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# COMPARATIVE STUDY OF IMPACT OF ENGLISH RECEIVED LAW ON ISLAMIC BANKING INSTITUTIONS IN MALAYSIA AND NIGERIA

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## Abstract

*The British introduced the common law into their colonies and greatly dominated the legal systems of the colonies and left marks that have persisted in the post-colonial period. However, Malaysia has able to maintain its cultural value and the Shariah not to be influence with the colonial master incorporated culture and law, while it is quite different when compared it with what is happened in Nigeria. The paper examines the reaction to the effects of British colonialism and the common law on the judicial machinery for the administration of Islamic banking law and finance in post-colonial Muslim-majority particular reference to Malaysia and Nigeria. The paper discusses on the impact of the common law on the structure of Islamic banking legal frameworks in the two jurisdictions. It is also stresses in the paper that through effort of Malaysian government, the Malaysian Muslim scholars have attempted to resolve some basic and operational issues in order to make Islamic banking products operation more viable and acceptable by Shariah, the government separates the legal framework guiding Islamic banking and finance from those existing conventional legislations. As a result, there are comprehensive legislations for Islamic banking and financial institutions in Malaysia when compared them with what is happened in Nigeria are like chalk and cheese.*

**Keywords:** Common Law, Shariah Law, Islamic Banking and Finance, Comparative Analysis.

## Introduction

In the middle of 19<sup>th</sup> century to the early part of 20<sup>th</sup> century, British colonialism spread to Muslim domains in parts of Indian subcontinent, South-east Asia and Africa, which included Malaysia and Nigeria<sup>1</sup>. The British introduced the common law into their colonies and greatly conquered the legal systems of the colonies and left marks that have persisted in the post-colonial era. However, Malaysia has able to maintain its cultural value and the *Shariah* not to be influence with colonial master

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<sup>1</sup> Adeyemo W. L. 2020 Legal and Shariah Analysis of *Ijarah* (Leasing) Products of Jaiz Bank Plc in Nigeria, (PhD Thesis) Islamic Science University of Malaysia. February P. 76

incorporated culture and law<sup>2</sup>, while it is quite different when compared it with what is happening in Nigeria<sup>3</sup>.

### **Governing Laws for Islamic Banking Institution in Malaysia**

The Malaysian government separates the legal framework guiding Islamic banking and finance from those existing conventional legislations. As a result, there are comprehensive legislations for Islamic banking and financial institutions in Malaysia.

By virtue of Article 3(1) of the constitution of Malaysia recognised Islam as the state religion it provides that:

Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation<sup>4</sup>.

It is significant that the Article 3(1) placed in the constitution shows the responsibility of the state towards the Islamic religion. It is not recognised Islam as religion of federation but to provide all workable instruments to it,

Article 3(2) provides that:

Article 3(2) in every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorize the Yang di-Pertuan Agong to represent him<sup>5</sup>.

Article 3(5) Notwithstanding anything in this Constitution, the Yang di-Pertuan Agong shall be the Head of the religion of Islam in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and for this purpose, Parliament may by law make provisions for regulating Islamic religious affairs and for constituting a Council to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam<sup>6</sup>.

The implication of the constitution provision is that the parliament may make law to regulate Islamic religious affairs, including the affairs of Islamic banking and finance.

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<sup>2</sup> Article 3(2) of 1957 of the Federal Constitution of Malaysia (as amended in 2010)

<sup>3</sup> Section 14(3), Evidence Act, Cap 112, Laws of Federation of Nieria1990 (as amended)

<sup>4</sup> Article 3(1) of 1957 of the Federal Constitution of Malaysia (as amended in 2010)

<sup>5</sup> Article 3(2) of 1957 of the Federal Constitution of Malaysia (as amended in 2010)

<sup>6</sup> Article 3(5) of 1957 of the Federal Constitution of Malaysia (as amended in 2010)

In addition, the parliament has a right to constitute a council to advise Yang di-Pertuan Agong in matters relating to the religion of Islam.

