



The Element of *Sad Zara'i* in Islamic Banking: A Study on *Shariah* Governance Approach in Malaysia

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Abstract

This paper examines the concept of *sad zara'i* through the *Shariah* governance approach implemented by regulators for Islamic banking operations in Malaysia. Since the establishment of its institution in 1983, the Islamic banking sector has experienced remarkable growth. Today, Islamic institutions are able to compete with their conventional counterparts. However, this sector has faced several challenges in sustaining its viability within the conventional finance environment. As a result, several aspects of *Shariah* need to be reconsidered, making Islamic finance look similar to the conventional finance. This includes imposing late payment charges, replicating conventional products to be Islamic, and implementing floating rates. While Islamic banking practices may be lenient in satisfying market needs, the regulator has taken several approaches to uphold *Shariah* principles in this sector. Some of those approaches seem to be embedded with *sad zara'i*, one of the popular sources of rulings in Islam, which applied to ban any means leads to *haram*. Thus, this study aims to analyze how *sad zara'i* is embraced in several policies by the regulator to ensure *Shariah* compliance within Islamic banking operations in Malaysia. Through library research, it is discovered that the element of *sad zara'i* can be manifested in several approaches through *Shariah* governance carried out by the regulator in Malaysia: presenting *urf fasid*, tightening so-called controversial practices, and providing guidelines on sensitive *Shariah* matters. While the data of this study may be limited since it relies on secondary data, practical issues on Islamic banking in Malaysia are discussed. Therefore, it is hoped that its findings can provide insight into how *sad zara'i* is applied in a new manifestation, especially in dealing with contemporary issues like Islamic banking.

Keywords: *Sad zara'i*, Islamic banking, Islamic finance in Malaysia

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1. Introduction

It is widely known that *Shariah* is based on revelation, as the *Quran* and the *Sunnah* are the highest authorities in determining what is permissible and what is forbidden. Muslims are required to follow all *Shariah* rulings, as they are divinely revealed and integral to their faith, rather than being man-made laws. In other words, those rulings principally are unchangeable without being influenced by human needs and desires. At the same time, since most *Shariah* rulings are in the form of principles and general, they are always relevant and applicable to the change of time and place.

While *mujtahids* have no authority to determine *Shariah* rulings, they play a role in interpreting *Shariah* texts and implementing its rulings in the right situation (Al-Duraini, 2013). Thus, *Shariah* texts should not be literally understood, and the application context needs to be carefully considered. In other words, every ruling must be applied together in line with *Shariah's* objectives, known as *maqasid Shariah* (Al-Kailani, 2008). As widely agreed by scholars, every *Shariah* ruling is revealed to bring *maslahah* (well-being) or to avoid *mafsadah* (harm), as this *maqasid* must be considered when the ruling is implemented (Al-Khadimi, 2010).

Sad zara'i (banning the means) is part of this tool to ensure permissible actions do not lead to *mafsadah* (Al-Burhani, 1985). It has become an essential discourse within scholarly works, especially in the *usul fiqh*

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discipline. Even though some of its technical aspects have become debatable issues, all scholars agree that what leads to haram is considered haram (Al-Qarḍawī, 1980). When a permissible action leads to *mafsadah*, either due to wrong individual intention or abuse of power, the action should not be allowed. In principle, if the action leads towards benefits, it is desirable commensurate with how appropriate it is in the quest for these ends, even if it is not the same as those benefits. In contrast, if an action is consequently directed toward evil, it will be forbidden, as it corresponds with the prohibition of these evils (Abu Zahrah, 1958). *Sad zara'i* ensures that *Shariah*'s objective will not be compromised even under the name of *Shariah* permissibility (Al-Duraini, 2008). In addition, it plays a role in safeguarding *Shariah* from being misused or when permissible actions are out of control. In principle, *sad zara'i* is crucially required in the area where permissible actions are surrounded by prohibited ones, like the Prophet condemning those who were involved indirectly in alcohol and *riba* (interest).

Therefore, this paper aims to analyze the element of *sad zara'i* that can be identified through the approach of *Shariah* governance carried out by the regulator for Islamic banking operations in Malaysia. The Islamic banking industry has been an alternative to conventional banking for decades. However, since both serve the same customers in the same field and are monitored by the same regulator, it has been observed that Islamic and conventional share many similarities. For example, the financing rate for Islamic facilities is designed floating to ensure it remains competitive with conventional facilities (Lahsasna, 2013). This would be against the original contract in *Shariah*, which must be fixed to avoid the *gharar* (uncertainty) issue (Ishak, 2019a). Another example is the late payment charge in which the rate of *ta'wid* (late payment compensation) is set to be 1%, which is like conventional loan facilities (Yaakub et al., 2013).

