

Legality Of Operation And Regulation Of Islamic (Non-Interest) Banking And Finance In Nigeria

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Abstract: Islamic banking and financial system has finally taken off in Nigeria but not without the usual challenges of any alternative financial system newly introduced into an existing conventional financial system. In Nigeria, there is the issue of whether the operation and regulation of Islamic banking and finance is supported by the existing legal regimes in the Country. The research examines the legal bases of operation and regulation of Islamic banking and finance in Nigeria. The research gives a new perspective on the arguments of Constitutionality and legal bases and conclude that the Islamic banking principle prohibiting riba (interest) is founded in the Holy Scriptures(Quran and Bible) and its operation in Nigeria founded in the Constitutions and the existing laws.

Keywords: Islamic Banking, Financial system, Constitution, Bible, Quran, Riba, Existing Laws.

I. INTRODUCTION

Islamic finance had its debut in Nigeria with the introduction of Islamic banking in the country in 2009 vide the operating license issued to the defunct Habib Nigeria Bank Ltd (HNB) to operate Islamic banking window.

In 2011, two more banks were licensed to operate non-interest (Islamic) banking in Nigeria namely Jaiz International Plc, licensed to operate a regional non-interest (Islamic) banking and Stanbic IBTC Plc licensed to operate a non-interest (Islamic) banking window (alongside its conventional banking operations) throughout Nigeria. In order to set the ball rolling for the operation of the licensed non-interest (Islamic) banks, the CBN issued the Framework For The Regulation And Supervision Of Non – Interest (Islamic) Financial Services In Nigeria.

The CBN's release of the guidelines in January 2011 elicited various reactions from Nigerians. Some saw the move as: "illegal, unconstitutional, unjust, inequitable and blatantly discriminatory against non – Muslim Nigerians".

This work shall examine the issues in parts dealing with legality of establishment and operation of Islamic banking and finance in the light of Nigerian Constitution; Non-interest banking and finance in the light of holy scriptures; Islamic financial system's operation and regulation in the light of the

existing laws in Nigeria; and the legality of establishment and operation of Islamic banking and finance in the light of Nigerian Constitution.

II. LEGALITY OF ESTABLISHMENT AND OPERATION OF ISLAMIC BANKING AND FINANCE IN THE LIGHT OF NIGERIAN CONSTITUTION

This notion of unconstitutionality of Islamic banking has been extensively debunked by scholars who argued, citing section 38 (1) of the Constitution of the Federal Republic of Nigeria (CFRN), 1999 that the Constitution in unequivocal terms provides that every person shall be entitled to freedom of thought, conscience and religion. An average Muslim would tend to avoid interest-based transactions practiced under the conventional banking and finance and opt for Islamic banking and finance system. This is why an average Nigerian Muslim would either abstain from conventional banking or as a matter of necessity, operate a current account for the reason of its non - attraction of interest. This state of affair however does not solve the problem as it merely amounts to what is referred to as adopting the lesser of two alternative harms. The first and the 'most grievous of the harms is the involvement in interest transactions and the

alternative but a less harm is dealing with such institution and not being bothered about what one's deposit is being used for provided it is kept safe'.

The purport of the foregoing is that a Muslim exercises his constitutional right to have his problem identified above solved through the non-interest banking and finance which enables him to avoid consuming the forbidden riba (interest or usury). Even though the non-interest system of banking and finance is founded on religious precepts, the choice of that system by a Muslim is premised on his right to freedom of thought, conscience and religion as enshrined in Constitution.

While the argument above is valid, it can be also argued that the basis of legitimisation of Islamic finance, including Islamic banking in Nigeria could be stretched beyond the confine of section 38. I consequently opine that it is the right of all Nigerians, whether Muslims, Christians or persons of any other religious conviction to have an Islamic (non-interest) financing or any other non-interest financing of choice as alternative financial system(s) in Nigeria in order to afford Nigerians sufficient choices to enable them realize their full economic potentials. Section 16 of the Constitution is in tandem with this view in its provision thus:

- ✓ the state shall within the context of the ideals and objectives for which provision are made in this constitution;
 - Harness the resources of the nation and promote national prosperity and an efficient, dynamic and self reliant economy.
 - Control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.
 - Without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sector of the economy.
- ✓ The state shall direct its policy towards ensuring
 - The promotion of a planned and balanced economic development”.

