

CORPORATE GOVERNANCE LEGISLATIONS FOR ISLAMIC BANKS IN NIGERIA: REVIEW OF COMPLIANCE WITH ISLAMIC PRINCIPLES

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ABSTRACT

Legislation is the bedrock of every endeavor for better outcome; mostly enabling environment for certain systems, practices and procedures. In any complex system, legislation plays pivotal role to solidify it. Hence, it is not debatable that corporate banking governance requires effective legislation to thrive. As with Islamic corporate banking governance in Nigeria, experts have made several complaints regarding the unsuitability of the existing legislations from the perspective of Shari'ah tenets. This thus prompted this article to examine the corporate governance legislations for Islamic Banks in Nigeria by way of review with Islamic principles. The article adopts doctrinal method of legal research by relying on the relevant legislations for corporate governance of Islamic banks in Nigeria as well as the primary sources of law under Shari'ah to fathom the Islamic principles as they relate to Islamic corporate banking governance. The article finds that the existing legislations for the corporate banking governance of Islamic banks are best suitable for the conventional banks. The legislations failed to incorporate Islamic principles for proper corporate banking governance of Islamic banks. The article thus places the burden of ensuring amendment of the Companies and Allied Matters Act (CAMA), 2020 on the Central Bank of

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II. ISLAMIC BANK AS CORPORATE ENTITY

Before examining the corporate nature of Islamic Bank, it is imperative first and foremost to understand the concept of banking from *Shari'ah* perspective. As the name implies, Islamic bank is a bank established pursuant to tenet of *Shari'ah*.⁶ It could also be explained as a bank established to function in an Islamic way.⁷ Banking activities are *Halal* (permissible) under *Shari'ah* provided they are in line with the dictates of *Shari'ah*.⁸ It is worthy of mention that Islamic bank is primarily established to serve Muslims by providing them with *Halal* (lawful) banking services.⁹ Therefore, Islamic bank is a bank established pursuant to *Shari'ah* principles in Islamic jurisprudence.¹⁰

Islamically, banking activities had long existed since the inception of Islamic legal system though in crude form.¹¹ Example that readily comes to mind is the Institution of *Baytul-Mal* which was the financial house of the then Islamic State.¹² Thus, the idea of banking is not a novel one in Islamic jurisprudence. But the incidence of modern development and the attendant effect of colonialism had dictated a new shape of the formation of Islamic bank.¹³

Nigeria, being a predominantly Common law country, has adopted certain condition precedent for the formation and establishment of banks in the country. As part of requirements to secure license to establish Islamic bank in Nigeria; there is need to comply with the extant law enacted for

⁶ Ahmad Alharhi, *Development of Islamic Banking System*, 3(1) Journal of Islamic Banking and Finance 12-25 (2015).

⁷ Mohi-ud-din Sangmi and Ahmad B. Khaki, *Islamic Banking: Concept and Methodology*, 1-18 available at: https://www.researchgate.net/publication/272236489_Islamic_Banking_Concept_and_Methodology (last visited on 19 November, 2022)

⁸ *Id.*

⁹ Funk, *supra* note 1

¹⁰ Nwocha, *supra* note 2

¹¹ Said Muhammad and Kong Ximei, *Islamic Financial System: A Brief Introduction from the Literature*, 6(2) Al-Azhar 1-12 (2020).

¹² Md. H. Rahman, *Baytul-Mal and Its Role in Economic Development: A Contemporary Study*, 2(2) Turkish Journal of Islamic Economics 21-44 (2015).

¹³ Abubakar B. Umaru, *Colonialism and Development in Nigeria: Effects and Challenges*, 70 International Affairs and Global Strategy 9-18 (2019).

incorporation of companies in the country.¹⁴ Thus, in line with the relevant provisions of Companies and Allied Matters Act (CAMA, 2020), any-would-be Islamic Bank in Nigeria has to be duly incorporated in compliance with the requisite laid down rules, regulations and procedures designed for that purpose.¹⁵

After complying with the condition precedent of pre-incorporation and the subsequent issuance of Certificate of Incorporation, then Islamic bank becomes a body corporate. That is, it attains the status of artificial entity or corporate entity as the case may be. It is therefore not gainsaid that all Islamic banks in Nigeria are corporate entities existing in abstraction. Taking JAIZ Bank Plc as an example, the bank is a corporation separate and distinct from individuals that established it. The same thing goes for all other full-fledge Islamic bank(s) or conventional banks operating Islamic windows.

The essence of discussing the corporate nature of Islamic Bank is therefore to demonstrate that Islamic Bank becomes artificial entity or corporate entity after incorporation.¹⁶ By virtue of the law, it is also empowered to render Islamic banking services despite its artificial nature.¹⁷ The question that therefore comes to mind is: how does a corporate entity, whose existence is in abstraction, perform the complex banking services required of an Islamic Bank? The answer to this question is the central focus point of the next subtopic.

III. CORPORATE GOVERNANCE AS THE AFTERMATH OF INCORPORATION

By way of explanation, corporate governance is the way and manner a duly incorporated company is being governed or controlled for the achievement of

¹⁴ Chidi E. Halliday & Krakase K.N. Briggs, *Formation of Companies under Company Law Jurisprudence in Nigeria: Lessons from other Jurisdictions*, 16(1) *Journal of Jurisprudence and Contemporary Issues* 182-192 (2018).

¹⁵ *Id.*

¹⁶ Darwanto & Anis Chariri, *Corporate Governance and Financial Performance in Islamic Banks: The Role of the Sharia Supervisory Board in Multiple-Layer Management*, 14(4) *Banks and bank Systems* 183-190 (2019).

¹⁷ *Id.*

the purpose(s) for which the company is incorporated. It is the accumulation of the periodic and relevant laws, rules, regulations guidelines, standards and codes carefully designed purposely to regulate the affairs of the shareholders of a corporation vis-à-vis the management of the corporation and the employees.¹⁸ Thus, corporate governance is an instrument of controlling and checking the excesses of the human agents of the company who are its directing minds.¹⁹ The framework of corporate governance is divided into internal and external corporate governance. The foregoing explanation of the concept corporate governance falls under internal corporate governance framework. The reason being that internal corporate governance is only concerned with the regulation of the internal organs of the company such as the Board of Directors (in the case of an Islamic bank, *Shari'ah* Board has been recommended), the Annual General Meeting (the shareholders) as well as the employees of the company.

