹⁷

“How will you give a judgment on matters or disputes?” Mu’adh answered; ‘I will refer to the Qur’an.’ The Prophet then asked, ‘What will you do if you do not find it in the Qur’an?’ Mu’adh answered, ‘I will refer to the Prophet’s Sunnah.’ The Prophet SAW asked, ‘But what will you do if you do not find a decree even in the Sunnah?’ Mu’adh readily answered, ‘I will be judge between mankind by resorting to juristic reasoning (ijtihad) to the best of my power”.

Although, there are reported opinions from scholars about the originality of the hadith, yet, most Islamic jurist used it as basis for juristic reasoning in Islamic law.¹⁸ Fatwa methodology in Islamic law is strictly a pre-condition ability of a scholar to exercise *ijtihad* on a subject matter. Al-Āmidī defines *ijtihad* as the expression of juristic reasoning to arrive at an assumed legislation on a religious decree with the condition of exhausting available information and evidences on the subject matter.¹⁹

4.0 Concept of Fatwa and its Methodology in Islamic finance

The role of fatwa in Islamic is representing the position of the prophet to guide people in their daily affairs, either in creed, worship, social, economic and political matters. Fatwa is a very active juristic instrument scholar use in resolving contemporary issues and application in Islamic finance products and services. There are leading Islamic financial institution in issuing fatwa such as International Fiqh Academy, the Accounting and Auditing organization for Islamic finance and the International Shariah Research Academy for Islamic

¹⁶ Musnad Ahmad bin Hanbalī, ḥadīth no. 17545.

¹⁷ Sunan Abi Dāwūd, ḥadīth no. 3592.

¹⁸ Muḥammad Shamsu al-ḥaqqi al-‘Azīm Ābādī. (1995.) “‘Awnu al-Ma‘būd”, Bairut: Dar- Al-fikr, 404.

¹⁹ Ali bin Muhammad Al-Āmidī. (2003). “*Al-iḥkām fī Usūl Al-Aḥkām*”, Muḥaqqiq: Abdur-Razāq ‘Afifī, Vol. 4, Al-Riyād: Dar Al-Ṣamī‘ī, 396.

finance.²⁰ In Malaysia for example, the Shariah Advisory commission (SAC) is the principal body that gives shariah verdicts for matters relating to Islamic financial transaction in Malaysia.²¹ There are conditions for using *ijtihad* to give fatwa outside the shell of the Quran and hadith. First, the matter is contemporary issue not found in the Quran and Sunnah of the prophet (PBUH). Secondly, Juristic reasoning to give fatwa must not have decisive text, (*Dalālatu Al-Qaṭi‘iyyah*) from both primary sources. In the absence of decisive evidences on a subject matter, Islamic scholars can express their juristic reasoning on the subject matter.²² Since the jurists are qualified, their decision as fatwa is not final and usually is considered as mostly persuasive and not binding to give room for future research on the matter.²³ There are some financial transactions that have been permitted by Islamic jurist on the basis of public interest (*maṣlahah*) and preference (*istiḥsān*). It is worth mentioning that *ijtihad* in fatwa (juristic reasoning) is widely used in *mu‘āmalah* (Islamic transaction) that other branch of Islamic law.²⁴

Although *Maṣlahah* is one of the secondary Sources of Islamic law that are Disputed upon among the Islamic schools of law, yet, it is still very relevant particularly in the contemporary Islamic financial transactions. *Maṣlahah* literally means benefit or interest.²⁵

Technical meaning: *maṣlahah mursalah* is unrestricted public interest in the sense of not having been regulated by the Legislator and there is no textual authority can be found on its validity or otherwise.²⁶

Al-khānī (2010) emphasised the importance of consideration in the situation which prevent benefit or prevent harm for a temporary time as a consideration that follows the higher objective of Shariah. It is fair to say that any measure within this scope is considered *maṣlahah* because prevention of *mafsadah* is also *maṣlahah*.²⁷ Among the conditions for validity of *maṣlahah mursalah* are: a

²⁰ Mahmoud A. El-Gamal. (2003). “Interest and the Paradox of Contemporary Islamic Law and Finance”, Fordham International Law Journal, The Berkeley Electronic Press, 2-3.

