



# The Significance of Ijtihad in Takaful Business: Case Study in Malaysia

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## Abstract

Takaful businesses have to be run according to Shariah. In takaful operations, many shariah issues have arisen based on operations, activities, products, investments, etc. In Malaysia, under the Islamic Financial Service Act (IFSA 2013), takaful operators are required to form a Shariah committee to advise and resolve these Shariah issues. This study will examine the significance of ijtihad that has been done by the Shariah Advisory Council (SAC) in solving the Shariah issues faced by the industry. The study is qualitative-based research that used various documents related to takaful business in Malaysia. The study results show that the ijtihad issued by SAC influences the takaful legal framework in Malaysia, particularly when it comes to shariah issues. Other countries could learn from this to implement Islamic law in legal and regulatory frameworks, especially in the Islamic finance industry.

**Keywords:** Takaful; Islamic Finance; Ijtihad; Malaysia

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## 1. Introduction

The Shariah Advisory Council of Bank Negara Malaysia (hereinafter referred to as “SAC”) was established in May 1997 as Malaysia's highest Shariah authority for Islamic financial institutions. The Central Bank of Malaysia Act of 2009 (CBA 2009) reinforces the tasks and responsibilities of the SAC as the authority for determining Islamic law for the purposes of Islamic financial operations, which is under the Bank's supervision and regulation. The shariah rulings by the SAC function as the main reference for Islamic financial industry to ensure all the activities related with it are in line with shariah. According to the CBA 2009, any shariah-related issues that are brought up in court or during an arbitration shall be referred to the SAC for clarification and certainty.

Insurance is one of the most important tools for mitigating the risk of financial loss. However, due to the fact that insurance entails prohibited elements of *riba* (interest), *gharar* (uncertainty) and *maysir* (gambling), Muslims should avoid taking out insurance and should opt for takaful cover instead. On the other hand, takaful must also operate according to shariah. In

Malaysia, the requirement for a takaful operator to adhere to Shariah in all their activities—including product offerings, marketing, underwriting, investment, claims and actuarial valuation—has been emphasized through law in the Islamic Financial Services Act 2013 (hereinafter referred to as “IFSA 2013”), subsection 28 (1). Failure to comply with this legislation may result in a fine not exceeding RM25 million, imprisonment for up to eight years or both, as provided in subsection 28 (5) of the act.

Takaful operates quite different from conventional insurance, even though, in general, they both give assistance to members in the event of misfortune. Although the concept of takaful business is taken from the conventional insurance industry, its implementation must and should comply with Shariah. Nevertheless, there are universal concepts accepted by both conventional insurance and takaful, such as complete honesty or the concept of utmost good faith (Shariah Resolution in Islamic Finance, 2010–2012). Central Bank of Malaysia (hereinafter referred to as “BNM”) has taken systematic steps to establish a legal structure to ensure that takaful practices are in accordance with Shariah principles. In order to strengthen Malaysia’s financial environment, BNM has introduced laws and guidelines to promote the stability and growth of Islamic finance (Hamat & Ghazali, 2019).

Takaful operates in accordance with Islamic Shariah (Daghi, E. Q., 2006). Masud (2010) stated that the set of rules extracted from the Quran (The Holy book) and Sunnah (sayings and actions of Prophet Muhammad) is known as Shariah. The Shari’ah which provides the framework for a set of rules and laws to regulate business, determines whether a transaction or economic activity is permissible or not. In order to make it legal, Shari’ah requires that all transactions must be free from prohibited elements such as *riba* (interest), *gharar* (uncertainty), and *maysir* (gambling).

Furthermore, there is a dynamic secondary source of common law rulings and scholarly interpretations known as fatwa. Fatwa are the outcomes of how humans have interpreted the texts, principles or combination of the two. In practice, when applying shariah in the takaful industry, it requires *fiqh* to understand the *nusus* that can be found from the Quran and hadith (Yusof & Alias, 2008). *Fiqh* is needed as to determine on how this *nusus* should be applied in handling on such related operations. Based on the above introduction, does *ijtihad* contribute to the establishment of the rules and regulations governing takaful operations?