Based, on the foregoing provisions, Nigerian government in its bid to fulfill her economic objective under chapter two of the constitution, may permit and encourage the establishment of alternative financial system such as Islamic banking and finance and any other non-interest banking in order to attain a balanced economic development.

As a matter of fact most nations which have adopted the Islamic financial system did so not as an affirmation of the guarantee for the rights of the Muslim populace only, but also in consideration of the potential contribution the Islamic alternative could give to their economy as well as the enormous economic benefits this could translate into for the citizenry regardless of colour, religion, sex or race. While the authorities in the U.K. desire the U.K to be the hub of Islamic finance in the West. It has also been canvassed that France could be the hub of Islamic Finance in Europe. Taking a queue from such propositions from other climes, it is opined that Nigeria stands the chance of a huge economic benefit if it becomes the hub of Islamic finance in Africa.

In the light of the foregoing, Olayinka A. Ajewole, posited that ‘dressing the new era of non-interest (Islamic) financial services in the garb of religion or seeing it in the light of religion only without considering its potential contributions to society would undermine the benefits of an alternative financing model. A cursory review of the underlying philosophy of the non-interest transactions seems to support social and economic justice and the allocation of resources’. Moreover, the right to freedom of choice of every Nigerian as well as non-discrimination principle enshrined in the Nigerian Constitution must be respected and this include the right to choose which financial institution model to use by any Nigerian, Christian or Muslim, or others. There are many non-Muslim Nigerians who for obvious reasons may prefer the non-interest (Islamic) financial model.

In his response to questions posed at an interview, Mohammed Mustapha Bintube, the then Jaiz bank's Managing Director, asserted thus:

“I will like to start by saying that our first credit did not go to a Muslim. It went to a Christian and this was noticed by the Central Bank in their maiden examination. They were surprised. Not only that, the (Second and the third person(s) were also Christians. The first was Daniel, while the second was a Gabriel. We are not talking of small credit here, we are talking about hundreds of millions. So I will like to say this bank is open to all irrespective of your religion, race or where you come from. So long as you meet the basic requirements set by the Central Bank, you are welcome. As long as you have a viable business you have integrity, and you are credible, we will be willing to do business with you.

On whether a non Muslim can sit on the board of directors of Jaiz Bank, he responded:

“O yes, definitely. In fact we have offered a Christian membership of the Board of Directors and he was glad. He accepted, but just as he was about to finalize arrangement, the 2009 crash took place he could not take up his shares. If you have a non Muslim that is willing to invest, believe me if he meets the CBN requirements he can be a director....”

And he concluded:

I hope that within the next five years we would have been able to make non interest banking to be known and practiced everywhere in Nigeria irrespective of race or religion. People should see the benefit so clearly that all the controversies that trailed our coming will be seen as unnecessary in the first instance.

III. NON-INTEREST BANKING AND FINANCE IN THE LIGHT OF HOLY SCRIPTURES

The Quran categorically prohibits Riba (usury/interest) with provisions inter alia as follow:

الَّذِينَ يَأْكُلُونَ الرِّبَا لَا يَقْوَمُونَ إِلَّا يَكْفًا يَوْمَ الَّذِي يَتَخَبَّطُهُ الشَّيْطَانُ مِنَ الْمَسِّ
ذَلِكَ بِأَنَّهُمْ قَالُوا إِنَّمَا الْبَيْعُ مِثْلُ الرِّبَا وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا فَمَنْ جَاءَهُ مَوْعِظَةٌ
مِّن رَّبِّهِ فَآتَنَّهُا فَلَهُ مَا سَلَفَ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا
خَالِدُونَ

