

AN EXAMINATION OF THE CONSTITUTIONALITY OF ISLAMIC BANKING OPERATIONS IN NIGERIA

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ABSTRACT

There is strong argument whether the operation of Islamic banking in Nigeria is constitutional or not. The right to engage in a financial system compatible with someone's faith is beyond social and economic rights and hence it falls under Chapter IV of the Constitution as the right to freedom of religion. As a fundamental human right, the government has an obligation to facilitate its actualization and the duty to put in place mechanisms to ensure it is not derogated upon except in the manner provided under Section 45(1) of the Constitution. Among the problem that this paper intends to address is to clear the misconception by the antagonist of Islamic banking operations in Nigeria that it is an attempt to Islamized the country. This problem has generated prolong debate among scholars. The aim of the paper therefore is to highlight and examine the legal framework for the Islamic banking operation in Nigeria with the objective of clearing the doubt cast by the antagonist of Islamic banking operation. The methodology adopted by the paper is doctrinal in nature (by way of content analysis of relevant laws and decided authorities). The paper observed that the operation of Islamic banking in Nigeria has in no way contradict the spirit of the Constitution of the Federal Republic of Nigeria 1999 (As Amended) thus, the paper recommends that the stakeholders and council of experts in Islamic banking should provide means of making it operation more effective just like other conventional banks so as to have wider coverage and more branches across the countries.

KEYWORDS: *Constitutionality, Islamic banks, Legal framework, Nigeria, Operations*

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1.1 Introduction

Islamic bank is a special type of banking system that operates based on the principle of Islamic law (Sharia). It is a system ordained by the Almighty Allah (SWA). It differs significantly from the conventional banking in that it is ethical. It avoids the charging of interest (*riba*) and *gharar* (uncertainty). Though growing with metrically due to its acceptability in most of the jurisdiction where it operates, it is without serious challenges, except in few jurisdictions.²

Islamic finance generally is a system of finance that carries its services and activities based on the tenets of Islamic commercial jurisprudence. It is an engagement in Mu‘āmalat (Islamic transactions) which comprises of banking business, trading, investments and commercial activities, as well as the provision of financial products and services in accordance with the principles of Shariah.³ Islam is a complete way of life that demands total submission the will of Allah (SWT) in the al-Qur’ān. It has a complete code consisting express instructions of Allah (SWT) as expounded by Prophet Muhammad (SAW) in the Sunnah. Economic activities are originated and linked with religious activities, which are either halal (permissible) or haram (prohibited).⁴ The conventional banking system thrives under the principle of interest, a category of usury (*ribā*), expressly prohibited by all sources of Shariah: the al-Qur’ān, Sunnah, *ijmā‘* (consensus of Muslim Jurists) and *qiyās* (analogical reasoning).

Before colonialism, traditional societies engaged in a diverse range of commercial and financial relations based on Islamic law - the Shariah, predominantly in the North, and customary practices predominantly in the South, as developed from the peoples’ consciousness. Muslims did not transact in usury (the base of modern banking) and other practices prohibited by Islam.⁵ This did not hinder transactions or defer

² Mansuri M.T. (2007) Islamic Law of Contract and Business Transactions. New Delhi Adam Publishers and Distributors. p. 4

³ Chiroma, M., et al (2016) ‘Legal Framework Regulating Islamic Finance in Nigeria: A Critical Appraisal of Hurdles against the Effective Shari’ah Governance,’ Unimaid Journal of Private and Property Law, vol. 1/1: p. 231.

⁴ Ahmad, A., (2011) ‘Islamic Banking and Prohibition of Riba/Interest,’ African Journal of Business Management, vol. 5/5: p. 1763.

⁵ Alkali, M.B., (2015) ‘Challenges in Implementing Islamic Banking and Finance in Nigeria: A Legal Insight,’ Journal Syariah, vol. 23/1, p. 145.

economic development as transSaharan trade boomed across the region. The coming of colonial masters and the subsequent introduction of what is now known as conventional banking put the Muslim population in a flux: whether to participate in a system anchored on expressly prohibited principles or refrain from taking part. Meanwhile, in the 1940s, some young economists theorised how the principles of Islamic commercial jurisprudence could guide the operations of banks to finance themselves without charging or taking interest based on halal transactions.⁶ After a series of “trial and errors”, came the breakthrough in the 1970s when the rapid establishment of Islamic banks dominated the Muslim World.⁷

All the laws regulating banking in Nigeria, including the one enabling Islamic banking have their roots traceable to the Constitution. By virtue of item no. 6 of the Second Schedule of the Constitution of the Federal Republic of Nigeria, only the National Assembly is empowered to make laws regarding banks, banking, under the Exclusive Legislative List. Although the two⁸ principal legislations were enacted by the military as decrees in 1991, by virtue of the Constitution⁹ these laws have been ratified as if they were made by an Act of the National Assembly. Therefore this paper will discuss the constitutionality of the operation of Islamic banking in Nigeria. The paper will also highlight on the various argument for and against the operation of Islamic banking and its legality in Nigeria.