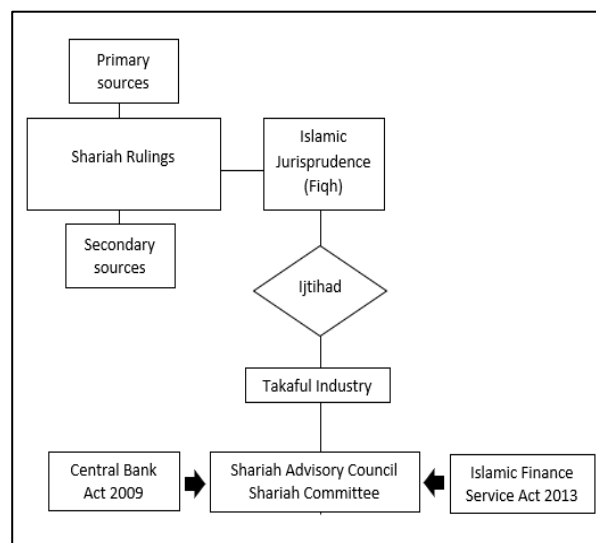


Figure 1: A Brief Overview of Islamic Jurisprudence in Takaful  
Source: Constructed by researcher

Since the fundamental sources of Islamic law are general in nature, fresh issues that occur in the operation of takaful without previous rulings or specific texts must be handled through an *ijtihad* process. *Ijtihad* is an important continuous process in the history of Islamic law and is seen as an important weapon for Muslim society's survival (Man, 2014 & Hasan, 2003). Changes in financial legislation and industry standards may necessitate a re-evaluation of *ijtihad* in order to ensure that Islamic finance stays compliant with both Sharia principles and legal obligations. Despite the fact that *ijtihad*'s concept has been covered in many studies, its vital role has not received as much attention. It is crucial to explain this since the *ijtihad* ruling also becomes a legally binding regulation. This study contributes to give understanding the significant of *ijtihad* in the establishment of governance, policies, and documentation in order to develop industry.



## 2. Literature review

In ancient Arab periods, *takaful* was found in the "*Aaqilah*" system, which involved mutual assistance. *Takaful* is an Islamic finance system where people collectively share financial losses, in accordance with Islamic principles promoting mutual support and risk-sharing (Khan et al., 2011). *Takaful* is an Islamic alternative to traditional insurance based on the Islamic principles of trusteeship, brotherhood, and cooperation. *Takaful* originally comes from the Arabic term *kafala*, which means "to guarantee." It also refers to a party's agreement to indemnify another for a pre-agreed liability. *Takaful* is a shariah-compliant insurance product which differs conceptually from conventional insurance due to the presence of elements of usury (*riba*'), uncertainty (*gharar*) and gambling (*maysir*) that are prohibited in Islam (Sharifuddin et al., 2016).

The incompatibility of conventional insurance with Shariah principles prompted Muslim scholars to recommend *takaful* as a Shariah-compliant substitute. *Takaful* is a scheme that provides disaster protection in the same way that traditional insurance does. In general, *takaful* is an extension of the concept of mutual assistance practised by Arabs (Haron and Wan-Azmi, 2009) and in this period, it has been grounded by the idea of *taawun* (mutual collaboration) and *tabarru'* (donation) (Billah, 2003, Lahsasna, 2016) and (Abdul Rahman and Redzuan, 2009). *Ta'awun* is defined as mutual protection and guarantee among participants (Borhan, & Saari, C., 2003). Meanwhile the term *tabarru'* refers to a mutual agreement among participants to contribute a certain amount of money to the fund that will provide financial assistance to any participant who suffers a loss (Mohd Sadad, M., & Radiah, K., 2012).

In order to ensure that all *takaful* activities are in line with Shariah, SACs have been appointed as advisors to Islamic financial institutions (IFIs), as stated in IFSA 2013, section 30. SACs play an important role in advising IFIs to ensure that all activities comply with Shariah. BNM's new "Shariah Governance Policy 2019" requires a majority of at least five SAC members to be Shariah-qualified. At the national level, SAC for Bank Negara Malaysia (BNM)—Malaysia's central bank—was established as an advisor and reference point for all matters relating to Islamic finance as well as other matters requiring resolution in accordance with Islamic law.

Since the primary sources of Islamic law are general in nature, new issues that arise in the operation of Islamic insurance without previous rulings or explicit texts must be addressed through a process of *ijtihad* (Weiss, 1978). According to Imam Ghazali (2005), *ijtihad* means to maximise one's capacity in a specific matter. *Ijtihad* is defined as the whole amount of effort expended in obtaining a legal opinion. It also means striving to the utmost to extract the law from the texts using all valid interpretation methods (Nyazee, 2002). *Ijtihad* can be defined as the creative and comprehensive intellectual effort to derive legal rulings on specific issues from the sources of Shariah in the context of the prevailing circumstances of Muslim society.

*Ijtihad* in modern Islamic finance is the result of the intellectual endeavours of Shariah scholars to legally apply Islamic economic principles in the context of an evolving banking and financial system (Jobst, 2007). Additionally, Rafikov & Akhmetova (2020) insisted that, a combination of experts in various fields is essential to help produce effective *ijtihad* and appropriate to the current situation. Monodisciplinary approaches tend to misrepresent the realities of this complicated life and, as a result, offer answers that lead to crisis. This corresponds with a depiction articulated by Hassan A. (2003), in order to ensure that *ijtihad* is conducted properly, it must be done by someone with knowledge relevant to the issue at hand.

