

**ISLAMIC FINANCIAL SYSTEM IN THE NATIONAL LEGISLATION
FRAMEWORK: COURTS CASES ANALYSIS**



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5. Report

5.1 Proposed Executive Summary

The legal framework of the Islamic financial system in Malaysia is still under the purview of the Civil law. This is because the Federal Constitution which divides the jurisdiction of the Civil and *Shari'ah* matters is silent on whether the *Shari'ah* Court has the power to hear cases or disputes relating to Islamic finance. As a result, this leads to many interpretations of the civil courts in contractual and financial applications which are contrary to the principles of *Shari'ah* Law.

This raise questions about the extent to which Islamic financial framework can be operational in the existing legal situation? Henceforth, this study will be focusing on the results and interpretations of the Civil Court in cases of Islamic finance and banking.

The study employs qualitative method in viewing the Islamic financial system under the country's legal framework through analysis of court cases in an attempt to produce a new proposal to strengthen the Islamic financial practices. For data collection, the researchers used different types of textual study through library and field research. In addition, interviews were conducted to gather the data. This study suggests several amendments in the Federal Constitution and relevant Acts in enhancing the existing laws and role of *Shari'ah* courts.

5.3 Introduction

Article 74 (2) of the Federal Constitution provides that except in the Federal Territories, matters relating to Islam are within the jurisdiction of the respective states. However, such jurisdiction is very limited and covers only persons professing the religion of Islam. Matters that are provided under this jurisdiction are strictly confined to personal laws such as marriage, divorce, and all ancillary matters related to them and succession. With regard to criminal laws, only punishment of offences by persons professing the religion of Islam against precepts of that religion such as offences of eating and drinking in public during the month of *Ramadhan*, neglecting from performing Friday prayer, committing *zina* and *khalwat* and other matters that strictly provided in various respective States' Islamic Criminal Laws. There is no provision in the Federal Constitution that address matters related to Islamic banking or Islamic finance simply because it is under the Federal jurisdiction. Therefore, any disputes relating to Islamic financial transactions will be tried in the Civil Courts and not in the *Shari'ah* Courts.

At present, Malaysia has been recognised as a model of Islamic state that progressively develops and aims to become the Center of the World Islamic Banking in the future. The aspiration began in early 80's, where Malaysia has emerged as a country that implements Islamic financial system. Consistent with the introduction of the Islamic Banking Act (IBA) 1983 and the Government Investment Act 1983, Islamic banking and financial transactions are able to be carried out in accordance with *Shari'ah* principles. Followed through the establishment of an Islamic insurance protection through Takaful Act (AT) 1984, amendments to Banking and Financial Institutions Act (BAFIA) 1989 to include Section 124 has widened the Islamic Banking System (IBS) in conventional banks. Subsequently, the introduction of the Securities Commission Act 1993, has made improvement to Islamic financial system, especially the Islamic capital market.

However, despite the achievements of the Islamic financial system, the system still faced various problems and difficulties, especially the legal aspects that govern them. From the legal aspect, the power given to the Civil Court by the Federal Constitution is more compared to *Shari'ah* court with respect to Islamic finance. Currently, court cases relating to Islamic transactions are not tried in the *Shari'ah* Court, but by the Civil Court.

Problem arises because the *Shari'ah* Court has no authority to hear cases relating to Islamic finance conflict. As a result, this caused a lot of misinterpretation between Civil Court; which is subject to English law and principles of *Shari'ah*. This raises questions about the extent to which Islamic financial framework can be operational in the existing legislation and what contributes to the misinterpretations especially from the Acts and Federal Constitution.