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BIMBO ATILOLA
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BANKING UNDER ISLAMIC LAW: JURISPRUDENTIAL CRITIQUE OF ITS IMPLICATIONS FOR SOCIO-ECONOMIC DEVELOPMENT IN NIGERIA *

1. Introduction

The concept and practice of Islamic banking have recently become an issue that touches on the national economic objective and contractual rights of individuals and corporate bodies. The underlying principle of Islamic banking is constituted by non-interest based financial transactions, instruments, institutions and systems.[1] The practice is no doubt informed by the sharia prohibition of usury *(riba)*, which is "dominant factor that differentiates sharia law from Western laws".[2] Usury means the charging of interest in exchange for a loan. Hence, while Jews and Christians had long since jettisoned the belief that usury is illegal Islam forbids the charging of interest in exchange for a loan. Muslims claim that charging of interest on a loan, for instance, "harms the human aims of Islam toward mercy, solidarity, and corporation".[3] Be that as it may, most Islamic economists attribute the vision of Islamic bank structure to the work of Mohammed Uzair in the mid twentieth century.[4] This paper examines the procedure of banking under Islamic Law and investigates the attendant implications on the socio-economic development of Nigeria and her citizens today. Critical analysis constitutes the methodology of the study.

2. Concept of Usury in Islamic Law

Before going into the nature of Islamic banking and its human right implications in Nigeria, it may be helpful to delineate the basic tenets of

* **Ikenga K.E. Oraegbunam, Ph.D., M.A.(Rel.), M.A.(Phil.), LL.M, B.L., Lecturer,** Dept of International Law & Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria.

1. A. Mirakhor, *Progress and Challenges of Islamic Banking*, 1997: n. p. Retrieved from http://financcinislam.com/article/10/1/305. Accessed on 13/12/10.
2. G.Herard, *Impact of Islamic Banking*, 2009: n.p. Retrieved from http://editorials.capitalcorpmerchantilebanking.com/ 23-web-news-The-Impact-of-Islamic-Banking.html. Accessed on 13/12/10.
3. http://intalk.wordpress.com/2008/03/28/usury-the-principle-behind-Islamic-banking/
4. See M.Uzair, *An Outline of Interestless Banking*, Karachi:Raihan Publications, 1955; M.N.Siddiqu, *Banking Without Interest*, Lahore: Islamic Foundations, 1983.

sharia provisions on and prohibition of usury *(riba)*. *Riba* is often rendered as 'usury' or 'interest' for which no counter value is given. According to Mannan , *riba* is regarded as "any unjust or excessive gain, or unjustified increase in capital for the earning of which no appropriate effort was made".[5] As an Arabic word, *riba* drives from the root word *'ribaa'* meaning to cut' or 'to prosper'. Nawawi observes that "the notion of *riba* has come from the etymological definition of *'zada'* or *'ziyadah'* which means 'addition' or 'increase' whether it be in kind or money, as an excess or surplus over and above the loan capital and transaction"[6]. Technically, *riba* is seen as an increase in the principal without any contract of sale.[7] It is an increase, which in a loan transaction or in exchange of commodity accrues to the lender without giving an equivalent counter value or recompense in return to the other party.[8] *Riba* covers interest both on commercial and consumer loans.[9] *Riba* is also described as the loan given for a specific period on the condition that on expiry of the period, the borrower will repay it with some increase.[10] Chaudhry holds that "riba is the additional sum which the creditor charged from the debtor at a fixed rate on the principal he lent, that is, interest".[11]

It goes without saying that all kinds of dealing in *'riba'* are claimed to be prohibited by the primary sources of sharia, namely, the Koran and the Hadith. Nawawi observes that in the Koran, "*riba* is mentioned in twelve verses as the opposite of the positive activities of trade and alms giving".[12] It may be illustrative to quote some of these verses. In Sura 2: 275, it is stated: "....But whoever returns to dealing in *riba*, such are the dwellers of the fire, they will abide therein forever". Sura 2: 276 also forbids *riba* by holding that Allah destroys *riba* and gives increase for *sadaqat* (deed of charity, alms, etc). Again, in Sura 3: 130, the Koran prohibits thus: "O ye who believe! Devour not *riba*, doubled and multiplied, but fear Allah that ye may really prosper". And in Sura