Foster (2007) observation on the ongoing *ijtihad* debate highlights the need for continuous interpretation of Islamic law to maintain financial flexibility within Islamic financial principles. Failure to incorporate *ijtihad* in Islamic finance may risk the misapplication of the law and the adoption of rigid interpretations, as warned by Codd in 1999. This, in turn, could impede the legal system's ability to effectively address modern challenges. Therefore, efficacy and inadequate performance should not be present in the *ijtihad* process because they can lead to unethical behaviour and then affect the status of shariah compliance (Ahmed, 2015). This means *ijtihad* cannot be practised arbitrarily until it undermines its authenticity (Abd-Allah, 2006). It contradicts with the practice of *ijtihad* in earlier times (Najmaldeen, 2014).

*Ijtihad* in Islamic finance can potentially deviate from the proper tools of *ijtihad* (Abozaid, 2016). Therefore, there have been calls for standardisation of Islamic legal principles and structures in order to avert this deviation. Standardization of regulations and regulatory in *takaful* can provide clear and consistent guidelines. This can help to eliminate ambiguity and assure Shariah conformity. According to Bakar (2002), standardization is not a bad thing as long as it does not limit the diversity of opinions that exist in the practice of *ijtihad*. However, concerns about *ijtihad*'s flexibility are often raised (Ahmed, 2015) and scholars may be less motivated to engage in future *ijtihad*. A flexible codification system in Islamic financial law will be able to provide a great and much-needed solution in the balance of *ijtihad* in Islamic finance (McMillen, 2011). Although *ijtihad* is certainly designed to be flexible and adaptable, its practical application may differ once it has been incorporated into a legally binding legal system and can make it challenging to enforce rigid standards on *ijtihad*.

This study aims to highlight the significance of *ijtihad* in Malaysia's legislation regarding the *takaful* business. In Malaysia, the *takaful* regulatory framework has been provided by BNM with full guidance and explanations for practices in the *takaful* industry. Furthermore, the existence of acts, policy documents and guidelines regulating businesses and financial activities in Malaysia give comfort and safety to the community to conduct business activities in full certainty. While this law is man-made,



it can be used as current *uruf* since it protects the community's interests and can prevent potential drawback (Ahmad Sufyan & Ab Mumin, 2008), such as fraud, leakage of funds and tyranny. As long as this law does not conflict with Shariah, then this legislation must be followed to safeguard the welfare of society. To the authors' best knowledge, there are limited studies in Malaysia that discuss about the embedding of the *ijtihad* made by the SAC into legal documents. Despite opposing viewpoints on the *ijtihad* practises, it is a crucial instrument nowadays. This study is expected to fill a gap in *ijtihad* literature and provide insight into how *ijtihad* affects the takaful legal system when it comes to shariah-related issues.

### 3. Methodology

This paper focuses significant on qualitative research method in discussing the of *ijtihad* in shaping the takaful framework in Malaysia by using library research approach. To be more specific, this study used a two-stage procedure to investigate *ijtihad* and its relationship to Malaysia's takaful framework. Data collecting is a process that involves the design and execution of data collection strategies to obtain information about the subject being researched (Idris Awang, 2001).

Firstly, in data collection, the literature on *ijtihad* and takaful are obtained from secondary data that included academic journals, books, conference papers and other periodicals documents. Almost the entire study employs this method to collect data on the notion of *ijtihad*, the history of takaful, Islamic finance issues, a collection of Islamic financial shariah resolutions, acts, policy documents, and so on. Secondly, in term of data analysing, the method utilised to analyse this research is content analysis. According to Bryman (2012), documentation analysis is the most used qualitative methodology. This research analyse document related to takaful industry such as Risk-Based Capital Framework for Takaful Operator, Takaful Operations Framework, Shariah Governance Framework 2019, Investment-Linked Business Guidelines, New Product Introduction, Operational Risk, Islamic Financial Service Act 2013 and others related documents.

This study aims to investigate the shaping direction of *ijtihad* in takaful industry. Once data was gathered from documents pertaining to the takaful industry, a thorough analysis has been conducted to determine the relevance of *ijtihad* and the governance documents issued by BNM. This study is significant for giving an overview and insight into how *ijtihad* can affect regulations, particularly in the takaful industry.