The external corporate governance framework takes care of the third parties who have stakes in the company either by virtue of the private agreement as in the case of companies' creditors or by virtue of statutory requirement as in the case of the Central Bank of Nigeria (CBN), Corporate Affairs Commissions (CAC) and other regulatory institutions such as the Financial Regulation Advisory Council of Experts (FRACE), Advisory Council of Experts (ACE) etc. It is in view of the foregoing that a standard corporate governance framework encapsulates the activities and interests of the internal stakeholders of the company as well as that of the external stakeholders whose activities towards the company may be private or statutory.²⁰

The essence of the foregoing discussion is to lay a foundation with respect to the understanding of the concept of corporate governance. It is thus imperative to note that without proper incorporation in compliance with the

¹⁸ Ahmed A. Muhammed-Mikaeel *et al*, *Corporate Governance and Practice in Nigeria: Exploring its Tricky and Prognoses*, 1(2) International Review of Law and Jurisprudence 108-114 (2019).

¹⁹ *Id.*

²⁰ Abikan & Ahmad, *supra* note 5

extant law, the issue of corporate governance cannot arise. It is therefore not gainsaid that corporate governance is an aftermath of incorporation." Before concluding on this point, it is equally necessary to explain the concept of incorporation.

Incorporation is simply the processes laid down for formation of a company.²² Before a company can be called a company properly so-called, it must have successfully passed through the processes of incorporation. The process of incorporation in this clime is governed by the Nigerian corporate law which is applicable to all intending banks in Nigeria be it Islamic or conventional bank.²³ The processes are supervised by the Federal Government Agency established for that purpose.²⁴

Thus, after successful incorporation, the company in question (i.e., Islamic Bank in the instant case) becomes an artificial person created by law but exists in abstraction. To complete the processes of its artificiality, the law gives it powers to perform a number of activities. To this end, the company can transact businesses, can enter into a valid contract with any persons, can hold land anywhere within territory of Nigeria, can sue and be sued in the Court of law, can have perpetual succession, can have common seal etc.²⁵ All the foregoing functions recognized of an incorporated company in Nigeria is also applicable to Islamic banks after due incorporation. Islamic Bank, being an artificial person created by law with the status of a body corporate in pursuance to the relevant Nigerian corporate law, cannot ordinarily discharge the varieties of functions and obligations imposed on it artificially.²⁶ It becomes necessary that it relies on certain human agents to perform all its functions maximally. Thus, this is where corporate

²² Umaru, *supra* note 13

²³ Funk, *supra* note 1

²⁴ *Id.*

²⁵ See generally, The Company and Allied Matters Act, 1990 (stipulating that the Federal Government Agency in charge of incorporation of companies in Nigeria is the Corporate Affairs Commission).

²⁶ Ahmed A. Muhammed-Mikaael, *Application of Corporate Personality Doctrine under the Nigerian Corporate Law and Shari'ah*, 8(1) *Lexgentia*, 4-5 (2022).

²⁷ *Id.*

governance comes into regulate and check the excesses of the human agents who are in the control of the Bank.

As it is common to business tycoons, the very essence of incorporating or floating a company is to meet the need or requirements of profit making and risk minimization as well as to adequately secure the funds injected into the business against unforeseen circumstance.²⁷ It is therefore not a gain saying that this cannot be achieved except with a virile corporate governance framework.

History had it that a number of banks have gone into extinction in Nigeria due to improper corporate governance.²⁸ While the banks that have existed from generations to generations, were able to achieve that feat as a result of sound corporate governance framework and proper implementation.²⁹ Therefore, the nature of a company will determine the nature of the corporate governance to be designed for its administration. Using Islamic bank as a case in point, one needs not be told that it is corporate governance legislation designed pursuant to the principles of Islamic jurisprudence that is applicable. The reason being that corporate governance legislation generally enables a company to achieve the purpose for which it was incorporated. This is because, failure to implement the appropriate corporate governance inevitably leads to corporate governance failure.³⁰ Thus, incorporation of Islamic banks in Nigeria and the aftermath of their banking licensing gives rise to emergence of Islamic corporate governance.

IV. EMERGENCE OF ISLAMIC CORPORATE GOVERNANCE FOR ISLAMIC BANKS

It is important at this juncture to first and foremost give an explanatory insight into the concept of Islamic corporate governance with a view to

²⁷ *Id.*

²⁸ Lateef O. Ahmodu *et al*, *Corporate Governance Failure: Lesson from on-going Financial Crisis in Nigeria (2015-2017)*, 4(1) Direct Research Journals of Social Science Education Studies 9-13 (2017).

²⁹ *Id.*

³⁰ Muhammed-Mikaeel, *supra* note 18, 108-114

properly showcasing the emergence of Islamic corporate governance. As discussed above, corporate governance ordinarily entails the totality of laws, rules, regulations, codes and standard carefully designed for the management and administration of a company by spelling out the right, duties and obligations of the human agents of the company for the overall interest of the company's shareholders and other stakeholders of the company.³¹ This is a general explanation of the concept of corporate governance. It must be noted that the explanation is applicable to Islamic corporate governance save for the fact that *Shari'ah* content and *Shari'ah* compliance must be emphasized. It in on this note that Islamic corporate governance is explained as the totality of the rules, regulations, principles, codes and standards designed pursuant to the relevant provisions of the Holy Qur'an and Sunnah of the Prophet (PBUH) for management and administration of a company.³² The very essence of corporate governance, be it under the conventional law or under *Shari'ah*, is to avert the situation of corporate governance failure.³³ It must however be noted that the incidence of corporate governance failure are not on all fours under the two systems of law. The concept of corporate governance is wider under *Shari'ah* because any administration of a company that is not *in tandem* with the dictates of *Shari'ah* can constitute a situation of corporate governance failure.³⁴ That is to say that fraud, embezzlement, mismanagement of funds alone does not constitute corporate governance failure under *Shari'ah*. Administering the affairs of the company to engage in any unlawful business is an incidence of corporate governance failure under *Shari'ah* even though, the conventional law does not recognize such situation as constituting corporate governance failure.