5. M.A. Mannan, *Islamic Economic Theory and Practice*, Delhi, 1980, 161.
6. R.H. Nawawi, *Islamic Law on Commercial Transactions*, Kuala Lumpur: CT.Publications, 1999, 117 – 118.
7. *Ibid.*
8. M.N.Suleiman, *The Muslim World Faces the Challenge of Extending Internationally While Remaining True to Islamic Principles*. Retrieved from http://www.al-bab.com/arab/econ/nsbanks.htm. Accessed on 10/02/11.
9. H.Y.Baba,"Islamic Banking and Quest for Effective Corporate Governance", *Journal of Contemporary Legal Issues*, Vol. 1 No.1, 2009, 135.
10. Nawawi, *Op.Cit.*, 118.
11. M.S.Chaudhry, *Code of the Teachings of Al-Quran*, Lahore:Fazal Hhague & SonsPrinters Dabar Press, 1988, 276 – 277.
12. Nawawi, *Op. cit.*, 121.

2.275 again, the Koran says that "those who eat *riba* will not stand on the day of resurrection except like the standing of a person beaten by *Shaitan* (satan) leading him to insanity...." Moreover, Islamic studies reveal that the *hadith* (traditions of prophet Muhammad) also condemn usury. According to Kathir, the Prophet Muhammad counts *riba* as "one of the seven destructive sins"[13]. Jabir too reported that the Prophet cursed the devourer of usury, its payer, its scribe, and its two witnesses all of which are equal in sins.[14] In the same vein, Hanjalah reported that the prophet holds that dealing in *riba* once is more than *zina* (adultery) committed thirty six times.[15] Furthermore, the prophet has been reported as maintaining that the least evil effect of *riba* indulgence is equivalent to committing *zina* with one's own mother.[16]

On another development, Karim notes the elemental conditions under which *riba* is said to be committed in Islam:[17]

1. There must be stipulation or demand for the excess. If excess is paid by way of thanks and gratitude willingly and voluntarily, it will not be considered as *riba*.

2. The two contracting parties must be Muslims or one Muslim and the other a non-Muslim *(Dhimmi)*.

3. The subject matter must be homogenous or of the same character. For example, gold for gold, wheat for wheat, corn for corn, etc.

4. The subject matter must be unequal in measurement and weight. If gold is exchanged for gold of the same weight and quality in hand to hand transactions, it is not interest. If it is not in equal terms, the excess is *riba*.

5. The subject matters of exchange must not be in hand to hand transactions. If a bag of corn is given for three bags of corn to be

13. A. Kathir, *Tafsir Ibn Kathir*, Vol.2, Riyadh: Darussalam Publishers and Distributors, 2000, 435.
14. See A.M.F.Karim, *Mishkat-ul-Masabih*, Vol. II, Lahore: Law Publishing Company, n. d., 221.
15. *Ibid*., 227.
16. Kathir, *Op.cit*., 74.
17. Karim, *Op.cit*., 218-219.

paid at a future date, the excess is considered as interest.

There is no doubt that Islam hinges the jurisprudence of the prohibition of usury on a number of factors. Islam claims that among the aims and objectives of sharia is the mitigation of human sufferings especially of the poor. Hence, sharia encourages with high hopes of rewards, charities and loans without any interest for the benefit of the poor and the weak.[18] Al – Fawzan adumbrates a number of reasons why usurious transactions are prohibited. The prevention of consuming people's property and wealth unjustly; prevention of harm to those in need and who borrow by increasing interest rates when they are unable to pay their debts; encouragement of charities, favours and kind treatment among Muslims, and encouragement of people to exert efforts for gains through mutual trading, professional and crafting activities, etc are some of the reasons why Islam prohibits usury. It is such convictions as the above that inform the development of Islamic banking and finance.