“Those who exact usury will not stand but like one deranged by the Devil's touch. That is because they say “Trade is just like usury while Allah has allowed trade and forbidden usury... who ever, on receiving advice from his

lord, relinquishes (usury), shall keep the gains of) what is past, and his mater shall rest with Allah . As for those who resume, they shall be the inmates of the fire and they shall remain in it

يَحِقُّ لِلَّهِ الرَّبُّوَا وَيَرْبِي الصَّدَقَاتُ وَاللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَتِيح

Allah bring usury to naught, but He makes charities to flourish". Allah does not like any sinful ingrate.

يَا أَيُّهَا الَّذِينَ ءَامَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِن كُنْتُمْ مُؤْمِنِينَ

"O you who have faith! Be wary of Allah and abandon (all claims to) what remains of usury, should be faithful.

فَإِن لَّمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِّنَ اللَّهِ وَرَسُولِهِ وَإِن تُبْتِغُوا مِن رَّءُسِ أَمْوَالِكُمْ لَا تَظْلُمُونَ وَلَا تُظَلَمُونَ

"If you do not do so, then be prepared to face war declared by God and His messenger! If you repent, you may retain your principal. Do not wrong (others) and you will not be wronged.

وَإِن كَانَ ذُو عُسْرَةٍ فَنَظِرَةٌ إِلَىٰ مَيْسَرَةٍ وَأَن تَصَدَّقُوا خَيْرٌ لَّكُمْ إِن كُنْتُمْ تَعْلَمُونَ

If any debtor suffers hardship, then postpone (repaying) it until conditions become easier (for him), while if you treat it (the indebtedness) as an act of charity it is better for you, if you only knew.

يَا أَيُّهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا الرِّبَا أَضْعَافًا مُّضَاعَفَةً وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُفْلِحُونَ

"O you who have faith! Do not exact usury twofold and several fold the sum lent) and wary of Allah so that you may be felicitous".

وَأَخَذَهُمُ الرِّبَا وَقَدْ نُهُوا عَنْهُ وَأَكْلِهِمْ أَمْوَالِ النَّاسِ بِالْبَاطِلِ وَأَعْتَدْنَا لِلْكَافِرِينَ مِنْهُمْ عَذَابًا أَلِيمًا

"And of their taking usury –though they had been forbidden from it – and for eating up the wealth of the people wrongfully. And we have prepared for the faithless among them a painful punishment". p

وَمَا ءَاتَيْتُم مِّن رِّبَا لِّيَرْبُوَا فِي أَمْوَالِ النَّاسِ فَلَا يَرْبُوَا عِنْدَ اللَّهِ وَمَا ءَاتَيْتُم مِّن زَكَاةٍ تُرِيدُونَ وَجْهَ اللَّهِ فَأُولَٰئِكَ هُمُ الْمُضَاعِفُونَ

"That which you give in usury in order that it may increase people wealthy does not increase with Allah. But what you give as Zakat seeking Allah's pleasure- it is they who will be given a manifold increase".

The foregoing legal principles are corroborated by the provisions of the prophetic traditions.

Abu Huraira said that Prophet Muhammad (p.b.u.h) had said: "A time is certainly coming to mankind when only the receiver of riba will remain, and if he does not receive it, some of its dust will reach him"

In another prohibiting tradition of Holy Prophet Muhammad (p.b.u.h), riba is regarded as one of the (Seven) great destructive sins thus: 'Avoid seven destructive sins'. The Listener asked; O messenger of Allah, what are they? He said, associating (partners) with Allah (Shrik), Magic or Sorcery, taking a life which Allah has made sacred except in the course of justice, devouring usury, appropriating the property of the orphan, fleeing from the battle field and slandering virtuous women who are discreet.

The gravity of the indulgence in riba is further exemplified by the narration of Abu Hurairah who reported that the holy Prophet Muhammad (p.b.u.h) said:

"Riba has got seventy divisions or degrees (of evil), the least of which resembles (in its sinfulness) committing Zina with one's mother".