1.2 Concept of Islamic Bank

The concept of Islamic bank signifies a special type of bank operated based on the principles of Islamic law. The term Islamic banking refers to a system of banking or banking activity that is consistent with the principles of the shariah (Islamic law) tailored and protected by Islamic economics.¹⁰ In particular, Islamic ruling (shariah) prohibits the

⁶ Ibid

⁷ Alharbi, A., (2015) ‘Development of the Islamic Banking System,’ Journal of Islamic Banking and Finance, vol. 3/1; p. 12.

⁸ BOFIA and CBNA.

⁹ Section 315(4) (b) of The Constitution of the Federal Republic of Nigeria, 1999, as amended in 2011 (CFRN,1999).

¹⁰ Ibid

collection and payment of interest (riba) Naveed and Kashif¹¹ defined the Islamic bank as a non-interest based financial institution which complies fully with Islamic laws which follows creative and progressive financial engineering efforts to offer efficient and competitive banking, investment, trade finance, commercial and real estate financing services.

Islamic banking is also define as follows:

The provision of financial services in accordance with Shari'ah Islamic law, principles and rules. Shari'ah does not permit receipt and payment of "riba" (interest), "gharar" (excessive uncertainty), "maysir" (gambling), short sales or financing activities that it considers harmful to society. Instead, the parties must share the risks and rewards of a business transaction and the transaction should have a real economic purpose without undue speculation, and not involve any exploitation of either party.

Islamic finance comprises banking, leasing, *sukuk* (securities), equity markets, investment funds, microfinance and *takaful* (insurance). However, 95% of Islamic finance assets are in the form of banking and securities. The main principles of Islamic banking activities comprise of prohibition of interest (riba) in all forms of transactions and undertaking business and trade activities, based on, fair and legitimate profit.¹² Unlike conventional banking system, the Islamic banking system prohibits usury (riba), the collection and payment of interest; instead, it promotes profit and loss sharing in all conduct of banking businesses.¹³

Under Islam, there is no concept of an economy functioning independently of the religious criteria that inform every single aspect

¹¹ Naveed, A.K and Kashif, U.R. (2010). Customer satisfaction and awareness of Islamic Banking System in Pakistan. African Journal of Business Management Vol. 4(5), pp. 662-671.

¹² Maali, B. and Napier, C. (2010) "Accounting, religion and organisational culture: the creation of Jordan Islamic Bank", Journal of Islamic Accounting and Business Research, Vol. 1 No 2, pp.92-113,

¹³ Laldin, M.A. (2008), "Islamic financial system: The Malaysian experience and the way forward", Humanomics, Vol. 24 No. 3, pp. 217-238.

of human life. The primary sources of the Shariah are the Quran and the Sunna, the sayings and actions of the Prophet Muhammad transmitted either orally, by silent approval or in action in the form of the hadith (the stories of the Prophet's companions). The Quran and the Sunna leave room for interpretation: they do not cover all of the questions confronting the contemporary Muslim community.¹⁴

Islamic banking and finance stems from the principles of the Shariah (Islamic law) which provides guidelines for Muslims in terms of their relationship with money. The Shariah (Islamic law) governs every aspect of a Muslim's religious practices, everyday life, and economic activities. Muslims, for example, are not allowed to invest in businesses considered non-halal or prohibited by Islam, such as the sale of alcohol, pork, and tobacco; gambling; and prostitution. Furthermore, the Quran contains explicit rules regulating personal status, contracts, property, civil and criminal law, and the economic system. The main prescriptions relating to financial transactions are: the prohibition of *riba* (i.e. the payment of a fixed or determinable interest on funds); and the prohibition of economic practices that involve the concept of *gharar* (deceptive uncertainty), *maysir* (speculation) and *harām* (prohibited behaviour).¹⁵

“Islamic Banking refers to a system of banking or banking activity that is consistent with the principles of the Shariah (Islamic rulings) and its practical application through the development of Islamic economies”. Islamic Bank is also define as “a financial institution whose status, rules and procedures expressly state its commitment to the principle of Islamic Shariah and to the banning of the receipt and payment of interest on any of its operations.

1.3 Emergence of Islamic Banking Laws in Nigeria

Previous literature analysis revealed that no particular provision of any legislation acknowledged Islamic banking as a concept until the enactment of Banks and other Financial Institutions Act (BOFIA) in

¹⁴ Abdul-Majid, M., Saal, D. S. and Battisti, G. (2010), “Efficiency in Islamic and Conventional Banking: An International Comparison”, *Journal of Productivity Analysis*, Vol. 34, pp. 25-43.