3. Process of Islamic Banking

Generally speaking, Islamic banking, according to Baba "refers to a system of banking or banking activity that is consistent with the principles of Islamic law (shariah) and its practical application through the development of Islamic economics".[19] The practice of Islamic banking is seen as part and parcel of Islam and regarded as,not optional for Muslims. Thus, the Muslim community sees itself as having an obligation to the Islamic bank. In the words of Janachi,

> Muslims who truly believe in their religion have a duty to prove through their efforts in backing and supporting Islamic banks and financial institutions, and that the Islamic economic systems is an integral part of Islam and indeed for all times...through making legitimate and *halal* profits.[20]

The effect is that although Islamic bank practitioners and clients need not be Muslims, yet they must accept the ethical prohibitions underscored by Islamic values. Herard notes that "Islamic banking has

18. Y.Y.Bambale, *Islamic Law of Commercial and Industrial Transactions*, Lagos: Malthouse Press Ltd. , 2007, 161 162.
19. S.Al-Fawzan, *A Summary of Islamic Jurisprudence*, Vol.2, Riyadh: Al-Maiman Publishing House, 2005, 38.
20. A.L.Janachi, *Islamic Banking, Concepts, Practice and Future*, 2nd Ed., Manama: Bahrain Islamic Bank, 1995, 29.

the essential belief that money should be used productively and investment activities dealt with in partnerships so that risks and rewards are shared by creditor and debtor alike"[21]. Interest-free banking is therefore based on the Islamic legal concepts of '*musharaka*' and '*mudaraba* consideration of which we shall soon turn to. Certainly, Islamic banking process represents a radical departure from conventional banking. It involves equity participation risk and profit and loss sharing arrangements. As a result of the prohibition of *riba*, an Islamic bank cannot charge any fixed return in advance but rather participates in the yield resulting from the use of funds. The depositors also share in the profits according to predetermined ratio and are rewarded with profit returns for assuming risk. Hence, unlike a conventional bank, Islamic bank is essentially a partner with its depositors, on the one hand, and also a partner with entrepreneurs, on the other hand, when employing depositors' funds in productive direct investment.[22] Thus, an Islamic bank is conceived as a financial intermediary mobilizing savings from the public on a *mudaraba* basis and advancing capital to entrepreneurs on the same basis. Under this system, a two-tiered profit-and-loss sharing arrangement operates under the rules outlined by Suleiman :[23]

(a) The bank receives funds from the public on the basis of unrestricted *mudaraba*. No restrictions are imposed on the bank with regard to the kind of activity, duration and the location of the enterprise. The funds must, however, not be applied to activities that are prohibited by Islam;

(b) The bank is at liberty to aggregate and pool the profit from different investment and share the net profit (after deducting administrative costs, capital depreciation and Islamic tax) with depositors according to a specified formula. In the event of loses, the depositors lose a proportional share or the entire amount of their funds. The return to the financier has to be strictly maintained as a share of profits;

(c) The bank applies the restricted form of *mudaraba* when funds are provided to entrepreneurs. The bank has the right to

determine the kind of activities, the duration and location of the projects and monitor the investment;

(d) The bank cannot require any guarantee such as security and collateral from the entrepreneur in order to ensure its capital against the possibility of an eventual loss;

(e) The liability of the financier is limited to the capital provided. On the other hand, the liability of the entrepreneur is also restricted but in this case solely to labour and effort employed. Nevertheless, if negligence or mismanagement can be proven, the entrepreneur may be liable for the financial loss and be obliged to remunerate the financier accordingly; and

(f) The entrepreneur shares the profit with the bank according to previously agreed ratio. However, until the investment yields a profit the bank is able to pay a salary to the entrepreneur based on the ruling market salary.

In keeping with the above rules, it is claimed that Islamic banking is based on the Islamic faith and must stay within the limits of Sharia in all its actions and deed. To ensure this, Islamic banking is made to revolve around two basic concepts of '*musharaka*' and '*mudaraba*'.

Musharaka' deriving as it were from '*sharikah*' means partnership. It is a union of two or more persons in one business concern. It is like joint stock trade or business in an organized or corporate way. According to Bambale, *Musharaka* is "a principle of Islamic law that the union of two or more persons is such that neither side should have undue advantage and be made to suffer loss".[24] Hence, with the co-operation of all co-sharers, the business may thrive well, and with disintegration, it may go down[25]. Technically, according to Billah, *musharaka* is defined as "a contract between two or more persons in carrying out a particular business with a view of not only sharing the profit but also loss and liability between the partners relying on the terms of the contract".[26] With regard to Islamic banking founded on *Musharaka*, the

24. Bambale, *Op cit.*, 167.
25. *Ibid.*
26. See *Ibid.*, 178.

bank along with other investor(s) provide capital to the business in a partnership arrangement, and the bank shares the profit of the business with the other investor(s) in a predefined ratio. In the event of loss, the bank shares the loss with the other investor(s) in proportion to their original investments.[27] Subsequently, the share of the profit allotted to the bank is now shared in relevant proportion with and among the depositors.

