

Proposed Solutions to the Legal Issues Affecting the Applicable Laws of Islamic Banking in Nigeria

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Abstract: Islamic banking applicable laws are lacking significant elements of standard IBF practice across the world. Provisions were not made for elements including the establishment of Islamic insurance companies, Islamic banking business, Islamic leasing business, Islamic capital market, takaful funds, takaful contracts, Islamic deposits, Islamic money market, Islamic foreign exchange market, credit sale (Al-Bai' Bithaman 'Ajl), advance purchase (bai' salam), commissioned manufacture (Istisna'), hire purchase (Ijarah thumma bai'), set profile sale (Murabahah), etc in the establishing laws regulating Islamic banking in Nigeria. A legal framework was not constructed for project financing of Mudharabah, project financing of Musharakah, Islamic accepted bill, Islamic trade finance and so forth. Perhaps all the highlighted products and services are indeed a compliment to Islamic banking legal framework and not an alternative method to its operation. Hence, the study aims at proposing suggestions and solutions to the multifaceted issues in the applicable laws. The study applied an exploratory approach to survey for an efficient strategy competent to amend and upgrade the status and performances of IBF in Nigeria. In identifying the suitable strategies, the study concludes that four major entities including, government, individuals, regulators and legislators are responsible for the expansion of IBF status in Nigeria.

Keywords: Applicable laws, elements, legal framework, products, Islamic banking.

I. INTRODUCTION

Islamic banking applicable laws took almost two decades to produce a full fledged Islamic financial institution otherwise known as Jaiz bank in Nigeria. Banks and Other Financial Institutions Act (BOFIA) 1991 enactment paved a way for the recognition of Islamic banking as a Profit and Loss Sharing System. Prior to the enactment of BOFIA, speculations were formed as to whether the Act will solely be devoted to non-interest financial institutions. However, the provisions of the Act proved the conjectures wrong as Islamic banking performances are found below beneficiary expectations. In fact, subsequent amendments that were made to the extant framework degenerate initial protections. An important point is that positive amendments were largely ignored in the entire process.

It is arguable that two decades and above are sufficient for a sustainable framework to produce a number of Islamic financial institutions. Yet, Jaiz International Plc Bank is the sole financial institution possessing the status of full-

fledged Islamic bank across Nigeria. Hence, the study aims at proposing recommendations to the legal issues restricting IBF applicable laws from producing many Islamic financial institutions over the decades.

II. ELEMENTS OF ISLAMIC BANKING LEGISLATIONS

Legal framework accurately and effectively determine Islamic banking performance. It deserves constant amendments toward latest trending in the Islamic banking industry. Contemporary and ensuing issues are controllable through update and reformation of legal infrastructure. Legal framework may be considered comprehensive if every essential content of standard IBF practice is included and protected, otherwise, it is highly unlikely to regard such arrangements as a comprehensive and sustainable framework. Despite that liquid funds, liquidity requirements, equity financing, long term financing and follow-up projects were not established in the provisions relegate it as an insufficient framework. In spite of the fact that consumers interest such as checking foreign exchange transactions, monitoring accounts and fund transfers were similarly not protected outdistanced it from being a productive structure.

It is empirically established that conventional legal infrastructure preceded IBF legal framework in existence. In certain regions, Islamic financial institutions may be sheltered by existing conventional legal provisions. Of course, in some environments, the extant financial laws may be amended. While other jurisdictions prefer to enact modern legislations for accommodating IBF system.

There is a tendency that the introduction of Islamic banking regulation and legislation may open a floodgate for controversial policy and decision. This is because issues will often arise as to whether or not to show preference to IBF over other financial institutions. Similarly, the chances for a level playing field treatment between Islamic and conventional banks may also be simultaneously striking. Political ambition and propaganda may also be involved as any incoming political party may decide to use enactments of IBF legislation for political campaigns.

Quite incontrovertible is that political support is principally a salient integral in the development of Islamic banking. United Malay National Organization (UMNO) largely supported the advocacy of IBF in Malaysia. The

government subsequently promotes UMNO's intention toward IBF by enacting Islamic Banking Act [2]. Thus, it is recommendable that masses initiate attempts prior to political and governmental contributions.

