



A CRITICAL STUDY OF THE LEGAL FRAMEWORK
FOR *SHARĪ'AH* GOVERNANCE IN ISLAMIC BANKING
IN NIGERIA AND MALAYSIA

BY

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ABSTRACT

For the first time in the history of Nigerian Banking Laws, Banks and Other Financial Institutions Act (BOFIA No. 25), 1991 permitted the establishment of Profit and Loss Sharing (PLS) banking which is the stamp of authenticity of Islamic Banking system. However, years after the promulgation of the Act, the establishment of Islamic banking system has been made unachievable by the narrow constituted by the same law and other banking related laws, governmental policies and the attitude of the Muslim populace amongst others. Therefore, this research studies the legal framework of *Shari'ah* governance in Islamic banking in Nigeria and Malaysia. It was conducted vide qualitative research methodology. It involves both doctrinal and non-doctrinal research. It was revealed that although PLS banking system is approved by the main Nigerian banking law, yet, its provisions are restrictive and lacking in comprehensiveness requisite of the system's smooth operations. Interest based economic system and fiscal policies of the government, pervading corruption, porous legislative process, the prevailing religious bigotry and lack of legal framework for *Shari'ah* governance were identified as threats not only to the establishment but also to the smooth operations of Islamic banking system in Nigeria. The significance of this research lies in the identification and prospects of the foregoing problems and the solutions proffered to avert or limit their negative consequences. The likelihoods that could be taken advantage of, to enhance the possibility of the establishment and operations of *Shari'ah* governance framework for Islamic banking system were as much highlighted. However, this research discusses the regulatory framework of the *Shari'ah* governance system of the two respective jurisdictions; Malaysia and Bahrain as they provide different distinctive models. Uniquely, the models of *Shari'ah* governance of both respective jurisdictions can serve as models for the effective legal framework for *Shari'ah* governance of Islamic banking in Nigeria. Unambiguously, it is a *sine qua non* for the significant differences of *Shari'ah* governance system. As from the regulatory overview, Malaysia represents mixed-model legal jurisdiction which is regulatory-based approach and Bahrain represents mixed-model legal environment which is minimalists approach. This research suggests that both regulatory frameworks of *Shari'ah* governance system need further enhancement and improvement in order to reinforce the development and growing of Islamic finance industry. This brings into focus the measures and efforts that need to be taken to strengthen the IFIs in Nigeria through enhancing the *Shari'ah* governance framework. Also, a sound judicial system and Islamic dispute resolution mechanism in Nigeria are key factors that would help in attracting foreign investors, particularly from the oil rich countries, to invest in the nascent IB industry in Nigeria. Therefore, the models of dispute resolution context that can be easily domesticated into existing mechanisms of dispute resolution are the models of dispute resolution of countries like Malaysia and Pakistan as they have similar colonial histories as Nigeria, and in fact, the element of legal pluralism is another similar trail that these countries share. So, borrowing a leaf from such best practices will help in solving matters in the IB industry in Nigeria. The research concluded that a failure to provide efficient *Shari'ah* governance framework either through law or legislation on the part of regulators and the banking sector would inevitably lead to serious disruptions in Islamic finance industry in Nigeria.

ملخص البحث

كان لأول مرة في تاريخ قوانين النظام المصرفي النيجيري، أن أجاز قانون البنوك والمؤسسات المالية الأخرى (رقم. BOFIA ٢٥)، عام ١٩٩١م، إنشاء النظام المصرفي القائم على المشاركة في الأرباح والخسائر، والذي أصبح سمة موثوقة النظام المصرفي الإسلامي. ومع ذلك، لم يتم تطبيق هذا القانون لإنشاء نظام مصرفي إسلامي رغم مرور سنوات طويلة على صدوره؛ وذلك بسبب قصور القانون نفسه وغيره من القوانين الخاصة بالعمل المصرفي والسياسات الحكومية وموقف جمهور المسلمين النيجيريين منه. وعليه، سيتناول هذا البحث الإطار القانوني للحكومة الشرعية الإسلامية حيال النظام المصرفي الإسلامي في نيجيريا وماليزيا. ولقد اعتمد في هذا البحث على المنهج النوعي الذي شمل كلا المراجع المكتبية وغير المكتبية. ولقد تبين أنه على الرغم من أن النظام المصرفي PLS قد اعتمد من طرف القانون المصرفي النيجيري إلا أنه اتسم بالمحدودية وعدم الشمولية. ومن الملاحظ أن النظام الاقتصادي الربوي، وسياسات الحكومة المالية، والفساد الشائع، والإجراءات التشريعية القاصرة، والتعصب الديني السائد وانعدام الإطار القانوني للحكومة الشرعية، كل ذلك يهدد إنشاء النظام ويُخلّ بكل إجراءات النظام المصرفي الإسلامي في نيجيريا. وتكمن أهمية هذا البحث في التعرف على المشاكل السابقة، ثم اقتراح الحلول المناسبة للقضاء على نتائجها السلبية أو التقليل منها. ومن ثمّ إنشاء النظام وإجراءات الحكومة الشرعية للنظام المصرفي الإسلامي. هذا، وقد تناول البحث الإطار الضابط لنظام الحكومة الشرعية في السلطتين القضائيتين: ماليزيا والبحرين؛ لأنهما تمثلان نماذج مميزة ومختلفة. وبصورة استثنائية، يمكن أن يكون نموذج الحكومة الشرعية للسلطتين القضائيتين نموذجا فعالا لإطار الحكومة الشرعية في العمل المصرفي الإسلامي في نيجيريا. فماليزيا تمثل نموذج السلطة القانونية المختلطة في المجال التنظيمي أما البحرين فتتمثل البيئة القانونية المختلطة. ويقترح هذا البحث بأن كلتا إطارا الضبط لنظام الحكومة الشرعية ينقصهما أيضا التعزيز والتحسين؛ إمدادا لتطور وازدهار الصناعة المالية الإسلامية. وبهذا يتركز الاهتمام على اتخاذ التدابير اللازمة وبذل الجهود؛ لتقوية المؤسسات المالية الإسلامية في نيجيريا- وذلك من خلال تعزيز إطار نظام الحكومة الشرعية. وكذلك يعدّ توفر النظام القضائي السليم وآلية حلّ النزاع الإسلامي في نيجيريا من العوامل الرئيسية التي من شأنها أن تساعد على جذب المستثمرين الأجانب، وخاصة من الدول الغنية بالنفط، للاستثمار في الصناعة المصرفية الإسلامية الناشئة في نيجيريا. وعليه، فبالإمكان تبني نماذج فض النزاعات المعتمدة في بعض الدول مثل ماليزيا وباكستان باعتبار أن لها أحداثا تاريخية استعمارية مشابهة لنيجيريا، ولا شك أن الاستفادة من هذين البلدين من شأنه أن يساهم في حل مشاكل