²¹ Tun Abdul Hamid Mohammad & Adnan Trakic. (2012). “The Shariah Advisory Council's Role in Resolving Islamic Banking Disputes in Malaysia: A Model to Follow?”. Kuala Lumpur, ISRA, RESEARCH PAPER No: 473.

²² See: Muhammad Hashim Kamali. (2005). “Introduction to Usul al-Fiqh”, UK, Islamic Text Society.

²³ Wael B. Hallaq. (1984). “Was the Gate of Ijtihad Closed?”, International Journal of Middle East Studies, UK, Cambridge University press, 3-41.

²⁴ Muhammad Hashim Kamali. (2005). “Harmonisation of the Shariah and Civil Law: Proposing a New Scheme for al-Usul Fiqh”, A conference paper in international Conference of Shariah and Civil Law 2. IIUM. 29-30th June, 244.

²⁵ Ibn Maṣ‘ūd, “*Istiḥsān* (Juristic Preference) and *Maṣlahah* (public interest)”, Retrieved on 20/01/2019, from: <https://sunnahmuakada.wordpress.com/2013/02/02/istihsan-and-maslaha/>.

²⁶ Hayatullah Laluddin. (2015). “Maslahah’s Role as an Instrument for Revival of Ijtihad”, International Journal of Islamic Thought, Vol. 8, 27.

²⁷ Mustafa Said Al-khānī, (2010) “*Athar ikhtilāfāt fi Al- Qawaid Al-Usūliyyah fi ikhtilāf Al-Fuqaha*”, Bathu Al-Duktūrah fi Jāmi‘at Azhar., 11th Ed., 490.

maṣlaḥah must be genuine, general benefit and must not conflict with al-Qur'an, al-Hadith or al-Ijma'.²⁸

Istiḥsān (Approbation) is another important Islamic secondary source of justification in Islamic law. Literal Meaning *Istiḥsān* is Derived from the root word of: *istaḥsana, yastaḥsinu, istiḥsānun*, that is something deem preferable, accepted, commendable or considered good. The intent of *Istiḥsān* is to avoid rigidity and inflexibility from literal enforcement of certain ruling or hukm. Hence, a ruling emerging from the texts most especially *dalālah dhaniyah* (non-definite evidence) may not permit something, yet another text may provide an exception to this broad principle.

For instance, the general rules forbidden to sell an object which is not in possession. The Contract of al-Salam is the sale of ASN object in which the price was paid in advance and the item is to be delivered at a future date. Although the general principle forbids this kind of contract, but the rule of *Bay' al-Salam* was established by a Hadith reported from the Prophet (pbuh). An exemption was made on the basis of consensus for the manufacturing contract (contract of *al-Istisnā'*). Similarly, in the case of permitting endowment (*wasiyah*) out of moveable property (*al-manqūl*) such as books, plates, cups and etc. The Original precedent that endowment must be in the form of something permanent (*al-'aqārāt*) such as houses, lands, buildings and other estates.

For instance, contract of manufacturing company is basically prohibited because of the hadith that say: (لا تبع ما ليس عندك), means: "It is not permissible to sell what you do not own"²⁹, considering the situation of (*Salam* contract) of construction companies in modern time, the contract have to be awarded and sometime partly payed before the construction will commences work based on specification. This contract was permitted based on *Istiḥsān* and *maṣlaḥah*. The *maqṣad* (higher object) from the hadith is not established in the *salam* contract of construction company, rather contract will work only if specification can be made in the contract the contractor further provides the needed goods.³⁰

Another common example is the permission for the medical practitioner to look at the *'awrah* of the sick during medical treatment. Even though in principle a medical doctor is not permitted to see someone else *'awrah* (nakedness), however, in the situation of *al-Ḍarūrah* (necessity), they are allowed. This principle is popularly used by the Maliki school of thought³¹.

²⁸ Ibid.