It is inappropriate to structure IBF legislations with religious sentiment and identity (Laws of Malaysia, 1983; reprinted in Kuala Lumpur, 2001). IBF legislation should ineluctably provide for the establishment of Shariah Advisory Board. This is to ensure that IBF products and operations are consistent with Islamic guidelines. Each Islamic financial institution is expected to constitute its Shariah Advisory Board, as the license of Islamic banks is revocable alongside non-Shariah compliance. It is illegal for Islamic financial institution to reserve funds like liquid deposits at Government Investment Certificates and Central Bank. The rationale behind its illegality is that such kind of funds is equivalent to interest payments. Perhaps, Islamic monetary instruments can be used as an alternative means for facilitating the reserved funds. Hence, all the highlighted services are essential in Islamic banking legislations.

It is a safe assumption to be specific in restricting and proscribing businesses of Islamic and conventional banks. Applicable bank affected by banning policies needs to be clarified and specified in the legislation. Specific requirements of Shariah-based bank requires to be detailed and differentiated from an interest-based bank. Therefore, the justification for an adequate and comprehensive arrangement of Central Bank Legislations is premised on the inclusion of all financial sectors, and not solely banking activities [5].

III. REGULATING ISLAMIC FINANCIAL INSTITUTIONS

Solutions to multifaceted issues facing IBF services and operations are often undertaken at the regulatory level rather than legislations approach. Of course, regulators are questionable for their steps and policies by the government, but they cannot be subjected to direct allegations by any personal-interest groups nor unsatisfactory association. Regulators enjoy considerable discretion and autonomy in the short term, and they may also be answerable to their acts and steps in the long term. Regulators choose to disclose and report institutional-information which falls under their control, supervision and jurisdiction. While less-assessment of product innovation may be accommodating to a valuable and appreciable level, a stringent assessment may amount to sluggish-readiness to initiate ideas that will switch the status quo to trending practices [4]. Thus, less and simple assessment of product innovation is definitely a useful suggestion for efficient service.

The soundness of a financial system can be regulated by the government from systemic issues, particularly in clearing and payment systems. Regulation is certainly essential in intensifying stakeholder's welfare with inherent information and strengthening marketplace level of competition. Regulation ensures the probity of fiduciary contracts. By operations, IFIs regulation is similar to

conventional regulation except for some little discrepancies in elements like the nature of Shariah contracts and dissimilar risk exposures.

Regulation is a crucial component of financial infrastructure. Components including Islamic bank activities, banking commerce links, domestic and foreign Islamic bank entries, capital adequacy, deposit insurance design, private sectors, government ownership of Islamic banks, et cetera, constitute the concept of regulation in financial institutions. Regulatory agencies are highly useful for supervisory purposes as they handle matters relating to conduct and licensing of Islamic banking businesses [3]. For efficient financial supervision, it is safe to clarify the objectives and responsibilities of relevant regulatory agencies.

IV. LEGAL ISSUES IN THE APPLICABLE LAWS OF ISLAMIC BANKING IN NIGERIA

As a matter of reality, Islamic banking legal frameworks in Nigeria are not constantly reviewed with global developments across the world. Protection policies that will strengthen the survival of Islamic bank were not created.

The justification for the existence of legal issues in IBF legal framework is premised on the absence of exact word establishing Islamic banking system in BOFIA [1]. Another issue that has a great bearing on this discussion is the lack of consideration for reestablishing the Shariah Advisory Board (S. A. B) members upon BOFIA several amendments.

BOFIA which has the power for regulating and designing IBF operations across Nigeria unwelcomed the phrase "Islamic banking" in the entire Act. Aside that, scopes, types and activities of takaful business were not spelled-out in BOFIA. Similarly, regulatory objectives of the Act were not specified, as to know whether the Act was basically enacted for the expansion of IBF services in Nigeria. Quite worrying is that BOFIA was enacted prior to the introduction of Islamic banking across the country. More so, Shariah requirements or Shariah compliances were not addressed in the major Act. Significantly, there was no provision drafted basically for designing the payment of Islamic instruments in the entire framework.