On the other hand, '*mudaraba*' technically refers to an agreement between at least two parties of which one party provides capital while the other provides the labour and both parties will share the profit, loss and liabilities according to the proportion agreed upon during contract.[28] For banking operations, the *mudaraba* concept involves three parties, namely, the depositors as financiers, the bank as the intermediary, and the entrepreneur who requires funds. The bank however assumes the role of an entrepreneur when it receives deposits or funds from the depositors and as financier when it provides the funds to the entrepreneur. Hence, the bank operates a two-tier *mudaraba* system[29] in which it acts both as a working partner *(mudarib)* with the depositors on the saving side of the equation and an owner of capital *(Nubaul – Mal)* on the investment portfolio side.[30]

There is no gainsaying the fact that both the *musharakah* and *mudaraba* concepts touch on corporate governance of the Islamic financial institutions though on different footings. What is however common to them is the profit and loss sharing arrangements. However, Herard notes that according to sharia, excess profit (capital) ought to be put back into the community in the form of alms (zakat).[31] Having gone thus far in the analysis of the nature of usury and Islamic banking procedure, it may now be necessary to examine the prospects and challenges of Islamic banking in Nigeria today *vis-à-vis* the economic rights of individuals and development of Nigerian nation.

4. Prospects and Challenges of Islamic Banking in Nigeria

Recently in Nigeria, issues on Islamic banking have constituted the

27. http://www/newhorizon-Islamicbanking.com.lastvisited10/9/2010
28. See Bambale, *Op cit.*, 178.
29. Baba, *Op cit.*, 137.
30. Bambale, *OP.cit.*, 178.
31. Herard, *Op.cit.*, n.p.

themes and subject matters of many workshops, conferences and symposia. They have also made headlines on pages of the national dailies and periodicals and have become subjects of discussions in articles in scholarly journals. The considerations range from the constitutionality of Islamic banking to its economic advantage / disadvantages and criticisms. No doubt, many a Nigerian Muslim scholar sees the adoption of Islamic banking system as the only panacea that would take Nigerian banking industry to an El-dorado. Besides, they vehemently argue that the establishment and full running of Islamic banking constitutes an urgent demand before Muslims' full realization and exercise of their religious freedom. Yet, some views present a veritable antipathy to the entire practice of Islamic banking as it is claimed to signal an affront to others' economic and contractual rights. This researcher will in what follows immediately consider these opinions and draw a response.

There is no gainsaying that Islamic banking has been seen as a necessity for the stabilization of Nigerian economy. It is in view of this that Ajibola claims that the shield of Islamic economics would have saved the world from the "trauma of implosion" resulting from the global economic meltdown "that brought even the acclaimed advanced economics to their knees".[32] According to Islamic Finance Expert (IFE), "the financial meltdown affected almost every economy that has direct or indirect linkage with Western Euro-American countries who have networked their economy with the global economy".[33] The implication of this claim is that the countries that embraced Islamic banking were protected from the crises. No wonder Tella notes that "records show that no Islamic bank suffered the contagion effect of the global crises"[34]. Certainly, this view holds that the world financial crisis was due to the collapse of the mortgage system in the United States of America (USA) and many economies that are allied to it. This downturn is thus attributed to the failures of the conventional banking system to position the world to meet the mounting technological and social challenges. Hence, for Balogun, "the operation of interest in the conventional banking has earned the banking system certain

32. Cited in *Islamic Banking in Nigeria: Nearer than Ever*. Retrieved from http://www.tribune.com.ng/index.php/eyes-of-islam/3142-islamic-banking-in-nigeria-nearer than-ever Accessed on 2/5/11.
33. IFE, *Islamic Banking in Nigeria: Can Nigeria Do It?* Retrieved from http://ifi nanceexpert.wordpress.com/2010/04/03/islamic-banking -in-nigeria-can-nigeria-do-it/ Accessed on 2/5/11
34. See footnote 32 above.

characteristics such as exploitation, monopoly, and inflation".[35] The debilitating debt crisis into which Nigeria was thrown in the last few decades and out of which she had only recently extricated herself is seen as a consequence of interest-based financial transactions. IFE believes that "all the problems we are witnessing in terms of poverty are as a result of interest"[36]. IFE puts it more succinctly:

> No economy, no human relationship can survive on interest and therefore it is a major generator of poverty because it takes more from the weak and gives to the powerful. Whoever is giving out has more, that is why he is lending and by the time he is exploiting the borrower, two things happen – either he (borrower) pays all the loan and makes nothing out of it or he will fail to pay back because the interest will be accumulating. This begets a lot of poverty.[37]

It is therefore affirmed that under the dispensation, "access to finance will be limited to only people that have so much money and will be able to satisfy the demand of interest".[38] The effect is that "micro, small and medium scale enterprises that create the greater part of employment have been denied access to credit simply because of interest and that leaves people with low capital and when people are left with low capital their ability to invest is being tarnished"[39]. It is further held that if people cannot invest, then production cannot be generated and without production, there will be high level of inflation and unemployment, which will lead to low level of income and savings. With this, a problem of under production and investment is created with the consequent vicious circle of poverty.[40]

It is to circumvent the above financial problematic that Islamic banking is seen as capable of presenting a viable economic alternative. Badru

35. *Ibid.*
36. IFE, *Op.cit.*, n.p.
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*
40. *Ibid.*

argues that "Islamic banking remains the credible alternative that would galvanize the development of the human folk"[41] and "change the face of banking in Nigeria".[42] Thus, for IFE, Islamic banking will provide "easy and accessible loans to small and medium scale enterprises which are the backbone of any economic growth".[43] Further reasons for a desire for a quick entrenchment of Islamic banking in Nigeria have been articulated thus:

> The natural attributes of the Islamic banking system: prohibition of Riba (interest), prohibition of Gharar (trade in uncertain instruments), prohibition of unequitable contracts, encouragement of equitable contracts, discouragement of greed, discouragement of exploitation, encouragement of equitable wealth distribution and re-distribution, support for the overall growth and development of the individual, concern for the overall growth of the community at large and dealings based on trust and equity, among others, which are the opposite of what transpires in the conventional banking system, are themselves enough reasons for quick coming of the Islamic banking system in Nigeria.[44]

It must be noted that the Babangida-led Junta had enacted and promulgated in 1991 the Banks and other Financial Institutions Decree (BOFID)[45] to pave way for the establishment of profit and loss sharing (PLS) banking.[46] The Decree exempts profits and loss sharing banks from the duty to display interest rates at their offices,[47] thus recognizing the possibility or existence of interest-free banking. Section 23 (1) of the Decree as amended provides thus:

41. See footnote 32 above.
42. *Ibid.*
43. IFE, *Op.cit.*, n.p.
44. *Ibid.*
45. Decree number 25 of 1991.
46. A.I. Abikan, *Constitutionality of Islamic Banking in Nigeria*. Retrieved from http://www.unilorin.edu.ng/publications/abikan/CONSTITUTIONALITY%20OF%20ISLAMIC%20BANKING.pdf.
47. See the proviso to section 23 of the Decree.

> 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.

Besides although section 43 (1) (a) prohibits the use of certain descriptive names that include 'Christian' and 'Islamic', inter alia, yet such prohibition is subject to and can be lifted by the written consent of the Central Bank Governor. Hence, in the case of 'Islamic' banking, it would not be any difficult to obtain such consent from Sanusi who is a fiery preacher in favour of nationwide adoption of Islamic banking. No wonder the Central Bank of Nigeria (CBN) under Sanusi had recently granted an approval in principle to the Jaiz International Bank Plc to operate an Islamic bank in Nigeria[48] The CBN is presently perfecting a supervisory and regulatory framework for the operations of non-interest banking and financing in Nigeria. It should be reminisced that in 1992, sequel to the promulgation of BOFID, some conventional banks were given provisional licence to operate interest-free banking. Consequently, in 1999 Habib Bank Nigeria Limited and later Bank PHB started an interest-free banking window. Note has to be taken that BOFID is part of the existing law in force in Nigeria today as provided for in section 315 (4) (b) of the Constitution of the federal Republic of Nigeria (CFRN) 1999. Although it was enacted as Decree number 25 of 1991, BOFID is now deemed as an Act of the National Assembly and cited as Banks and other Financial Institution Act.[49] Based on BOFID, Zamfara State's full Islamization project included the intention to establish an Islamic Banking system. According to Abikan, it was pursuant to this goal that Zamfara government floated Halal Group which was to become Halal Islamic Bank which though later was merged with the Jaiz Group, (with the same objective) that became Jaiz International Bank Plc.[50]

48. http://www.tribune.com.ng/index.php/eyes-of-Islam/3142-islamic-banking-in-nigeria-nearer-than-ever.
49. Cap B3, Laws of the Federation of Nigeria 2004.
50. See footnote 46 above.