While it is claimed that Islamic banking practices in Malaysia follow the trend of its conventional counterpart, *Shariah* governance plays a significant role in distinguishing between both, particularly on *Shariah* complaint aspects. These can be observed through several policy documents and *Shariah* resolutions issued by the regulator requesting Islamic banking players reconsider some of their practices. This includes *wadiah* (safekeeping), *rahn* (pawn), and *qalb dayn* (financing restructuring) to avoid the element of *riba*. At the same time, several so-called controversial practices, such as *bay' al-Inah* (buy and sell back) and *tawarruq* (commodity sale for liquidity), have been tightened phase by phase (Ishak, 2019b). In addition, some practices are modified to ensure their permissibility does not lead to harm, such as stipulating *ibra* (rebate) and its calculation in the financial agreement. This indicates how *sad zara'i* is still embedded through the approach of *Shariah* governance even though they did not mention it. In this regard, this study applies library research by analyzing related policies issued by the Malaysian regulator, namely Bank Negara Malaysia (BNM) as part of *Shariah* governance practice, to ensure Islamic banking operations remain *Shariah* compliant. Although this study's data may be limited since it is secondary data, issues on Islamic banking in Malaysia are practically discussed.

2. Literature Review

2.1. *Sad zara'i* in *usul fiqh* discourse

The term *sad zara'i* contains two Arabic terms: *sad*, which literally means to block, and *zara'i*, which can be understood as means. These combined words can be technically defined as the method to block something as it leads to an unlawful end (Al-Shatibi, 2004). Based on the concept of *sad zara'i*, there would be a situation in which a permissible action in *Shariah* can be forbidden as it is associated with something prohibited at the end (Al-Zuhaili, 1986). For instance, selling grapes is allowed. However, if a seller sells it to an alcohol manufacturer to produce wine, then this selling should not be allowed (Al-Zaidan, 1986). Thus, the fundamental assessment to ban permissible action through the *sad zara'i* method is since its outcome leads to a prohibited direction (Abu Zahrah, 1958).

Through classical and contemporary literature, scholars sometimes discuss the topic of *sad zara'i* and *hiyal* (legalistic trickery) (Al-Ashur, 2001). The latter means utilizing a legal way for a prohibited end that could not be achieved directly in the way allowed by *Shariah* (Khir, 2010). *Hiyal* occurs when people tend to do a prohibited thing or try to escape their obligation by hiding it within a permitted action, which is unacceptable in Islam (Sayyid Ubak, 2012). For example, to avoid paying zakat, a person gives a small portion of his property to others as a present or a loan to others. Therefore, his property amount would be below the minimum rate for the *zakat* requirement (Al-Shatibi, 2004).

Nevertheless, it is extremely difficult to determine the real intention of a person, and an action should not be judged due to an assumption of wrong intention without evidently proven (Shibayr, 2007b). At the same

time, not all *hiyal* is prohibited; if its action is in line with *Shariah*, then it should be allowed. This can be observed when the Prophet SAW proposed a solution: exchanging different quantities between two types of dates: Medina and Khaibar. First, sell the dates for money, then use the money to buy the other dates (Muslim, 2000). Although this solution looks like *hiyal*, it is an alternative for *riba* exchange that should align with *maqasid Shariah*. Thus, *hiyal* should be banned only when its outcomes are against *Shariah* (Al-Shatibi, 2004).

From another perspective, al-Shatibi (2004) has linked the topic of *sad zara'i* to the general principle of *ma'alat al-Af'al* (considering the outcome of action). This principle aims to ensure that the outcome of *Shariah* rulings aligns with its objectives (Al-Sanusi, 2003). Since the basis for the assessment of blocking the permitted means in *sad zara'i* is examined based on their outcomes, regardless of their intention, this is part of *ma'alat al-Af'al* (Ishak, 2018).

In terms of the authority of *sad zara'i*, all Muslim scholars unanimously agree with the general principle that what leads to *haram* would be considered *haram* too (Al-Zuhaili, 1986). Exploring *Shariah* sources, many verses of the *Quran* indicate that an action should be stopped when it leads to *mafsadah* despite the prohibition of insulting non-Muslim religious practices in chapter al-An'am, verse 108. This verse indicates that insulting non-Muslims, particularly towards their worship or their practice, is prohibited since the consequences of this action would lead them to insult Allah back (Ibn Kathir, 2008). As for the Sunnah, it was reported that when the Prophet's companion offered to kill Abdullah Bin Ubay due to his action in creating a clash between Muslims, the Prophet responded that he would leave him alone. Let the people not say that Muhammad kills his companions (Muslim, 2000). It is learned that the Prophet refused to punish Abdullah bin Ubay due to its consequences that would make people think he killed his own companions, as well as it could cause chaos among people (Ibn al-Qayyim, 2006).