Article 121(1A) provides that:

High courts shall have no jurisdiction in respect of any matter within the jurisdiction of the *Shariah* courts<sup>7</sup>.

Furthermore, the constitutional provision disallowed the high court to entertain any matters fall within the jurisdiction of *Shariah* court. However, *Muamalah* Bench is introduced. The court is vested with an exclusive and restrictive jurisdiction to hear and determine all matters or disputes arising from the operations of Islamic banks in Malaysia<sup>8</sup>.

English law is applicable throughout Malaysia with two conditions: firstly, it is applicable in the absence of local statutes covering the same matters; local law takes precedence over English law, as the latter is only met to fill gaps in the local system<sup>9</sup>. Secondly, English Law will be applied when it is suitable for local circumstances, Malaysia a commonwealth country has a dual system *Shariah* Courts operate exclusively for Muslims at the state level, and in the federal territories of Kuala Lumpur and Labuan and civil courts that operate at the federal level; The federal constitution provides the power divided between the federal government states that make up the federation<sup>10</sup>.

Furthermore, prior to 30 June, 2013 when Islamic Financial Services Act, (IFSA) first came in to force, the legislations in respect of *Shariah* governance on Islamic finance were not statutorily provided in any single Act<sup>11</sup>, the Islamic Financial Services Act, (IFSA) 2013<sup>12</sup> has essentially repealed the Islamic Banking Act 1983 (IBA, 1983)<sup>13</sup>, Islamic Insurance of *Takaful* Act, 1984<sup>14</sup>, Banking and Financial Institution Act 1989 (BAFIA, 1989)<sup>15</sup> and Payment System Act 2003<sup>16</sup>.

The Islamic banking and financial institutions have been provided with adequate legal frameworks for easy operation. Meanwhile, the Bank Negara Malaysia (BNM), being

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<sup>7</sup> Article 121(1A) of 1957 of the Federal Constitution of Malaysia (as amended in 2010)

<sup>8</sup> Adeyemo W. L. 2020 Legal and *Shariah* Analysis of *Ijarah* (Leasing) Products of Jaiz Bank Plc in Nigeria, (Ph.D Thesis). Islamic Science University of Malaysia. February P 190.

<sup>9</sup> Min Aun Wu, 1999 Malaysian Legal System. Publisher: Longman.

<sup>10</sup> Section 3 of the Malaysia civil Law Act 1956 (as amended)

<sup>11</sup> Zurina *et al*, 2013.

<sup>12</sup> Islamic Financial Services Act. 2013. *Laws of Malaysia Act* 759.

<sup>13</sup> Islamic Banking Act. 1983. *Laws of Malaysia Act* 276

<sup>14</sup> *Abacha v. Fawehinmi* (2000 FWLR, (pt. 4) 533)

<sup>15</sup> Banking and Financial Institution Act. 1989. (BAFIA), *Laws of Malaysia Act*, 372.

<sup>16</sup> Payment System Act. 2003. *Laws of Malaysia Act*, 627.

the Central Bank of Malaysia (CBM)<sup>17</sup>, issued operation licenses to local banks and international banks operating in Malaysia. BNM ordered and instructed that the banks must have Islamic banking experts as members of their advisory boards, where these boards monitor the respective bank's operations for *Shariah* compliance<sup>18</sup>. Central Bank of Malaysia was vested with the power to act as the Malaysian banking and financial institutions supervisor. However, the Central Bank of Malaysia Act 1958 was amended in 2003 to insert section 16B purposely for the establishment of the *Shariah* Advisory Council, which shall have the authority for the ascertainment of Islamic law for the purpose of Islamic banking business, *Takaful* and any other business which is based on *Shariah* principles and regulated by the Central Bank of Malaysia<sup>19</sup>