### 4. Regulatory Framework for Takaful Business Malaysia

The takaful industry in Malaysia started with the enactment of the *Takaful Act 1984*. This act was the reference for the industry for nearly 29 years before being revised in 2013, when it and the *Islamic Bank Act 1983* were consolidated to become the *Islamic Financial Service Act 2013*. IFSA 2013 was enacted to regulate and supervise IFIs, payment systems and other related entities, as well as overseeing the Islamic money and foreign exchange markets (Mat Zain et al., 2020). In general, there are more than 70 policy documents in regulations related to the takaful industry. It can be classified as in Figure 2. However, the researcher will explain a number of policy documents in this section.

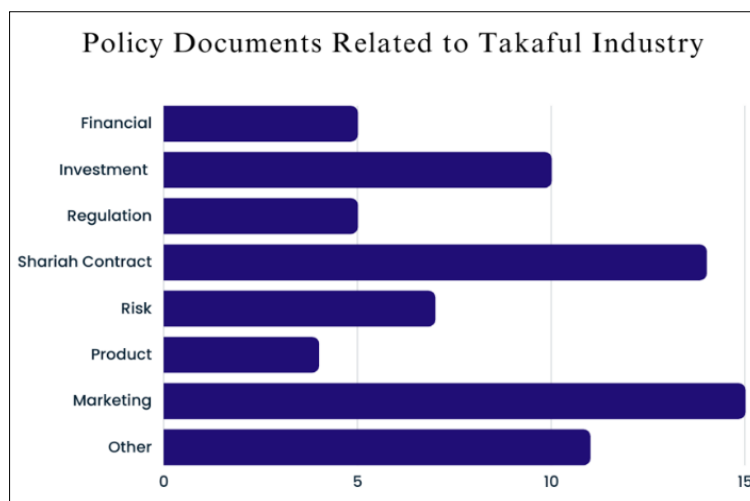


Figure 2: Number of Policy Documents Related to Takaful Industry in Malaysia

Source: Central Bank of Malaysia



BNM issued comprehensive guidelines to improve the standard of Shariah governance in 2010, the “Shariah Governance Framework for Islamic Financial Institutions”. This framework specifically requires IFIs to ensure the effectiveness of their Shariah governance processes in their operations, arrangements and business activities (Arif & Markom, 2017). It was revised in 2017 to increase the efficiency of Shariah governance for IFIs due to the increasing complexity of Islamic financial business by developing new policies on governance, compliance and risk management. In 2019, the revised version of the Shariah Governance Framework was published by BNM: the “Shariah Governance Policy 2019.” This policy document is particularly focused on strengthening the roles and responsibilities of the SAC and other units involved in compliance with Shariah governance policy.

In ensuring the efficiency of takaful businesses in Malaysia, BNM also issued the “Takaful Operational Framework” (TOF) as a guideline for takaful operators, especially for managing takaful funds and shareholders’ funds. The requirements in this policy document were developed in accordance with IFSA 2013, whereby a takaful operator acts as the manager and administrator of takaful funds on behalf of participants. TOF basically provides a guideline for takaful operators for establishing and maintaining takaful funds, product structuring, underwriting takaful risks, re-takaful, investment, payment and charges on surrender of a takaful certificate, claims management, remuneration for the management of takaful funds, management of operating costs, management of surplus in the participants’ risk fund, and deficiency and loss rectification.

For new product offerings by takaful operators, BNM also provides the guideline “Introduction of New Product”. This policy document sets out the applicable regulatory procedures for the management and control of risk related to the development, offering and marketing of new financial products and services by financial institutions. It also addresses financial institutions’ responsibilities to consumers to ensure that products offered or recommended are acceptable, and that consumers are clearly and fully informed of the nature and risks associated with these products. More specifically, this policy covers product risk management, business conduct requirements, reporting requirements and supervisory and administrative actions.

BNM also issued “Operational Risk” as a guideline for strengthening governance, frameworks and processes in managing risks in financial institutions. It emphasizes the effectiveness of coordinating the management of operational risk with that of other risks to provide a comprehensive and integrated approach to a financial institution’s overall risk management strategy. This policy document also addresses the need for greater scrutiny /oversight of larger and more complex institutions due to the higher inherent operational risks they face and the potential dilution of operational risk issues at the level of the board and senior management.

To ensure that the capital adequacy of takaful operators is commensurate with their risk profile, BNM issued a “Risk-Based Capital Framework for Takaful Operators”. A primary consideration in this framework’s development was the fiduciary duties of the takaful operator to the participants to ensure the appropriate management of the takaful funds and overall takaful business operations, in line with Shariah. The objectives of this framework are the fulfilment of all obligations under a takaful contract, providing flexibility to the takaful operator to operate at different risk levels in line with their business strategies, and ensuring the development of a strong takaful industry that promotes public confidence and contributes to the overall stability of the financial system.