²⁹ Al-Tirmidhī, Jāmi'u Al-Tirmidhī, Hadith no. 1232.

³⁰ Mufti Taqī Usmani. (n.d.). "Forward Sales and Manufacturing Contracts: Salam And Istisnā'", Albalagh, Retrieved on 22/01/2019, from: https://www.albalagh.net/Islamic_economics/salam_istisna.shtml .

³¹ Ibid.

5.0 Exploring Fatwa methodology on the permissibility of ASB

Amanah Saham Nasional Berhad (ASNB) is a wholly owned subsidiary of Permodalan Nasional Berhad (PNB) with different kinds of investment funds. Prominent among these funds are Amanah Saham Bumiputera (ASB) and Amanah Saham Malaysia (ASM). The ASB as the first fund by (PNB) which was launched on 2 January 1990 by the fourth Malaysian Prime Minister, Tun Dr Mahathir Mohammad. ASB is only open to Bumiputeras. In the year 2000, ASM was opened for Malaysian citizens that are non-Bumiputra. These states have maintained that investing in ASB/ASN is permissible mainly due to its significant economic impact and potential with regards to Malay Muslims (most Muslims in Malaysia). However, ASB as a corporate organization has its own shariah Advisory Board responsible for issuing fatwa and supervision of Shariah Complaint products and service. Despite the competent hands employed by the company to saddle the affairs of Shariah complaint issues in the organization, there still arise Fatwa issues from independent organizations and bodies.

The main contention in the ASB/ASN fatwa was that, prior to 2017, the Selangor and Penang Fatwa Council did not agree with that view. The shariah compliance status of ASB/ASN generated confusion and arguments especially Muslim investors. There is continuous quest among Investors who are sensitive to halal and illegal matters on the exact status of these investment schemes offered by Permodalan Nasional Berhad (PNB).³²

Although the Malaysia Islamic capital market has shown some level of flexibility in its fatwa on shariah compliant products. Shariah Adviser of the Securities Commission Malaysia (SC) has set a maximum limit of 20 percent of the maximum allowable resource from illegal sources. That is, A company is still recognized to be compliant if the halal resource income exceeds 80 percent. However, Maybank did not meet the require as one of the major investment portfolios of PNB. Therefore, the fatwa council rejected the need to invest in PNB. This position further generates debates among other states fatwa considering whether the position is supreme over other fatwa states.³³

The other states fatwa also posit that should the 20% benchmark set by shariah advisory of securities commission be a final standard or it is subject to review based on other factors. Firstly, the study of Fauzias Mat Nor et al. (2017), further argue that mixing of halal and illegal sources is not necessarily prohibited by Islam. For example, past fuqaha allows men to wear silk dress mixed with

³² Mohamed Azam Mohamed Adil, "Why ASB/ASN investments are permissible for Muslims", Retrieved on 21/01/2019, from: <https://www.nst.com.my/opinion/columnists/2017/06/251470/why-asbasn-investments-are-permissible-muslims>.

³³ Wafik Grais & Matteo Pellegrini. (2006). "Corporate Governance and Shariah Compliance in Institutions Offering Islamic Financial Services", World Bank Policy Research Working Paper 4054, 5.

cotton cloth and wear mixed jewellery between gold and other metals. Since the previous jurist differed in view of the maximum permissible limit of in the mixture of permissible and non-permissible items because this is a *muāmalāt* issue that is related to the wealth and development of the public interest. Hence, there should be flexibility in consideration of the 20% limit with an intent to protect the wealth of the muslim Ummah.³⁴ Fauzias Mat Nor et al. (2017), also contend that fatwa councils would have considered the position of and its policies in the Islamic financial products. Maybank is the topmost bank that has reached the target of Bank Negara in having 50% investment in Islamic asset by 2020. As at 2017, Maybank is ranked fifth among the world's largest Islamic banking institutions. Hence, it seems so the researcher that Maybank deserves further consideration from the existing 20% requirement.³⁵