The amendment uplifted the position of Islamic banking and finance in Malaysia. It also subsequently allowed the court to refer any proceedings relating to Islamic banking matter, which is based on the *Shariah* principles before any court or arbitrator or any question that arises concerning a *Shariah* matter, to the *Shariah* Advisory Council. Any ruling made by the *Shariah* Advisory Council pursuant to a reference by the court shall be taken into consideration by the court, and if the reference was made by an arbitrator, be binding on the arbitrator<sup>20</sup>

In 2009, the Company Act of 1957 (repealed in 2016) and the Central Bank of Malaysia Act, 1958 were amended as Bank Negara Malaysia Act, 2009<sup>21</sup>. As such, Bank Negara Malaysia became the overseer of any matter relating to Islamic banking and finance in Malaysia. The amendment has brought a significant improvement to Islamic finance institutions in Malaysia. The amendment has also granted the Islamic bank necessary and autonomous mandates to continue to undertake its operations effectively<sup>22</sup>.

As a result of comprehensive legal frameworks, Malaysia has thirteen full-fledged Islamic banks, eleven investment banks, twenty-seven commercial banks with Islamic banking window, twelve licensed Insurance companies, *Takaful* operators and thirteen development financial institutions. These banks, development financial institutions and *Takaful* insurance companies could be found in all corners and angles in Malaysia for the public's ease of access. There is no doubt that these institutions

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<sup>17</sup> Central Bank of Malaysia Act. 2009. *Laws of Malaysia Act 701*.

<sup>18</sup> *Ibid*

<sup>19</sup> Zurina K., 2013. "A Study of Students' Reading interest in a Second language" *International Education Studies* Vol. 6 No. 11 ISSN 1913-9020, E-ISSN 1913-9039. Published by Canadian Center of Science and Education.

<sup>20</sup> Abdulhamid, M. 2016. *I Will Never Beg*. Selangor: Malaysian Current Law Journal Sdn Bhd.

<sup>21</sup> Central Bank of Malaysia Act. 2009. *Laws of Malaysia Act 701*.

<sup>22</sup> *Ibid*

have adequate legal frameworks for ease of operations in the Malaysian business and spatial environment<sup>23</sup>.

### **Governing Laws for Islamic Banking Institution in Nigeria**

It is necessary at this point to firstly discuss the sources of law in Nigeria before discussing the governing laws for Islamic Banking and financial Institutions in the country.

#### **Sources of Law in Nigeria**

The Sources of law in Nigeria are the constitution of federal Republic of Nigeria, statutes, principles of common law, case law, Islamic law, customary law and international law<sup>24</sup>. The Constitution is the supreme law of the country<sup>25</sup>. The statutes are subject to interpretation by courts; these interpretations constitute the legal connotation of legislations<sup>26</sup>. Furthermore, judicial decisions are also sources of law in Nigeria; the country operates a common law system, where the doctrine of *stare decisis* or judicial precedent applies<sup>27</sup>.

Customary laws are the native laws Nigerians which existed side by side with Islamic law or independent of Islamic law in the pre-colonial period, and which are still observed as a choice of communities in Nigeria<sup>28</sup>. When Nigeria was colonised, the colonial master abrogated some customs that they thought to be barbaric and unacceptable. However, before the customs must be enforced such customs should be tested and should not: (a) repugnant to natural justice, equity and good conscience;<sup>29</sup> (b) incompatible either directly or by implication with any law for the time being in force;<sup>30</sup> and (c) contrary to public policy<sup>31</sup>. The tests which have been existed before 1960 still remained today.

Another, test was added in the post-independence era known as constitutional test; the constitution test is the supreme law of the land <sup>32</sup> and any other law that is inconsistent with the provisions of the constitution is null void to the extent of the

<sup>23</sup>Takaful perators ([http://www.bnm.gov.my/index.php?ch=fs&pg=fs\\_mfs\\_dfi&ac=162](http://www.bnm.gov.my/index.php?ch=fs&pg=fs_mfs_dfi&ac=162) accessed on 12/4/2020 at 9.23pm).