While scholars agree with the general principle of *sad zara'i*, they differ in how genuine *mafsadah* should be considered (Al-Zaidan, 1968). In more detail, an action could be claimed to cause *mafsadah*; however, it is uncertain. As a result, over-using *sad zara'i* may prohibit permissible action without a strong justification. In this regard, Muslim scholars have clarified the level of *mafsadah* based on four situations (Al-Shatibi, 2004).

Such a situation can be summarized as the following: -

- i. An action leads to *mafsadah*. The first situation refers to an action that leads to *mafsadah*, as it is almost impossible to deny its negative impact, for example, insulting non-Muslim practices. This action would prompt them to insult Allah back. In this situation, all Muslim scholars unanimously agreed that this level of *mafsadah* is genuine, and those actions must be banned.
- ii. An action most often leads to *mafsadah* and rarely leads to *maslahah*. In this context, even though *mafsadah* does not definitely occur like the previous, it is very likely to happen. For example, selling grapes to an alcohol manufacturer to produce wine. Like the first situation, Muslim scholars also agreed that it represents a genuine *mafsadah*, and this action must be banned.
- iii. An action leads to *mafsadah*, but there is no certainty or even dominant probability. Unlike the previous situation, *mafsadah* in this situation could not be surely determined. In this case, an action that can lead to *mafsadah* if a person has bad intentions to legalize a prohibited action. For example, in the case of *bay' al-Inah*, this contract can be manipulated to legalize the *riba*. This situation created an argument between two groups: Hanafis and Shafi'is, who did not recognize this *mafsadah* unless it had been clearly proven, and a group of Malikis and Hanbalis who consider this situation as the real *mafsadah* as those actions need to be banned (Al-Shatibi, 2004).
- iv. An action rarely leads to *mafsadah*. In this situation, the possibility of *mafsadah* to occur through this action is very rare. For example, digging a well in a place where it is not likely to cause harm. As for this *mafsadah*, Muslim scholars also agreed that it must be ignored since its consequences are doubtful.

This discussion of *sad zara'i* has been expanded into *fath zara'i* (open the means) since a group of late classical scholars have attempted to reconsider the meaning of *zara'i*. It is widely defined as a means that can be banned or allowed. Al-Qarafi, for example, has mentioned that *zara'i* can be mandatorily closed or obligatorily opened. An example would be a man who is given money to eat haram if that is the only way to prevent him from committing adultery (al-Qarafi, 2003). Similarly, another scholar, Ibn al-Qayyim (2006) clarified that *zara'i* was originally permissible even if it led to *mafsadah*, but the *maslahah* is more dominant. For example, this includes the permissibility for a man to look to a woman if he intends to marry (Ibn al-Qayyim, 2006).

In contemporary discussion, the International Islamic Fiqh Academy (IIFA) of the Organization of the Islamic Conference (OIC) has issued a special resolution on *sad zara'i* as it is a fundamental principle of *Shariah*. *Sad zara'i* can be divided into several categories:

- i. An action is consensually agreed by scholars its prohibition since it is already stipulated in the Quran and the Sunnah,
- ii. An action that unanimously agreed since the harm exceeds the benefit,
- iii. An action that is subject to a different view.

IIFA has concluded that *sad zara'i* must not be applied if it rarely leads to *mafasadah* or the *maslahah* more dominant than *mafasadah* (IIFA, 1995). It can be concluded that *sad zara'i* plays a significant role in upholding *Shariah* by providing gaps between permissible and prohibited activities. If a matter leads to *mafasadah*, it should be banned based on the concept of *sad zara'i*, despite its original status is permissible. Even though the degree of considering *mafasadah* is not the subject of consensus among scholars, they all agree that what leads to haram must be prohibited.

2.2. *Sad zara'i* in *Muamalat*

Muamalat (financial transaction) is one of the main areas in which *sad zara'i* is mostly applied. In general, the main principle of this area is that 'the origin *muamalat* is permitted unless there is any evidence of its prohibition' (Al-Shatibi, 2004). Thus, according to *Shariah*, rulings pertaining to financial activities are more flexible. Exploring the Quran and the Hadith, most of the sacred texts related to financial activities usually are general principles or general rulings rather than detailed descriptions (Shibayr, 2007a). In addition, business, finance, and economic activities should be allowed if there is no clear evidence of their prohibition from *Shariah* sources (Al-Shatibi, 2004). In other words, any contract, condition, and innovation does not need special permission or recognition from the Quran or the Sunnah.