Due to the uniqueness of investment-linked takaful certificates, BNM introduced “Investment-Linked Business”. The principal objective of this policy document is to ensure that consumers are given fair treatment by licensed persons in preserving the value of consumers’ investment-linked policy/takaful certificates. Accordingly, it sets out requirements for licensed persons to promote and maintain a high level of corporate governance and professionalism in the management of investment-linked businesses, ensure that the sales and marketing of investment-linked policies/takaful certificates are done professionally and properly, and enhance product transparency and disclosure to protect the interests of policy holders/takaful participants. To achieve these objectives, this policy document sets out requirements for approving operating an investment-linked business, the management of investment-linked funds, product design, fees, charges and expenses, disclosure, investment, and the valuation of asset and liabilities of investment-linked funds.

In addition, the growth of the takaful industry in Malaysia led to the establishment of the SAC, as Malaysia’s top authority on matters of shariah relating to Islamic finance. The SAC has been mandated with determining Shariah compliance in areas like Islamic banking, Takaful, Islamic financial business, and any other businesses that are based on shariah principles. As the reference body and advisor to Bank Negara Malaysia on shariah matters, SAC is also responsible for validating all Islamic banking and takaful products to ensure their compatibility with shariah principles. The authority of SAC is also established by IFSA 2013, which empowers BNM to determine its position on shariah matters; the bank may follow the decisions of its SAC in respect of businesses, affairs or activities which require shariah rulings.

BNM is authorized to establish shariah-related standards based on SAC decisions or rulings. This describes the *ijtihad* performed by SAC will be incorporated into the standards. The IFSA 2013 emphasized the Central Bank’s power to prescribe shariah standards under section 29, which states as follows:

29. (1) The Bank may, in accordance with the advice or ruling of the Shariah Advisory Council, specify standards—  
 (a) on Shariah matters in respect of the carrying on of business, affair or activity by an institution which requires the ascertainment of Islamic law by the Shariah Advisory Council; and  
 (b) to give effect to the advice or rulings of the Shariah Advisory Council.

This means Islamic financial institutions must adhere to shariah standards established by the Central Bank in accordance with the SAC's advice. The standards issued by BNM on Shariah compliance, as specified in subsections 29(1), shall always be followed by every takaful company, its director, chief executive officer, senior officer, or member of its shariah committee (Rusni & Safinar, 2017). All parties must at all times follow the institution's internal policies and procedures in order to implement the standards specified by BNM in subsection 29(1). If fails to comply with any shariah-related standards established by BNM, may be imprisoned for not more than eight years, fined RM 25 million, or both as stipulated in subsection 29(6).

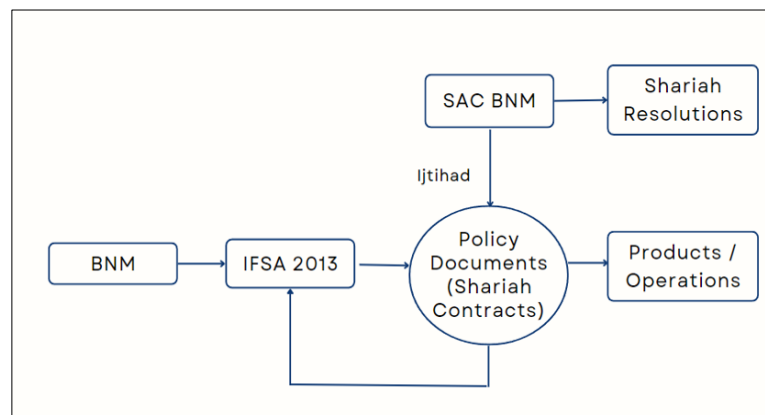


Figure 3: Policy Document Binds All Industry Players in the Application of Shariah Contracts in the Product  
 Source: Constructed by researcher.

BNM issued 14 policy documents on shariah contracts (Table 1) and these policy documents binds industry participants to execute this contract in their products and operations. The operation of the takaful industry is based on shariah contracts such as *wakalah* (guarantee), *qard* (loan), *mudharabah* (profit sharing), *hibah* (gift), etc.; it must comply with all the structure and not violate shariah criteria as specified in these policy documents. When a problem arises, the SAC needs to do *ijtihad*, they should first resort to these documents.