<sup>24</sup> Niki Tobi, 1996. *Sources of Law*. MIJ Professional Publishers Ltd, Lagos.

<sup>25</sup> Section 1, 1999 Constitution of the Federal Republic of Nigeria (as amended)

<sup>26</sup> Hakeem Ijaiya. 2007. "The Problems of Statutory interpretation in Nigeria" *ABU Journal of Public Law* Vol.1 No 1.

<sup>27</sup> Elias T. A. and Jegede M.I, 1993. *Nigeria Essays in Jurisprudence*. MIJ Publishers, Lagos.

<sup>28</sup> Oba A. A. 2006. "The Administration of Customary Law in the Post-Colonial Nigerian State" *Cambrian Law Review* Vol. 37 P. 95

<sup>29</sup> Section 34 (1) of High Court Law , Cap H2, Laws of Kwarwa Ste, 2007.

<sup>30</sup> Ibid

<sup>31</sup> Section 14(3), Evidence Act, Cap 112, Laws of Federation of Nieria1990 (as amended)

<sup>32</sup> Section 1(1) 1999 Constitution of the Federal Republic of Nigeria (as amended) " This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria"

inconsistency<sup>33</sup>. Though Islamic law and customary law are two clearly separate legal systems, but the colonial authorities deemed Islamic law as a variant of customary law<sup>34</sup>. As a result of this, all the validity tests and conditions which customary laws have to pass through before it is enforceable in the courts also apply to Islamic law. The modes of proving customary law in the courts also apply to Islamic law. Furthermore, the Constitution also recognizes Islamic law, although its scope is limited to Islamic personal law, while section 10<sup>35</sup> seems to prohibit the adoption of state religion<sup>36</sup>. International law is a source of Nigeria law. The Constitution provides that no treaty between the federation and any other country shall have the force of law in Nigeria except to the extent to which any such treaty has been enacted into law by the National Assembly<sup>37</sup>.

### **The Central Bank of Nigeria (CBN)**

The Central Bank of Nigeria (CBN) is the apex regulatory authority of the financial system in Nigeria. The CBN was established by the CBN Act of 1958<sup>38</sup>. The bank oversees the procedures of other operating banking system and act as a banker of last resort to the banks in the country. It manages and controls the growth of money in the government budget. The Central Bank of Nigeria objectives is to promote monetary stability and sound financial system. It issues and revokes license of the banks in Nigeria<sup>39</sup>.

Subsequent legislation/amendments contained in the CBN Act 24 of 1991 (amended in 1997, 1998, 1999 and 2007) as well as the Banks and Other Financial Institutions (BOFIA) Act No. 25 of 1991 (amended in 1997, 1998 and 1999)<sup>40</sup>. In addition, the new CBN Act (2007) reinforced its mandate to ensure monetary and price stability. The enabling Law made in also gave the Central Bank of Nigeria more flexibility in regulating and overseeing the banking sector and licensing finance companies which previously operated outside any regulatory framework<sup>41</sup>. These include: primary

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<sup>33</sup> Section 1(3) 1999 Constitution of the Federal Republic of Nigeria (as amended) provides: "If any other law is inconsistent with the provisions of the constitution, the constitution shall prevail, and that other law shall to the extent of the inconsistency be void"

<sup>34</sup> Abdullateef W. A & Siddiq A. A. 2012 *Ethico-Legal Issues in the Nursing Profession*. Evans Brothers Nigeria Publishers Ltd.