Nevertheless, the original status of *muamalat* activities can lead to haram or *mafasadah*. Analysing Hadith related to *muamalat*, several financial activities are banned not due to their original status but due to their outcome, which negatively affects society. For example, the Prophet has prohibited *bay' hadir lil badi* (sale by the urbanite for the nomadic) and *talaqin ruqban* (buying goods by intercepting the villagers' caravans) (Al-Nawawi, 1997). Both types of *bay'* could lead to monopoly, as it could harm society by increasing the price of goods and harm the original sellers by buying their goods at a low cost (Al-Duri, 2011). At the same time, several forms of *bay'* are prohibited since they can cause disputes among Muslims, like the prohibition of buying what has been outbid by others (Al-'Asqalani, 2000).

In addition, some permissible *muamalat* could be considered haram if they are associated with the element of haram, particularly *riba*. For example, the Prophet disallowed receiving gifts from borrowers to avoid *riba* if it is not a norm (Ibn Majah, 2007). Similarly, *bay' wa salaf*, which is a combination of *bay'* and *qard* (loan), is prohibited since it could create an increased amount for the repayment of the *qard* (Amanullah, 2018). In more detail, any benefit the lenders enjoy must not be derived from the *qard*. In this case, the *bay'* may give a buyer additional profit; when combined with *qard*, the profit may be part of the *qard* itself (Mahmud et al., 2018).

Nevertheless, not all cases of *sad zara'i* application in *muamalat* are the subject of agreement among scholars, as some have become debatable issues. The most popular one is *bay' al-Inah*. Most classical and contemporary scholars have condemned this contract as a trick to legalize *riba* (Al-Zuhaili, 2006). *Bay al-Inah* is practiced when a person sells an item for a deferred payment and then repurchases the item in cash at a lower price (ISRA, 2010). Although most scholars viewed *bay' al-Inah* as a form of a trick of *riba*, other scholars, including Ibn 'Umar, Abu Yusuf, Imam Shafie, and Zahiris, did not see any *Shariah* issue with it (Lahsasna, 2014). For example, Imam Shafie did not accept the argument that *bay' al-Inah* is a form of a trick since this *bay'* contains two different contracts.

In modern times, *bay' al-Inah* is designed by some Islamic banking institutions as financial facilities to provide liquidity. Nevertheless, this contract has been criticized by many bodies, mainly IIFA, through their resolution on the issue of *muwa'adah* (bilateral promise) in a financial contract that must be free from *bay' al-Inah* (IIFA, 2009). In addition, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) has issued its standard on *tawarruq*, requiring this contract to be free from *bay' al-Inah* (AAOIFI, 2010). However, the *Shariah* Advisory Council (SAC) of the BNM has taken a different approach as they allow *bay' al-Inah* based on *bay'* (BNM, 2010).

Similarly, *tawarruq* is banned by certain scholars due to *sad zara'i*. This contract is a financial instrument when a person who needs cash buys a commodity on credit from another person and then sells it to a third party for immediate cash (Alkhan & Hassan, 2019). Through two selling processes, the price of the second sale could usually be lower than the first since the person intends to obtain liquidity from this instrument, not to own the item. Although *tawarruq* has no issue among most scholars in comparison to *bay' al-Inah*, Ibn Taimiyyah and Ibn al-Qayyim are among the prominent scholars that rejected *tawarruq*, claiming it aims to legalize *riba* (Ahmed & Aleshaikh, 2014).

In modern times, the *tawarruq* has been designed uniquely as a financial instrument by Islamic banking institutions, making it slightly different from the classical one. *Tawarruq* has evolved to be organized and is known as *tawarruq munazzam* (organized). In more detail, Islamic banking institutions play a role in arranging the *tawarruq* process through commodity markets, and the process occurs immediately and systematically. *Tawarruq* is applied as a financial instrument in various products, including deposits, financings, investment, and money market instruments (Bilal & Mydin Meera, 2015).

This new *tawarruq* has received fierce criticism from several influenced bodies and prominent scholars. IIFA, for example, has forbidden *tawarruq munazzam* due to the utilization of spoiled commodities, the lack of genuine possession and delivery, and banks being appointed as the customers' agents, known as dual agencies. As a result, *tawarruq* is considered a trick of *riba* (IIFA, 2009). As for AAIOfI, despite the fact that this body does not clearly prohibit *tawarruq munazzam*, it provides strict conditions for this instrument, mainly from the perspective of the agency. Islamic banking institutions are not allowed to act as an agent on behalf of their customers if they buy the commodity from them. Instead, the commodity must be sold by the customers either themselves or through their own agent (AAOIFI, 2010).