³¹ *Id.*

³² Abdussalam M. Abu-Tapanjeh, *Corporate Governance from the Islamic Perspective – A Comparative Analysis with OECD Principles*, 1-17 available at: <https://www.researchgate.net/publication/222527039_Corporate_governance_from_the_Islamic_perspective_A_comparative_analysis_with_OECD-principles> (last visited on 24 November, 2022)

³³ *Id.*

³⁴ Qur'an, Surah Al-Maidah (5:44, 45 & 47)

The foregoing thus serves as one of the bases for emergence of Islamic corporate governance because the concept of corporate governance failure under the conventional law and *Shari'ah* differs. Muslim corporate managers therefore need to internalize *Shari'ah* tenets and principles in corporate governance. This shows that for all intent and purposes, the conventional legislation for corporate government of Islamic Banks cannot adequately fulfill the requirements of *Shari'ah*. Thus, this brings to therefore the need to have full-fledge *Shari'ah* compliant corporate governance legislation.

Allah (SWT) in the Glorious Qur'an categorized any Muslim who fails to apply the dictates, rulings, and teachings of *Shari'ah* in his/her worldly affairs as *Kaafirun*,³⁵ *Faasikun*,³⁶ *Dhaalimun*.³⁷ This is not far fetch in the sense that *Shari'ah* as a legal system offers complete codes of lives touching on every aspect of Muslims' lives of which banking corporate affairs and banking corporate governance are not exempted. Although, the concept of corporate governance as we have it in the recent time is modern in nature, *Shari'ah* corporate governance is therefore applied as a result of the dynamism of the Divine law to any emerging situations. Thus, the relevant aspects of the rules and principles of *Shari'ah* are applied to govern the modern corporate practices as observed in the case of Islamic banks.

The principle of law governing Muslims is that they are not permitted to go outside the provisions of *Shari'ah* to regulate their affairs whether corporate or not.³⁸ Thus, since incorporation of a company brings to the fore the necessity of corporate governance as in the case of Islamic banks in Nigeria which are corporate entities, it follows that *Shari'ah* compliant corporate governance legislation has to be designed with a view to administering their affairs, activities and modes of operation. As it was observed in the Nigerian situation, Islamic banks surfaced as novel and special type of bank in the banking sector in addition to the age-long conventional banks which already

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Qur'an, Surah Al-Ahzab (33:36)

have their conventional corporate governance legislation.³⁹ Therefore, the birth and emergence of Islamic bank in the country inevitably leads to the emergence of Islamic corporate banking governance in line with *Fiqh* of *Shari'ah*.

V. ISLAMIC PRINCIPLES EXPECTED OF THE CORPORATE GOVERNANCE LEGISLATION OF ISLAMIC BANKS

The principles of Islamic corporate governance are derived from the primary sources of *Shari'ah*. To this end, it is imperative to reflect on the understanding of *Shari'ah* and its sources of law before delving into the discussion of the various Islamic principles expected of corporate governance legislation of Islamic banks.

Shari'ah simply refers to the legal system brought by Prophet Muhammad⁴⁰ (PBUH) from Allah (SWT) to all mankind. The general misconception about *Shari'ah* is the fact that majority believe it is only legislated for Muslims alone. The correct view thus is that *Shari'ah*, as a Divine legal system, is promulgated by Allah for the generality of mankind. However, those who accept, believe and submit to the Divine law are typically called Muslims.

Shari'ah does not only contain comprehensive codes, standards or principles for all spheres of lives of Muslims but also remains the best legislation for any given circumstances.⁴¹ The foregoing is not an exaggeration because the law was promulgated by the Highest, the Wisest, the Most Knowledgeable i.e., Allah (SWT), the Creator of the universe and everything under or above it. That is why it is inappropriate to compare *Shari'ah* standard to that of any other system of law. The unique feature of *Shari'ah* is that it shapes the lives of its subjects in all ramifications. Allah (SWT) explained in the Holy *Qur'an*

³⁹ Suraj T. Ajagbe, & Alhassan N. Brimah, *Islamic Banking Development and Evolution: Current Issues and Future Prospects*, 3(2) Journal of Research in International Business and Management 73-79 (2013)

⁴⁰ See generally, Mirza B.M. Ahmad, *Life of Prophet Muhammad 1-9*, Islam International Publications Limited, UK (2013) (contending that Prophet Muhammad is the seal of all Prophet sent from Allah. By implication, *Shari'ah* is the last and applicable legal system till the Day of Judgment).

that: 'do the man think, after their creation, that they will be left to do whatever they like without been regulated?'⁴⁰ It is therefore not gain-said that *Shari'ah* is a Divine law which regulates every aspect of Muslims' endeavors without the exception of banking corporate affairs and banking corporate governance.⁴¹

With the foregoing understanding of *Shari'ah*, it is therefore imperative to examine the various Islamic principles expected of corporate governance legislation of Islamic banks. As discussed earlier, *Shari'ah* is comprehensive codes of life that touches every aspect of Muslims' affairs which Islamic corporate governance practice is not an exception. It is therefore worthy of note that principles of corporate governance are many from the provisions of *Qur'an* and *Sunnah*. However, few of them shall be discussed to showcase the position of *Shari'ah* on banking corporate governance practices.

Firstly, is the Principle of *Taqwallah* (i.e., fear of Allah).⁴² In any endeavor that a Muslim embarks upon, be it religious or otherwise, the first watch word is fear of Allah. Without the fear of Allah, every action will not achieve its objective. That is why the principle of *Taqwallah* is referred to as the most important of all Islamic corporate governance principles. Fear of Allah is bedrock of every successful action. Allah (SWT) warns Muslims to fear him in all their actions, inactions and omissions. In the *Sunnah* of Prophet Muhammad (PBUH), he equally admonished Muslims to fear Allah wherever they are. The implication of *Taqwallah* in corporate is such that those at the helms of affairs in corporate setting must act on behalf of the company as if Allah (SWT) is directly supervising them. The *Taqwallah* imbibed by the Islamic banks' managers would enable them to comply with all the dos of

⁴⁰ See generally, Ghulam Azam, *Islam the Only Divine & Complete Code of Life* 7-63, Kamiuh Prokashon Limited (2009) (stating that apart from the beauty of *Qur'an* as source *Shari'ah* of this last dispensation is that-unlike the previous legislation, it does not only focus on theology but also encapsulates other aspect such as politics, economics, transactions, businesses, sociology, etc.).