<sup>35</sup> Section 10 of 1999 Constitution of the Federal Republic of Nigeria (as amended), provides "The Government of Federation or a state shall not adopt any religion as State Religion"

<sup>36</sup> Adeyemo W. L. 2020 *Legal and Shariah Analysis of Ijarah (Leasing) Products of Jaiz Bank Plc in Nigeria*, (PhD Thesis) Islamic Science University of Malaysia. February P.75

<sup>37</sup> Section 12(1) 1999 Constitution of the Federal Republic of Nigeria (as amended)

<sup>38</sup> Central Bank of Nigeria Cap C4 *Laws of the Federation of Nigeria 2004* (as amended)

<sup>39</sup> Adewunmi, W. 2016. "Mobilizing Domestic Resources for Economic Development: The Role of Central Bank of Nigeria and Other Financial Institution", *CBN Economic and Financial Review*, 34(4), 30-41.

<sup>40</sup> Aderibigbe J. O. 2014. "An Overview of the Nigerian Financial System. *CBN Bullion*, 28(1), 11-43.

*African Journal of Accounting and Financial Research* Vol.1, No.1, pp.9-18, 2018 [www.abjournals.org](http://www.abjournals.org) 18

<sup>41</sup> Falegan, S. B. 1995. "Central Bank Autonomy: Historical and General Perspective". *CBN Economic and Financial Review*, Vol. 33 No. 4.

mortgage institutions, finance companies and development finance institutions. With this development, the CBN became the overall regulator of all financial institutions in the Nigeria. It is through this amendment that the CBN New Banking Model groups the operating bank in Nigeria to three. They are commercial banks, Merchant Banks and Specialised Banks<sup>42</sup>.

However, Commercial banks are banks financial institutions that offer basic investment products like savings account, current account to individual and corporate customers. They provide a range of financial services to the general public such as accepting deposit, granting loans and advances to the customers. It is profit making company, which pays interest at a low rate to the depositors and charges higher rate of interest to the borrowers and in this way the bank earns the profit<sup>43</sup>. While, Merchant banks are also known as Investment banks, they are banks whose business includes receiving deposits on deposit account, provision of finance, consultancy and advisory services relating to corporate and investment matters making or managing investments on behalf of any person (BOFIA)<sup>44</sup>.

### **Specialised Banks and Islamic banks**

The Law that enacted the Specialised Banks in Nigeria is Banks and Other Financial Institutions Act (BOFIA, 1991)<sup>45</sup> (as repealed 2007). The main aim of the federal government for the establishment of Specialised Banks is to assist and encourage the industry and poor citizen who are owing to poor assets quality and low capital base. Specialised banks include bank of industry, bank of agriculture, non-interest banks, microfinance bank, development banks, mortgage banks and such other banks as may be designated by the CBN from time to time (BOFIA, 1991)<sup>46</sup>.

However, Islamic banks categorised among the specialised banks. The banks are defined by BOFIA 1991<sup>47</sup>. Also, under BOFIA 1991<sup>48</sup>, profit and loss sharing banks are exempted from displaying their lending and deposit interest rates in their offices. Thus, profit and loss sharing banks are not allowed to display lending and deposit interest because they are not allowed to charge interest in their dealings. Similarly,

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<sup>42</sup> Fadare, S. O. 2010. "Recent Banking Sector Reforms and Economic Growth in Nigeria". *Middle Eastern Finance and Economics*, 1(1), 01-09.

<sup>43</sup> Oke, B. A. 1998. "Central Bank Independence in Developed Countries: A Comparative Analysis" in WAIFEM *Issues in Central Banking & Bank Distress in Sub-Saharan African Countries*, Lagos, Nigeria.

<sup>44</sup> Oluduro, O. F. 2015 9. "History And Evolution Of Banking in Nigeria" *Academia Arena*;7(1) <http://www.sciencepub.net/academia>

<sup>45</sup> Yahaya, A. 2016. "The Central Bank of Nigeria Guidelines on Shariah Governance Standards: An Appraisal" (Postgraduate Thesis). Bayero University Kano, April. P. 67

<sup>46</sup> Section 12(1) 1999 Constitution of the Federal Republic of Nigeria (as amended)

<sup>47</sup> Section 61 of BOFIA 1991 provides that "A bank which transacts investment and banking business and maintains profit and loss sharing accounts."