There are also copious provisions in the scriptures such as the Jewish Torah and the Christian Bible which equally

prohibit interest (Riba) in financial transactions. 'The Council of Arles (314), Nicaea (325), Carthage (348), and Aix (789) objected to interest as a method of profit making. In the third Lateran Council, 1179, it was proclaimed that manifest usurers shall not be admitted to communion, nor if they die in their sin receive Christian burial and the Wills of unrepentant usurers were declared invalid'

The Bible provides thus:

"Thou shall not lend upon interest to thy brother: interest of money, interest of victuals, interest of any thing that is lent upon interest. That the Lord thy God may bless thee in all that thou putest thy hand unto, in the land wither thou goest into possess it"

"If thou lend money to any of my people that is poor by thee thou shall not be unto him as an usurer, neither shall thou lay upon him usury"

To buttress the forgoing, it is reported that a Christian group in New Zealand had been offering interest free housing loans (as a trust) to their parishioners since 1989. The group also won a New Zealand Supreme Court case on 2nd June 2011 allowing them to continue offering such financing as a demonstration of their Christian faith and compassion. The Swedes have had such an interest free model (JAK Bank) since 1965.

IV. ISLAMIC FINANCIAL SYSTEM'S OPERATION AND REGULATION IN THE LIGHT OF THE EXISTING LAWS IN NIGERIA

Islamic financial system can also be justified in the light of the existing laws. While there may not be express and direct provisions in the Constitution pertaining to the Islamic financial system, the same Constitution recognizes and affirms any existing laws outside the Constitution that may have such provisions. Section 315 provides inter alia thus:

"subject to the provisions of this constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be:

(a) an act of the national assembly to the extent that it is a law with respect to any mater on which the National Assembly is empowered by this Constitution to make laws"

The Constitution defines existing law thus:

"Existing law means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date."

Considering the foregoing Constitutional provisions, the relevant laws such as the Bank and Other Financial Institutional Act (BOFIA) 1991; Investment and Securities Act (ISA) 2007 and the Nigerian Deposit Insurance Act 1988 as amended are recognized existing laws, and consequently, the legality or constitutionality of Islamic financial system could be assessed in the light of the provisions of such existing laws and regulations.

The relevant laws regulating banking in Nigeria are the Central Banking Act 1969; BOFIA 1991 as amended, the CBN Act, 1991 as amended. In order to appreciate this

analysis better, there is need to state the relevant sections of the Banking and other Financial Institutions Act (BOFIA) as follows:

The Provision of BOFIA which deals with display of interest rate provides thus:

“every bank shall display at its offices, its lending and deposit interest rates and shall render to the bank information such rates as may be specified from time to time by the bank. Provided that the provision of this section shall not apply to the profit and loss sharing banks.

The provision of BOFIA which deals with restrictions on the use of certain names provides:

Except with the written consent of the governor

(a) no bank shall as from the commencement of this Act, be registered or incorporated with a name which includes the word Central, Federal, Federation, National, Nigeria, Reserve, State, Christian, Islamic, Moslem, Quranic or Biblical.

Section 66 of BOFIA which deals with interpretation, defines profit and loss sharing bank to mean bank which transacts investment or commercial banking business and maintains profit and loss sharing accounts. Section 3 provides that the Central Bank has power to issue a license to any Bank and other financial institutions.

The BOFIA provision which deals with supervisory power of the Central Bank provides thus:

“The Bank (CBN) shall have power (a) to supervise and regulate the activities of other financial institutions and specialized banks; (b) to prescribe the minimum paid-up capital requirement of other financial institutions and specialized banks”.