Nevertheless, the notion of Islamic banking for Nigeria is greeted with much discontent from some circles. The elements of this antipathy range from economic, social, religious, political to other reasons. It may be apt to albeit briefly comment on these criticisms. Firstly it cannot be overstated that an enabling economic environment is a condition precedent for appropriating the so-called ideals of Islamic banking. Mirakor argues that "while it has been relatively easy to create a system in which deposits do not pay interest, the asset profolios of Islamic banks do not contain sufficiently strong components that would support profit-sharing".[51] Mirakor believes that "the main reasons for this include the lack of a legal and institutional framework to facilitate appropriate contracts as well as mechanisms to enforce them and / or lack of appropriate menus containing a broad range and a variety of maturity structures of financial instruments".[52] The domino effect is that a relatively strong risk perception has become associated with profit-sharing methods in particular and Islamic banking in general. This surely leads to the concentration of asset portfolios of Islamic banks in short-term and trade-related assets with inimical effects on investment and economic development. The problem is exacerbated by the fact that Muslim countries, as is the case in most of developing nations like Nigeria, suffer from a lack of deep and efficient capital and money markets that can provide the needed liquidity and safety for existing assets.[53] Thus financial imbalances in the fiscal, monetary and external sectors of these economies cannot provide fertile grounds for efficient operation of Islamic banking. It also appears that individual Islamic banks "face difficulties in fund placement because they have had a major bias towards short-term, secured, low-return but liquid investments".[54] Hence, although efforts have been made to create a market niche for Islamic banking, yet those efforts do not seem to have achieved the market depth that could ensure long-term profitability and survival. Accordingly, this stems from the fact that Islamic financial market developments that, in recent years, have revolutionized finance and capital market.[55] It is further agued that "without a sizeable effort at structural reform and adjustment that

51. Mirakhor, *Op.cit.*, n.p.
52. *Ibid.*
53. *Ibid.*
54. *Ibid.*
55. *Ibid.*

provide suitable grounds for efficient operation, wholesale adoption of Islamic banking as the cornerstone of the financial system will face difficulty that will detract from its claimed efficacy as an alternative system".[56]

Taking the above views into account, it is really very difficult for Nigeria to realize her economic objectives if it builds its economy on Islamic financial system. It should always be borne in mind that Nigeria government has it as a constitutional duty to promote "a planned and balanced economic development"[57] and "control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity".[58] It does appear that the stringent and strangulating rules in relation to Islamic banking process would pose obstacles on the road to national economic growth in spite of pretentious claims to the contrary.

Secondly, the national socio-ethical terrain appears to be quite unfavourable vis-à-vis the assumptions of the protagonists of Islamic banking. There is no doubt that every banking system whether conventional or Islamic is fundamentally based on trust. To share profit and loss is also primarily tied to trust.[59] People must be trustworthy for them to actively participate in what Islamic banking is claimed to hold for them. Unfortunately in Nigeria, the high level of systemic corruption, distrust and dishonesty in addition to an already ingrained socio-economic debacle would make it very difficult for Islamic banking to operate. For example, there is the arrangement of the so-called 'social account' in Islamic banking in favour of the weak people of the society, and in which collaterization and much agreement is done away with. The assumption is that when the beneficiaries are given loan, and when they trade and fail they will not be required to pay back, but if they succeed, they should pay back.[60] This researcher is convinced that in Nigeria today, this arrangement would surely be misused, as not many would be willing to pay back even if they succeeded in the business. It seems that the interest and collateral

56. *Ibid.*
57. C.F.R.N. 1999, s. 16(2)(a).
58. C.F.R.N. 1999, S. 16(1)(b).
59. IFE, *Op.cit.*, n.p.
60. *Ibid.*

attached to loans in conventional banking system are a mechanism fashioned to obviate the borrower's possible breach of trust and to make him pay back within time.