¹⁵ Aziz, Z. A. (2012), “Islamic Finance in a Challenging Economy: Moving Forward”, Opening Address at the 2nd ISRA Colloquium 2012, 27 November.

the year 1991. BOFIA considerably confirmed the approve of Profit and Loss Sharing bank across the country.¹⁶

As far back as independence, an attempt was made at venturing into Islamic banking by establishing Nigeria Muslim West Africa Bank Ltd.¹⁷ However, shortly after its establishment the then Federal Minister of Finance, Chief Obafemi Awolowo ordered it to stop operations on the ground that it was not categorically licensed to operate as an Islamic bank.¹⁸ No doubt the current pedestal upon which Islamic banking regulation rests on is the Banks and Other Financial Institutions Decree (BOFID).¹⁹ Particularly, the proviso of section 23(1) made some rather vague reference to the existence of this kind of bank, thus it states:

“Every bank shall display at its offices its lending and deposit interest rates and shall render to the Bank information on such rates as may be specified, from time to time, by the Bank; “Provided that the provisions of this subsection shall not apply to profit and loss sharing banks (emphasised).”²⁰

Based on this the CBN granted a license to the defunct Habib Bank Plc.²¹ to commence operations as a “window”, under the principle of PLS in 1992 but the bank could not commence operations until 1994,²² and by 1996 the bank secured its final approval. In January 2009, the Central Bank of Nigeria joined the Islamic Financial Services Board (IFSB) as a full-fledged member. Later, the Central Bank issued a draft framework for the regulation and supervision of non-interest banks in Nigeria as an exposure document to elicit comments and suggestions

¹⁶ Sections 23 and 61 of BOFIA

¹⁷ Zubair, A. & Alaro, A. A., ‘Legal and Operational Frameworks of Islamic Windows in Conventional Financial Institutions: Nigeria as a Case Study,’ (Paper presented, 1st University of Ilorin International Conference on Islamic Bank and Finance, Jointly Organized by Department of Islamic Law, UNILORIN and Islamic Research and Training Institute, Jeddah, Saudi-Arabia, 6-8 October 2009).

¹⁸ See Muslim Bank (Revocation of License) Order, 1968.

¹⁹ Now Banks and other Financial Institutions Act (BOFIA).

²⁰ 23(1) BOFIA.

²¹ Fatai, B.O., (2012) ‘Can Islamic Banking Work in Nigeria?’ Journal of Sustainable Development in Africa, vol. 14/2 (2012): 25

²² Alkali, M.B., & Buang, A.H., (2004) ‘Challenges in Implementing Islamic Banking and Finance in Nigeria: A Legal Insight,’ p. 146.

from stakeholders. As a result, the framework was re-issued on June 21, 2011, offering two forms of Non-Interest Financial Institutions (NIFIs): NIFIs based on principles of Islamic commercial jurisprudence, and NIFIs based on any other established rules and principles.

Nigeria was later to join the Islamic Liquidity Management Corporation (ILMC) in 2010, through the CBN, along with 11 other Central Banks and two multilateral organisations.²³ It was this atmosphere that led to the establishment of the first full-fledged noninterest bank: Jaiz Bank Plc, which commenced operations as a regional bank in January 2012, in Abuja, Kano and Kaduna.²⁴

1.4 Legal Framework For Islamic Banking in Nigeria

All the laws regulating banking in Nigeria, including the one enabling Islamic banking have their roots traceable to the Constitution. By virtue of item no. 6 of the Second Schedule of the Constitution of the Federal Republic of Nigeria, only the National Assembly is empowered to make laws regarding banks, banking, under the Exclusive Legislative List. Although the two²⁵ principal legislations were enacted by the military as decrees in 1991, by virtue of section 315(4) (b) of the Constitution²⁶ these laws have been ratified as if they were made by an Act of the National Assembly. Opponents of Islamic banking hinge their argument on the provision of section 10 of the Nigerian Constitution, which provides that, “the Government of the Federation or a State shall not adopt any religion as State Religion”²⁷ and that as such, the introduction of Islamic banking smacks of Islamising

²³ Sanusi, L.S., (2011) ‘Islamic Finance in Nigeria: Issues and Challenges’ (Lecture, the Markfield Institute of Higher Education (MIHE), Leicester, United Kingdom. P. 91

²⁴ Aliyu, S. and Usman R., (2012) ‘Islamic Banking and Finance in Nigeria: Issues, Challenges and Opportunities,’ MPRA: Munich Personal RePEc Archive, Paper No. 42573, pp. 1-17.

²⁵ Ibid

²⁶ The Constitution of the Federal Republic of Nigeria, 1999, (as amended 2011).

²⁷ Ibid

Nigeria.²⁸ What they failed to do, however, is to demonstrate how this could be achieved through the introduction of Islamic financial services.