⁴¹ *Qur'an*, Surah *Al-Qiyamah* (75:36)

⁴² *Qur'an*, Surah *Al-An'am* (6:38)

⁴³ *Qur'an*, Surah *Al-Hashr* (59:7 and 18)

Allah in their corporate governance and at the same enhance them to avoid all the don'ts of Allah. This is because Allah loves those who fear Him in all their endeavors. The corporations' alter ego deals with the company's properties and funds. Thus, to overpower the whisper of Shayton, it is expected that they cannot do without fear of Allah in their corporate governance practice. This Islamic principle of *Taqwallah* in corporate governance is more relevant to those involved in the governance of the affairs of Islamic Bank. The reason being that, as good as banking services is, it may be a disastrous endeavor if not governed in line with the fear of Allah. Most corporate governance failures recorded in the past cannot be divorced from lack of observance of *Taqwallah*. The managers of Islamic banks will find *Taqwallah* indispensable in every sphere of operations of Islamic bank with a view to avoiding lucrative and tempting forbidden businesses and even excessive profit making.

Secondly is the Principle of Accountability for banking corporate governance.⁴⁵ The general sense of the principle of accountability under *Shari'ah* is such that each of the action of a Muslim exhibited overtly or secretly is subject to accountability on the Day of *Qiyamah* (Judgment Day).⁴⁶ Allah has promised pertaining to accountability that nobody shall be subjected to injustice.⁴⁷ That is, it was a person does that he shall be accountable upon.⁴⁸ Principle of accountability is firmly established a number of *Quranic* verses. Importantly, Allah made it clear in the *Qur'an* that man should not think that after their creation on earth, they will be left to freely do whatever they desire without being accountable for the consequence. The *Sunnah* of Prophet Muhammad (PBUH) is very apposite when it admonished that everyone is a shepherd and shall consequently be responsible for his flocks. This *Hadith* is an all-encompassing *Hadith* in the sense that it leaves no one out in the issue of accountability. Thus, Islamic corporate governance principle of accountability is very unique one which

⁴⁵ *Qur'an*, Surah *Al-A'raf* (7:6-7); *Qur'an*, Surah *Al-Ghashiyah* (88:25-26)

⁴⁶ *Id.*

⁴⁷ *Qur'an*, Surah *Al-Israa'* (17:15)

⁴⁸ *Qur'an*, Surah *Al-A'raf*, *supra* note 45, 8-9

deviates from the conventional notion of accountability in corporate governance. From *Shari'ah* perspective, the bank managers directing the affairs of the Islamic banks though accountable to the shareholders, their foremost accountability is to Allah (SWT). All their corporate activities shall be questioned upon on the Day of Judgment. This is because governance of whatever level is not be taken with levity by sincere Muslims. Thus, by the Islamic corporate governance principle of accountability, the corporate managers should take cognizance of the indisputable fact that Allah (SWT) is interested in the consequence of the corporate actions, in actions, omissions and even overall decisions.

With respect to the corporate governance of Islamic Bank, the respective alter egos are to ensure that all their corporate decisions do not occasion injustice to the shareholders and the stakeholders of the banks as well as ensuring that their decisions do not give room for non-*Shari'ah* compliant practices in the banking services. The reason being that, by that Islamic corporate governance principle of accountability, such non-*Shari'ah* compliant decision shall not go without its consequence with Allah on the Day when secret shall become overt.⁴⁹

Principle of Justice is also one of Islamic corporate governance principles.⁵⁰ Justice refers to giving entitlements/rights to whom it is due. Allah (SWT) in the Holy *Qur'an* admonished Muslims to observe justice at any given situation even if it be against oneself.⁵¹ In a number of Traditions of the Messenger of Allah (PBUH), he frowned against unjust treatment to the weak and preferential treatment to the strong or influential.⁵² This principle

⁴⁹ *Id.*

⁵⁰ *Qur'an*, Surah *An-Nisa'* (4: 58 and 135); *Qur'an*, Surah *Al-Ma'idah* (5:8); *Qur'an*, Surah *An-Nahl* (16:90); *Qur'an*, Surah *Ar-Rahman* (55:7-9)

⁵¹ *Qur'an*, Surah *An-Nisa'* (4: 135)

⁵² See generally, Abu-Amina Elias, *Daily Hadith Online- The Teachings of Prophet Muhammad in Arabic and English*, available at: <https://www.abuaminaelias.com/dailyhadithonline/2021/10/28/ilm-quran-sunnah/> (last visited on 24 November, 2022) (in which one of the Aadith of Prophet Muhammad (PBUH) reported by Abdullah bn Umar, he quoted the Prophet as saying: "Knowledge is three types and anything else is a surplus: a decisive verse, or an established Sunnah, or an obligation of justice").

of Islamic corporate governance is pivotal to corporate banking governance setting. This is owing to the fact that there is need to deal justly with the corporate employees, shareholders and creditors. No one should be denied his/her due rights especially the weak among them. Doing justice must also prevail in transaction of business on behalf of Islamic banks. For instance, it will be a great injustice to the shareholders for the bank managers to embark on businesses with *Gharar* (uncertainly or too much risk).

Islamic banking sector deserves more observance of justice especially on the part of the bank managers. The investment window of Islamic bank should be carefully managed. It will be unjust to leave it to the hands of incompetent officials who had little or no experience in Islamic investment practices. By the Islamic corporate governance principle of justice, *Shari'ah* demands that experts with '*adalah*' (probity) should be recruited to man the respective departments or units of Islamic banks for proper corporate governance practices. Experts with '*adalah*' in this sense means people who are ready to commit themselves to the services of the bank for the sake of Allah without placing emphasis on the derivable worldly benefits.

The Islamic Principle of *Shura* (Consultation) cannot be over-emphasized.³¹ The hallmark of Islamic banking governance rests on the *Shura* which greatly differentiates the mode of decision making in Islamic banks from that of the conventional banks. Principle of consultation simply means taking decision in corporate organization by way of mutual consultation. Mutual consultation is a Divine commandment in the Holy Quran which Prophet Muhammad (PBUH) practicalised during his life. Thus, taking corporate decision by way of *Shura* (Mutual Consultation) involves taking the views of everyone into careful consideration before coming up with a unanimous decision. This is sharply in contradistinction with the voting system adopted under the conventional corporate governance practice. The significant feature of the decision making by way of *Shura* in that such decision cannot contradict the tenets of *Shari'ah* contained in the *Qur'an* and *Sunnah*.