<sup>48</sup> Section 23(1) of the Banks and Other Financial Institutions Act. 1991 (BOFIA) Cap. B.3 *Laws of the Federation of Nigeria 2004*.



BOFIA, 1991<sup>49</sup> also empowered profit and loss sharing banks to engage in equipment leasing, a whole or retail trade, export and import trades and to acquire or hold share capital of any agricultural, industrial or venture company and the share capital of other businesses. Besides, CBN in its efforts to allow non-interest banking system and pursuant to its power under BOFIA<sup>50</sup> issues guidelines that are binding on all non-interest financial institutions to establish *Shariah* Advisory Committee to oversee *Shariah* compliance of the Non-Interest Financial Institutions.

Conversely, one of the mandatory requirements of the CBN for the licensing of non-interest bank, clearly stipulated in the BOFIA 1991<sup>51</sup> is the incorporation of such organisations by the Corporate Affairs Commission. As such, there is some relationship between the Islamic banks and the Corporate Affairs Commission in Nigeria, as the bank must first be incorporated by the Commission, and the Commission must have all relevant corporate information about the banks<sup>52</sup>. The payment of tax to Federal Inland Revenue Services (FIRS) is compulsory on all taxable individuals and incorporate companies including banks (conventional or Islamic) operating in Nigeria. The implication of this is that Islamic bank must satisfying all these statutory requirements before it was duly incorporated, and it has continued to fulfil its statutory obligations to Government through such agencies<sup>53</sup>.

Furthermore, the Nigerian Deposit Insurance Corporation (NDIC) also ensures that every failed bank and every failing bank is supported and the issues in such regards are resolved. Hence, as part of requirements by the CBN<sup>54</sup>, the NDIC has been empowered to examine the books and affairs of incorporated non-interest bank meaning that the NDIC has important role to play in the affairs of Islamic banks in the growth and development the banks' businesses.

### **Comparative Study of the Two Jurisdictions.**

When comparing the two systems the huge differences between them are striking<sup>55</sup>. Malaysia is fertile with its Islamic banking and finance law. However, Nigeria is sterile with its un-interpreted statute<sup>56</sup>. Despite the similarities between their laws,

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<sup>49</sup> Sections 21 and 26 of the Banks and Other Financial Institutions Act. 1991 (BOFIA) Cap. B.3 *Laws of the Federation of Nigeria 2004*.

<sup>50</sup> Sections 57 of the Banks and Other Financial Institutions Act. 1991 (BOFIA) Cap. B.3 *Laws of the Federation of Nigeria 2004*.

<sup>51</sup> Section 12(1) 1999 Constitution of the Federal Republic of Nigeria (as amended)

<sup>52</sup> Companies and Allied Matters Act, 1990 Cap C. 20 *Laws of the Federation of Nigeria 2004* (as amended).

<sup>53</sup> Adeyemo W. L. 2020 *Legal and Shariah Analysis of Ijarah* (Leasing) Products of Jaiz Bank Plc in Nigeria, (PhD Thesis) Islamic Science University of Malaysia. February P80

<sup>54</sup> Onaja A.O, Onu M. E & Ajodo S. O, 2002. "Contributions of Financial Sector Reforms and Credit Supply to Nigerian Agricultural Sector (1978-2009)" *CBN Journal of Applied Statistics* Vol.2 NO 2.

<sup>55</sup> Professor Bevan 1970 cited Dusuki, 2002 p. 8)

<sup>56</sup> Adeyemo W. L. 2020 *Legal and Shariah Analysis of Ijarah* (Leasing) Products of Jaiz Bank Plc in Nigeria, (PhD Thesis) Islamic Science University of Malaysia. February P 80

Malaysia is different from Nigeria is a federal state with written constitution with federalism in nature. Federal constitution is the supreme law of the countries while Islam is recognised as state religion in Malaysia<sup>57</sup>. The official status of Islam in Malaysia legitimizes the religious of Islamic Financial Services Act (IFSA) and facilitates the establishment of special bodies to administer Islamic banking and financial institutions matters, whereas Muslims in Nigeria have to contend with non-Muslim opposition to the existence of Islamic law and Islamic Banks.