It is also worth mentioning that the significant role of PNB in Malaysia economic growth is not overemphasized. PNB investment instruments in ASN and ASB schemes mobilize funds amounting to RM266 billion owned by 11.6 million account holders. This fund is utilized by the purchase of strategic companies such as Maybank, UMW Holding Berhad, Sime Darby Berhad, Lintas Kota Holdings Sdn. Bhd (PROLINTAS), SP Setia Sdn Bhd and so on.³⁶

The National Muzākarah Fatwa Committee for Religious Affairs also pointed out the *fiqh* (Islamic jurisprudence) agreement across Hanafi, Maliki, Shafi'i and Hanbali juristic schools that permit investing in companies that involve halal and haram activities under certain circumstances, such as considering the wider public interest (*maṣlahah 'ammah*) and the avoidance of harm (*mafsadah*).³⁷ The scale of preference shows that public interest (*maṣlahah 'ammah*) and avoiding harm (*mafsadah*) are given priority as part of the higher goals of shariah. Hence, the fatwa thrust basically on Maqasid Shariah of protecting the general public interest.³⁸

Although the Selangor Fatwa Committee had earlier issued a prohibiting fatwa, meanwhile, the reverse decision by the Selangor Fatwa Committee received laudable applaud among the Bumiputeras. The latest position taken by the National Muzakarah Fatwa Committee for Religious Affairs and 13 other states, including the Federal Territories of Kuala Lumpur, Labuan and Putrajaya

³⁴ Fauzias Mat Nor, Ainulashikin Marzuki, Nur Ainna Ramli and Amir Shaharuddin. (2017). "Revised Malaysian Shariah Screening: Its Impact on Islamic Capital Market", E-Proceedings International Halal Management Conference (IHMC), 69 – 80.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Mohamed Azam Mohamed Adil, "Why ASB/ASN investments are permissible for Muslims", Retrieved on 21/01/2019, from: <https://www.nst.com.my/opinion/columnists/2017/06/251470/why-asbasn-investments-are-permissible-muslims>.

³⁸ Ibid.

in 2008. Some experts argued that the socio-economic concern about the Malay Muslims is the major driving force that influences the nature of the Fatwa.³⁹ As at present, ASB/ASN investment schemes and opportunity seems the salvage institution committed to improve the economic and social status of the Bumiputeras. *Maṣlaḥa ‘ammah*, that is the general benefit is the methodology used by the scholars to derive at pressing need of the Malay Muslims in Malaysia.⁴⁰

However, certain criteria are expected to be conformed with before an issue could be considered under *Maṣāliḥu* (public interest). Apart from the fact that it must be genuine benefit, the benefit must be to the general public interest. Hence, financial analyst has warned that if investment of ASB/ASN that is invested by its agent; Permodalan Nasional Berhad (PNB), is withdrawn from Maybank due to non-Shariah compliant of some of its financial activities, the majority of Malay Muslims will be affected. In essence, Necessity rule is applied in this context. Furthermore, Maybank is assumed to be one of the largest bank in Asia-pacific region, and it would probably have negative effect on the economy of the nation especially the Malay Muslims.⁴¹

According to the study conducted by Shakir Ullah et. al. (2016), on the repositioning of fatwa as a struggle between the business managers and the shariah scholars, the study demonstrates that the differences in objective has led to the challenges in positioning of fatwa. The business managers usually aim to maximize profit at all cost while the shariah scholars target the compliancy of the business activities to Shariah principles and objectives. However, the authors posited that maintaining balance between the two seems the way forward in Islamic finance. Moreover, it is necessary for both parties to understanding the perspective of one another to be able to maintain mediation and balance.⁴²

Correspondingly, other Shariah experts posited that the situation of protecting the economic growth and development of the Muslim Ummah is one of the higher objectives of shariah. The Intents of Shariah are usually categorized and prioritized based on the levels of necessity, such as; essentials (*darūriyyah*), complimentary (*hajiyyah*) and embellishment (*taḥsiniyyah*). Protection of Wealth of the collective Ummah or group of Muslims is a necessity. This position is

³⁹ Rozita Abu Bakar, Anuar Nawāwī & Ahmad Saiful Azlin Puteh Salin. (2015). “Determinants of Lower Bumiputera Participation in the Variable-Price Unit Trust Investments”, *International Academic Research Journal of Social Science*, 2.