While the *muamalat* area may enjoy flexibility regarding *Shariah* permissibility, their status is not guaranteed to remain *Shariah* compliant until the end. All contracts, terms, and activities must be carefully implemented to ensure they are not associated with haram elements such as *riba*, *gharar*, and *maisir* (gambling). On top of that, *muamalat*, which represents business, finance, and economic activities, should aim to bring well-being to humankind. Thus, it should not be misused to benefit a specific group and harm others.

2.3. *Shariah Governance in Malaysia.*

It is known that Malaysia is among the leading countries in Islamic finance. Even though it is not a large majority Muslim in comparison to other Muslim countries, Malaysia, through its government, has proven how serious this country is in supporting the Islamic finance industry. It is reported that Malaysia is the best country in terms of legal framework, supervision, education, and human resources development for Islamic finance, consisting of Islamic banking, the Islamic financial market, and the Takaful industry (IFDI, 2022). In terms of supervision, BNM is the sole authority in Islamic banking and Takaful, while the Security Commission plays a regulatory role in the Islamic financial market (Kamaruddin et al., 2020).

In general, Islamic banking institutions must ensure a strong institutional arrangement, effective oversight, responsibility, and accountability for public confidence, particularly on *Shariah* matters. Thus, *Shariah* governance is needed as a monitoring body to ensure these institutions do not compromise *Shariah* compliance. *Shariah* governance can be defined as a set of institutional and organizational arrangements through which Islamic financial institutions ensure that there is an effective independent oversight of *Shariah* compliance over the issuance of relevant *Shariah* pronouncements, dissemination of information and an internal *Shariah* compliance review (ISRA, 2010).

Shariah governance plays a crucial role in development, review, approval, auditing, and certification of *Shariah* compliance for any product or practice. This is vital to strengthening public confidence. Since this area requires special expertise and the financial practices are complex, *Shariah* governance needs to be institutionalized efficiently. Islamic banking institutions must establish effective *Shariah* governance arrangements that are well integrated with business and risk strategies of the institutions.

In the case Malaysia, *Shariah* governance in this country has adopted two-tier 'centralized model' which means that all Islamic banking institutions are monitored directly by the regulator in terms of *Shariah* requirements. Through this model, there are two layers of *Shariah* committees: at regulatory level known as Shariah Advisory Council (SAC) and Shariah Committees (SC) at institutions level. SAC, established in 1997, is the sole authority for *Shariah* matters for Islamic banking in Malaysia. Their decisions are also extending to the courts and arbitrators which all SAC rulings for any proceedings relating to Islamic banking on *Shariah*

matters, shall be binding.

Having these two levels: the national and the internal have many advantages in terms of independence, integrity and competency. SAC as the highest regulatory authority is vital to ensure the integrity of internal SC as well as retain public confidence (Lahsasna, 2014). While SAC plays a vital role in harmonizing different standards and acting as the highest *Shariah* authority for Islamic financial institutions, internal SC are responsible to approve Islamic products and monitor their implementation in terms of *Shariah* compliance. Through this centralized model, many practices have been standardized for all Islamic banking rulings. For example, resolutions from SAC have become mandatory reference for developing, reviewing and approving any Islamic product. At the same time, BNM as the sole regulator, has issued *Shariah* based policy documents to ensure consistency in the application of *Shariah*. These documents outline the *Shariah* parameters and operational requirements that must be followed and reported. Among these policy documents are the following:-

Table 1: Policy Documents by BNM

Date of issuance	Title
03 Jan 2024	<i>Hajah and Darurah</i>
20 Sep 2019	<i>Shariah Governance</i>
28 Dec 2018	<i>Tawarruq</i>
19 Jul 2018	<i>Rahn</i>
11 Apr 2018	<i>Bai` al-Sarf</i>
14 Apr 2017	<i>Kafalah</i>
02 Feb 2017	<i>Wa'd</i>
19 Aug 2016	<i>Ijarah</i>
04 Aug 2016	<i>Hibah</i>
04 Aug 2016	<i>Qard</i>
04 Aug 2016	<i>Wadiyah</i>
27 Jun 2016	<i>Wakalah</i>
07 Jan 2016	<i>Istisna'</i>
20 Apr 2015	<i>Mudarabah</i>
20 Apr 2015	<i>Musyarakah</i>
23 Dec 2013	<i>Murabahah</i>

Source: Bank Negara Malaysia

2.4. Previous studies and the gap

Among previous contemporary studies on *sad zara'i* in Islamic finance was from Al-Qaradaghi (2015), who comes up with several factors of *sad zara'i* that are widely applied in modern times, including in Islamic finance: firstly, due to the ignorance of *maqasid Shariah*, the general principle of *Shariah* in terms of permissibility. Secondly, there is an excessive sensitivity regarding women, and thirdly, the issue of corruption, which makes *sad zara'i*, plays a significant role in tackling these situations. However, when there is insufficient evidence to fulfill the application of *sad zara'i*, the principle of original permissibility must resort. Meanwhile, Marji (2024), in his research, indicates the importance of considering between *sad* and *fath zara'i* in financial transactions that involve the element of personal relationship that can lead to either *maslahah* or *mafsadah*. From another perspective, Sadiq (2024), in his study, has concluded two critical roles of *sad zara'i*: to preserve *Shariah* and to provide flexibility in its application. Another contribution to this topic is from Mustofa (2023), who specifies the role of *sad zara'i* in enhancing development and providing guidelines for issuing fatwas.