Nigeria is a secular state with no defining religion. Although section 10<sup>58</sup> seems to prohibit the adoption of state religion, but the Constitution clearly guarantees the right of every citizen of Nigeria to the religion of their choice<sup>59</sup>.

The Malaysia monarch known as Yang di-pertuan Agong, is the supreme Head of the federation, who is the Head of state, much like the Queen in the United Kingdom and the government is carried out in her names<sup>60</sup>, but there is no such system in Nigerian context. Malaysia and Nigeria were colonized by Britain which introduced the common law. The two countries are common law nations with varied legal systems made up of common law, *Shariah* and customary law. The two countries are multi-religious, multi-ethnic and practice federalism. They are operating conventional and Islamic banking system<sup>61</sup>.

Malaysia and Nigeria both inherited the English legal system as a colonial legacy, and so both jurisdictions share a common law the “second-handiness” stemming from the fact that much local legislation is based on English models<sup>62</sup>. English law has been given upper hand over the *Shariah* and customary laws in Nigeria legal system. Therefore, English law is applicable throughout Nigeria; while local laws are more recognised in Malaysia especially when the matter is relating to Muslim; *Shariah* law shall prevail, also when there is a local statute covering the matter; the local law takes priority over English received law.

It can be understood that the operation of Islamic banking institutions in Malaysian and Nigerian are almost the same fundamentally. In both countries, the central banks have the autonomous and statutory power to regulate both the conventional and

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<sup>57</sup> Article 3 of Federal Constitution of Malaysia, 1957 (as amended)

<sup>58</sup> 1999 Constitution of the Federal Republic of Nigeria (as amended)

<sup>59</sup> Ibid

<sup>60</sup> Min Aun Wu, 1999 Malaysian Legal System. Publisher: Longman.

<sup>61</sup> Oladimeji, M. A. 2016. Regulatory, Supervisory and Industry Development of Islamic Banking System in Nigeria: (PhD Thesis). Islamic Science University of Malaysia. April.

<sup>62</sup> Niki Tobi, 1996. Sources of Law. MIJ Professional Publishers Ltd, Lagos.

Islamic financial institutions<sup>63</sup>. In Malaysia, Securities Commission control the banks and finance companies; while the commercial banks, merchant banks and finance companies are allowed to offer Islamic banking products and services under the IFSA, 2013<sup>64</sup>. These institutions are required to separate the funds and activities of the Islamic transaction from the conventional business in order to ensure that there would not be any co-mingling of funds. In Nigeria, Central Bank of Nigeria controls the conventional and the Islamic banks and finance companies; but there is no specific Act like IFSA 2013 regulating the activities of the Islamic bank. The Central Bank of Malaysia and the Central Bank of Nigeria give exclusive power to the *Shariah* Advisory Council to regulate and control the activities of the Islamic bank. The Islamic bank also performs the same activities and functions like the conventional bank in both countries<sup>65</sup>.

The Malaysian empowerment of the Islamic Banking and Finance with adequate legal frameworks as against the operation of the Nigerian Islamic Banking and Finance, a supposedly Islamic bank and finance institution under the conventional banking and finance frameworks in Nigeria appears a sharp point of distinction with implication for comparative effectiveness, patronage and public confidence<sup>66</sup>.

Comparatively, Malaysia has thirteen full-fledged Islamic banks, eleven investment banks, twenty-seven commercial banks with Islamic banking window, twelve licensed Insurance companies, *Takaful* operators and thirteen development financial institutions. There is no doubt that these institutions have adequate legal frameworks for ease of operations in the Malaysian business and spatial environment<sup>67</sup>, while, in Nigeria, the number of Islamic banks operating full-fledged Islamic banking and finance activities are two namely; Jaiz Bank obtained license from CBN in 2011 and Taj Bank license was approved in the year 2019, and two other conventional banks, that is, Stanbic IBTC Bank Plc. and Sterling Bank Plc. were granted license by the Central Bank of Nigeria to operate interest-free banking and finance services through a special window in 2012 and 2013 respectively<sup>68</sup>.