Even the Federal High Court in *Sunday Ogboji vs. CBN and 2 others*²⁹ were tactical to have evaded this question when confronted with the plea to declare the licensing of the Jaiz Bank Plc. as tantamount to declaring Islam as a state religion and economic discrimination based on religion contrary to Sections 10 and 16 (1) (d) of the Constitution, as the argument was found to be absurd. In a similar attempt, Agbede remarked that “in a country that professed to be secular, the Islamic law as a distinct third system is hardly compatible with the express provisions of the Constitution which prohibits any law that discriminates on grounds inter alia of religion.”³⁰ This view is erroneous because Islamic banking does not preclude adherents of other faiths from participating. The only limitation is that all transactions involved must be halal. There is nothing wrong with this limitation considering that there are alternatives existing in conventional banking where there is no question as to what use monies are put to as long as the interest and the principal sum are paid back or renegotiated in the long run. To the Muslim, the right to engage in a financial system compatible with his faith is beyond social and economic rights. It falls under Chapter IV of the Constitution as the right to freedom of religion.³¹

This right covers every aspect of the Muslim’s life. As a fundamental human right, the government has an obligation to facilitate its actualization and the duty to put in place mechanisms to ensure it is not derogated upon except in the manner provided in Section 45(1) of the Constitution.³² Section 16 (1) (d)³³ further cements this position by stating that, without prejudice to the right of Nigerians to participate in

²⁸ Eyieyie, E., (2011) ‘Islamic Banking, Law and Appropriate Regulation of NIFI in Nigeria,’ The Guardian, 23 July P. 91

²⁹ Godwin Sunday Ogboji v. Central Bank of Nigeria and 3 others (Unreported) suit No. FHC/ABJ/CS/710/2011.

³⁰ Agbede, I. O., (1989) ‘The Legal Pluralism - the Symbiosis of Customary and Religious Laws: Problems and Prospects,’ in Fundamentals of Nigerian Law, ed. Ajomo, M. A. Ibadan: Spectrum Books,, p. 238.

³¹ Section 38 (1), CFRN, 1999.

³² Section 45 (1), CFRN, 1999.

³³ Ibid

areas of the economy within the major sector of the economy, the government must protect the right of every citizen to engage in any economic activities outside the major sectors of the economy. It is the duty of the government to direct its policy towards ensuring the promotion of planned and balanced economic development in such a manner that wealth or the means of production and exchange is not concentrated in the hands of few individuals or a group.³⁴ This is exactly what the CBN actualised after decades of consultations. Thus, the Constitution clearly sets out to achieve an inclusive financial system where no one is prevented from participating in major sectors of the economy on any discriminatory grounds. Put differently, the conventional banking system does, in fact, discriminate against the millions of Muslims who feel strongly about the interest system it thrives on. So if there existed any unjust exclusion of adherents of any faith from the financial sector in general, it was achieved prior to the issuance of guidelines on Islamic banking.

1.5 Constitutionality for and against Islamic Banking in Nigeria

To start with, the protagonists of Islamic banking maintain that the introduction of Islamic banking into the Nigerian banking system is constitutional and appropriate, given the legal provisions on its establishment and the prospects it has in the country, in the one hand. In the other hand, they rectify that it is intellectually and legally erroneous for the antagonist of the Islamic banking, to ignore the reality of the legality of the inclusion of the product in the Nigerian banking system on the bases of mere inclination to religious sentiment that such disposition is contrary to the provisions of the Nigerian banking legal system,³⁵ and that it is unpatriotic and inhumane for them to overlook the benefits the introduction of the product will bring to the country, in terms of job creation to cater for the problem of the teaming unemployed youths in the country, as well as the attraction of foreign investments particularly from gulf Cooperation Countries (GCC).³⁶

³⁴ Section 16(2)(c) CFRN

³⁵ Ibid.

³⁶ Olatoye, K. A. (2013). Legal Issues and Challenges in the Regulation of Islamic Finance in Nigeria. Ph. D Thesis (Unpublished). Faculty of Law. Lagos State University, Ojo. Pg. 229

The group posit that Islamic banking vis-à-vis profit and loss sharing banking is provided for, in the banking regulation.³⁷ The Section states that; ‘... *the only types of banks that will be permitted to carry on banking business in Nigeria under BOFIA (are): (a) Commercial banks; (b) Merchant banks; and (c) Specialized banks, which include non-interest banks, microfinance banks, development banks and mortgage bank.*’³⁸ *it shall be read together with the provisions of the relevant Sections of BOFIA, 1991 (as amended), the CBN Act 2007, Companies and Allied Matters Act (CAMA), 1990 (as amended), and the other circular and Guidelines that are issued by the Central Bank of Nigeria CBN from time to time.*’³⁹

In a nutshell, the protagonists of Islamic banking therefore conclude that it was the diligent and brilliant work of the Nigerian legislature that culminated in the legality of introducing profit and loss banking, otherwise known as Islamic banking into the Nigerian banking system. Therefore, it is the Nigerian lawmakers in their wisdom envisage the need for Nigeria to join the league of the nations that practice dual banking system by allowing the operation of Islamic banking. However, having adduced the argument of the protagonists of Islamic banking in Nigeria. It will be appropriate, at this juncture, to examine the premises on which the arguments of the antagonists of Islamic banking it founded.⁴⁰

The antagonist of Islamic banking in their part, premised their arguments on four different legal questions regarding the Nigerian banking legal framework. The arguments are as follow:

a. That there is Variation in the Definition of ‘Non-Interest Financial Institution’ between ‘BOFIA 1991’ and ‘NIFI Guideline, 2011’

³⁷ Section 4 (1) (c) of the Regulation on the Scope of Banking Activities and Ancillary Matters, No 3, 2010

³⁸ Regulation on the Scope of Banking Activities and Ancillary Matters, No 3, 2010.