³¹ Qur'an, Surah Ash-Shura (42: 38)

Because as a rule, the subject matter of deliberation and the consequent decision must be Shari'ah compliant.

Therefore, the corporate governance legislation of Islamic bank cannot be complete without the inclusion and observance of the Islamic corporate governance principle of consultation when it comes to decision making. By doing so, the corporate managers will attract the pleasure of Allah at all times in their corporate governance practices.

The Principle of Integrity and Truthfulness is also worthy of mention.⁵⁴ It is one of the integral parts of the Islamic corporate governance principles. The principle of integrity connotes being in a state of honesty and uprightness at every material time. Allah charges Muslims to be upright and honest either in the private or public. The principle directly relates to the concept of *Amanah* (Trust). The man who has integrity is presumed to be a trustworthy fellow. Such a person does not bend his position to any unscrupulous tempting situation. The Messenger of Allah enjoins Muslims to render trusts back to whom they are due. Thus, integrity and trustworthiness should top the list of requirements of any-would-be a corporate manager. The reason is that where integrity and trust is lacking in those who stir the affairs of a corporation, the end result would be corporate governance failure. From *Shari'ah* perspective, the corporate managers should be persons who are above the board in term of integrity and trustworthiness. It is this that will enable them to be able to observe moral and ethical standards in accordance with *Shari'ah*.

With respect to the corporate governance of Islamic bank, *Shari'ah* stipulates that the various professionals to be appointed must be people with good virtue in words, actions and in *Eeman* (Faith). This is because, there is clear distinction between an expert in a particular profession and his/her qualities in term of integrity, truthfulness, honesty and trustworthiness. Both must be present in any-would-be corporate manager of Islamic banks. Thus, the foregoing Islamic corporate governance principle dictates that people of

⁵⁴ Qur'an, Surah *Al-Ahqaf* (46: 13-14)

integrity and honesty should be appointed to the relevant boards or committee for maximum performances. This is because, the various board members are there as the trustees of the investors and expected to play a fiduciary role with integrity in the overall interests of all the stakeholders of the bank.

The Islamic corporate governance principles also include the Principle of Sincerity and Intention in corporate governance practice.⁵⁵ As already discussed above, the life of a Muslim should be lived in such a way to please Allah alone. Allah (SWT) enjoins Muslims in the Holy *Qur'an* to always seek His pleasure in what they do. This is a matter of intention which is only known by Allah alone. Corporate governance practices attract enormous worldly benefits and rewards. But what the Islamic corporate governance principles dictate is that corporate governance should be practiced with the utmost sincerity and intention to please Allah with a view to earn His *Rahmah* (mercy). To this end, the Messenger of Allah warns that Allah is not concerned with Muslims' appearances and their wealth accumulation but He is only concerned with Muslim's state of mind and their deeds. Thus, whoever does a thing because of Allah will certainly be rewarded and whoever does otherwise, that would be his reward.

The significance of the foregoing to concept of Islamic corporate governance of Islamic bank is that those stirring the affairs of Islamic banks are to perceive their actions as religious duties which can earn them innumerable rewards from Allah apart from the worldly immediate benefits. These principles enhance maximum performance on the part of the alter egos of Islamic bank having been motivated with the expectation of the everlasting and permanent rewards from their Creators, Allah (SWT).

The last but not the least is the Principle of Brotherhood. Principle of Brotherhood is a general principle applicable under *Shari'ah*. It has been shown to be applicable to corporate governance practice under *Shari'ah*. By

⁵⁵ Muhammad M. Suplhey, *Corporate Governance in Islam vis-à-vis the Modern Corporate World*, 14(1) Malaysian Accounting Review 81-92 (2015).

the principle of brotherhood, Muslims perceive themselves as one and do not let the differences in race, color, complexion, background, ethnic, tribe, clan, family, state and country to disunite them. The principle is a Divine commandment under *Shari'ah*. Allah (SWT), in a number of the verses of the Holy Qur'an, warns Muslims to hold unto the rope of Allah by shunning any issue that may cause their division. The traditions of Prophet Muhammad (PBUH) equally follow suit when he made the Muslims to realize that they are brothers of each other. He was emphatic when he cautiously proclaimed that Arab is not better than non-Arab and that the whites are not better the blacks because all of them hailed from Allah (SWT).⁵⁶ In the spirit of the Islamic principle of brotherhood, lawful cooperation, interactions and dealings have been encouraged.

In relation to Islamic corporate governance, Islamic jurists have interpreted the relevant provision of the Holy Qur'an to cover the aspect of corporate activities.⁵⁷ Without lawful cooperation with the spirit of brotherhood, there would be nothing like corporate activities. This is because corporate activities involve association of two or more for common purposes. In the sphere of corporate governance, *Shari'ah* has divinely recommended *Shura* (mutual consultation) for decision making of mechanism.⁵⁸ Thus, the members of *Shura* Committee or *Shari'ah* Board would only achieve meaningful deliberations if they observe the Islamic corporate governance principle of brotherhood. This shows that the importance of the Islamic corporate governance principle of brotherhood cannot be over emphasized especially with respect to the corporate governance principle of Islamic Banks.

It is important to state at this juncture that Islamic bank and all its operations are expected to be regulated by *Shari'ah*. It is not gain-said that Islamic Banks sprung up in Nigeria solely to offer lawful Islamic banking services to Muslims and any interested members of the populace. Though,

⁵⁶ Qur'an, Surah Al-Hujurat (49: 13)

⁵⁷ Surah Al-Ma'idah (5:2)

⁵⁸ Surah Ash-Shura, *supra* note 53

the position in Nigeria now seems to recognize Non-interest based financial institutions in the country without necessarily tagging them Islamic Banks; the bitter truth remains that Islamic Banks do not become as such simply because it is a non-interest financial institution, they are banks that emerged from the overall understanding of the unique Islamic financial jurisprudence.⁵⁹ That is why the only suitable corporate governance legislation for Islamic Banks is the one fashioned out in line with the provision of *Shari'ah* in all ramifications. The pertinent question here however is: do the legislations for corporate governance of Islamic Banks conform to Islamic principles of corporate governance?