الصناعة المصرفية الإسلامية في نيجيريا. أخيراً، توصل البحث إلى أنّ عدم توفير إطار الحوكمة الشرعية الفعال، إمّا من خلال القانون أو التشريع من قبل المنظمين والقطاع المصرفي، سيؤدي حتمياً إلى اضطرابات شديدة في الصناعة المالية الإسلامية في نيجيريا.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any degree at IIUM or other institutions.

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LIST OF ABBREVIATIONS

AALCO	Asian African Legal Consultative Organization
AAOIFI	Accounting and Auditing Organisation of Islamic Financial Institutions
ABC	Arab Banking Corporation
ADR	Alternative Dispute Resolution
AFRC	Armed Forces Ruling Council
AGC	Audit & Governance Committee
AGM	Annual General Meeting
BAFIA	Banking and Financial Institutions Act
BB	Bangladesh Bank
BBA	<i>Bay' Bithaman Ajil</i>
BCBS	Basel Committee on Banking Supervision
BIMB	Bank Islam Malaysia Berhad
BMB	Banking Mediation Bureau
BNM	Bank Negara Malaysia
BOD	Board of Director
BOFIA	Banks and other Financial Institutions Act
BOFID	Banks and other Financial Institutions Decree
BOIC	Bahrain Order in Council
CAMA	Company and Allied Matter Act
CBB	Central Bank of Bahrain
CBMA	Central Bank of Malaysia Act
CBN	Central Bank of Nigeria
CERT	Centre for Research and Training
CFRN	Constitution of the Federal Republic of Nigeria
CLJ	Quarterly Law Journal
CPR	Civil Procedure Rules
DCO	Dominion, Colonial and Overseas
DFIA	Development Financial Institutions Act 2002
FCT	Federal Capital Territory
FMB	Financial Mediation Bureau
FSA	Financial Services Act
GCC	Gulf Cooperation Council
HSBC	Hongkong and Shanghai Banking Corporation
I- REIT	Islamic Real Estate Investment Trust
IBA	Islamic Banking Act.
IBF	Islamic Banking and Finance
IBU	Islamic Banking Unit
IDB	Islamic Development Bank
IDR	Islamic Dispute Resolution
IFIs	Islamic Financial Institutions
IFSA	Islamic Financial Service Act
IFSB	Islamic financial Services Board
IIFM	International Islamic Financial Market
IIFS	Institutions Offering Islamic Financial Services

IILM	International Islamic Liquidity Management Corporation
ILEA	Inner London Education Authority
IMB	Insurance Mediation Bureau
IOSCO	International Organisation and Securities Commission
KFH	Kuwait Financial House
KHCB	Khaleeji Commercial Bank BSC
KLCMC	Kuala Lumpur Court Mediation Centre
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LFN	Laws of the Federation of Nigeria
LRCICA	Lagos Regional Centre for International Commercial Arbitration
MIFC	Malaysia International Islamic Financial Center
MLJ	Malaysia Law Journal
NIFI	Non-Interest Financial Institution
OECD	Organisation for Economic Co-operation and Development
OFI	Other Financial Institution
OIC	Organisation of the Islamic Conference
OMO	Open Market Operations
PLS	Profit and Loss Sharing
PPA	Property Purchase Agreement
PSA	Property Sale Agreement
RPGTA	Real Property Gains Tax Act
SAB	<i>Shari'ah</i> advisory body
SAC	<i>Shari'ah</i> Advisory Council
SAMA	Saudi Authority Monetary Agency
SBP	State Bank of Pakistan
SC	<i>Shari'ah</i> Committee
SEC	Securities and Exchange Commission
SG	<i>Shari'ah</i> Governance
SMC	Supreme Military Council
SSB	<i>Shari'ah</i> Supervisory Board
TA	Takāful Act
UAE	United Arab Emirate
UBA	United Bank for African
UDHR	Universal Declaration of Human Rights.
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law