³⁹ Section 3.1, Framework for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria, FPR/DIR/CIR/GEN/01/010, January 13, 2011.

⁴⁰ Ibid

The antagonists of Islamic banking claim that there is a variation between the definitions of ‘Non-Interest Financial Institution/ Profit and loss banking’ in BOFIA, 1991 and the Guideline of Non-Interest Financial Institution, 2011, and consequently, alleged that the introduction of Islamic banking in the country to the extent of such variation is illegal.⁴¹

However, the protagonists of Islamic banking argue in this regard that the claimed of variation or contradiction in the definitions of such laws is nothing but a mere intellectual confusion. They assert that, had the antagonists of Islamic banking taken a critical look at the definitions with a view to sustain objectivity, they would have realized that despite the appearance of differences in the words of the definitions, the wordings do not defer as such, they are rather synonymous in meaning and purpose. The definitions are as follow:

1. BOFIA, 1991, Section 61, Non-Interest Financial Institution is: *a bank which transacts investment or commercial banking business and maintains profits and loss sharing accounts*.⁴²
2. The Guideline of Non-Interest Financial Institution, 2011, Non-Interest Financial Institution is : *a bank or other financial institution under the purview of the Central Bank of Nigeria (CBN), which transacts banking business, engages in trading, investment and commercial activities as well as the provision of financial products and services in accordance with the Shariah principles and rules of Islamic commercial jurisprudence*.⁴³

Thus, the reality is that the application of shariah rules and the principles of Islamic jurisprudence are tantamount to the operation of ‘profit and loss sharing account as reflected in the BOFIA⁴⁴ In fact, it is this statute (as the paramount regulatory law for banking in Nigeria) hat provides for the establishment of Non Interest Financial Institutions in the country. Thus, save if the hard-work

⁴¹ Ibid

⁴² BOFIA, 1991, Section 61

⁴³ The Guideline of Non-Interest Financial Institution, 2011.

⁴⁴ Sanusi, L. S. (2011). “Islamic Finance in Nigeria: Issues and Challenges”. Lecture Delivered at Markfield Institute of Higher Education (MIHE). Leicester: UK. 17 June 2011

of the Nigerian legislature which led to the enactment of BOFIA, 1991 will be jeopardized, the only way to implement the BOFIA, 1991 is to give way for the introduction of Islamic banking product into the Nigerian banking system. Undoubtedly, no reasonable Nigerian will allow the hard work of his legislators to be jeopardized.⁴⁵

Moreover, the difference between BOFIA, 1991 and the NIFI Guideline, 2011, as legal instruments, should be identified. BOFIA, 1991 is an Act of parliament while NIFI Guideline, 2011 is a delegated legislation which is meant to amplify and address the ambiguous and unresolved areas in the BOFIA. The Guideline is explicit on all that is required to put the Act into practice. In other words, a delegated legislation is a law which is made by a person or body other than Parliament, such as the Central Bank of Nigeria (CBN); the law may be in the form of a Guideline, Framework or Regulation. Its importance is to clarify the parts of the statutes which need further clarification or explanation for proper implementation.⁴⁶

Therefore, the function of the Guideline of NIFI 2011, in this sense, is to be explicit and specific in its definition of Islamic banking, hat the generic definition of the Act.⁴⁷ Thus, the guideline shed light on the BOFIA, 1991's definition of Non-Interest Institution. For further understanding of the definition, there is a need for the explanation of the account that is maintained by Islamic bank.

A close study of the practices of Islamic banking system shows that the account which it maintains in its operations is based on the doctrine of profit and loss sharing system.⁴⁸ In other words, Islamic bank maintains 'profit and loss sharing account' in all its

⁴⁵ Ibid

⁴⁶ See, < <http://www.lawteacher.net/english-legal-system/resources/delegated-legislation.php> >(retrieved 28/08/2011).

⁴⁷ (BOFID) 1991).

⁴⁸ Ahmad Sanusi Hussin and Md. Ali bin Md. Sariff, Islamic Banking Handbook, Financial Sector Talent Enrichment Programme, (Institut Bank-Bank Malaysia (35880), 2010), at 36.

practices.⁴⁹ That is, at both the micro and the macro levels of banking operation systems. For instance, although, Islamic bank operates on the same template with the conventional bank, in term of the creation of deposit facilities, such as deposit account, current account, savings account, investment account etc. for the convenience of its customers, however, its practices defer from the conventional practice as regards the contracts that governs the relationship between the bank and the customers. The relationship between the depositors and the bank under the conventional banking system is a 'debtor-creditor relationship',⁵⁰ whereas in the Islamic banking system, the relationship between the depositor and the bank is 'investor-entrepreneur relationship that is, a partnership relationship.