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<sup>63</sup> Adeyemo W. L. 2020 Legal and *Shariah* Analysis of *Ijarah* (Leasing) Products of Jaiz Bank Plc in Nigeria, (PhD Thesis) Islamic Science University of Malaysia. February P 80

<sup>64</sup> Islamic Financial Services Act. 2013. *Laws of Malaysia Act* 759.

<sup>65</sup> Oladimeji, M. A. 2016. Regulatory, Supervisory and Industry Development of Islamic Banking System in Nigeria: (PhD Thesis). Islamic Science University of Malaysia. April. P. 89

<sup>66</sup> Adeyemo W. L. 2020 Legal and *Shariah* Analysis of *Ijarah* (Leasing) Products of Jaiz Bank Plc in Nigeria, (PhD Thesis). Islamic Science University of Malaysia. February. P. 103

<sup>67</sup> [http://www.bnm.gov.my/index.php?ch=fs&pg=fs\\_mfs\\_dfi&ac=162](http://www.bnm.gov.my/index.php?ch=fs&pg=fs_mfs_dfi&ac=162) accessed on 24/4/2018 at 9.23pm.

<sup>68</sup> Adeyemo W. L. 2020 Legal and *Shariah* Analysis of *Ijarah* (Leasing) Products of Jaiz Bank Plc in Nigeria, (PhD Thesis). Islamic Science University of Malaysia. February P. 105

It has been shown that the Central Bank of Malaysia made a provision for the establishment of Islamic banking and finance institutions in Malaysia, while the Central Bank of Nigeria has also made its own provision for the establishment of Islamic banking and finance institutions in Nigeria. The inadequacy of legislations and associated regulations in Nigeria has affected the growth of Islamic banking and finance in the country. The review showed, for instance, that despite BOFIA having been in operation since 1991 is still in its infancy due to the lack of any case law to test its strength and weakness<sup>69</sup>.

### **Recommendations**

The Nigerian government should introduce Islamic Banking Deposit Insurance, whereby the Islamic banking sector will be placed within the purview of the provisions of recommended *Takaful* Act. The law will be regulating all the issues on Islamic insurance in the country. With this, the Nigerian Islamic Banking Deposit Insurance Scheme would be based on the principles of *Shariah*.

The services of the bank should be extended not only to the urban centres in Nigeria, but also the nook and cranny where there are Muslims among the inhabitants. With this, the Muslims and their non-Muslim counterparts would become the beneficiaries of the services of Islamic Banking and financial institutions like the Malaysian citizenry who continue to enjoy the provisions made by Malaysian government for Islamic Banking and financial institutions.

The study also recommends the adoption of a legal framework that is similar to that of Malaysia. Since Nigeria is also operating a dual banking system, where conventional and Islamic banks co-exist, there is the need to have some specific laws for the smooth operation, productivity and effectiveness of the Islamic banking sector. By this, Nigeria should have an Islamic Banking Act, among other relevant laws. This Act should make clear provisions on all matters relating to the practice of Islamic banking system. Alternatively, the existing principal banking laws may be amended to incorporate all areas that are necessary for the recognition and smooth practice of Islamic banking institutions. The amendment should incorporate all the guidelines and policies of the CBN on Islamic banking and its operation in Nigeria. Accordingly, any of the above options will help in solving the question of legal problems of Islamic banking system in Nigeria at large.

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<sup>69</sup> Dogarawa, A. B. 2013. "Critique of the Non-Interest Banking Framework in Nigeria". *International Shariah Research Academy for Islamic Finance, Malaysia*, 5 (1), 115-134