In all of the foregoing provisions, there are clear indications that Islamic banking and finance (a profit and loss institution) is recognized under the Nigerian banking laws. Particularly, sections 23 and 66 of BOFIA make reference to banking institutions running and maintaining profits and loss accounts which is an important feature of Islamic banking. The CBN relied heavily on the highlighted statutory provisions to prove the legality of its licensing and regulation of Non Interest (Islamic) Financial Institutions via its Regulatory Guidelines of 2011 thus:

“These guidelines are issued pursuant to the Non – Interest banking regime under section 33 (1) (b) of the CBN Act 2007; Sections 23 (1); 52; 55(2); 59 (1) (a); 61 of Banks and Other Financial Institutions Act (BOFIA) 1991 (as amended and section 4 (1) (c) of the Regulation on the scope of Banking activities and ancillary matters, No .3, 2010. It shall be read together with the provisions of other relevant sections of BOFIA 1991 (as amended, the CBN Act, 2007, Companies and Allied Matters Act (CAMA) 1990) as amended and circulars /Guidelines issued by the CBN from time to time.

In respect of the Takaful (Islamic Insurance), an existing law is the NAICOM Act 1997 which the National Insurance commission claimed in its Regulatory Guidelines to have conferred power on it to regulate Takaful (Islamic Insurance) in Nigeria thus:

“The national Insurance Commission (the Commission) issues the Guidelines for Takaful-Islamic Insurance (the Guidelines) pursuant to section 7 of the NAICOM Act 1997”

On Islamic Capital Market, another major subsector of Islamic Finance, the existing law is the Investment and Securities Act of 2007. The Securities and Exchange Commission (SEC’s) Rules on Islamic Fund Management of 27th January, 2011 was made pursuant to section 313 (6) of the Investment and Securities Act (ISA) 2007. The rules were to be read in conjunction with rules 41 (1) of the Commission (SEC’s) Rules and Regulations on Unit Trust Scheme and Other Relevant rules of the commission.

All of the foregoing statutes pursuant to which the relevant Regulatory Agencies (namely CBN, SEC and NAICOM) claimed to have exercised their powers to license and regulate Islamic finance in Nigeria are recognized by Section 315 of 1999 Constitution as existing laws which are applicable and enforceable in Nigeria.

IV. CONCLUSION

This work has examined the legality of Introduction and regulation of Islamic finance in Nigeria. It also extensively examined the unresolved issue bordering on the need for adjudication of Islamic financial disputes in Nigeria, by the appropriate judicial authorities.

The introduction or operation of Islamic financial system in Nigeria is found to be legitimate in view of the relevant provisions of the various extent laws in the Country. The CBN relied on section 33(1)(b) of the CBN Act, 2007; Section 23(1) 52; 55(2); 59(1)(a); and 61 of BOFIA 1991 as amended, section 315 of the 1999 Constitution, Section 4(1)(c) of the Regulation on the scope of Banking Activities and Ancillary matters No. 3, 2010, among others, to license and regulate Islamic (non-interest) banking in Nigeria.

The National Insurance Commission (NAICOM) relied on section 7 of the NAICOM Act, 1997 and section 315 of 1999 Constitution to license and regulate Islamic Insurance (Takaful), while the security and Exchange Commission (SEC) relied on Section 313 (6) of ISA, 2007 and section 315 of 1999 Constitution to license and regulate the Islamic capital market in Nigeria.

Although there were pockets of reactions and oppositions to the establishment of, particularly, Islamic banking in Nigeria; that opposition became short-lived as research has shown that copious Biblical injunctions equally prohibit interest (riba). The understanding of that biblical precepts amongst the majority of Christians in the country as well as the public enlightenment throwing light on the non-discriminatory nature of Islamic financial principles and its economic benefits to society eventually contributed in no diminutive way in dousing the tensions initially brewed by the introduction of the non-interest banking regulatory instruments by the CBN. In fact research has also shown herein that the first three beneficiaries of the first of full-fledged Islamic bank’s credit in Nigeria were Christians.

The argument on the legality of Islamic financial system’s establishment in Nigeria goes beyond that of the constitutional right of the Muslims to the practice of their religion and must be seen, rightly so, in the light of the constitutional right of every Nigerian namely: right to economic well being usually engendered by economic development.