⁴⁰ Ibid

⁴¹ Mohamed Azam Mohamed Adil, deputy chief executive officer of International Institute of Advanced Islamic Studies (IAIS) Malaysia, presented opinion on the column of “New Strait Times”, “Why ASB/SBN are permissible for Muslims?”. <https://www.nst.com.my/opinion/columnists/2017/06/251470/why-asbasn-investments-are-permissible-muslims>

⁴² Shakir Ullah et al. (2018). “Fatwa Repositioning: The Hidden Struggle for Shari’ah Compliance Within Islamic Financial Institutions”, *Journal of Business Ethics*, 149(4), 1-23.

arrived at because upholding the protection of general economy of the people is weightier than allowing it to get loss.⁴³

Even though PNB investment in halal product and services is equal to 70 % of its total asset, while remaining 30% is invested with Maybank. The implication of this data shows that the PNB is also treading the path of gradual procedure in ensuring complete Shariah Compliant of product of services.⁴⁴ This is evident from the verses of the Quran that prohibit alcoholic drink in the period of ignorance on gradual process. The gradual prohibition of alcohol in the Quran came in 3 verses in the following order of revelation:

"They ask you about intoxicants and games of chance. Say: In both of them there is a great sin and means of profit for men, and their sin is greater than their profit. And they ask you as to what they should spend. Say: What you can spare. Thus does Allah make clear to you the communications, that you may ponder" [Surah 2:219]. Then, the next level, *"O you who believe! do not go near prayer when you are Intoxicated until you know (well) what you say"* [Surah 4:43]. Then the next level; *"O ye who believe! wine and the game of chance and idols and divining arrows are only the abomination of Satan's handiwork. So, shun each one of them that you may prosper"*. [Surah 5:90].

In the contemporary world, the gradual change is better than any other rehabilitation programs that people may want to consider particularly in the socio-economic context. According to Rozita A. B. et al. (2015), who claimed that PNB is committed to shariah compliant investment and will not invest in businesses not permitted shariah. Through various investment instruments such as ASN and ASB schemes, PNB managed to mobilize funds amounting to RM266 billion owned by 11.6 million account holders.⁴⁵ This fund is utilized by the purchase of strategic companies such as Maybank, UMW Holding Berhad, Sime Darby Berhad, Lintas Kota Holdings Sdn. Bhd (PROLINTAS), SP Setia Sdn Bhd and so on. The position of shariah advisory of securities was a general standard for measuring shariah complaint product in Islamic capital market.⁴⁶ The position of the PNB shariah advisor and the other state fatwa committee was based on protection of public interest and wealth of the Muslims. The significant role of PNB in acquiring largest share in Maybank is considered a laudable factor rather than considering the volume of non-permissible ownership in Maybank. Maybank is the largest bank in Malaysia and the 5th in the ASEAN region. Moreover, Maybank is ranked within the range of 90th to 93rd among the most

⁴³ Muhammad Saad bin Ahmad bin Maşūd Al-'ayūbi. (1998). *"Maqasid As-shariah Al-Islāmiyyah wa 'alaqatuhah bi Al-adilat As-shar'iyah"*, Dar-Al-Hijrah, As-Saudiyyah, 179.

⁴⁴ Ibid.

⁴⁵ Rozita Abu Bakar, Anuar Nawāwī & Ahmad Saiful Azlin Puteh Salin. (2015). "Determinants of Lower Bumiputera Participation in the Variable-Price Unit Trust Investments", International Academic Research Journal of Social Science, 3.