Thirdly, on the political sphere, given the multi-religious and pluralistic posture of the nation even in those parts that are Muslim-dominated, the adoption of Islamic banking system may be a recipe for national disharmony and disintegration. For one thing, such ideas as floated by Zamfara State government to establish Islamic banking even when adherents of other religions are citizens of the state smacks of an ardent attempt to adopt an Islamic practice for the entire state. For another, that attempt certainly would be tantamount to using state machinery and funds to foster an Islamic agenda. Besides, hardly can anyone be convinced that employment opportunities in Islamic banks and other financial institutions can be available to non-Muslims. In this regard, the adoption of full sharia in general and cultivation of Islamic banking culture in particular in a multi-religious state seems to do violence to the secularity posture of the nation as enshrined in section 10 of the 1999 Constitution.

On another political development, strong criticism had arisen against Islamic banking in relation to terrorism clothed in the *Zakat* (charity) practice. According to Herard, "since Zakat can be given to anyone and does not need to be accounted for in the books as it is meant to be supportive of community charity-giving, it is observed that it has been a great tool for terrorist networks to receive funds and to prevent anyone from finding out where funds are coming from".[61] Hence, the supposed claim of Sharia law need to help the needy (Zakat) has become a conduit mechanism used by Islamic banks to fund terrorist organizations. Although much of this later criticism is directed to Al – Rajhi Bank,[62] nothing prevents the spread of this terrorist agenda to other Islamic banks and financial institutions in Nigeria considering the fact that Islam regards itself as *ummah* knowing no geographical boundaries.

More so, various holes have been picked in the arguments and descriptions presented by Islamic scholars and economists regarding

61. Herard, *Op.cit.*, n.p.
62. *Ibid.*

the working of Islamic banking system and finance. Thus, while Islam claims that *mudaraba* is specifically and uniquely an Islamic mode of financing, Sheikh argues that this "is historically not true".[63] He observes that Muhammad at age 25 entered into a *Mudaraba* contract with Khadija at a period well before revelation. Therefore, *mudaraba* far from being of an Islamic origin was prevalent in then Arabian and Middle East society. It arose out of the socio-historical circumstances of the time. This might perhaps account for why Judaism and Christianity that were also founded within the same geographical enclave outlawed usury that held sway for centuries before the advent of economic revolution.[64] Thus, Islam simply had to adopt *mudaraba* financing as it is regarded at not contradicting the values of Islam. Again, it is argued that the arrangement followed by Islamic banking today is the reverse of that in the time of Muhammad. Sheikh maintains that in the case of Muhammad who entered into a contract as *mudarib* (businessman, fund manager or asset manager) "the flow of money was from a rich financial entity to a business entity in need of finance".[65] This is far from what obtains today. In the currently practised Islamic banking, the flow of funds is from the small pool of investors to a large financial entity, which cannot invest the funds in instruments other than the financial instruments. Sheikh believes that such arrangement has no productive effect on the economy, as it would not generate any employment. Hence, since *mudarib* is a person in need of finance, bank as a reservoir of money acting as *mudarib* is a senseless arrangement.[66]

Furthermore, the rules formulated by Muslim jurists regarding *mudaraba* financing are not a gospel truth. At best, these rules can only serve as guidelines, which are not immune to criticisms and modifications. It should be noted that there is a fundamental assumption of the freedom of contract in Islam. Mirakor notes that "although profit-sharing has now become the pre-eminent method of Islamic banking, it is important to emphasize that strictly speaking, the position of shariah on the freedom of contract is flexible".[67] It seems

63. S.A. Sheikh, *Critical Analysis of Islamic Banking System*, 2007: n. p. Retrieved from http:/ www.accountancy.com.pk/articles.asp?id=178. Accessed on 2/5/11.
64. See S.C. Easton, *The Heritage of Western Civilization to 1715*, 2nd Ed., New York: Holt, Rinehart and Winston Inc., 1970, 481-484,602-603; See also C.J.H. Hayes & F.F. Clark, *Medieval and Early Modern Times*, New York: The Macmillan Co., 1966, 247-250.
65. Sheikh, *Op.cit.*, n.p.
66. *Ibid.*
67. Mirakhor, *Op. cit.*, n.p