Findings further exhibit that the establishment and maintenance of takaful funds were not included in the Act. Prerequisites of takaful and shareholder funds were also overlooked. Besides that, business conduct standards that will determine fair, transparent and professional dealings with financial consumers were not addressed in BOFIA. Also, disclosure pre-contractual duty, takaful contract representations and misrepresentation remedies were not also covered. Consumer protection such as restricting banks from inquiring customer's account, exempting officer or agent of Islamic financial institutions from having access into customer's bank account was not provided. Islamic deposits, Islamic money market and Islamic foreign exchange market were also excluded contents in the Act. Furthermore, Shariah

compliance mechanism could not be detected inside the Act. Market conducts and consumer protection was not inserted into the Act. Accordingly, aspects of Islamic banking dispute resolution were also not protected by the Act. In fact, there was no provision for interbank money market in the entire framework. From the foregoing analysis, it is arguable that there are unbearable legal issues in the framework of Islamic banking in Nigeria.

Correspondingly, it is indeed significant to state that provisions in Guidelines are not actionable in the court of law compared to provisions in the Act. As a matter of reality, subsequent amendments made to BOFIA added more obscurities into the provisions relating to IBF services in the Act.

V. SOLUTIONS TO THE HIGHLIGHTED LOOPHOLES IN THE APPLICABLE LAWS OF ISLAMIC BANKING IN NIGERIA

There are alternative approaches for curbing issues confining the growth of IBF system across the country. The supposition that enactment of laws can solely resolve the entire challenges reducing the expansion of IBF is dangerous. Although, amendment and enactment of laws is also a one-sided coin to the problem, nevertheless, certain entities need to be assembled for the process. In this regard, the role of regulators, government, individuals and legislators will be analyzed as follows:

1. Role of Regulators of Financial Institutions (Frace) Toward the Amendment And Reformation of IBF Practice Across Nigeria

*By familiarizing people with the concepts of Islamic banking and finance-*Awareness and knowledge of Islamic banking operations may help in overcoming challenges accompanying the expansion of IBF in Nigeria. With more orientation about Islamic banking concepts, products, potentials and benefits, many Nigerians, most especially the non-Muslims will be more receptive to welcome IBF services across the country. Conducting seminars, conferences, symposiums and increasing training for regulators would assist in gaining huge admirers of Islamic banking services. Aside from that, sustainable initiatives should be explored by IBF regulators in Nigeria. More so, Islamic banking and finance should be included as an accredited course in Nigeria educational system.

*By striving for separate legislation and not an additional Guidelines-*In Malaysia, separate legislation governs all Islamic financial institutions. The essence of separating this legislation was to ensure that Shariah principles are distinguished from the conventional standard. Lack of specific legislation regulating Islamic banking operation limited the IBF performances in Nigeria. Hence, a separate Act is highly needed for the development of IBF in Nigeria.

By specifying the applicable school of thought in the Act - Systems regulated by two different sources but operating in a single pluralistic structure are inevitable to amount to quarrels when it comes to operation. In this regard, CBN (Central Bank of Nigeria) is expected to concentrate on strengthening provisions relating to institutional infrastructure, regulatory framework and Shariah and legal infrastructure. For instance, the Central Bank of Malaysia Act 2009 harmonized Islamic finance decisions to be solely adjudicated by a particular jurisprudential school. This means that all Islamic financial institutions regardless of their Shariah advisers will strictly adhere to Shafie school of thought in Islamic finance matters. Hence, stating specific jurisprudential school which will be followed in the course of determining Islamic finance cases in the legal framework is of paramount importance for the successful decision of Islamic banking products and disputes.

By providing a solid legal framework for Islamic banking operations- CBN actors are expected to provide a conducive atmosphere for the flourishing of IBF in the country. It is recommended to follow rules, laws, policies and legal framework of successful Islamic banking regulators such as the UK and Malaysia, so as to ensure Islamic banking development across Nigeria.