No.	Shariah Contract
1.	Tawarruq (Monetization)
2.	Rahn (Pledge)
3.	Qard (Loan)
4.	Bai' al-Sarf (Currency Exchange)
5.	Ijarah (Lease)
6.	Kafalah (Guarantee)
7.	Wa'd (Promise)
8.	Hibah (Gift)
9.	Wadi'ah (Safe-keeping)
10.	Wakalah (Agency)
11.	Istisna' (Manufacturing sale)
12.	Mudharabah (Profit sharing)
13.	Musyarakah (Profit and loss sharing)
14.	Murabahah (Mark-up sale)

Table 1: Policy Documents of Shariah Contract  
 Source: Central Bank of Malaysia



For example, in a bid to ensure the credibility and ethical foundation of Islamic financial products and services, BNM issued the "*hibah*" policy document. This document serves as a comprehensive guide for takaful operators, outlining the Shariah rulings and operational criteria essential for the implementation of *hibah* within the framework of takaful practice. To achieve these goals, this policy document provides shariah requirements, operational requirements, the arrangement of *hibah* with other shariah contracts and also outlines the responsibilities of the board of directors, shariah committee and senior management in overseeing and ensuring that this policy is adhered to by all parties. The set requirements within this policy document are in accordance with IFSA 2013 Section 29(1), as highlighted in the policy itself:

*The requirements in Part B of this policy document are specified pursuant to–*

*(a) section 29(1) of the IFSA;*

Likewise, other policy documents *Qard*, *Wakalah*, *Mudharabah*, etc also fulfil requirement in the IFSA 2013. Therefore, the SAC must give priority to what is stated in this policy document when there are diverse viewpoints on a subject. If the information in the policy document is unclear or incapable of providing a legal decision, they will do *ijtihad*. It is important to emphasize that the SAC's *ijtihad* remains their primary point of reference and it has been embedded in takaful business's regulation in Malaysia.

## 5. Discussion

BNM has published the Takaful Operational Framework (TOF) guideline, which has a specific role in the management, determination and distribution of surplus. According to the TOF, takaful operators are required to have their own internal policies for surplus management with the consent of the SAC and their respective board members. This policy must comply with Shariah principles and it should include the conditions respecting the use of surplus and its distribution to eligible recipients, as well as the level of surplus that must be maintained to protect takaful funds for future use. Accordingly, at its 42<sup>nd</sup> meeting (25 March 2004) and 59<sup>th</sup> meeting (25 May 2006), SAC decided that the distribution of surplus to participants and takaful operators is permissible. For takaful operators using the *wakalah* model, surplus distribution to takaful operators is considered a performance fee for the efforts of takaful operators in managing takaful funds. For takaful operators who use the *mudharabah* model, surplus distribution is given according to the agreed partnership ratio between participants and takaful operators (BNM, 2010).

There is also a description of re-takaful in the TOF. A licensed takaful operator must not cede risks to an insurer or reinsurer except under unavoidable circumstances, as per applicable rulings by SAC BNM. The legal provisions on re-takaful were discussed at its 47<sup>th</sup> meeting (14 February 2005), which decided that takaful operators should not cede risks to insurance or reinsurance companies where avoidable, unless there is no existing takaful or re-takaful operator that will accept a particular risk, or there is no existing such operator with the capacity or expertise to accept a particular risk.

Section 95 of IFSA 2013 specifies that a licensed takaful operator shall provide *al-qard* or other financial support to the takaful fund in the event of a shortfall in the takaful fund. Based on the decisions at its 38<sup>th</sup>, 46<sup>th</sup> and 62<sup>nd</sup> meetings held in 2006, the SAC determined the mechanism to be implemented: the provision of *al-qard* to meet the liability requirements of the fund in case of a shortage of assets in the participant risk fund. This indirectly demonstrates that decisions by SAC BNM have legal authority under Section 95, IFSA 2013. Therefore, the practice of *al-qard* contracts or the provision of assets from shareholders' funds should occur in the event of a shortage of funds.

In addition, the implementation of insurable interests was certified by SAC at its 52<sup>nd</sup> (2 August 2005), 76<sup>th</sup> (9 June 2008) and 118<sup>th</sup> (29 November 2011) meetings with the provision that the insurable interest protected should exist when the contract commences and when the benefit claim of the takaful is made. The existence of this protective interest is the main condition in the implementation of the payment of takaful benefits. This Shariah resolution should be accepted as a form of *ijtihad* and recognized as Shariah-compliant and in line with the provisions of IFSA 2013. Therefore, if takaful participants in family takaful contracts that do not have a protective interest against the person covered while the contract is sealed, then the contract is invalid.