VI. REVIEW OF THE LEGISLATIONS FOR CORPORATE BANKING GOVERNANCE OF ISLAMIC BANKS IN NIGERIA VIS-À-VIS ISLAMIC PRINCIPLES

Applicable legislations for corporate governance of Islamic banks in Nigeria are principally the Central Bank of Nigeria (CBN) Act, 2007; the Banks and other Financial Institutions Act (BOFIA), 1991 (as amended); Regulation on the Scope of Banking Activities and Ancillary Matters No. 3, 2010; and the Companies and Allied Matters Act (CAMA), 1990.⁶⁰ The purpose of this section is to examine the legislation and their compliance level with Islamic principle of corporate governance.

VI.1 Central Bank of Nigeria (CBN) Act, 2007

This legislation is primarily enacted to establish the Central Bank of Nigeria and empowers it to function as the apex bank in Nigeria.⁶¹ The CBN Act positions the Central Bank of Nigeria as banker to both the federal government of Nigeria and other banks operating in the country.⁶² As banker to the government, the CBN Act empowers the Central Bank to play advisory

⁵⁹ Muhammad & Ximei, *Supra* note 11

⁶⁰ Now, Companies and Allied Matters Act (CAMA), 2020 having been amended recently

⁶¹ Ekundayo P. Mesagan & Olatunji A. Shobande, *Role of Apex Banks: The Case of Nigerian Economy*, XXII (2) *Journal of Economics and Business Research* 171-186 (2016)

⁶² Central Bank of Nigeria Act, 2007, s. 40

role to the federal government of Nigeria in terms of budgetary preparation and overall economic well-being of the nation. As banker to other banks in Nigeria, the CBN Act empowers it performs some sort of supervisory, oversight functions and control over the activities of other banks in the country.⁶³ Banks are of three main categories in Nigeria such as commercial banks, merchant banks and specialized banks. Thus, the CBN Act empowers the Central Bank of Nigeria to have control over these banks in terms of licensing, issuance of guidelines for their operation, withdrawal of license in deserving situation to mention but a few.⁶⁴

It is thus important to mention that Islamic banks in Nigeria are categorized under specialized banks being non-interest charging banks. A cursory look at the CBN act shows that it makes provisions for licensing of specialized banks such as non-interest banks to which Islamic banks belong. However, the CBN Act, apart from licensing the operation the banks, does not give credence to any Islamic corporate governance principles which cannot be divorced from operation of Islamic banks. The CBN Act only recognizes non-interest banks from general perspective and not from Islamic corporate governance principles standpoint. Little wonder the Act forbade toga of Islamic religion in the name of Islamic banks that can operate in Nigeria.

VI.2 Banks and other Financial Institutions Act (BOFIA), 2020

This legislation is primarily enacted to ensure that all banks in Nigeria mandatorily undergo licensing processes under BOFIA and possess certifications before they can carry on banking businesses in Nigeria.⁶⁵ It is important to point out that BOFIA was originally enacted for the regulation of the conventional banks in Nigeria.⁶⁶ However, with the approval and introduction of Islamic banks, it was amended in that direction to recognize non-interest banks.⁶⁷ The issue thus still remains that the major inter-

⁶³ *Id.*, s. 51

⁶⁴ *Id.*

⁶⁵ Banks and Other Financial Institutions Act, 2020, s. 2.

⁶⁶ Abdulqadir I. Abikan, *The Legal Framework for Islamic Banking in Nigeria* in *Essentials of Islamic Banking and Finance in Nigeria* 106 - 119 Benchmark Publishers Limited, Kano (2013).

⁶⁷ Banks and Other Financial Institutions Act, *supra* note 65, Ss. 57-62

banking businesses, operations and activities are of the conventional banks governance principles which are far different from Shari'ah corporate governance principles.⁶⁸ This lacuna has enhanced exploitations by some conventional banks in Nigeria granted license to operate non-interest banking services without recourse to the core Islamic corporate governance banking principles.⁶⁹

VI.3 Regulation on the Scope of Banking Activities and Ancillary Matters No. 3, 2010

This Regulation is an important legal instrument that directly affects Islamic banks' operation in Nigeria. The purport of formulation of this Regulation is to put an end to the universal banking license regime which permitted foreign banks to directly carry on operation in Nigeria.⁷⁰ Thus, foreign Islamic banks cannot directly operate in Nigeria except by undergoing certain mandatory licensing procedures. With the Regulation, the scope and framework of banking businesses is modified in Nigeria to such an extent that indigenous banks are encouraged while foreign banks approval and licensing to operate.

The subject matter of formulation of the Regulation is to provide guidelines for the general scope of banking business in Nigeria.⁷¹ It is observed that at the time the Regulation was made, Islamic banking business was not envisaged because the Regulation predates emergence of Islamic banks in Nigeria.⁷² Thus, Islamic principles of corporate governance are outside the coverage of the Regulation. Despite this lacuna, Islamic banking business and operations are still subjected to the Regulation.

⁶⁸ *Id.*, Ss. 63-73

⁶⁹ Ibrahim A. Abdulkareem *et al*, *Shari'ah Compliance Practice: An Analysis of Trends among Islamic Banks in Nigeria*, 23(1) *International Journal of Business and Society* 137-151 (2022)

⁷⁰ Omoh Gabriel, *CBN Releases Guidelines for new Banking Model*, available at: <https://www.vanguardngr.com/2010/11/cbn-releases-guidelines-for-new-banking-model/amp/> (last visited on 26 November, 2022)

⁷¹ *Id.*

⁷² The reason is that the Regulation was released in 2010 while Islamic Banks got official license to operate in Nigeria in year 2011.

VI.4 Companies and Allied Matters Act (CAMA), 2020.

The leading corporate law in Nigeria is the Companies and Allied Matters Act (CAMA), 2020.⁷³ The CAMA, 2020 is indispensable for all corporate entities in Nigeria with the inclusion of Islamic banks.⁷⁴ This is because, the Central Bank of Nigeria (CBN) makes incorporation condition precedent for securing license for banking operation.⁷⁵ Thus, any-would-be-Islamic bank in Nigeria must undergo the rigour of incorporation laid down in CAMA. CAMA is thus the first point of call for Islamic banks in Nigeria.