In this regard, the argument on whether Islamic bank product is inclusive in the Non-Interest Financial institution which was generally provided under the BOFIA⁵¹ and was explicitly clarified in the Guidelines⁵² is unfounded; it has no basis in fact and in law. The introduction of Islamic banking into Nigerian banking system is based on nothing, but the profit and loss sharing account as provided under the BOFIA

Furthermore, looking at the macro level of the Islamic banking operations, that is, the Islamic financial market transaction. In reality, the products are known in the conventional banking system. However, the Islamic banking fashion of the products defers, in that, its operation in the macro level is Sometimes based on investor and entrepreneur transaction in the capital market, and between the central bank and the commercial banks and other financial institutions in the money market, and among the banks and other financial institution in the interbank money market, as opposed to the creditor-debtor relationship of the conventional system. In short the relationship of the participants in the macro

⁴⁹ Other models of the transaction of the bank such as al-Murabarah, BBA, al-Inah, al-Twaruq, etc... are also more or less profit sharing system, because they are not interest based.

⁵⁰ Ibitoye T. A. & Ajayi, O. A. (2018) Elements of Banking, (Ibadan: Bash-Moses Printing Company, 1999), at 154

⁵¹ Section 61 of BOFIA, 1991

⁵² NIFI 2011

level of the Islamic financial institution is basically profit and loss sharing relationship.⁵³

Thus, it can be seen that the macro and micro levels of the banking system which are the core areas of the banking system, are operated on the basis of profit and loss sharing in the Islamic banking system. Therefore, it will be illogical to conclude that merely because Islamic banking draws its *modus operandi* from the principles of Islamic law of commercial jurisprudence '*Fiqhu al-Mu'amalaat*', which forbids usury, gambling, speculations, uncertainty, but legalizes trade and the principle of justice (certainty) in its dealings, the 'profit and loss sharing' of its model is in tandem with the provision of the BOFIA 1991.⁵⁴ This statutory provision does not draw any line of demarcation between the practices of 'profit and loss sharing accounts' of the Non-Interest Financial Institution systems. It is actually inclusive of the Islamic banking product and any other profit and loss sharing products of the banking system. In this regard, it can only be logical and reasonable to insist that, the (BOFIA) Act 1991, provides for, and legalizes the operation of Non-Interest Financial Institution is legal and constitutional pursuant to the provision of BOFIA.⁵⁵

To sum up, it is proper to assert that, it would have been *ultra vires* for the Central Bank of Nigeria (CBN) to develop the Guideline⁵⁶ as a framework for the operation of the Non-Interest Financial Institutions. BOFIA, 1991 is the paramount law of the Nigerian banking system, from which all the guidelines that are developed by the Central Bank of Nigeria CBN, for the various financial activities, whether it is conventional or Islamic, are drawn. Thus, the duty of the Central Bank of Nigeria is to develop guidelines on the bases of the existing provisions of the statute, which was what the CBN did in this respect. Therefore the CBN does not in any way, contravene or violate any law, since what it did was actually, the performance of its duty.

⁵³ Ibid, 176.

⁵⁴ Section 61 of BOFIA 1991

⁵⁵ Section 61 of BOFIA 1991

⁵⁶ NIFI, 2011,

b. That there is the Possibility of Discrimination against non-Muslims in the Services of Islamic Banks:

Enormous concern and anxiety have been demonstrated, as to whether Islamic bank will give equal right and opportunity to non-Muslims and the Muslims in its services. In reality, the anxiety is a mere lack of understanding of the operations of the Islamic commercial jurisprudence. The Islamic commercial jurisprudence '*Fiqh al-Mu'amalaat*' the basic of the principles which underpin its operation, in any way, precludes non-Muslim from transacting under its purview. That is to say that, the Islamic commercial jurisprudence which is an embodiment of the rules of contracts, agreements, obligations and liabilities does not differentiate between the human family whether they are Muslims or non-Muslims.

The practice of shariah in the contemporary time is not different, in any way, from that of the early period. The application of the rules of Islamic law of transactions on the contracts that exist between the Muslims and non-Muslims in those days was apparent. One of the ever-glaring examples on this was some of the transactions that existed between the Holy Prophets

Muhammad (S. A. W) and some non-Muslim. For instance, at the time of the demise of the Holy Prophet (S. A. W.), his property was in the custody of a Jewish merchant. The prophet had received the loan of foodstuff from the person for his family, and placed his property with him as collateral for the loan.⁵⁷ In this case, if the holy Prophet (S. A. W.) would go that far in transacting with a Jewish, 'a non-Muslim', what then will restrict a Nigerian non-Muslim from benefiting from the services of the Islamic banking product, vis-à-vis, investment, employment or subscription to any of its services.