What drove many nations which have adopted the Islamic financial model is the existence of market for the products in their domain as well as the multiplier effect of the presence of the alternative non-interest (Islamic) financing (banking inclusive) model on the economy.

Secondly, right of freedom of choice of all Nigerians in respect of the relevant financial services need to be respected in order to engender the free choice of economic benefits, even by non – Muslims, emanating from the non interest (Islamic) financial model.

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- [2] Jaiz international had long before then filed an application for operating license to the Central Bank of Nigeria (CBN) but the grant was delayed largely due to the CBN's banks reform of 2004 – 2005 which raised the shareholders fund of all banks from the initial N2billion the proposed bank had deposited to N 25billion.
- [3] Sterling bank Plc also later secured the CBN approval for operating a non- interest (Islamic) banking window.
- [4] See Guidelines For The Regulation And Supervision Of Institutions Offering Non-Interest Financial Services In Nigeria, CBN circular No FPR/Dir/Cir/Gen/01/017 dated June 21st 2011.
- [5] See Eghes Eyeyien, The CBN, Islamic Banking, The Law, and Appropriate Regulation of Non – Interest Financial Institutions in Nigeria, The Economy, Vol. 1, No. 27 August 2011, P. 68. As a recipe for harmony and progress, such criticisms by non-Muslims need not be seen as sheer antagonism but as a tool capable of putting the operators of non-interest financial system on their toes to achieve the much desired goals of Shariah (maqasid al Shariah)- which is to attain justice in a non-discriminating way. Shariah is built on the principle of justice and equity to benefit all humans irrespective of their colour, religion or tribe. Both Muslims and Non-Muslims can equitably benefit from Islamic Non-interest Financial system.
- [6] See Abdulqadir Ibrahim Abikan,'Constitutionality Of Islamic Banking In Nigeria', In Contemporary Issues In Islamic Jurisprudence, a book in honour of Chief Justice of Nigeria, Honourable Justice Idris Legbo Kutigi, Benin Rawe Fortune Resources, 2009, pp 94- 121.
- [7] See Constitution of the Federal Republic of Nigeria (CFRN), 1999, S.38
- [8] Islamic banking is reported to be growing at the rate of 15% per annum and it has the capacity of global growth to about \$5 trillion in 2016. See www.dummies.com.
- [9] Seewww.klgates.com. Accessed last April 3rd, 2012.
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- [19] Ibn Kathir, Al-Hafiz, Taf Sir, Ibn Kathir, Riyadh, Darusalam Publishers & Distributors, 2000, Vol 2; p.74
- [20] Abdrazaq Kilani, Punch, 6 July, 2011
- [21] Holy Bible, Deuteronomy 23:19-20
- [22] Holy Bible, Exodus 22: 25
- [23] Abdurazaq Kilani, Op. Cit.. He opined that most of the vituperations against the Central Bank of Nigeria may even be coming from the fifth columnist within the apex bank who have allowed themselves to be used for selfish interests.
- [24] The section came into force on the 29th day of May 1999
- [25] (BOFIA), 1991, S. 23(1)
- [26] Reference to 'the Bank' means the Central Bank of Nigeria while reference to 'bank' means any other bank licensed under the Act. See section 66, BOFIA.
- [27] Profit and loss sharing banks refers to Islamic banks, a variant of the recognized non interest financial institution
- [28] See Banks and Other financial Institutions Act (BOFIA) 1991 as amended.
- [29] BOFIA, S. 43 (1) (a),
- [30] BOFIA, S. 3 (3),
- [31] BOFIA, S. 61(1) (a & b).
- [32] CBN Guidelines for the Regulation and Supervision of Institutions Offering Non- Interest (Islamic) Financial Services in Nigeria, June , 2011, paragraph 3.1
- [33] See Operational Guidelines For Takaful Insurance Operators, 2012., Section 1, paragraph 1.1
- [34] See the Draft Rules and Regulations of the Securities and Exchange Commission on Islamic Fund Management , January, 2011