Noticeably, importance of CAMA is not limited to incorporation stage. Its importance transcends throughout the life and death of corporations in Nigeria.⁷⁶ The aspect of post-incorporation relevance of CAMA to Islamic banks as far as this study is concerned is the corporate governance framework orchestrated in the Act.⁷⁷ As a matter of law, Islamic banks in Nigeria must have structure of corporate governance framework laid down in the CAMA.⁷⁸ Hence, in accordance with CAMA, Islamic banks must have Board of Directors for their corporate governance structure with mandatory statutory duties in the course of their various corporate banking governance decisions. The decision-making process, as laid down in CAMA for the Board, favors majority rule by voting system.⁷⁹ This of course is a great departure from Islamic principle of *Shura* mechanism for corporate decision amongst other relevant Islamic principles of corporate governance.⁸⁰

More so, the governance structure laid down in CAMA is a common law pattern which cannot satisfy Shari'ah yearning for corporate banking

⁷³ Abikan & Ahmad, *supra* note 5, 1-7

⁷⁴ Oluwakemi Odeyinde, *Appraisal of Companies and Allied Matters Act, 2020*, 1(1) Bells University of Technology Journal of Management Science 116-123 (2021).

⁷⁵ The CBN Guidelines for Licensing and Regulation Payment Service Bank in Nigeria, 2020, s. 6.1

⁷⁶ Companies and Allied Matters Act, 2020, Parts A-G

⁷⁷ *Id.*, Chapter 11

⁷⁸ *Id.*

⁷⁹ The Companies and Allied Matters Act, 2020, *supra* note 60, Ss. 289-292

⁸⁰ Qur'an, Surah Ash-Shura (42: 38)

governance of Islamic banks with respect to Islamic principles of corporate governance. The reason is that notion of accountability expected of managers in Islamic banks extended beyond this present world due to its divinity.

VII. DISCUSSION AND OBSERVATION

The above legislations are in existence to regulate the affairs of Islamic Banks in Nigeria. The observation on the CBN Act, BOFIA and the 2010 Regulation on the Scope of Banking Activities and Ancillary Matters is that the three legislations are generally for the operation of banking business rather banking governance framework in the real sense of it. However, CAMA sets out the governance framework to administer and control the business of the Islamic banks as corporations like any other corporations in the country. According to CAMA, Islamic banks as corporation exist in abstraction and depend on human organ which would their directing minds.⁴¹ It is on this basis that CAMA makes provisions for board of directors as controlling organ of Islamic bank who are at the helms of affairs of their control, administration and governance.⁴²

Thus, the governance structure and framework set out by CAMA cannot actualize the internalization of Islamic principles in Islamic banking governance. To have proper banking governance for Islamic banks, there is need for CAMA to make special provisions for Shari'ah board, Shari'ah audit and other special units that can internalize Islamic principles in corporate governance of Islamic banks in Nigeria. As it were, CAMA, as legislation, does not recognize Shari'ah board, Shari'ah audit for Islamic banks. The implication of this is that if the affairs of Islamic banks are run contrary to Islamic principles, there is no legal sanction for it under the existing Nigerian corporate banking legislation.

Thus, with birth and introduction of Islamic banks in Nigeria, it is thus high time for the regulatory legislation to be amended to provide enabling

⁴¹ Umaru, *supra* note 13

⁴² Odeyinde, *supra* note 74

environment for full-fledged operation and governance of Islamic banks. By doing so, corporate governance legislation for Islamic banks in Nigeria will be able to be rated as Shari'ah compliant in terms of Islamic principles of corporate banking governance.

VIII. INDIAN POSITION REGARDING CORPORATE GOVERNANCE LEGISLATIONS FOR ISLAMIC BANKS

India has a similar legal system with Nigeria especially in the area of dominance of the common law with existence of supreme constitution binding on all authorities and persons across the country.³¹ With respect to corporate governance of Islamic banks, India does not have a special legislation for that purpose. The general banking legislations for the operation of the conventional banks are equally made to govern the affairs of Islamic banks. To this end and by implication, the corporate governance legislations of Islamic banks in India are primarily the Banking Regulation Act, 1949 and the Reserve Bank of India Act, 1935.³² Of particular interest is therefore the Banking Regulation Act, 1949 which is the leading banking law in the country. The banking governance implementation is anchored mainly by the Reserve Bank of India (RBI) and the Central Government.

It is apposite to note that the review of the corporate banking legislation of Islamic banks in India revolves round the existence of the Banking Regulation Act, (BR Act) 1949. In this vein, Islamic banks face a number of challenges from the salient provisions of the BR Act. The reason, which is not far-fetched, is basically because of the fact that the BR Act had being in existence far more before the introduction of Islamic banking system. The purpose for which the BR Act was enacted was to govern the affairs the conventional interest-based banks in India. However, with the subsequent introduction of Islamic banks, the relevant banking regulations' provisions of the BR Act continue to affect their smooth operation.

³¹ Prajwal Dwivedi, *Legal System in India*, 2(8) White Black Law 1-22 (2021).

³² Aisah Badruddin, *Islamic Banking and Finance in India: A Kosher or Myth*, 1(1) International Journal of Management, Innovation & Entrepreneurial Research 1-6 (2015).

The first point of attraction is the issue of the legal status of Islamic banks within the legal framework of BR Act. According to the BR Act, banks are recognized as companies established for the transaction of banking business in India.⁸⁵ By extension, the BR Act defines the banking business strictly to be the companies accepting deposits from the public for the purpose of loan or investment which is payable by on demand and other vide various instruments such as cheque, draft etc.⁸⁶ The definition of banking business according to BR Act primarily favors the conventional interest-base banks because there is prohibition of outright trading in the activities of banks in India.⁸⁷ A cursory look at the foregoing shows that Islamic banks in India have much to contend with in this regards. This is because the Islamic banks have zero-tolerance for interest (*riba*) and its stead focus on the implementation of the Shari'ah principles of profit and loss vide a number of its trade-based products such as *Mudarabah*, *Murabaha*, *Musharakah*, *Ijarah*, *Istisna* etc.⁸⁸ The hallmark of Islamic banking business is deeply rooted in trading to satisfy the principle of profit and loss and to avoid interest-based transactions. Thus, legal status of Islamic banks from the perspective of banking business under the BR Act does not enjoy automatic recognition.

The RBI mandatory special directive on interest charging is another challenging issue for Islamic banks in India.⁸⁹ RBI is empowered by the BR Act to make regulation, guidelines, directives and policies in the interest of the general public, banking sector and of course the depositors.⁹⁰ The nature of the power conferred on the RBI is mandatory and binding on all banks in India. The fulcrum of the RBI's directives so far has being to statutorily

⁸⁵ Abhishek Gupta, *Banking in the name of Faith: A Legal Perspective of Islamic Banking in India*, available at: <https://ssrn.com/abstract=3872321> (last visited on 24 February, 2023).