Furthermore, the study of the contemporary practice of Islamic banking across the world shows that the bank is an institution which renders its services to the general public, regardless of their religious profession, affiliation or inclination. For example, United

⁵⁷ Mahmud A. (2005) *Life Of Muhammadsa*, (UK: Islam International Publications Limited) at 300.

Kingdom, the country is only second to Malaysia in this respect. Despite the fact that the majority of the population of the country are Christians.⁵⁸ Similarly, although, the Muslims in Malaysia outnumbered the non-Muslims, as they constitute the 60.4% of the total population, like Nigeria,⁵⁹ however, there are other major religious groups in the country. These include the Buddhism, 19.2%, Hinduism 6.3%, Christianity 9.1%, and the others 2.6%. Imaginably, if Islamic banking is meant to serve only the Muslim communities, how would these countries emerge as global hubs of Islamic banking? All the members of the various religious groups in these countries are strong participants in the Islamic banking industry regardless of their religious diversity. The country participated as depositors, investors and employees of the bank. In fact, this is what culminates into the rapid growth and development of the Islamic banking industry in the world today. The Islamic banking practice in Nigeria cannot be different from what is obtainable in other part of the world. It gives equal opportunity to all Nigerians.

Nigerians of all religious classes should be rest assured that the Constitution of the Federal Republic of Nigeria,⁶⁰ has preserved their right to derive benefit from any economic out-fit in the country. The constitution⁶¹ preserves this right '*without prejudice to the right of any person to participate in area 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 sectors of the economy*'⁶². Therefore, no Nigerian shall be deprived of the benefits of the Non-Interest financing system of the Islamic banking system, in term of investment, deposit, financings, employment etc. What Islamic bank stands for is the realization of the principles of equity, justice and fairness, and most importantly

⁵⁸ Richard Kerbaj, (2011) Muslim population 'rising 10 times faster than rest of society', January 30, 2009, The Times, <
<http://www.timesonline.co.uk/tol/news/uk/article5621482.ece> >(02/09/2023).
At 2:30pm P. 91

⁵⁹ CIA - The World Factbook - Nigeria, see, <
<https://www.cia.gov/library/publications/the-worldfactbook/geos/ni.html#People> >(retrieved 02/09/2011).

⁶⁰ 1999, (as amended)

⁶¹ Section [16 (1) (d)]

⁶² Section 16 (1) (d), Constitution of the Federal Republic of Nigeria, 1999.

the safeguarding of the economic system from derailing through the interest based practices.

c. That the Composition of the Shariah Council/ Council of Experts Violates the Principle of Federal Character:

Another issue that requires critical discussion is the misconception over the creation of the Sahriah Council or the Council of Experts to assist the Central Bank on the supervision and regulation of Islamic banking practices in Nigeria, as well as the creation of Shariah Boards and the employment of a Shariah advisory in each of the Banks that practice Islamic banking or opens Islamic banking window⁶³. This is in accordance with provision of the Guideline of the financial Institutions. The Guideline states that ‘the ‘duty of ‘*the CBN Council of experts or Shariah Council*’⁶⁴ is to advise the Central Bank of Nigeria (CBN) in shariah matters for effective regulation and supervision of financial institutions in the country.⁶⁵

However, the antagonists of Islamic banking contend in this regard that, since the council of shariah experts will be comprised mainly of the experts of Islamic commercial Jurisprudence there is tendency that some geopolitical zones or states of the federation will not be represented in the council. They therefore, conclude that the creation of the council is illegal because it will not conform to the Principle of ‘Federal Character’ which was enshrined in the constitution of the Federal Republic of Nigeria.⁶⁶

However, the protagonist of Islamic banking maintains that the present argument is not different from the previous ones. They emphasis that the argument is unnecessary, given that, it is the (BOFIA) Act 1991 which provides for the establishment of Non-Interest Financial Institutions in Nigeria, therefore, it must be

⁶³ Section 5.1, Guideline on non-Interest Window and Branch Operations of Conventional Banks and other Financial Institutions, Financial Policy & Regulation Department Central Bank of Nigeria, Abuja, December 31, 2010.

⁶⁴ Section 9.0, Framework for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria, FPR/DIR/CIR/GEN/010, January 13, 2011.

⁶⁵ INFI Guideline, 2011

⁶⁶ Section 14 (3) of the constitution

construed that the law has implicitly provided for all that is necessary for the operation of the bank. This is because the Shariah council or Council of Expert is an integral part of Non-Interest Financial Institution product of Islamic Banking. Thus, since BOFIA, is economical in its definition of the system, it is necessary that the Guideline of the Non-Interest Financial Institution, which is an operational framework that was developed on the bases of BOFIA⁶⁷ be explicit in this respect.