By amending local framework through successful foreign and international standard- factors including political structure, socio-economic, local history, tax plan, the legislative process, national and cultural laws cannot be disregarded in the process of achieving a high standard of IBF practice across Nigeria. The crucial role of these factors is that collective, astounding and extraordinary outcomes will be collaboratively constructed. As a matter of reality, sensational growth, amazing development, updated mechanisms and recent initiatives will be acquired through local and international amalgamations.

By clarifying Islamic banking services and activities through legal provisions - emerging controversies can be avoided by enacting legal provisions for each service, activity and product. Ensuring legal protection for IBF services, activities, products and businesses are undeniably important in designing a robust Islamic banking framework in Nigeria.

By enacting specific Act and not supplementary Guidelines - it is doubtless that Act is more effective than Guidelines when it comes to actionable consequences in the court of law. An Act is supposed to encompass every essential component of standard Islamic banking practice. Continuous enactment of Guidelines will merely trivialize IBF matters at law courts rather than substantiating it. Hence, Financial Regulation Council of Experts (FRACE) members are urged to agitate for dedicated and specific Act, instead of Guidelines.

By including Shariah compliance framework - standard and penetration of Islamic banks will be extremely weak in the absence of vigorous Shariah compliance framework.

By introducing transformation programs - this can be achieved by verifying and identifying every factor responsible for the limited expansion of the banking service. Transformation program can be introduced and conveyed through regular programs and frequent workshops. Aside from that, rewarding employees and patronizers will as well imbue dramatic progress into IBF industry. The transformation program may also enhance the chances for reducing risk, organizing opportunities, expanding capabilities and sustaining performances.

By remodeling the logo and identity of IBF system – the logo should be reconstructed within the context of customers' response and perceptions. The logo should be designed in such a way that every individual regardless of faith, race and political party will be enticed, convinced and motivated in subscribing for the banking system. Hence, the study recommends an IBF brand survey across Nigeria.

By adopting dynamic and trending skills into the banking services – another significant method of attracting customers is by initiating centers for offsite electronic banking. With this initiative, Islamic financial institutions will definitely gain more customers compared to conventional banks in the Nigeria context.

By providing laws for establishment and operation of Takaful industry- Governments and legislators are jointly enjoined to enact appropriate and accommodative policies for takaful Industries. Legal and regulatory frameworks strengthening takaful operations actively needs to be defined. Aside from that, individuals who tend to establish takaful companies require to be supported by an act of encouragement such as tax holidays and rental discounts. As a matter of fact, the standard structure of takaful business is highly desired to be included in Islamic banking framework in Nigeria.

2. Role of Government Toward the Development of IBF Status Across Nigeria

Government's support and contributions are highly needed-Average success of Islamic banking system in Malaysia is heavily attributed to the government's policies and regulations in developing the industry. In the absence of government's support, many attempts may be less-achieved by financial institutions. Malaysia Government-assisted all banks including Islamic financial institutions by supplying the needs of these institutions and providing an enabling environment for them to operate their respective banking businesses and activities.

Quite irrefutable is that all these factors contributed tremendously towards the growth of IBF industry in Malaysia. This approach would have been suitable for Nigeria context if only the government can help in providing every necessary support, most especially, aspect for amending the legal and regulatory framework of IBF in Nigeria. Besides, Nigeria government can also assist by enabling legal provisions protecting stakeholders, and centers preparing upcoming

Islamic finance practitioners. This will enable human-resources to have the capacity of managing the financial institutions.

The legal support may be structured in legislations, decrees, Acts and regulatory framework, so as to accelerate Islamic financial institution development in Nigeria. By constructing Islamic banking provisions into guidelines are considered improper, as guideline's sanction is not actionable in the court of competent jurisdiction.

Additionally, Government is urged to take proactive measures in avoiding ambiguous provisions, series of tax and legislative changes in the amendment process, so that obstacles pinning Islamic banking development can be removed. As such, the Federal Government of Nigeria (FGN), agencies and all other relevant authorities are wanted to assist the Islamic banking industry with all essential legislative and administrative support to succeed.

Government issuance of compassionate public policy – being lenient starts from equalizing the recognition of conventional and Islamic financial institutions across the country. There is a need for harmonizing these financial institutions through the establishment of Harmonization Councils and Educational Research Centres. Hence, the Government's commitment is highly required for the expansion of Islamic banking services in Nigeria.