⁸⁶ The Bank Regulation Act, 1949, s 5b

⁸⁷ *Id.*, s 8

⁸⁸ Ahmed A. Muhammed-Mikaseel & Mistura A. Mohammed-Yusuf, *Enhancing Islamic Banks' Participation through Agriculture under Nigerian inclusive Financing Policy: Musaqah and Muzara'ah as Panacea in Legal Paradigm in Nigeria* 386-406, Department of Islamic Law, Faculty of Law, Usmanu Danfodiyo University, Sokoto (2022).

⁸⁹ The Bank Regulation Act, 1949, *supra* note 86, s 21

⁹⁰ Gupta, *supra* note 85

prevent banks from engaging in risks on their advances while financing businesses.⁴¹ In the same token, the RBI, in the exercise of its power, places statutory obligation on banks to charge interests on their respective advances.⁴² The forgoing issues directly conflict with Islamic banks' zero-tolerance for interest (*riba*) as well as risk taking in line with the principle of profit and loss while engaging in banking trading activities geared towards avoiding *riba* (interest) in all ramifications.

Another area of challenge to Islamic banks within the framework of the RBI Act is the issue of statutory mandatory cash reserve requirement. According to the RBI Act, all banks are required to maintain minimum daily balance in form of cash reserve with the RBI.⁴³ The primary essence of this is to enhance solid financial base for all banks in the country. It is thus expedient to note that the conventional banks will find this requirement easier to comply with due to their interest-based approach giving them opportunity to draw more monies from clients through facility servicing. For Islamic banks to make profits, there is need for them to take risk and embark on certain trading. This of course might expose Islamic banks to the risk of the default of the statutory mandatory daily cash reserve requirement. This is because Islamic banks cannot boast of cash flow and availability compared to their counterpart conventional banks.

The requirement of interest payment to depositors is another issue that poses great challenge to Islamic banks in India. Base on the banking regulation in India, banks are required by law to pay interest to depositors especially for savings and fixed deposits. This requirement inevitably conflicts with Islamic principle of zero-tolerance for interest either in form of taking or accepting.

⁴¹ *Id.*

⁴² *Id.*

⁴³ The Reserve Bank of India Act, 1935, *supra* note 86, Ss. 18 & 42

Of great importance is the lack of Shari'ah governance provisions in the BR Act as well as in the RBI Act.⁹⁴ Since Islamic banks are primarily incorporated to transact banking businesses within the Shari'ah compliant principle, there is need for periodic checks and balances by Shari'ah experts to ensure compliance. For effective compliance, legislation is required to make it mandatory otherwise cases of abuse without remedies will become recurrent. It is expedient to point out that both the BR Act and RBI Act are silent on the provisions for Shari'ah governance of Islamic banks which require Shari'ah expertise. The absence of the mechanism to ensure compliance with Shari'ah principle in the corporate governance of Islamic banks in India remains a great challenge probably due to the common law legal system in operation. In the clime like Malaysia which has the blend of common and Islamic law in their legal system, utmost importance is paid to this aspect of legislation for Shari'ah governance of Islamic banks.

There is however a green light after the tunnel. The BR Act has a very flexible provision that can be explored to solve the various challenges of Islamic banks in the Act.⁹⁵ Under the BR Act, an exceptional power is granted to the Central Government to exempt any bank, institution or agency from any provision of the BR Act. This power may be exercised generally or specifically. What the Central Bank needs to do is get a recommendation of the RBI with respect to the exercise of the power to exempt which must be presented before the Indian two Houses of parliament for consideration and approval.

IX. CONCLUSION AND RECOMMENDATION

The extant legislation for corporate governance of Islamic banks in Nigeria include the Central Bank of Nigeria (CBN) Act, 2007; the Banks and other Financial Institutions Act (BOFIA), 1991 (as amended); and the Regulation on the Scope of Banking Activities and Ancillary Matters No. 3, 2010; and the Companies and Allied Matters Act (CAMA), 2020. The legislations are very

⁹⁴ Gupta, *supra* note 85.

⁹⁵ The Bank Regulation Act, 1949, *supra* note 86, s. 53.

robust for administration and governance of the conventional banks in Nigeria. The reason is that as at the time these legislations were being made, the intendment of the policy only focused on the conventional banks in the country. This thus accounted for the reason the legislations for short of Islamic principles of corporate banking governance. For there to be serious Islamic corporate banking governance, the existing legislations ought to be amended to enable full-fledged Islamic banking Shari'ah governance setting. To this end, the Central Bank of Nigeria is therefore charged to champion the course of amendment of the existing legislation to a view ensuring that they adequately create enabling environment for corporate banking governance of Islamic banks in Nigeria. Hence, it is high time the apex bank acted outside the box, i.e., beyond mere issuance of guidelines for Islamic corporate banking governance but to procure solid legislation for corporate governance of Islamic banks through legislative processes. Specifically, it is imperative that the Companies and Allied Matters Act (CAMA), 2020 is sufficiently amended to incorporate Islamic corporate banking governance principles, systems and procedures.

With respect to the legislation for corporate governance of Islamic banks in Indian, Islamic banks similarly face a number of challenges in the country owing to the fact that the BR Act which regulates the affairs of all banks was purposely enacted for the operation of the conventional interest-based banks. The introduction of Islamic banking system came far more after the enacted of the BR Act. Little wonder the Islamic banks had to contend with certain provisions in the BR Act to survive as corporate banking entities in Indian banking sector.

The leeway in section 53 of the BR Act, which enables the Central Government on the recommendation of the RBI and upon the due consideration by both Houses of parliament in India to exempt any bank from any of the provision/obligation in the BR Act. Is it therefore recommended that the various challenges of Islamic banks identified in the

BR Act be tackled through the exceptional power granted the Central Government under section 53 of the BR Act.

Nigeria has to borrow new leaf from the unique provision of section 53 of the BR Act of India. If such provision is included in the various legislations for corporate governance of Islamic banks in Nigeria, the challenges being presently faced by Islamic banks might have been tackled without necessarily having to go through the regour of enacting separate legislation specially for Islamic banks as was the case in Malaysia.