Table 9, IFSA 2013 provides for disclosure obligations in takaful contracts to prevent any manipulation of the takaful contract or moral risk. Accordingly, participants are required to perform pre-contract disclosure and representations to takaful operators starting from the application process, claiming takaful benefits, after the contract is made, and modifying and renewing the takaful contract. In fact, the 25<sup>th</sup> SAC meeting (2 August 2005) also allowed the obligation to disclose this information to apply in the takaful industry. IFSA 2013 has divided the takaful contract into two types: consumer contracts and contracts other than consumer contracts. For consumer takaful contracts, participants must answer questions submitted by the takaful operator; for takaful contracts other than consumer contracts, participants must disclose information they know and expect that this information will affect the decision of the takaful operator as to whether to accept the risk or not, as well as its rates and terms. In addition, participants must also take reasonable care to not make an incorrect statement to a takaful operator



when answering the questions. To ensure that takaful operators and participants carry out their responsibilities according to the principle of “full trust”, the SAC at its 122<sup>nd</sup> meeting (27 March 2012) decided a number of conditions: takaful operators should ask specific questions relevant to the underwriting decision and participants should also take reasonable steps by not falsely answering questions asked by takaful operators.

Table 10 of IFSA 2013 provides for the payment of takaful benefits under certificates of family and personal accident cover. Takaful benefits will be given to individuals named as beneficiaries through conditional *hibah* upon the death of the takaful participant. In this situation, the benefits of takaful should not go to the estate of the deceased participant and not be subject to his debts. The practice of conditional *hibah* and paying takaful benefits was discussed by BNM SAC at its 34<sup>th</sup> (21 April 2003) and 52<sup>nd</sup> (2<sup>nd</sup> August 2005) meetings, then gazetted under the provisions of IFSA 2013.

In addition, SAC’s 102<sup>nd</sup> meeting (22 June 2010) decided that payment of the surrender value from the participant risk fund is allowable and does not contradict the concept of *tabarru’*. The TOF clearly provides for payment and charges upon surrender of a takaful certificate. A licensed takaful operator must ensure that the amount payable to takaful participants upon surrender is made from the appropriate funds, they must determine the value of the surrender, including the expense of any applicable surrender fee, in a manner consistent with the equal treatment of the participants and in compliance with actuarial standards.

Section 91 of IFSA 2013 obliges the separation of the takaful and shareholders’ funds. This separation should also be divided according to the type of takaful contract, such as family, general and investment-linked takaful. Based on section 92 of IFSA 2013, all takaful funds received should be managed and maintained by the takaful operator. SAC, at its 62<sup>nd</sup> meeting (4 October 2006), suggested that separating takaful funds by the types of takaful business and investment purpose is allowed. This is one of the efforts towards improving the efficiency of fund governance and safeguarding the rights of the parties involved.

Pursuant to section 204, IFSA 2013, the Companies Act 1965 (CA 1965) applies to the winding up of takaful operators. In this event, the termination of takaful certificates will cease from the date of winding up. Participants are entitled to claim as debts payable, depending on the types of takaful certificates, if the certificate is terminated. SAC referred the order of priority for claims on takaful and shareholders’ funds. At its 75<sup>th</sup> (23 April 2008) and 114<sup>th</sup> (28 July 2011) meetings, SAC suggested the order of priority for the sequence of the fund. IFSA 2013 lists matters relating to this sequence, which are also defined in CA 1965. In the case of the shareholder fund series, SAC proposed that preferential debt—under section 292(1) of CA 1965—and debt to the government—under section 10 of the Government Proceedings Act 1956—be given priority.

No	Issues	BNM SAC Shariah Resolution in Islamic Finance	Statutes and Policy Documents
1.	Management of surplus	42 <sup>nd</sup> meeting (25 March 2004) 59 <sup>th</sup> meeting (25 May 2006)	TOF
2.	Re-takaful	47 <sup>th</sup> meeting (14 February 2005) 113 <sup>th</sup> meeting (23 June 2011) 114 <sup>th</sup> meeting (28 July 2011).	TOF
3.	Deficiency of takaful funds ( <i>qard</i> )	38 <sup>th</sup> , 46 <sup>th</sup> and 62 <sup>nd</sup> meetings (2006)	<i>IFSA 2013</i> , section 95, TOF 19.1
4.	Surrender of takaful certificate	102 <sup>nd</sup> meeting (22 June 2010)	TOF (14), <i>IFSA 2013</i> , schedule 8, section 140
5.	Separate funds in takaful industry	62 <sup>nd</sup> meeting (4 October 2006).	<i>IFSA 2013</i> , section 91
6.	Permissible takaful interest	52 <sup>nd</sup> meeting (2 August 2005) 76 <sup>th</sup> meeting (9 June 2008) 118 <sup>th</sup> meeting (29 November 2011)	<i>IFSA 2013</i> , schedule 8, section 140.
7.	Disclosure requirement	25 <sup>th</sup> meeting (2 August 2005) 122 <sup>nd</sup> meeting (27 March 2012)	<i>IFSA 2013</i> , schedule 9, section 141, part 2
8.	Nomination and payment of takaful benefit (conditional <i>hibah</i> )	34 <sup>th</sup> meeting (21 April 2003) 52 <sup>nd</sup> meeting (2 <sup>nd</sup> August 2005)	<i>IFSA 2013</i> , schedule 10
9.	Winding up	75 <sup>th</sup> meeting (23 <sup>rd</sup> April 2008) 114 <sup>th</sup> meeting (28 July 2011)	<i>IFSA 2013</i> , division 3, section 204.