Regarding the application of *sad zara'i* on application, Faraj (2020) has analyzed two popular instruments in Islamic banking: *musharakah mutanaqisah* and *tawarruq*. Some scholars argue that both are banned because of *sad zara'i*. While he concluded that the justification to ban *musharakah mutanaqisah* is weak, *tawarruq* prohibition based on *sad zara'i* is clear. Another study from Eletrebi, Suleiman, and Awang (2021) focuses on financial transactions that *Shariah* is concerned about with time in all its parts, past, present, and future; thus, all actions need to be considered their consequences. While this topic is still limited to be discussed through the previous literature, this study fills the gap in how *sad zara'i* is applied through the *Shariah* governance,

mainly through the regulator approach.

3. Research Methodology

This study is based on library research that relies on literature to achieve its objective. In more detail, library research is understood as a systematic process for obtaining and presenting data in academic papers. On the one hand, library research through literature could be outdated, incomplete, and biased due to different objectives, and it could be difficult to interpret. On the other hand, library research did not involve high costs compared to fieldwork research. Library research is crucial for the beginning of the research, particularly to review the previous literature, identify the gaps, and propose a conceptual framework before moving on to fieldwork. Since this study is conceptual in nature, which aims to analyze implicit elements of *sad zara'i* through the *Shariah* governance approach carried out by the regulator of Islamic banking in Malaysia, analyzing literature and related documents is sufficient for its objectives.

Regarding data collection, as this is library research, this study relies on secondary data. The data includes classical and contemporary literature related to *sad zara'i* and selected SAC resolutions and BNM policy documents. As for data analysis, thematic analysis is applied to identify several essential themes related to the concept of *sad zara'i*, its foundation from *Shariah* sources, and its parameters. As for the second phase, this study analyses selected SAC resolutions and BNM policy documents to identify the element of *sad zara'i*. The findings of this study are presented in the form of several themes to obtain a better understanding of *sad zara'i* application by the regulator through *Shariah* governance.

4. Results and Discussion

On the one hand, the achievement of Islamic finance as a new industry in this country is impressive since Islamic institutions have successfully provided alternative facilities to their conventional counterparts. Conversely, this sector is still under the shadow of conventional finance. As a result, due to many restrictions and challenges, some Islamic finance operations are influenced by the conventional finance approach. This includes product development, risk management, and business operations. To ensure the viability of Islamic finance, several practices need to be tolerated. This includes considering controversial views like *bay' al-Inah*, *bay' al-Din*, and *tawarruq* as Islamic products, as well as providing exceptions like allowing reinsurance in the *Takaful* industry. As a result, their products look like conventional banks (Chowdhury et al., 2020).

Nevertheless, from another perspective, the regulator demonstrates their seriousness in ensuring Islamic finance operations are end-to-end *Shariah* complaints. This includes providing guidelines on *Shariah* through various policy documents that Islamic banking institutions must follow. Currently, there are 14 policy documents regarding *Shariah* contracts, such as *murabahah* (mark-up sale), *mudharabah* (partnership), and *bay al-Inah*. At the same time, Islamic banking institutions are required to fulfill *Shariah* resolutions issued by SAC. Through these approaches, it is discovered that not all matters are leniently tolerated.

Several themes that are in line with the spirit of *sad zara'i* identified as follows:

i. Theme I: Preventing '*urf fasid*

'*Urf* (custom) can be understood as a matter that is well known by the overwhelming most people, and they are consistent in practicing it (Abu Zahrah, 1958). The matter based on '*urf* is widely recognized by *Shariah* as long as it does not go against mandatory *Shariah* principles and rulings, especially what has been clearly mentioned in the Quran and the Sunnah. In fact, '*urf* plays a crucial role in addressing issues that are not explicitly covered by revelation. In addition, '*urf* is flexible as it can change the change of time and place (Bello & Hassan, 2013). In this regard, *Shariah* is revealed either to recognize, reject, or modify the '*urf*, as many practices have been recognized and continued since the time of the Prophet SAW. This includes respecting guests and avoiding conflicts during the holy months among them (Al-Zaidan, 1968).