that any transaction subject of a contract is permissible so long as it does not contain any element of *riba* (usury) and / or *gharar* (gambliing). Sheikh corroborates this view by holding that "anything which does not contradict with any of the Islamic laws is permissible"[68]. More still, it goes without saying that profit and loss sharing is not the only alternative of interest. Ghamidi has argued that "an investor can opt to become a partner only in profits".[69] According to this arrangement, an investor whose aim is to earn interest gets the fixed amount irrespective of profit or loss on the part of the borrowing entity. The partner will thus get a profit if the borrower makes a profit, which structure does not result in any exploitation of the borrower nor does it contradict with any of the Islamic laws.[70] This is a common practice in limited liability partnerships of professionals like lawyers and doctors where the other partners do not make good of any loss if the loss was solely caused by the actions of a particular partner. Mirakor also observes the fact that there are many other alternatives[71] of interest apart from profit and loss sharing that constitutes the mainstay of Islamic banking:

If a financial system operates primarily, or even mostly, with modes that are not profit-sharing but satisfy the requirements of shariah, the system is not rendered un-Islamic. This is a very important point, because many critics of the present practices of Islamic banks contend that much of these banks' transactions eg. Murabahah, installment sales, leasing or salaf, are not profit-sharing methods and that these transactions resemble interest-based transactions. While the later may be true in that, for example, installment sales may resemble interest-based transactions, the fact is that the former is permitted by the shariah but interest – based transactions are not, even though they may produce identical results.

Moreover, it goes without saying that religion generally, just as custom and morality, is a source of law. Surely, there is nothing wrong in raising the ideals and values of a particular religion to the status of legislation and policy. But at any event, such an exercise must be

68. Sheikh, *Op.cit.*, n.p.
69. Cited in *ibid.*
70. *Ibid.*
71. Mirakhor, *Op.cit.*, n.p.

carefully executed in a manner that the religion would still remain a mere source of law or policy and not the law or policy itself. Hence, whatever is appreciable and desirable in Islamic or Christian economics, for instance, can be borrowed to improve the status quo. A wholesale adoption of a particular religion's practice, no matter how well intentioned, for the service of a people that adhere to different faith confessions would constitute an affront to the secularity principle of the Constitution put in place for the harmonious co-existence of the citizens in the whole or any part of the federation. In the same way, using a religious scripture or doctrines as blue prints for national development especially if that nation is multi-religious would surely not coincide with the aims of the Constitution to maintain a neutral posture in view of national peace. It is precisely for this reason that in Nigeria, names of religions are not normally used for political parties, universities and other academic institutions, media houses and so on. Thus, the discretion allowed the Central Bank Governor[72] to permit the use of certain names that include 'Islamic' and 'Christian', inter alia, should be amended to remove the discretion. This is particularly germane as the running of 'Islamic' banking, for instance, is completely subject to the rules of sharia and the governance of purely Islamic administrative bodies such as Sharia Supervisory Boards (SSB) or Sharia Advisory Boards (SAB).[73] It is therefore observed that while Islamic banking may thrive in Muslim countries like Malaysia, Saudi Arabia, Iran and Pakistan, the practice of Islamic banking in Nigeria would rather breed disharmony and discontent.

5. Conclusion

The Islamic vehemence in Nigeria to establish and run Islamic banking is often claimed to point around the propensity to exercise right to religious freedom. Yet it is clear that in Nigeria, exercise of religious freedom is subject to the overriding need to maintain public order and safety among others.[74] An eye must always be had by one on the sensibilities of the other while exercising any right. Besides, in a fast moving and dynamic society of today, the application of what was obtainable in olden days even if it touches on exercise of human rights must be done after a prudent consideration of the historical

72. Section 43 (1) (a) of BOFIA.
73. Baba, *Op cit.*, 138-139.
74. Section 45 of 1999 Constitution.

circumstances and spirit of the time. It should be clearly noted that in the days of Prophet Muhammad, people knew one another and could see them almost on daily basis, and which factor explains why there was no need to demand for interest on loans. But now, sequel to the anonymity of the world, individuals in today transportation urban migration and the general tenets of economic and commercial revolution, interest and collateral had become a safety measure or device employed to cushion or securitize the attendant risks in money lending. This may explain the reason why Christianity and Judaism had jettisoned their condemnation of interest-based transactions. Nigeria has a peculiar reason not to encourage Islamic banking especially because of her multi-religions and pluralistic nature.