Moreover, they refer to the argument as to whether the creation of Council of Shariah in the CBN violates the principle of the 'federal character' or not as a weak attempt of playing to the gallery. This is because the claim is premature. The antagonists of Islamic banking in Nigeria need not to cross a bridge before they arrive at it. All the six geopolitical zones of Nigeria are blessed with experts of Islamic law 'shariah, including the south-south, south-east zones that are predominantly non-Muslim. Therefore, the principle of federal character as enshrined in the law needs not to be violated in the composition of the members of the Council of experts since all the geopolitical zones of the country can be represented. However, it must be emphasized that the fact that the principle of federal character will be observed in the composition of the shariah council of the Central Bank does not negate the requirement of Shariah expertise of the members of Council or boards. The CBN guidelines does place faith as a criterion for membership of CBN Council of Experts or of any other Islamic bank.

Therefore, the composition of the members of the council f experts in the Central Bank or in the Shariah board of any bank that operate Islamic banking or opens a window must comprised of experts of Islamic commercial jurisprudence.

In other words, if Islamic banking in Nigeria, like that of the other countries of the world, such as those of Asia, America, Europe and even some African countries will be successful if the guiding rules are adhered to. This must be emphasized because, not every scholar of shariah is a specialist in the area of Islamic banking. In fact, one of the challenges that face the Islamic banking industry today globally is the dearth of experts of Islamic law of Banking,

⁶⁷ Section 16 of BOFIA, 1991

Security and Takaful. The experts on Islamic commercial jurisprudence are very scarce. Therefore, the Nigerian nascent Islamic banking industry needs to thread with caution.⁶⁸ Nevertheless, the principle of ‘federal character’ as enshrined in the Constitution of the Federal Republic of Nigeria must be observed. The constitution states that:

‘the composition of the government or in any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few state or from a few ethnic or other sectional groups in that Government or in any of its agencies.’⁶⁹ This principle must be implemented in the composition of council of expert of the Central bank, subject to expertise.

1.6 Conclusion

It is the humble conclusion of this article that, the laws regulating banking in Nigeria, including those enabling Islamic banking have their roots traceable to the Constitution. By virtue of item no. 6 of the Second Schedule of the Constitution of the Federal Republic of Nigeria, only the National Assembly is empowered to make laws regarding banks, banking, under the Exclusive Legislative List. Opponents of Islamic banking hinge their argument on the provision of section 10 of the Nigerian Constitution, which provides that, “the Government of the Federation or a State shall not adopt any religion as State Religion”⁷⁰ and that as such, the introduction of Islamic banking smacks of Islamising Nigeria.⁷¹ What they failed to do, however, is to demonstrate how this could be achieved through the introduction of Islamic financial services. Even the Federal High Court in *Sunday Ogboji vs.*

⁶⁸ Ahmad T., (2010) Overview of Islamic Finance, Bank Islam, 13 December Kuala Lumpur:, p. 45.

⁶⁹ Section 14 (3), Constitution of the Federal Republic of Nigeria.

⁷⁰ The Constitution of the Federal Republic of Nigeria, 1999, as amended in 2011 (CFRN,1999).

⁷¹ Eyieyie, E., (2011) ‘Islamic Banking, Law and Appropriate Regulation of NIFI in Nigeria,’ The Guardian, 23 July. P. 87

*CBN and 2 others*⁷² were tactical to have evaded this question when confronted with the plea to declare the licensing of the Jaiz Bank Plc. as tantamount to declaring Islam as a state religion and economic discrimination based on religion contrary to Sections 10 and 16 (1) (d) of the Constitution, as the argument was found to be absurd. The conventional banking system does, in fact, discriminate against the millions of Muslims who feel strongly about the interest system it thrives on. So if there existed any unjust exclusion of adherents of any faith from the financial sector in general, it was achieved prior to the issuance of guidelines on Islamic banking. Therefore, it is concluded that the Islamic banking is constitutional as it is based on the provision of the Nigerian constitution.

From the above the paper find the following:

1. The paper observes that the operation of Islamic banking in Nigeria has in no way contradict the spirit of the 1999 Constitution of the Federal Republic of Nigeria.
2. It is observed that, despite the fact that, the operation of Islamic banking has constitutional barking in Nigeria, there is serious lack of awareness or patronage on the part of Muslims. They often to patronize the conventional banks. Hence this attitude limited the coverage and scope of Islamic bank like jaiz Bank and other Bank that operate based on the sharia principles of Islamic commercial jurisprudence.

From the above Findings, the following recommendation are made:

- d) The paper recommends that the stakeholders and counsel of experts in Islamic banking should provide means of making it operation more effective just like other conventional banks so as to have wider coverage and more branches across the countries.
- e) Islamic scholars/religious leaders should rise up to their responsibility of sensitizing and orienting the general public on the need to patronize Islamic bank for their benefit and sharia compliance operation. Conferences, seminar, TV/Radio programme should be serious engage to enlighten the Muslim

⁷² Godwin Sunday Ogboji v. Central Bank of Nigeria and 3 others (Unreported) suit No. FHC/ABJ/CS/710/2011.

Ummah. This will help to create more awareness of the activities of Islamic bank which will eventually lead to having more branches across the country.