Nevertheless, scholars have categorized '*urf* into *sahih* (acceptable) or *fasid* (corrupt), as only the former is recognized in *Shariah* while the latter is rejected. Thus, scholars have underlined special parameters to recognize '*urf*, one of them '*urf* must not contradict either the verse of the Quran or the text of Hadith. If not, the '*urf* will be rejected by *Shariah* (Syab'an, 2008).

Regarding Islamic banking in Malaysia, the issue of granting *hibah* (gift) for deposit is an example of how *sad zara'i* is applied to overcome the potential of '*urf fasid*. At the beginning of the Islamic banking industry, *hibah* had been commonly practiced under deposit-taking products, including

current and saving accounts. Most Islamic institutions at that time offered savings accounts based on *wadi'ah* (safekeeping) contracts and ensured that money was guaranteed. *Wadi'ah* then became *wadi'ah yad dhamanah* (guaranteed safekeeping), where its original concept should be treated as *qard* (loan) from depositors to Islamic banks (Lahsasna, 2014). Since Islamic banking institutions enjoyed these deposits as the cheapest capital for their business operation, they awarded *hibah* to their depositors.

However, granting *hibah* to depositors was claimed to be customary within the Islamic banking industry. It seemed *wadi'ah* was practiced similarly to conventional deposits. As a result, this custom had become '*urf fasid*' since granting additional benefits towards loans against the *Shariah* principle (Ishak et al., 2021b). As a response, BNM, as the regulator, has issued a policy document on *qard*, which disallows using the *wadi'ah* term for deposits designed based on the concept of *qard*. In addition, the *hibah* is required to be based on the actual rate, and a clear disclaimer must be provided that a depositor may or may not receive a *hibah*.

This approach indicates how the spirit of *sad zara'i* is embraced through this policy document to remove controversial elements through Islamic deposits. Since the practice of *qard* is sensitive in terms of receiving additional from its original amount, stressing these requirements can create a gap in ensuring *qard* practice does not fall under the non-*Shariah* element. At the same time, it is crucial to ensure that deposit practices among Islamic banking institutions are clearly different from what has been practiced by their conventional counterparts.

ii. Theme II: Tightening controversial practices

Its fact *Shariah* rulings were not revealed at once. Rather, this legal system was completed over 23 years and 5 months, spanning two distinct periods: *makiyyah* (the period of Mecca) and *madaniyyah* (the period of Medina). While the majority of *makiyyah* verses stress the element of faith, humanity, and general rulings, *madaniyyah* verses provide details of *Shariah* rulings in various aspects. This is due to the different reality between Mecca and Medina (Al-Qahtan, 2006).

Shariah strongly considers the reality of people before introducing its rulings, as many of them are revealed step by step, like the prohibition of *riba*. While *Shariah* rulings have been completed in terms of the revelation process, their application still needs a gradual approach by considering the situation. This includes legalizing *Shariah* rulings into the form of modern laws like family laws, commercial laws, and criminal laws (Al-Zuhaili, 2010). In fact, the gradual approach aims to ensure that *Shariah* rulings can be implemented pragmatically and that the real problem can be overcome wisely (Al-Qardawi, 2005). In this regard, even if a ruling cannot be completely applied, it should not be completely left. Instead, it should develop pragmatic solutions to ensure the ruling can be implemented.

Considering the importance of a gradual approach, the Islamic banking industry has been introduced gradually in Malaysia. This includes licensing awards and regulatory development (Ishak et al., 2021a). As for *Shariah* compliance, the element of *sad zara'i* seems to be applied gradually and carefully. For example, in dealing with the *bay' al-Inah* issue. This instrument is among the earliest contracts utilized by Islamic banking institutions as financing facilities, particularly in Southeast Asia countries, including Malaysia and Brunei (Yusoff et al., 2019).

While *bay' al-Inah* has been fiercely condemned by majority bodies and scholars, Malaysia took a different approach. If the original concept is permissible and only with strong evidence, then should it be prohibited? Meanwhile, the *maslahah* through *bay' al-Inah* seemed to be realized at that time since there were many restrictions in terms of alternatives, particularly during the first period of this industry. This is due to *bay' al-Inah* being simple and easier in practice for Islamic banks as a financier. This contract was also utilized in structuring Islamic credit cards, which today are crucial for daily business dealings and commercial transactions (Shaharuddin, 2012).