⁴⁶ Ibid.

valuable bank brand⁴⁷. Hence, PNB has more than 70 percent stake in Maybank, the largest banking institution in Malaysia and fourth in Southeast Asia.⁴⁸

5.0 Conclusion and Recommendation

There are many fatwa methodologies that can be used to arrive at a juristic opinion. Hence, the Mufti can use either of them or combination of the methodology. For example; The permissibility of Investment in ASB could be based on *maṣlahah*, necessity in protection of the objection of wealth in the intent of the Shariah and opening the means to prevent greater challenges of economic backwardness to the Muslim Malay. A good example is the position of Prof. Dato Mahmood Abdul Majid in his work "Status Halal ASN Dan ASB" who justify the importance of creating a new standard permissibility for these investment scheme using the tool of *Siyāsah Shar'iyah*, (Islamic policy) to protect the interest of the muslim and religion particularly in a multireligious environment. The study finds that there is struggle of achieving set objectives between the business managers and the shariah scholars. The former focus on maximizing profit while the later ensure compliance to the principles and maxims of Shariah. Hence, maintaining mediation and balance between the two objectives is the best mechanism. The latest Fatwa that permits Shariah compliance of ASB investment is majorly thrust on the principle of general and public interest. Notwithstanding the claim of 70% compliancy to shariah by avoiding investment in alcohol and gambling, the remaining 30% could trigger its prohibition. Rather, protection of public interest is a strong evidence suffice its permissibility.

References

- Abu Hassan, Aliyu bin Muhamad bin Muhamad Al-Māwardī, (1999/1419). "*Al-Hawi Al-kabir Fi Fiqh Mazhab Imam Shafi*", vol.1.
- Abu Nur, Muhammad Zuhair, (2011), "*Usul Al-Fiqh*", Vol. 2.
- Ahcene Lahsasna, (2011). "Fatwa and its Shariah Methodology in Islamic Finance", Journal of Fatwa management & Research.
- Al-Farūqī, L.I. (1985), "Music, musicians and Muslim law", Asian Music, Vol. 17, No. 1.
- Al-khānī, Mustafa Said, (2010/1431), "*Athar ikhtilāfāt fī Al-Qawā'id Al-Usūliyyah fī ikhtilāf Al-Fuqahā*", Baḥṡhu Al-Duktūrah fi Jāmi'at Azhar., 11th Ed..

⁴⁷ Star online, "Maybank bank brand value up 24% to RM12.83b", (2018), Retrieved on 30/08/2019 from: <https://www.thestar.com.my/business/business-news/2018/07/19/maybank-bank-brand-value-up-24pct-to-rm12pt83b#5681GkfZfb0fzBIQ.99>.

⁴⁸ Ibid.

- Al-ayūbī, Muhammad Sad bin Ahmad bin Mas'ūd, (1998/1418), *"Maqasid As-shariah Al-Islāmiyyah wa 'alaqatuhah bi Al-adilat As-shar'iyah"*, Dar-Al-Hijrah, As-Saudiyyah.
- Aziz, A. and Shamsul, A.B., (2004), "The religious, the plural, the secular and the modern: a brief critical survey on Islam in Malaysia", *Inter-Asia Cultural Studies*, Vol. 5 No. 3.
- Azra, A., (2005), "Islamic thought: theory, concepts, and doctrines in the context of Southeast Asian Islam", in Nathan, K.S. and Kamali, M.H. (Eds), *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century*, Institutes of Southeast Asian Studies, Singapore.
- Asyraf Wajdi Dusuki et. al., (2014). "Historical Roots of Islamic Finance in Malaysia: From the Pre-Islamic Era until 1983", (Kuala Lumpur: ISRA).
- Fauzias Mat Nor, Ainulashikin Marzuki, Nur Ainna Ramli and Amir Shaharuddin, (2017). "Revised Malaysian Shariah Screening: Its Impact on Islamic Capital Market", *E-Proceedings International Halal Management Conference (IHMC)*.
- Hayatullah Laluddin, (2015). "Maslahah's Role as an Instrument for Revival of Ijtihad", *International Journal of Islamic Thought*, Vol. 8.
- Ibn Fārīs, Aḥmad bin Zakariyyā, Abū Al-Ḥusain, (1979/1399). *"Mu'jam maqāyīs al-lughah"*, Muhaqiq: Abdus-Salām Muhammad Harūn, Vol. 6, Dar-al-Fikr, Dimishqi.
- Ibn Maṣ'ūd, *"Istiḥsān (Juristic Preference) and Maṣlahah (public interest)"*, <https://sunnahmuakada.wordpress.com/2013/02/02/istihsan-and-maslaha/>.
- Ibrahim Mustafa wa Ākharūn, (2010). *"Majma' lughah Al-'Arabiyyah"*, Al-Qāhirah.
- Mohamed Azam Mohamed Adil, (2017). Presented opinion on the column of "New Strait Times", "Why ASB/SBN are permissible for Muslims?". <https://www.nst.com.my/opinion/columnists/2017/06/251470/why-asbasn-investments-are-permissible-muslims>.
- Mufti Taqī Usmani, (n.d.). "Forward Sales and Manufacturing Contracts: Salam And Istiṣnā'", Al-Bbalagh, Retrieved on 22/01/2019, from: https://www.albalagh.net/Islamic_economics/salam_istisna.shtml.
- Muhammad Fathullah Al Haq Muhammad Asni & Jasni Sulong, (2017). "Fatwa Coordination between State: Analysis of the Practices of Standardization and its Methods in Malaysia", *Journal of Fatwa Management and Research*, Vol. 9, No. 1.
- Muhammad Hashim Kamali, (2005), "Harmonization of the Shariah and Civil Law: Proposing a New Scheme for al-Usul Fiqh", A conference paper in international Conference of Shariah and Civil Law 2. IIUM. 29-30th.