By using non-Muslims media platforms and stations to publicize IBF services – utilizing non-Muslim avenues to convey messages and information relating to IBF services is another plausible strategy for convincing the masses about Islamic banking contents and benefits.

By providing revamped knowledge and resourceful centers for IBF operations – customers, employees and propagators consistently need relevant information and new initiatives. One of the ways for acquiring recent updates concerning IBF newest practices is by conducting academic researches. Besides, Shariah scholars need research grants to assemble credible and reasonable details about contemporary issues and upgrades. As a matter of reality, it is worth emphasizing that the implication for establishing academic research-centers is that the vacuum of greater and outstanding innovation will be fulfilled in the Islamic banking field. Furthermore, it is suggested that training workshops should be funded and employees should also be equipped with the latest tools.

By proposing and presenting a proposal/bill – this can be executed by any member of Nigeria agencies including members of the National Assembly. The interested member for the establishment and expansion of Islamic banking will commence the process from the publication stage. The process will subsequently extend to the first reading, second reading, committee stage and third reading at the National Assembly. In order to complement and harmonize the process, both houses at the National Assembly will jointly assent to the bill.

Thereafter, the President of the Federal Republic of Nigeria will be posteriorly required to endorse the bill. It is important to state that the process is possible through cordial collaboration between National President and entire houses of the National Assembly. Hence, individuals, legislators, government and members of Nigeria agencies are urged to address the widespread of Islamic banking across the country.

3. Individual Contributions Toward The Realization of IBF Across Nigeria

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4. Role of Legislators In Enacting A Dedicated And Specialised Act For IBF Practice Across Nigeria

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VI. CONCLUSION

From the foregoing discussion, IBF applicable laws in Nigeria were found omitting some important elements demonstrating Islamic banking standard practice. Findings revealed that the applicable laws negatively influenced Islamic banking performances in Nigeria. The fact that these provisions ignored certain significant factors, products, services, businesses and activities demoted the applicable laws from being awarded as an international standard structure. Islamic banking system has the potential of gaining many opportunities in Nigeria, but the threats and weaknesses of the banking system which were not legally addressed in enactments distanced these achievements from realities.

In the Nigeria context, major enactments for financial institutions were specifically formulated to regulate conventional banking operations. However, alongside the introduction of IBF system, same legislations were incessantly adopted as legal direction for its operations, establishment and activities. Moreover, since there were no dedicated laws for the newly introduced bank otherwise known as the Islamic banking system, the study found that regulators played a prejudiced-game between both financial institutions by ignoring level-play approach in the course of standardizing, supporting and developing these major financial systems in Nigeria.

The study perceives that Islamic banking has long-term potential in the Nigeria context. Government involvement is crucial in building the groundwork and ensuring sustainable development for the industry. Dedicated legislation, accommodative regulatory policies and sustainable initiatives are absolutely important for the government to put into consideration when upgrading and amending extant Islamic banking legal framework. The essence of demanding for dedicated legislation is that direct and necessary amendment can be made to the legislation without undergoing any challenging conventional processes.

Islamic banking issues will not be carefully and cautiously adjudicated if qualified judges and competent courts are not given attention within the legal framework. Meanwhile, since matters of banks and all other financial institutions are categorized under High and Federal High Court in Nigeria, there is no doubt that ill-suited decisions will likely be issued at these courts. Thus, it is, however, appropriate to channel Islamic banking disputes into an Alternative Dispute Resolution (ADR) forum for proper adjudication.

A comprehensive legal framework is expected to address universal standard features of Islamic banking services and operations. This framework is necessary to strengthen and promote IBF practice across the country. Islamic banking regulatory authorities may achieve this by enacting specific laws for Islamic financial institutions which will outline operational activities, licensing businesses, available products and all other significant provisions of Islamic banking services. More so, among the methods of

upgrading the existing framework is by amending the subsisting enactments and related provisions. Thereafter, IBF industries will indeed have the chance to develop in a structured and systematic manner. Ultimately, these missing and highlighted elements are considered as essential factors in standardizing Islamic banking laws across Nigeria.

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