However, due to the controversial issue associated with *bay' al-Inah*, BNM seems to discourage Islamic banking institutions from utilizing this contract as their financial facility (Ishak, 2019b). BNM has gradually reviewed the application and the operational requirements of *bay' al-Inah* so as to fulfill scholars' requirements for this contract. For example, among the strict requirements is to ensure *bay' al-Inah* is practiced with two separate contracts without mentioning a condition to repurchase the asset

after selling it. In addition, both contracts must occur at two different times (BNM, 2013). This spirit of *sad zara'i* can be identified through this policy as the regulator aims to ensure that even though bay *al-Inah* is a debatable issue. Hence, it must be practiced according to *Shariah* principles, as mentioned by its proponent, so that it is not like a trick to legalize *riba*.

Rahn could be another example to illustrate this point. This facility has been widely offered not only by Islamic banking but also by Islamic non-banking institutions. In general, *rahn* consists of several contracts: *qard*, *wadi'ah yad damanah*, and *ujrah* (fee). Since a customer needs liquidity, the institutions provide financing under the name of *qard*. Consequently, the customers pawn their items as collateral based on *wadi'ah yad dhamanah*. Lastly, *ujrah* is implemented with a fee for the safekeeping of the items (Sharif et al., 2013). While *rahn* has become a popular *Shariah*-compliant financing facility as it provides an immediate service, potential *Shariah* issues have been detected. Although the fee that has been imposed does not refer to the *qard*, it is unclear how it has been charged. It seemed that *ujrah* for safekeeping is charged based on the pledged item value. As a result, it could lead to the element of *qard jar naf'an* (a loan that begets an advantage) when the core of this product is *qard*.

In 2018, BNM issued a new policy on *rahn*. The policy clearly mentions that any charge imposed on customers must be based on the cost of safekeeping, not the percentage. To be precise, it must be based on the expenses incurred directly for the maintenance of the pledged item. These include safekeeping costs, documentation, liquidation, and discharging collateral. The element of *sad zara'i* is identified when the regulator intends to stop the potential of the *riba* element, even though it is still uncertain.

iii. Theme III: Providing a General Guideline of *Shariah*.

While it has been proven that Islamic financial institutions are able to become competitive players in the financial industry, many *Shariah* aspects need to be tolerated due to the challenges faced in adapting Islamic finance into the modern financial system. Certain aspects need exceptions, such as Takaful operators considering reinsurance to manage risk (Ab. Ghani et al., 2019). In principle, *Shariah* recognizes hardship or any unusual situation as an exemption that may be allowed or some obligation that may be reduced.

In 2024, BNM issued a special policy document on *hajah* (need) and *darurah* (necessity) which serves as a guideline in allowing exceptions of *Shariah* ruling due to hardship situations. Neglecting hardship may have a detrimental effect on the operation of Islamic banking. This policy is required to ensure the viability of the Islamic finance industry by allowing Islamic banking institutions to reconsider the application of *Shariah* rulings. Such examples given by the policy are utilizing a conventional nostro account and financing *Shariah* non-compliant business by a prescribed institution (BNM, 2024).

From the *sad zara'i* perspective, the approach conducted by BNM is crucial to avoid any potential misuse of the principle. In fact, not every hardship qualifies under the situation of *hajah* and *darurah* since the hardship could be certain, or it may just be based on assumption. Thus, this policy document is timely, outlining its expectations and the requirements for applying these concepts in carrying out Islamic banking and Takaful businesses. This regulatory framework clearly emphasizes the parameters of different categories of *hajah* and *darurah*, and it strengthens the governance and oversight of Islamic banking institutions by providing detailed operational guidance for the decision-making process and implementation plan.

5. Conclusion and Recommendation

This paper examines the *sad zara'i* element identified through the *Shariah* governance approach implemented by the regulator in Islamic banking operations in Malaysia. The Islamic banking sector has experienced an impressive development in this country since its first establishment in 1983. Today, Islamic banking sectors have become strong competitors to their conventional counterparts. While this sector is growing fast, it has faced challenges due to the modern financial environment. As a result, several aspects of *Shariah* need to be reconsidered to maintain the viability of the Islamic banking industry. Although it may seem that Islamic banking practices are lenient in satisfying market needs, the regulator has taken several approaches to uphold

Islamic principles and rulings in this sector. Some of those approaches seem to be embedded with *sad zara'i*. Based on library research, it was discovered that the element of *sad zara'i* can manifest in several approaches carried out by BNM. This includes preventing *urf fasilid* by requiring Islamic banking institutions to reconsider their deposit concept, tightening so-called controversial practices such as *bay' al-Inah*, *tawarruq*, and *rahn*, and providing general guidelines on *Shariah*, especially *hajah* and *darurah* policy. Although this study is limited by the use of secondary data, it effectively addresses current issues in Islamic banking in Malaysia. Future research encourages to explore this topic issue through field studies using qualitative methods.

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