Table 2: Mapping of Shariah Issues with Islamic Resolutions, Statutes and Policy Documents

*Source: Researcher analysis*





BNM as a body of authority strives to ensure the stability and development of the takaful industry by providing rules to regulate its operations in accordance with the method of *fiqh* which is “Acts of those with authority over people must take their interests into account”. It refers to the responsibility of the leader to ensure that administration and governance meet the interests of the community, where legislation is developed to benefit the people. This is because Shariah is established based on *maslahah* and rejects harm in this world and hereafter. The approach taken by BNM’s governance, in issuing various laws and guidelines, is to safeguard the welfare of the people and avoid harm. In addition, it can also ensure that the affairs of community life are guaranteed to be efficiently based on Islamic law through the standards and rules it sets.

Similarly, the legal maxim "Averting harm takes precedence over achieving benefit" means that avoiding harm is prioritized over gaining benefit. This legal maxim explains government efforts to determine the necessary legislation that emphasizes the damage or *mafsadah* that will occur against something which could cause great problems compared to the benefits that will be achieved. Thus, priority should be given when refusing something bad is greater than the benefits that may accrue. For example, guidelines for investing in the takaful industry have been introduced to avoid institutions conducting investment activities that may violate the law of Islamic transactions. This demonstrates that the act of referring to the legal framework in the process of *ijtihad* is important for safeguarding the interests of all parties in accordance with human life and amidst constant change.

As mention before, IFSA was introduced in 2013 and the SAC's discussion of the above matters was done before that. In the table above, there is some *ijtihad* in the legal framework for the takaful sector which is used as a guideline to be implemented in the takaful industry. This means SAC'S *ijtihad* have been coded in this legal framework and show that Shariah compliance and governance in the takaful industry is given recognition and authority in legislation and civil law in Malaysia. It also demonstrates that the results of *ijtihad* in the takaful industry have influenced the framework of financial law in Malaysia. This can be seen by the promulgation of the legal framework and statutes which have provided full clarification and guidance for practice in the takaful industry in line with existing Shariah resolutions.

## 6. Conclusion

*Ijtihad* plays a role in establishing of rules and regulations for the takaful businesses. These regulations have given takaful businesses a structure for carrying out Sharia-compliant business practices. The purpose of this study is to examine the significance of *ijtihad* in Malaysian takaful businesses. Based on current government legislation, it emphasises compliance with Islamic law in the implementation of takaful businesses, ensuring that the legislation is more systematic and aligned with the Islamic financial system practiced in Malaysia. Administrative and management matters should be guided by Islamic texts and the proper process of *ijtihad*.

The findings of this study point in the direction of investigating ways to develop takaful business to be more competitive with implementation of law that are compliant with Islamic principles. Generally, shariah has been included into the takaful law through *ijtihad*, and these regulations contain some *ijtihad* that are used as guidelines for the takaful industry. *Ijtihad* which has been codified in the legal framework, demonstrates that Shariah compliance and governance in the takaful industry are given recognition and authority in Malaysian legislation and civil law. This can be observed from the legislation that has been enacted, which was fully clarified and even provided guidelines for practice in the takaful industry in accordance with the *ijtihad* conducted by SAC.

The paper also records the following results:

- *Ijtihad* that has been incorporated into takaful business regulation assists in creating a structured framework for scholars to interpret Islamic law while adhering to certain guidelines.
- Legal decisions related to religious matters must be addressed by experts. Therefore, in this case the Malaysian Islamic financial law system applies the legal ruling that resulted from *ijtihad* scholars.
- Codification of Islamic law is required to achieve uniformity. In fact, it upholds essential elements of legality like providing notice of what is prohibited and establishing uniformity to address the similar issues.
- Laws and regulations should refer to current reality and needs in accordance with the concept of *ijtihad* which is flexible (*murunah*) and practical. It allows that legal decisions may change according to circumstances and the changing *maslahah* of society throughout the ages.

Finally, this study can contribute to future studies as new knowledge about the significance of *ijtihad* which has been embedded in takaful business's regulation in Malaysia. Furthermore, the existence of such a legal framework related to Islamic finance demonstrates the proactive nature of BNM in developing Malaysia’s legal framework in line with shariah.



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