- Muhammad Hashim Kamali, (2005). "Introduction to Usul al-Fiqh", UK, Islamic Text Society.
- Muhammad Saad bin Ahmad bin Maşūd Al-‘ayūbi, (1998/1418). "*Maqasid As-shariah Al-Islāmiyyah wa 'alaqatuhah bi Al-adilat As-shar'iyah*", Dar-Al-Hijrah, As-Saudiyyah.
- Mustafa Said Al-khānī, (2010/1431). "*Athar ikhtilāfāt fi Al- Qarwaid Al-Usūliyyah fi ikhtilāf Al-Fuqaha*", Bathu Al-Duktūrah fī Jāmi‘at Azhar, 11th Ed.
- Nazlida Muhammad Hashim and Dick Mizerski, (2010). "Exploring Muslim consumers' information sources for fatwa rulings on products and behaviors", *Journal of Islamic Marketing*, Vol. 1, Issue: 1.
- Rozita Abu Bakar, Anuar Nawāwī & Ahmad Saiful Azlin Puteh Salin, (2015). "Determinants of Lower Bumiputera Participation in the Variable-Price Unit Trust Investments", *International Academic Research Journal of Social Science*.
- Shabana, Ayman, (2010). "Custom in Islamic Law and Legal Theory: The Development of Concepts of 'Urf and 'Adah in the Islamic Legal Tradition", (Palgrave Series in Islamic Theology, Law, and History).
- Shakir Ullah et al., (2018). "Fatwa Repositioning: The Hidden Struggle for Shari'a Compliance Within Islamic Financial Institutions", *Journal of Business Ethics*, 149(4).
- Star online, (2018). Maybank bank brand value up 24% to RM12.83b, Retrieved on 30/08/2019 from: <https://www.thestar.com.my/business/business-news/2018/07/19/maybank-bank-brand-value-up-24pct-to-rm12pt83b#568lGkfZfb0fzBlQ.99>.
- Wael B. Hallaq, (1984). "Was the Gate of Ijtihad Closed?", *International Journal of Middle East Studies*, UK, Cambridge University press.
- Wafik Grais & Matteo Pellegrini, (2006). "Corporate Governance and Shariah Compliance in Institutions Offering Islamic Financial Services", *World Bank Policy Research Working Paper* 4054.
- Wiechman, D.J., Kendall, J.D. and Azarian, M.K., (1996), "Islamic law: myths and realities", *Crime & Justice International Online*, Vol. 12, No. 3.